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MUSLIM LAW

*Furqan Ahmad**

I INTRODUCTION

LONG AGO, Mahmood J had observed:[1] "It is to be remembered that Hindu and Muhammadan laws are so intimately connected with religion that they cannot readily be dissevered from it. As long as the religions last, the laws founded on them last."[2] Since Islamic law is not a judge made law and jurist made law, it is difficult in finding a solution to this controversy. Therefore, its true position and interpretation can only be derived from juristic thoughts and not from judicial decisions, since judicial precedents are not the source of Islamic law; rather it is strictly based on the juristic verdicts. It does not mean that there is no scope for the development of the law. Contrary to this, through juristic verdicts, laws have been debated and accordingly reformed. The true illustration in this regard, in the modern age, is found in the juristic thoughts of Abdul Rashid Ridha of Egypt, Shaikh Ali Tantavi of Syria and another famous jurist of contemporary Muslim world who not only initiated various reforms implemented in the respective countries, but changed the whole destiny of the respective societies and countries as well. These types of illustrations are found in the history of Muslim law in India too.[3] The problem is that baring a few exceptions in India, the learned judges

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1 *Gobind Dayal* v. *Inaytullah* (1885) ILR 7 All 775.

2 *Id*., para 5, Mr. Baillie has noticed this and remarked that Muhammedans in the provinces are more in the habit of regulating their dealings with each other by their own law, and to disregard it would be inconsistent with justice, equity, and good conscience; and, this being so, he assumed that the judges have been obliged to extend the operation of the Muhammedan Law beyond the cases to which it is strictly applicable under the Regulations. He quotes Macnaghten in his preface to the *Principles of Muhammedan Law*, as having arranged the order of cases in which this law has been applied by our courts. A.A.A. Fyzee, *Outlines of Muhammedan Law* 90 (Oxford University Press, New Delhi, 1999); Mohammad Nazmi, *Mohammadan Law* 32 (Central Law Publications, Allahabad, 2008).

3 See Furqan Ahmad, "Role of Notable Indian Muslim Jurists to the Development and Reform of Muslim Law in India", 4 *Islamic and Comparative Law Quarterly* 523 (1984).

neither consult these writings in the form of legal literature and verdicts nor even try to look the judicial precedents of India and Pakistan (at least where the language of the courts is English) which laid the foundation of development of Muslim law in this sub-continent. Krishna Iyer and Behrul Islam JJ and similar other learned judges will always be remembered in the history of Islamic law in India for their contribution, who tried to decide cases according to the true legal spirit and at the same time, kept in mind, the social needs of the country and as well as the community during adjudication.

This number of reported cases during the current year has increased in comparison to earlier years, which shows the confidence reposed by the community in the judicial system on one hand, and their awareness and expectations from the law, on the other. The collection of cases and their analysis have been done with reference to status and property. The survey includes marriage, dissolution of marriage in its various facets, guardianship *etc.*, which are included under the caption 'law relating to status'. Similarly, the cases reported on gift, will, succession and inheritance, and *waqf* are discussed under the title 'law relating to property'. A part of the survey is devoted to '*Kafala* system' which means maintenance of those children who have lost their parents. Significantly, this survey includes a case on the judicial system itself, which is known as '*Qada* system' *i.e.*, justification of *Sharia* courts as an arbitrator. The cases reported on other issues are discussed under a separate heading 'Other Miscellaneous Issues'. About 75 reported cases comprising of Supreme Court as well as various high courts have been included in this survey.

II LAW RELATING TO STATUS

Nikah (Marriage)

It is a popular belief that marriage under Muslim law is a contract as the three essential ingredients of a contract are found in it, *viz*., offer, acceptance and consideration. Indeed, the essential ingredients of Muslim marriage are *ijab* i.e. consent of bride and *qubool* i.e. acceptance by the bridegroom. The third mandatory requirement for marriage is that it should be solemnized through a token of love and affection i.e. *mehar*. This may be specified but, if not specified in the marriage agreement, *mehar* will be paid according to the dower of bride's sister or her paternal aunt, etc. This token of love and affection is sometimes treated as consideration. This is the reason as to why a Muslim marriage is known as a contract. However, the commandments of the Quran and the teachings of the Holy Prophet clearly indicate that this contract is not like an ordinary contract and when the parties want with or without reasons it should be broken off. This is a sacramental contract and the parties are directed rather warned not to dilute the sanctity of this institution and as far as possible they should live within the sacramental bond. The Quran itself addressed the role of a husband and wife as a *libas* (cloth) for each other, which means they are like a garment for each other which hides their flaws from the world. A famous jurist Abudul Rahim says "*nikah* is a collection of both *ibadat* and *muamlat*" (i.e. worship and dealing). However, the age old traditional practices have been adulterated e.g. *ijab* is first essential of marriage but most of the parents feel their daughter as their property and it is against their

honour to obtain any prior consent from their daughters. This tradition is an outcome of the practice of feudalism that prevailed for a long time in India and has nothing to do with law. Prophet himself had obtained the consent from her daughter *Fatima* while she was getting married with a handsome person popularly known as *Ali*. The consent of the daughter when it is taken traditionally in the presence of many family members and the guests can never in the modern era be treated as a free consent. Similarly, other wrong practices are being treated mandatory though they have no legal basis. That is why a simple process of solemnizing marriage under Muslim law has now become an economic and social problem among Muslim community. Few of the judgments pertaining to various aspects of marriage in Islam are discussed below.

Marriage – conversion

In *Seema* v. *State of U.P.*,[4] the validity of marriage between a Muslim boy and Hindu girl was questioned. The court in this case, relying on a division bench judgment of High Court of Allahabad in *Dilbar Habib Siddiqui* v. *State of U.P.*,[5] where various original sources of Islamic law were referred to for a valid marriage, observed:

> Nikah i.e., marriage in pre-Islamic Arabia, meant different forms of sex relationships between a man and a woman. Prophet Mohammed brought about a complete change in the position of woman in society through Holy Quran, which is the primary and basic source of Islamic Law. In this respect we can do no better than to refer the verses of Holy Quran. Sura 2 Ayat 221…. provides as "Do not marry unbelieving women until they believe.....Nor marry your girls to unbelievers until they believe

The court further stated that a marriage in Muslim law is not only a ritual but also a devotional act.[6] Court also referred to Mulla:[7]

> Koranic injunctions recognize in Islam, marriage as the basis of society. Though it is a contract, it is also a sacred covenant. Temporary marriages are forbidden. Marriage as an institution leads to the uplift of man and is a means for the continuance of human race.

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4 2015 (2) ADJ 649 : 2015 (109) ALR 386.

5 2010 (69) ACC 997.

6 M.U.S. Jang, *Desertion on the Development of Muslim Law in British India*, 1, 2, as cited in Aquil Ahmad, *Mohammedan Law* 108 (Central Law Agency, Allahabad, 21st edn., 2004).

7 *Supra* note 4, para 11. However no such version was found in M. Hidyatullah (ed.), Mulla's *Principles of Mahomedan Law* 166 (N.M. Tripathi Pvt. Ltd., Bombay, 19th edn., 1990)

Further, the court referred a leading book of Islamic jurisprudence where it is well recognized that marriage is a sacred act and the essentials of a valid Muslim marriage are as under:[8]

> The bride should be (1) a Muslim (2) chaste (3) virgin, (4) beautiful, (5) accomplished, (6) having sweet tongue, and good manners, (7) possessing property, (8) having children bearing capacity and affectionate nature and (9) equal respectability.

The single judge of High Court of Allahabad, while following the precedent of *Dilbar Habib Siddiqui*[9] opined that in a valid marriage both the spouses have to be Muslims as per the Quranic injunction. In *Sonal Jain* v. *Khan Farogh Azam*,[10] the issue of conversion was elaborately discussed, where a marriage between a Hindu girl and a Muslim boy was solemnized. The Allahabad High Court, on the issue of conversion, observed:[11]

> Conversion from one religion to other is a tricky issue…Heavy burden lies on the person who alleges that conversion took place to prove it with cogent trustworthy evidence. It shall further be necessary to establish that conversion is voluntary without any coercion or misunderstanding.

The division bench of the high court referred to articles 25 and 26 of the Constitution of India and its interpretation in *Vasudeo Gupta* v. *State of U.P*.[12] and also referred to a verse from Gita. The court was of the view that ordinarily injunction should have been granted by the trial court only after recording satisfaction on the basis of the pleadings on record, and after inviting objections as well as the keeping in mind the three conditions as mentioned above. One would agree that the matter of conversion should be taken into account after a thorough and careful consideration. The family court should have taken the matter seriously keeping in view the after effects and sincerity attached with such a marriage which is the outcome of conversion. In *Noor Jahan Begum* v. *State of U.P.*,[13] High Court of Allahabad considered a number of petitions pertaining to the issue of marriage after conversion, where conversions, though admitted by the girl for the purpose of *nikah*, they expressed their inability to have much knowledge about Islamic law. Common issue in all writ petitions was whether conversion of religion of a Hindu girl at the instance of a Muslim boy, without any knowledge of Islam or faith and belief in Islam and merely for the purpose of *nikah* was valid? The court,

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8 See Fazlal's Karim in his translation and commentary of *Mishkat-ul-Masabih, Al-Hadis* (Book II), Ch. XXVII, s. 2.

9 *Supra* note 5.

10 2015 (2) ALJ 125.

11 *Id*., para 10.

12 2011 (5) ADJ 674.

13 2015(1) ADJ 755; 2015(3) ALJ 322.

while answering the issue, dwelled upon as to what constitutes a religion. Finding it difficult to form a common consensus as to the definition of religion, court referred to the Supreme Court judgment in this regard:[14]

> A religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being. …Every religion must believe in a conscience and ethical and moral precepts.

Moving to another aspect as to who is a Mohammedan, the court referred to Mulla which runs thus:[15]

> …[A]ny person who professes the Mahomedan religion, that is, acknowledges (1) that there is but one God, and (2) that Mahomed is His Prophet, is a Mahomedan. Such a person may be a Mahomedan by birth or he may be a Mahomedan by conversion…Thus a non-Muslim who has attained majority and is of sound mind may embrace 'Islam' by declaring that he believes in the oneness of God and the prophetic character and that Mahomed is his prophet.

Referring *Rakeya Bibi* v. *Anil Kumar Mukherjee*,[16] a Division Bench of Calcutta High Court observed:

> …[I]n case of a conversion there should be a change of heart and honest conviction in the tenets of new religion in lieu of tenets of the original religion... More so when a person converted denies even the factum of conversion. As to whether there in fact a conversion or not must depend on facts and circumstances of each case and not general rule can be laid down in that behalf.

Apex court, while examining conversion, observed that there should be a declaration of one's belief and the said declaration should be in such a way that it should be known to those to whom it may interest. If a public declaration is made by a person that he has ceased to belong to one religion and is accepting another religion, he will be taken as professing the other religion.[17] Coming to the aspect of *bona fide* intention on conversion, the court observed that in case of conversion from one religion to another a strict proof is required and it cannot be easily inferred,

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14 *A.S. Narayana Deekshitulu* v. *State of A.P.* (1996) 9 SCC 548.

15 *Mullas Princefoles of Mahomedan Law Supra* note 7 at 14, s.19.

16 ILR 1948 (2) Cal 119. Also see *Dr. Abdur Rahim Undre* v. *Smt. Padma Abdur Rahim Undre*, AIR 1982 Bom. 341, in which, considering the question of conversion, it held: "Conversion to another religion basically requires change of faith. To say the least it is a matter of conviction".

17 *Punjabrao* v. *D.P. Meshram*, AIR 1965 SC 1179; 1965 SCR (1) 849; *Narayan Waktu* v. *Punjabrao*, AIR 1958 Bom 29; (1958) 60 BOMLR 776 : ILR 1959 Bom. 229.

especially when a person converted denies even the *factum* of conversion. One must rely on facts and circumstances of each case and not as a general rule as to the fact of conversion.[18] The court expressed its agreement with the view that a valid marriage under Muslim law requires both the spouses have to be Muslims.[19] If a person feigns to have adopted another religion just for worldly gain or benefit, it would be a religious bigotry.[20] The high court opined that conversion to Islam, in the present set of facts, of the girls without their faith and belief in Islam and at the instance of the boys, solely for the purpose of marriage, cannot be said to be a valid conversion to Islam religion; besides these marriages are against the mandate in *Sura* II *Ayat* 221 of the Holy Quran, hence void. But what is Islam, who is a Muslim and is the knowledge of Islamic law necessary for every converted Muslim? Generally, most of the Hindus and Muslims in India are determined through the parameters according to their traditions and culture, otherwise 90% of them do not know much about the law and religion. How can then one expect that a converted Hindu or Muslim will have adequate knowledge of his/her law and religion, immediately after his/her conversion. Meaning of faith, belief, conviction and religion and their parameters should not be determined by the judges by their own perception, because of their peculiar nature and if they feel that judicial activism is necessary to eradicate a social evil they must stand for it. However, their stand referring to the Holy Scriptures and interpreting them, at times, creates a lot of problem and instead of resolving the issue it aggravates the problem and the objective of social reform takes the shape of politics of law reform.[21] A similar judgment was given by Kuldeep Singh J in *Sarla Mudgal* v. *Union of India*,[22]

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18 *Ayesh Bibi* v. *Subodh chandra Chakrabariti*, ILR (1945) 2 Cal 405; AIR 1949 Cal 436. Also one judgment of Privy Council finds place in the survey, see *Skinner* v. *Skinner* (1897) ILR 25 Cal. 537, which held "[T]hat such change must be made "honestly" and "without any intent to commit a fraud upon the law"… that were a party puts forward his conversion to a new faith as creating a right in his favour to the prejudice of another, it is proper and necessary for a court of law to enquire and find whether the conversion was a bona fide one."

19 Sura 2 Ayat 221 of The Holy Quran as mentioned in M. Hidyatullah s*upra* note 7, which runs thus: "Do not marry unbelieving women until they believe.....Nor marry your girls to unbelievers until they believe". Here a believing women is referred to such a women who has embraced Islam and has faith in Prophet Mohammed. Marriage in Muslim law is not only a ritual but is also a devotional act. At page 166 of the same book, it says "Koranic injunctions recognise in Islam, marriage as the basis of society. Though it is a contract, it is also a sacred covenant. Temporary marriages are forbidden. Marriage as an institution leads to the uplift of man and is a means for the continuance of human race." See Dr. M.U.S. Jang, "Dissertation on the Development of Muslim Law in British India", pp.1, 2; See Aquil Ahmad, *Supra* note 6.

20 See *Rev. Stainislaus* v. *State of Madhya Pradesh*, (1977) 1 SCC 677.

21 As U. Baxi once spoke while delivering a speech on Prof. Fayzee's Birthday. The same is published in Upendra Baxi, "Islamization and the Politics of Law Reform", 1 *Islamic and Comparative law Quarterly,* 323-24 (1981).

22 (1995) SCC 3 635.

which was also referred too by the court. However, he rightly held that religion like Islam does not like conversion not for the purpose of adopting another's belief but for ulterior motive and vested interest.

In *Javid Iqbal* v. *State of Jammu and Kashmir*,[23] one Javid Iqbal while doing his M.S. and Registrar-ship in P.G.I. Chandigarh came in contact with Gurpreet Kaur when her grand-mother was admitted in PGI for treatment. In the process, Javid Iqbal and Gurpreet Kaur became good friends; they were treating each other as husband and wife; Gurpreet Kaur embraced Islam and performed *nikah* with Javed Iqbal and changed her name to Samira. The high court found that the case had varied history and involved aftermath of inter-religious marriage based on love affairs, which had miserably failed and finally reached to the point of no return. The *factum* of conversion and re-conversion, allegation and counter allegation, conversion for marriage and then conflicts and regular fight between spouses had become part of a living style and legacy of present social setup developed under western social background. These types of marriage and divorce have no meaning under the Muslim law. Such litigation should be avoided from the very beginning as the intention behind these conversions and consequent marriages are well known with conflicts and reconversions later.

Puberty

In *Rashid Khan* v. *State of M.P.*,[24] the issue was raised by the husband for the custody of his wife who was in wrongful detention by her mother. In this regard, the court referred to *Munshi* v. *Mt. Alam Bibi*[25] decided by the division bench of High Court of Lahore, where it was observed that under Mohammedan law, once the girl attains puberty she was competent to enter into a marriage. The court further referred to *Mt. Gulam Sakina* v. *Falak Sher Allah Bakhsh*[26] where it was opined that puberty under Mohammedan law is presumed, in the absence of evidence, on completion of the age of 15 years and the minor should exercise the option of puberty after the age of 15 years. Further, court held that anything done by the minor during the minority would not destroy the right which can accrue only after puberty. [27]

The court further referred to *Noor Mohammad* v. *Mohammad Jiauddin*,[28] where it was opined that marriage solemnized under Mohammedan law was purely a civil contract. The essentials of a valid Muslim marriage are offer and acceptance at the same sitting, by the parties to the marriage, in the presence and hearing of two male or one male and two female witnesses. A precedent from the High Court of Delhi was also refereed[29] where the mother of the girl was seeking a writ of

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23 2014 (2) JKJ 242.

24 2014 (3) MPHT 268 : 2014 (2) MPLJ 56 : 2014 (3) RCR (Civil) 823.

25 AIR 1932 Lah 280.

26 AIR 1950 Lah 45.

27 The court also referred to *Md. Idrish* v. *State of Bihar*, 1980 Cri LJ 764.

28 1997 MPLJ 50.

29 *Tahra Begum* v. *State of Delhi*, W.P. (Crl.) 446/2012, Cri. M.A. 3701/2012.

habeas corpus for getting custody from the husband of her daughter. The court reproduced the effective para of the judgment as under:

> The girl in this case, Shumaila, clearly expressed her choice of residing with her husband, this Court is of opinion that she ought to be allowed to exercise her option. …We direct the presence of Mehtab, Shumaila and either of her in-laws once in six months, in order to ascertain her well-being, till she attains the age of majority before the Child Welfare Committee. The Committee shall take necessary steps including obtaining the necessary undertaking from Mehtab in that regard subject to completion of these steps, (which shall be within a week) Shumaila shall be allowed to live with Mehtab, in the matrimonial home.

The High Court of Madhya Pradesh further referred to the authors of Muslim law regarding age of marriage of Muslim girl[30] and then opined that since the girl had married after attaining the age of 15 years, her marriage could not be said to be a void marriage as girl on more than one occasions had expressed her wish to reside with her husband. Therefore, she had unchallenged right to reside with him. Keeping in mind the facts and circumstances of the case, for the welfare of the girl, the court directed to follow the directions given by the judgment of High Court of Delhi.[31]

Under Islamic law, puberty is concerned with the majority of the girl and after attaining puberty a girl can break her matrimonial bond if it is done by the parent or the guardian during minority. This view is clearly admitted by various courts. If the marriage is solemnized after attaining puberty (majority under Islamic law) with free will of the girl, the husband is legally competent to keep his wife and any vigilance of matrimonial home is not desirable under Islamic law. It is a pious relationship that should not be checked by anyone.

Similarly, in *Yunus Khan* v. *State of Haryana*,[32] the father of the girl challenged the validity of marriage claiming the custody of the girl and stating that she was a minor. The court stated that the girl gave her consent willingly and had undergone puberty and, therefore, marriage was not void as per section 12 of Child Marriage Act, 2006, which declares marriage of a minor child to be void in certain circumstances. Clause (a) of section 12 stipulates that a marriage would be void when a child/minor, is taken or enticed out of the keeping of the lawful guardian. Applying this provision in the present case, the court took the view that the girl could not be said to have been either taken, or enticed away, from her father for two reasons: One based on the general principle of enticing away and two on the principles of Mohammedan law governing marriage. Clarifying first preposition,

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30 This view is taken in M. Hidyatullah, s*upra* note 7; Aqil Ahmad (2004), *supra* note 19 and B.R. Verma, *Commentaries on Mohammedan Law* (Law Publishers (India) Pvt. Ltd., Allahabad, 2012).

31 *Infra* note 51.

32 2014 (3) RCR (Civil) 611 : 2014(3) RCR (Crim) 518.

reference was made to the judgment of the Supreme Court in *S. Varadarajan* v. *State of Madras*.[33] The court clarified that Act of 2006 did not repeal the Muslim Personal Law (Shariat) Application Act, 1937, which read thus:[34]

> Notwithstanding any custom 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).

The high court explained that the marriage of a Muslim girl continues to be governed by the personal law of Muslims. Reliance for the same was placed on the work of *Mulla*,[35] and *Tyabji*,[36] which clearly state that if the girls was well above 15 years and no unwillingness could be proved, the marriage was valid.

In *Yusuf Ibrahim Mohammed Lokhat* v. *State of Gujarat*,[37] the husband sought for the quashing of the F.I.R. filed for the offence punishable under sections 9, 10, 11 of the Prohibition of Child Marriage Act, 2006. Here, a girl, aged 17 years, with her consent got married with petitioner, aged 21 years. The issue was whether a girl after obtaining puberty can solemnize marriage without obtaining consent of her father or guardian. The court stated that a girl after attaining puberty had complete authority to solemnize her marriage. Further, the court found that there

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33 AIR 1965 SC 942.

34 The Muslim Personal Law (Shariat) Application Act, 1937, s. 2.

35 *Supra* note 7 at 223, s. 251 Capacity for marriage:

(1) Every Mohammedan of sound mind, who has attained puberty, may enter into a contract of marriage.

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

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

Explanation.- Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years.

36 Faiz Badruddin Tyabji, *Principles of Mohammedan Law*, 52 (N.M. Tripathi, Bombay, 4th edn., 1968). S. 27, which runs thus:

> Age of competence to marry.-With reference to the age of competence to marry, it is presumed in the absence of evidence of attainment of puberty, that males attain puberty at the age of 15 years, and females at the age of 9 [15] years.

37 MANU/GJ/0999/2014.

were no allegations of enticing or taking away so as to constitute the punishment under kidnapping from lawful guardianship under section 361of Indian Penal Code (IPC). The court also found that the parents of the girl had accepted the marriage and were happy.

Dissolution of marriage

It is widely misinterpreted that only man has the right to divorce and the woman has no such right. This is very far from the actual truth. The procedural difference of separation of a woman and man owes to two distinct names, *i.e.*, *khula* and *talaq* respectively. The Holy Quran gives a detailed procedure for divorce. The concept of mutual consent of divorce, which is treated as part of modern family law is also provided with the name of *mubarat.* Another form of dissolution of marriage on the initiative of court also finds place under Islamic law of divorce which is known as *faskh* (judicial separation).

Pronouncement of *talaq*

In *Masrat Begum* v. *Abdul Rashid Khan*,[38] the petitioner claimed that respondent had not produced any material to substantiate that the petitioner was divorced in accordance with the mandate of Shariat. In this regard, reliance was placed in *Manzoor Ahmad Khan* v. *Mst. Saja*;[39] *Safina Bi* v. *Parvez Ahmad*[40] and *Mohammad Naseem Bhat* v. *Bilquees Akhter*,[41] which were held irrelevant keeping in mind the facts of the present case. The court in this regard referred to *Ameer Ali*[42] and *Mulla*,[43] besides making reference to what is stated in *Hedaya*.[44] The court also referred to *Mohammad Naseem Bhat* v. *Bilquees Akhter*[45] and held them not so relevant in the present case. The court clarified that it was settled law that it was not within the competence of the court to interpret the Quranic verses or the precepts of the Prophet without knowing the context in which they were made and the same fell within the domain of scholars (*Muhaddisin* and *Muffasirin*), who have full knowledge of the religion and, therefore, are experts in the field, to interpret the Quranic verses and/or the Precepts of the Prophet.[46]

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38 2014 Cri LJ 2868 : 2014(3) JKJ 1.

39 2003 (II) SLJ 619.

40 2010 (II) SLJ 525.

41 2012 (4) JKJ 318.

42 Ameer Ali, *Commentaries on Mohammedan Law* 1552-1557 (Hind Publishing House, Allahabad, 2004).

43 *Supra* note 7 at 261-262.

44 Shaykh Burhanuddin Abu Bakr-al-Marghinani. *The Hedaya*: *Commentary on Islamic Laws*, Charles Hamilton (English Translation), 72-73 (Kitab Bhavan, New Delhi, 2008).

45 2012 (4) JKJ 318, especially paras. 26 and 27.

46 See *Amad Giri* v. *Mst. Begha*, AIR 1955 J&K 1, para 3, where it has been stated: Before examining the question under reference on its merits, I feel no hesitation in recording my strong disapproval of the manner in which the Tehsildar Magistrate has written his judgment. However learned the Tehsildar Magistrate may be in

In this regard, the court referred to *Shamima Ara* v. *State of U.P.*,[47] which held as under:

> We are also of the opinion that the *talaq* to be effective has to be pronounced. The term pronounce means to proclaim, to utter formally, to utter rhetorically, to declare to, utter, to articulate (See Chambers 20th Century Dictionary, New Edition, p. 1030). There is no proof of *talaq* having taken place on 11.7.1987. What the High Court has upheld as *talaq* is the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5.12.1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced something in the past cannot by itself by treated as effecting *talaq* on the date of delivery of the copy of the written statement to the wife. The respondent No. 2 ought to have adduced evidence and proved the pronouncement of *talaq* on 11.7.1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed.

It is thus a clear position that a plea in the written statement by itself cannot be taken as effecting divorce.

True procedure of *talaq*

Javid Iqbal v. *State of Jammu and Kashmir*[48] is a good illustration for laying down the correct procedure of divorce, where Javid Iqbal despite persuasion, when Ms. Gurpreet Kaur alias Samira Choudhary did not come back, did send her first *talaq* through first divorce deed (*talaknama*) on 25.02.2012 with the request that Gurpreet Kaur would again call to rethink and come to terms and start living without causing any further undue trouble to him and his family with a course of meaningful reconciliation. When there was no response, Javid Iqbal filed a suit for restitution of conjugal rights, which was dismissed for want of prosecution. Meanwhile, Javid Iqbal sent second *talaq* through second divorce deed dated 27.03.2012, again with a specific stipulation that Gurpreet Kaur would rethink

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theology, he should have known that he was acting as Judicial Officer, and it was not for him as such Officer to give his own interpretations of the verses of the holy Quran. Times without number the highest Judicial Courts in India including the Privy Council have sounded a note of warning against entertaining new and novel interpretations of the texts of the Quran and *Hadis* by persons who are not recognized as competent to give such interpretations. So far as these are concerned, we have to rely on the interpretation of only such commentators of yore (*Muffasirin* and *Muhaddisin*) whose authority is acknowledged throughout the Muslim world. Also see *Mohd. Ismail* v. *Abdul Rashid*, AIR 1956 All. 1.

47 AIR 2002 SC 3551, para 16; also see *Mst. Amina Banoo* v. *Abdul Majid Ganai*, 2005 (I) SLJ 341.

48 2014 (2) JKJ 242.

and come to terms and start living with him before the third and final divorce was pronounced. Allegedly, the failure of Gurpreet Kaur to reconcile as proposed, Javid Iqbal issued third *talaq* through third divorce deed dated 26.04.2012.

Grounds for divorce under Dissolution of Muslim Marriages Act

In *Unous Mia* v. *Shelina Aktar*[49] one Shelina Aktar filed a petition under section 125, Code of Criminal Procedure (Cr PC) claiming that she was legally married wife of Unous Mia. The main issues before the Tripura high court were: (i) whether, a Muslim woman can divorce her husband by pronouncing *talaq* thrice; (ii) whether, the first husband had not been heard of for more than 7 years; (iii) whether, there was any legal and valid marriage between the parties; (iv) whether the fact that the husband was a witness to the *talaqnama* and was aware of the fact that the wife was earlier married prior to getting married to him was a ground to grant maintenance to the wife even if the marriage was invalid. In this regard, the court referred to a division bench decision of High Court of Tripura, in *Anjana Dey (Mandal)* v. *Subal Mandal*.[50] The high court set aside the order passed by the family court and sent back their matter disposal afresh.

In *Munavvar-ul-Islam* v. *Rishu Arora @ Rukhsar,*[51] pursuant to a college-time romance the parties married according to Islamic law. Prior to contracting the *nikah*, wife embraced Islam and even changed her name to Rukhsar. After the marriage, wife filed a suit in which she sought a declaration of validity and subsistence of the marriage and also filed a complaint under the Prevention of Domestic Violence against Women Act, 2005 as well as a petition seeking maintenance under section 125, Cr PC. The issues before the high court related to the Dissolution of Muslim Marriages Act, 1939 and whether impugned order of the family court was invalid and contrary to express the provisions of Muslim personal law. The case also raised the question as to whether adjuration of Islam or apostasy *per se* did not result in dissolution of a marriage governed by Muslin personal law. The court held that neither could it be said that apostasy *per se* did not dissolve a marriage governed by Muslim personal law nor could it be said that Act made any change to this general law. Plain meaning of section 4 of Act would be to effect that even if prior to passing of Act of 1939 apostasy would have operated to dissolve marriage *ipso facto* subsequent to coming into force of section 4 marriage was not *ipso facto* dissolved. Marriage of the respondent who was originally a Hindu was regulated not by rule enunciated in section 4 of Act by pre-existing Muslim personal law which dissolves marriage upon apostasy *ipso facto*.

In *Shinu Javed Mansuri* v. *Javed Hussain Mansuri*,[52] the appellant was Christian by birth and she converted to Islam to marry the respondent. The marriage of the couple faced breakdown down. The appellant claimed that she was ill-treated and harassed by her husband. Later, she claimed to have converted to her

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49 MANU/TR/0317/2014.

50 (2014) 1 TLR 773, paras 12,15,20,21 and 22.

51 AIR 2014 Del. 130 : 2015 (2) ALLMR 72 : 2014 (3) JCC 1617.

52 2015 GLH (1) 453: (2015) 1 GLR 770.

original faith of Christianity on the premise that upon her reconversion to her original religion, her marriage with the respondent stood dissolved. She also alleged that since 2008, the husband had neglected to look after her and the girl child born out of the wedlock. She prayed before the family court for declaring the marriage null and void, and also for monthly maintenance for her daughter. The family court passed an order, rejecting wife's contention, stating that in the suit she had raised grounds of cruelty but had not prayed for dissolution of the marriage and accordingly, section 4 of the Dissolution of Muslim Marriages Act would not apply to a person who had converted into Islam from some other faith and who re-embraces her former faith.

On appeal, the high court referred to the following statement of objects and reasons for the enactment of the Act of 1939:

> Clause 5 is proposed to be incorporated in this Bill….Thus, by this Bill the whole law relating to dissolution of marriages is brought at one place and consolidated in the hope that it would supply a very long felt want of the Muslim community in India.

Further, the court referred to section 2 of the Act, pertaining to grounds for a decree for dissolution of marriage which provides that a married woman shall be entitled to obtain a decree for the dissolution of her marriage on anyone or more of the grounds mentioned in clauses (i) to (ix) of the said section. After perusal of provisions, the court referred clause (ix) of section 2, which provides that the marriage may be dissolved on any other ground which is recognized as valid for the dissolution of the marriages under the Muslim law. The court also referred section 4 of the Act, 1939.[53] The court found that a mere renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam by itself would operate to dissolve her marriage.[54] Further, the court opined that Section. 4 made it clear that in case of a woman who renounces Islam or converts to some other faith, section 4 along with its first proviso would apply. However, in case of a woman, who has converted into Islam from some other faith and thereafter re-embraces her original faith, section 4 would not apply. For this reason, the High

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53 The Dissolution of Muslim Marriages Act, 1939, s. 4. Effect of conversion to another faith:-

> The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage:—
>
> Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in Section 2:—
>
> Provided further that the provisions of this Section shall not apply to a woman converted to Islam some other faith who re-embraces her former faith.

54 The first proviso to s. 4 of the 1939 Act provides that after such renunciation or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in s. 2.

Court of Tripura was at slight variance with the view of the High Court of Delhi [55] and High Court of Kerala.[56] The Tripura case was decided in a different background where a Muslim lady claimed conversion to some other religion and, thereafter, remarried on the pretext that by such conversion her earlier marriage stood dissolved. Similarly, the decision of High Court of Andhra Pradesh in *Sarwar Yar Khan* v. *Jawahar Devi*[57] as per the High Court of Tripura, did not lay down any *ratio* which could be applied in the present case.

In *Shaik Nagoor Bibi* v. *Shaik Pakeer Saheb*,[58] one Shaik Meerasaheb developed illicit intimacy with the plaintiff and continued their relationship for 2 years. Subsequently, Meerasaheb made the plaintiff to convert into Islam and married her, as per the Islamic caste custom, in the presence of witnesses. Since then, the plaintiff and Meerasaheb lived as wife and husband. The main issue before the High Court of Andhra Pradesh was whether the plaintiff's conversion to Islam and marriage to Meerasaheb was in accordance with Islamic law and, if so, whether such marriage was valid in view of her relationship with Srirangam Satyam. The court did not question the conversion, relying on the above rule. But with regard to her first marriage, the court referred Mulla:[59]

> The conversion of a Hindu wife to Mahomedanism does not ipso facto dissolve her marriage with her husband. She cannot, therefore, during his lifetime, enter into a valid contract of marriage with any other person. Thus if she, after conversion to Mahomedanism, goes through a ceremony of marriage with a Mahomedan, she will be guilty of bigamy under Section 494 of the Indian Penal Code.

Another contention raised by the plaintiff was with regard to presumption that when a man and woman are living together as wife and husband and recognized by locals, the court can draw an interference that they are living as husband and wife. For this, the court again referred section 268 of Mulla.[60]

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55 *Munavvar-ul-Islam* v. *Rishu Arora @ Rukhsar*, AIR 2014 Del. 30: 2015 (2) ALLMR 7; 210 (2014) DLT 108.

56 *K.C. Moyin* v. *Nafeesa*, AIR 1973 Ker 176.

57 1964 (1) Andh. WR 60.

58 2015 (1) ALD 701.

59 *Supra* note 7 at 14, s. 20.

60 *Id.*, 7at 230, s. 268. Presumption of marriage: Marriage will be presumed, in the absence of direct proof, from-

(a) Prolonged and continual cohabitation as husband and wife (e); or

(b) The fact of the acknowledgment by the man of the paternity of the child born to the woman, provided at the conditions of a valid acknowledgment mentioned in Section 344 below are fulfilled (f); or,

(c) The fact of the acknowledgment by the man of the woman as his wife;

(d) The presumption does not apply if the conduct of the parties was inconsistent with the relation of husband and wife;

In this regard, one judgment of Privy Council was also referred.[61] Dismissing the appeal, the court held that a mere conversion of plaintiff into Islam and allegedly marrying Meerasaheb would not create any valid marital relationship. The court did not find any proof of her divorce from Srirangam Satyam and, therefore, the court held her marriage with Meerasaheb invalid.

***Nafqah* (Maintenance)**

Under Muslim law, a man is duty-bound to provide maintenance to his parents, children as well as his wives. The maintenance provided to the parents and minor children are dependent upon the availability of resources to parents as well as children. It is worth mentioning that father is entitled to maintain his son only till his majority, but daughter is entitled for maintenance till her marriage. However, this is the unique feature of Islamic law that husband is entitled to maintain his wife even if she is affluent enough and the husband is poor; it does not depend on the resources of the parties. The law of maintenance of wife has created history in the arena of Muslim law of India. Under Muslim law, husband is entitled to maintain his wife till subsistence of marriage and, after divorce, till the period of *Iddat*. This is a codified law of some established schools of Muslim jurisprudence, particularly *hanafi* and *ithna-ashari* law which are applicable and prevalent in India. Since maintenance is covered under criminal law which after amendment of 1973 in section 125 Cr PC, where an obligation has been imposed to maintain wife which includes divorced wife with a caveat to maintain till she is re-married. The traditional law followers protested against this legislative measure and, therefore, it was further amended under section 127 (b), which stipulates that if the sum of dower amount paid to wife and other 'customary or personal law sum' is sufficient to fulfill the divorcee's need, the magistrate may exempt former husband from payment of maintenance. This is customary or personal law sum of gift as well as *mehar* as a substitute provided by the later amendment.[62]

The harmonious construction of these two provisions made by Krishna Iyer J in *Fuzlubi* v. *K. Khader Vali*[63] and *Bai Tahira* v. *Ali Hussain Fidaalli Chothia*[64] did not raise any controversy. However, in *Shah Bano*,[65] the interpretation of these concepts opened many flood gates. It invited resentment from traditional *ulema* and afterwards through general Muslim masses. In order to overcome the furor of Muslims against the intervention in their law and religion, the legislature passed

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(e) Nor does it apply if the woman was admittedly a prostitute before she was brought to the man's house;

(f) The mere fact, however, that the woman did not live behind the purda, as the admitted wives of the man did, is not sufficient to rebut the presumption.

61 See *Ghazanfar* v. *Kaniz Fatima* (1910) 37 I.A. 105, the Privy Council held that such presumption cannot be drawn in respect of a prostitute who is living with a man.

62 See Cr PC., s. 127

63 (1980) 4 SCC 125.

64 (1979) 2 SCC 316.

65 *Mohd. Ahmed Khan* v. *Shah Bano Begum*, 1985 SCR (3) 844.

the Muslim Women (Protection of Rights on Divorce) Act, 1986 and accordingly a Muslim wife is excluded from the provisions of Cr PC. Though the validity of this Act was upheld by the apex court, the Supreme Court has decided the cases under Cr PC in order to award maintenance to Muslim wife keeping aside the Act of 1986.[66]

Maintenance of wife/divorcee

In *Shamim Bano* v. *Asraf Khan*,[67] the wife was meted out with cruelty and torture by the husband and his family members regarding demand of dowry and a criminal case was initiated. During the pendency of criminal case, wife also filed an application under section 125, Cr PC for grant of maintenance. While the application for grant of maintenance was pending, divorce between the appellant and the respondent took place on May 5, 1997. The wife further filed another case under section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 before the judicial magistrate, who dismissed the same. Being aggrieved, the wife approached high court of Chhattisgarh.

The high court held that a Muslim woman was entitled to claim maintenance under section 125, Cr PC, even beyond the period of *iddat* if she was unable to maintain herself. The husband approached the Supreme Court. The questions before the apex court were: (i) Whether the wife's application for grant of maintenance under section125, Cr PC was to be restricted to the date of divorce and, as an ancillary to it, because of filing of an application under section 3 of the Act after the divorce for grant of *mahr* and return of gifts would disentitle the wife to sustain the application under section 125; (ii) whether regard being had to the present factual situation, as observed by the high court i.e. the consent under section 5 of the Act of 1986 was an imperative to maintain the application. The apex court while examining earlier precedents (*Mohd. Ahmed Khan* v. *Shah Bano Begum*,[68] *Danial Latifi* v. *Union of India*,[69] *Khatoon Nisa* v. *State of U.P.*[70]) opined that a divorced Muslim wife was entitled to apply for maintenance under section 125, Cr PC and that *mahr* was not such a quantum which can *ipso facto* exempt the husband from liability. The court further referred to *Shabana Bano* v. *Imran Khan*,[71] where it was held that a petition under section 125, Cr PC would be maintainable before the family court as long as the wife did not remarry. The amount of maintenance to be awarded under section 125, Cr PC cannot be restricted for the *iddat* period only.

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66 Recently a judgment came in Supreme Court on 6 April 2015; see *Shamima Farooqui* v. *Shahid Khan*, AIR 2015 SC 2025; 2015 (4) SCALE 521; (2015) 5 SCC 705; 2015 (5) SCJ 342.

67 (2014) 12 SCC 636.

68 (1985) 2 SCC 556.

69 (2001) 7 SCC 740.

70 2002 (6) SCALE 165.

71 (2010) 1 SCC 666.

In *Farzana Ansari* v. *Abid Ali Ansari*,[72] the wife applied for maintenance under section 125, Cr PC before the judicial magistrate first class. The court, while addressing the issue of maintenance cited the Supreme Court judgment,[73] in which it was held that "the expression '*unable to maintain*' only connotes that the wife has no other means or source to maintain her. It has nothing to do with her potential earning capacity." Considering all aspects of the case in the light of above judgment, the high court was of the view that 'to pay reasonable maintenance is the legal obligation' of husband and in every case husband is liable to maintain divorcee till long, whatever circumstances he faces. It is respectfully submitted that the observation is neither in conformity with Muslim law nor secular law of the country.

In *Shahin Bano* v. *Shamsuddin*,[74] the issue before the court was whether a Muslim divorced wife was entitled to receive an amount of maintenance from her divorced/former husband under section 125, Cr PC. The high court reproduced section 3(1) (a)[75] and section 4(1)[76] of the Act of 1986, and referred to the decision of the constitution bench of the Supreme Court in *Mohd. Ahmed Khan* v. *Shah*

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72 2014 ALLMR (Cri) 1681.

73 *Ramesh Chander Kaushal* v. *Veena Kushal*, AIR 1978 SC 1807. Also see *Smt. Mamta* v. *Jaiswal*, 2000 (3) MPLJ 100; *Vimal* v. *Sukumar Anna Patil*, 1981 Cri LJ 210 (1).

74 2014 Cri LJ 4818; 2015 (2) RCR (Cri) 266.

75 The Muslim Women (Protection of Rights on Divorce) Act, 1986, s. 3. Mahr or other properties of Muslim woman to be given to her at the time of divorce:

(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to-

(a) a reasonable and fair provision and maintenance to be made and paid to her within the *Iddat* period by her former husband

76 S.4, The Muslim Women (Protection of Rights on Divorce) Act, 1986. Order for payment of maintenance- (1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where the Magistrate is satisfied that a divorced woman has not remarried and is not able to maintain herself after the *Iddat* period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order:

Provided that, where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her:

Provided further that, if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

Bano Begum,[77] where apex court had held that there was no conflict between section 125, Cr PC and the Muslim Personal Law on the question of a Muslim husband to provide maintenance to his divorced wife, who is unable to maintain herself.[78] The court referred *Danial Latifi* v. *Union of India*,[79] which runs thus:[80]

> The object and scope of Section 125, Cr.P.C. is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, Even under the Act, the parties agreed that the provisions of Section 125, Cr.P.C. would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125, Cr.P.C. would now be granted under the very Act itself.

Lastly, the court referred *Shabana Bano* v. *Imran Khan*,[81] where it was held that the application filed by a Muslim divorced wife under section 125, Cr PC would be maintainable and the amount of maintenance to be awarded cannot be restricted for the *iddat* period only so long as the divorced wife does not remarry.[82] In *Shamim Bano* v. *Asraf Khan*,[83] the Supreme Court had reiterated its earlier view and held that the application filed by a Muslim divorced woman under section 125, Cr PC was clearly maintainable.[84] on *G. Fazeel Ahmad* v. *S. Jameela Unnisa*,[85] a civil appeal was filed for reasonable and fair provision of maintenance of Rs. 6, 00,000/- for her whole life, for return of dowry amount and for return of *jahez* articles. The high court awarded Rs. 50,000 as reasonable and fair provision (*mata*) for maintenance. The division bench of the High Court of Andhra Pradesh took into consideration only the welfare of the divorcee rather than resolving the conflict between two legal regimes, *viz*. Criminal Procedure Code, 1973 and the Muslim Women (Protection of Rights on Divorce) Act, 1986.

In *Mohd. Waqar* v. *State of U.P.*,[86] a complaint under section 12 of the Protection of Women from Domestic Violence Act, 2005 was filed. The high court held that a divorced Muslim woman was not entitled to live in the matrimonial

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77 (1985) 2 SCC 556; AIR 1985 SC 945.

78 *Id*., para 14.

79 (2001) 7 SCC 740; AIR 2001 SC 3958.

80 *Id*., paras 30 and 31.

81 (2010) 1 SCC 666.

82 *Id*., para 21 and 23.

83 2014 SAR (Criminal) 659 : (2014 ATR SCW 3369)

84 *Id*., at para 13.

85 2014 (6) ALD 762; 2014 (6) ALD (Cri) 762; 2015 (1) ALT 299; II (2015) DMC 721 AP.

86 2014 (4) ALJ 513.

house, or share joint kitchen.[87] Besides, the order did not consider any domestic incident reported or received from the protection officer. The court also found that the revisionist was deprived from producing certain evidence related with bank statements and educational qualification of the complainant, which, in view of financial statement, had a bearing on the capacity to pay maintenance. Further, the court held that a revisional court could not reassess or reappraise evidence and could not upset findings of fact recorded by trial court by substituting its own finding.[88] Thus, the impugned order was quashed and revision was allowed.

In *Rani Mahalka Nisha Khan* v. *Abdul Javed Khan*,[89] The High Court of Chattisgarh, after quoting various judgments of Supreme Court,[90] arrived at the conclusion that the proceedings under section 125, Cr PC were of civil nature and that the said proceedings claiming maintenance by divorced Muslim woman were to be treated as beneficial legislation. The court further reproduced the following observations made in *Shabano Bano* v. *Imran Khan*:[91]

> Cumulative reading of the relevant portions of the judgments of this Court in *Danial Latifi* and *Iqbal Bano* would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.
>
> In the light of the aforesaid discussions, the impugned orders are hereby set aside and quashed. It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 Cr.P.C. after the expiry of period of *iddat* also, as long as she does not remarry. As a necessary consequence thereof, the matter is remanded to the Family Court as Gwalior for its disposal on merits at any early date, in accordance with law.

In the revision petition *M. Mohammad Ali Jinnah* v. *M. Balgees Beevi*,[92] the husband pronounced triple *talaq* to his wife. The husband did not provide

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87 The Muslim Women (Protection of Rights on Divorce) Act, 1986, s. 4.

88 See *State of Kerala* v. *K.M. Abdullah and Co.,* AIR 1965 SC 1585; *Munna Devi* v. *State of Rajasthan,* AIR 2002 SC 107; *Associated Cement Co. Ltd*. v. *Keshvanand*, AIR 1998 SC 596; and *Dulichand* v. *Delhi Administration*, AIR 1975 SC 1960, in these cases it has been held that while the appellate jurisdiction is co-extensive with the original court's jurisdiction as an appreciation and re-appreciation of evidence is concerned, the revisional court has simply to confine to the legality and propriety of the findings and as to whether the subordinate court acted within its jurisdiction.

89 MANU/CG/0040/2014.

90 *Shabano Bano* v. *Imran Khan* (2010) 1 SCC 666; *Danial Latifi* v. *Union of India* (2001) 7 SCC 740; *Iqbal Bano* v. *State of U.P.* (2007) 6 SCC 785.

91 (2010) 1 SCC 666.

92 MANU/TN/1305/2014.

maintenance for his ex-wife and child, namely the first and second respondents. On behalf of herself and her child, the ex-wife filed a petition in the family court under section 125, Cr PC. The family court directed husband to pay maintenance to the ex-wife at the rate of Rs. 2,500/- per month and Rs. 1,500/- per month for the child. Aggrieved by the order, the husband brought the revision petition on the ground that (i) the husband cannot be held liable to pay maintenance beyond the *iddat* period as per section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986; and, (ii) the means/income of the revision petitioner had not been proved by sufficient evidence and the family court arbitrarily fixed a total sum of Rs. 4,000/- per month to be paid to the respondents.

The high court, while relying on the Supreme Court decision,[93] held that section 125 being a welfare legislation intending to benefit the wife including the divorced wife shall be applicable even to a divorced Muslim woman and that the provisions of the Act of 1986 will not in any way alter the position of such divorced woman *vis-a-vis* the erstwhile husband of such woman. As for as section 5 of the Act of 1986 was concerned, the revision petitioner had not given his consent for the proceedings being governed by sections 125 to 128 of the Cr PC. The court further held that the petitioner was capable of earning sufficient income not only for his maintenance but also for the maintenance of his present wife and also the maintenance of his past wife and his child born through the first respondent. Moreover, the quantum of maintenance awarded by the family court was not sufficient to support ex-wife and child with dignity and status comparable to her status enjoyed by her while she was married to her ex-husband.

In *Jahanara Begum* v. *Rustom Ali Bhuyam*,[94] the petitioner filed an application under section 125, Cr PC before the family court for maintenance which was granted. The order was challenged before the Guahati high court, which dismissed the appeal. The matter then came before Supreme Court which disposed of the case vide order which runs thus:

> Leave granted. In view of the decision of the Constitution bench in *Danial Latifi & Anr.* v. *Union of India* 2001 (7) SCC 740, the matter has to be considered by the trial Court afresh. For that purpose we set aside the order passed by the trial magistrate and the High Court and remit the case to the trial court for disposal of the claim afresh in accordance with law. The appeal is disposed of accordingly.

The high court modified the order of family judge regarding maintenance of wife as per the amendment to Cr PC following the direction of apex court. Accordingly, the payment of maintenance of Rs 500/- pm to be given from October 2001 and not from February, 2003 was awarded.

In *Aashiq Khan* v. *Anisabai*,[95] agreeing with revisional court's view that the proceedings under section 125, Cr PC were quasi-criminal and quasi-civil in nature,

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93 *Mohd. Ahmed Khan* v. *Shah Bano Begum*, 1985 SCR (3) 844.

94 2015 (1) GLD 431 (Gau), 2014 (4) GLT 334.

95 2015 (1) JLJ 337, 2015 (1) MPHT 352.

the court held that the principles of appreciation of evidence as applicable in civil cases are applied to the proceedings under section 125, Cr PC and hence the documents should have been properly proved before any interference could be drawn on the basis of the documents, besides giving plaintiff an opportunity to rebut the same. Allowing the revision, the orders passed by the revisional court and the judicial magistrate, first class were set aside and the matter was remanded back to the court of judicial magistrate, first class.

In *P. Ramsheed* v. *Sajna V.*,[96] keeping in mind the objects of Cr PC and the Muslim Women (Protection of Rights on Divorce) Act, 1986, the court held that whatever amount was received by the wife under section 125, Cr PC after divorce, will have to be adjusted towards the amount due and payable under the special law, making sure that no double benefits are derived. While dismissing the revision petition, the court made it clear that adjustment must be made between the amount paid under section 125, Cr PC and section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986.

In *Masrat Begum* v. *Abdul Rashid Khan*,[97] the major issue related to the issuance of interim maintenance, whether the petitioner would be entitled to interim maintenance till such time the divorce is proved. The court observed that since an application made under section 125, Cr PC takes several months for being disposed of finally, the fruits of the proceedings under section 125 must be made available through an interim maintenance. Further, the court referred to the provision of the Jammu and Kashmir Muslim Personal Law (Shariat) Application Act, 2007.[98] As to the question of grant of interim maintenance, the court referred *Savitri* v. *Govind Singh Rawat*[99] and explained that the question of interim maintenance would arise only if the personal law applicable to the parties authorizes the enforcement of any such right to maintenance.

In court's view, the argument of the petitioner was not supported by the personal law governing the parties. The court found that the statutory provisions of sections 488 to 490, Cr PC did not contemplate the grant of interim maintenance. Hence, while dismissing the petition and agreeing with the judgment of the revisional court, the high court directed the chief judicial magistrate to decide maintenance matter pertaining to the year 2009, within a period of two months.

In *Syed Mohd. Fazle Haider Zaidi* v. *State of U.P.*,[100] the high court was of the view that maintenance had been demanded by the wife not only for herself but also for the minor daughter and, therefore, the application for maintenance could not be dismissed at the threshold. Further, the court referred to the observations made by the apex court *Iqbal Bono* v. *State of U.P.*[101] The court also referred to the

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96 MANU/KE/1069/2014.

97 2014 Cri LJ 2868, 2014 (3) JKJ 1.

98 Act no. IV of 2007.

99 (1985) 4 SCC 337.

100 2014(1) ACR1009, 2014 (2) ADJ 725, 2014 (2) ALJ 608.

101 (2007) 6 SCC 785.

observation made in *Shabana Bono* v. *Imran Khan*[102] to the effect that the application, even by divorced Muslim women, would be maintainable under section 125, Cr PC. The court was of the opinion that if the wife was entitled to any maintenance in view of provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986, it would depend on the evidence as to whether at the time of divorce the husband had provided maintenance or not in accordance with law as this would be a matter which has to be thrashed out after leading evidence by the parties.[103]

Maintenance of unmarried daughter

In *Meharunnisa* v. *Syed Habeeb*,[104] the issue before the court was whether the unmarried daughters of Muslim parents were entitled for an award of maintenance under section 125, Cr PC even after attaining the age of majority till their marriage, if they were unable to maintain themselves from their father. In this regard, the court relied upon the Supreme Court's decision in *Noor Saba Khatoon* v. *Mohd. Quasim*,[105] in which it was observed as follows:

> Criminal Procedure Code, 1973-Sec. 125 -right of minor children staying with their divorced mother to claim maintenance under Sec. 125 from their Muslim father having sufficient means till they attain majority or in case of females till they get married. The Supreme Court held that, the right is not affected by Sec. 3(1)(b) of Muslim Women (Protection of Rights on Divorce) Act, 1986. Sec. 3(1)(b) of 1986 Act provides additional maintenance to the divorced mother for maintaining her infant child for the fosterage period of two years from the date of birth of the child and is independent of the right of the minor children unable to maintain themselves to maintenance under S. 125. That right is absolute under S. 125 as well as under Muslim Personal law. Benefit of S. 125 is available irrespective of religion and it would be unreasonable, unfair and inequitable to deny this benefit to the children only on ground of their being born of Muslim parents.

A major daughter must establish that she was suffering from physical or mental abnormality or injury which created a circumstance or situation that she became unable to maintain herself and then only she was entitled to maintenance.[106] The

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102 (2010) 1 SCC 666.

103 See *Daniel Latifi* v. *Union of India* (2001) 7 SCC 740 (see para 28, 29 and 36).

104 2015 (1) AKR 578, 2015 CriLJ 1836, 2015 (2) KCCR 1601, 2015 (3) RCR (Criminal) 449.

105 (1997) 6 SCC 233.

106 For this proposition, the court relied on *Muhammad* v. *Kunhayisha* 2003 (3) KLT 106. Also see *Jagadish Jugtawat* v. *Manjulata* (2002) 5 SCC 422. However, in both the rulings, the Supreme Court has not in detail gone through whether the major daughters either under Hindu law or under the Mohammedan law, are entitled to claim maintenance under any statute or personal law, can also claim maintenance u/s. 125 of Cr.P.C. as a matter of right.

court made a deeper and sharper analysis of section 125(c), Cr PC, addressing to the sociological problems which are prevailing in the society and rampantly affecting the rights of major daughters. The court referred to *Hedaya*, which states:[107]

> The maintenance of infant children rests upon their father; and no person can be his associate or partner in furnishing it (in the same manner as no person is admitted to be associated with a husband in providing for the maintenance of his wife) because the word of God, in the Quran, Says "The Maintenance of the woman who suckles an infant rests upon him to whom the infant is born".

Court also referred Baille's work, which says:[108]

> A father is bound to maintain his children and no one shares the burden with him….A father must maintain his female children absolutely until they are married…

Further, Court referred Tyabji:[109]

> The daughters are entitled to maintenance until they are married and unless they have property of their own.

Thereafter, Mulla's work was also referred to:[110]

> 370. He is also bound to maintain his daughters until they are married…

And lastly, Fyzee, who writes:[111]

> A Father is bound to maintain his sons until they attain puberty and his daughters until they are married. He is also responsible for the upkeep of his widowed or divorced daughter.

The court found that statutes were not mere exercises but instrument of government and while constructing statute the general purpose undertaken by that enactment should be borne in mind by the courts.[112] Involving same principle in

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107 Charles Hamilton I, *Hedaya or Guide: A Commentary on the Mussulman Laws*, 408 (Stanish Grove Grady (ed.), William H. Allen & Co., London, 1870).

108 Neil B.E. Baillie, *Digest of Muhammadan Law*, 460-62 (Premiere Law House, Lahore, 4th edn., 1965).

109 *Supra* note 36.

110 *Supra* note 7 at 300, s. 370.

111 Asaf A. A. Fyzee, *Outlines of Muhammadan Law*, 214 (Oxford University Press, New Delhi, 4th edn., 1974).

112 In this regard court referred, Maxwell *Interpretation of Statutes* 229 (10th edition), wherein it is stated: Where the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose

interpreting section 125(1)(c), Cr PC, the court found that the main object of introducing such provisions should be fetched in mind, which is in conformity with the main intention of the legislators in bringing such provisions into the statute book. The court mentioned various decision of apex court in this regard.[113]

In *Yahiya* v. *Souja*,[114] the *mehar* was awarded by the magistrate, which was taken by the petitioner in revision before the session court but the same was dismissed. In appeal, the high court found no illegality or impropriety in quantum of compensation payable to the wife as maintenance. Whether the wife was entitled to get interest on the amount which was not paid in time; the court observed that the wife was entitled to get interest on the original amount of the maintenance awarded by the court below.

In *Moideen* v. *Nusaiba*,[115] the question was whether a divorced Muslim woman was entitled to get any amount exclusively for *iddat* period, towards her expenses and maintenance, apart from reasonable and fair provision referred to under section 3 of the Act of 1986. Thus, it arrived at the conclusion that the primary responsibility cast upon the husband was to pay the amount as mentioned in section 3(1)(a) of the Act within *iddat* period.

In *Smti. Hasina Begum* v. *Md. Humayun Miah*,[116] the issue before the High Court of Tripura was whether the Muslim divorcee was entitled for maintenance beyond *iddat* period. The additional session judge held that wife was not entitled for maintenance beyond *iddat* period. The order of the judicial magistrate, granting maintenance was restored.

In *Md. Abdul Kuddus* v. *Nazma Begum*[117] the wife filed a petition for grant of maintenance to herself and her daughter. The issue before High Court of Tripura was whether a divorced Muslim wife was entitled to maintenance under section 125, Cr PC after the period of *iddat*. As per the trial court's findings, there was no legal divorce and maintenance under section 125, Cr PC was accordingly awarded. The high court opined that a Muslim woman was entitled to maintenance under section 125.[118] Dwelling upon history of the Muslim Women (Protection of Rights

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of the enactment or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence.

113 *Mohammad Ahmed Khan* v. *Shahbanoo Begum* (1985) 2 SCC 556; *Dwarika Prasad* v. *Bidyuth Parva Dixit*, (1999)7 SCC 675; *Vijakumar Prasad* v. *State of Bihar* (2004) 5 SCC 196; *Shaila Kumari Devi* v. *Krishnana Bhagwan Pathak* (2008) 9 SCC 672; *Chanmuniya* v. *Virendra Kumar Singh Kushwala* (2011) 1 SCC 141; *Badshah* v. *Urmila Badshah Godse* (2014) 1 SCC 199.

114 MANU/KE/1230/2014.

115 2014 Cri LJ 3011 : 2014 (2) KLT 780.

116 MANU/TR/0036/2014.

117 MANU/TR/0062/2014.

118 See *Mohd. Ahmed Khan* v. *Shah Bano Begum* (1985) 2 SCC 556. The relevant portion of the judgment reads ...We have attempted to show that taking the language of the statute as one finds it, there is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under s. 125 and that, *mahr* is not a sum which, under the Muslim Personal Law, is payable on divorce.

on Divorce) Act, 1986, the court held that in order to dilute *Shah Bano* judgment, the Act was passed. Further, the constitutional validity of the Act was challenged in *Danial Latifi* v. *Union of India*[119] which upheld it.[120] Therefore, a Muslim husband was liable to maintain his wife who had not remarried and was unable to maintain herself even after the period of *iddat* was over and he was duty bound to make a reasonable and fair provision for the maintenance of the divorced wife even after the period of *iddat.* The liability of the Muslim husband to his divorced wife does not cease on the completion of the *iddat* period since in *Daniel Latifi* judgment nowhere was it said that section 125, Cr PC will not apply to a Muslim wife. The court referred to another judgment of the apex court where it was held:[121]

> Proceedings under Section 125 Cr.P.C. are civil in nature. Even if the Court noticed that there was a divorced woman in the case in question, it was open to it to treat it as a petition under the Act considering the beneficial nature of the legislation. Proceedings under Section 125 Cr.P.C. and claims made under the Act are tried by the same court.

In another judgment of the apex court, it was held that:[122]

> The appellant's petition under Section 125 Cr.P.C. would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 Cr.P.C. cannot be restricted for the iddat period only.

Dismissing the petition, while relying on the apex court judgments, the high court took the view that a Muslim woman even after divorce would be entitled to claim maintenance from her husband under section 125, Cr PC as long as she does not marry.

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119 (2001) 7 SCC 740.

120 The conclusions formed in the case were: (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 iddad 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.

121 *Iqbal Bano* v. *State of UP* (2007) 6 SCC 785.

122 *Shabana Bano* v. *Imran Khan* (2010) 1 SCC 666.

The law relating maintenance of Muslim divorcee, however, should not be interpreted only under the parameters of technicalities but objects and reasons of the statutes should be given prime consideration in order to avoid further confusion among the stakeholder.

Guardianship

The law of guardianship in Islam is almost same as in other legal systems in India. The only unique feature of Islamic law is that it provides a special right to women for keeping the custody of their children (in case of boy, upto 7 years and for girl, till puberty or marriage) while guardianship will remain intact with father who is liable to pay the maintenance of his minor children when they are under the custody of mother. This special right of woman is known as *hizanat*.

In *Bushara* v. *Shibinu*,[123] the issue before High Court of Kerala was whether the father's visiting right infringe the custodial rights of the mother. In this regard, the court held that the matrimonial appeal was bereft of any merit and accordingly dismissed. While deciding the appeal, the court had relied upon the Mulla[124] which reads:

> Right of mother to custody of infant children.—The mother is entitled to the custody of (*hizanat*) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries a second husband in which case the custody belongs to the father.

The high court made it clear that the guardianship will remain with father and his visiting rights will not infringe the mother's right for custody of child (*hizanat*).

In *Rizwana Begum* v. *Noor Ahmad*,[125] the issue before the High Court of Allahabad was whether under the Guardian and Wards Act, 1890 for the welfare of the minor any person other than father can be appointed as guardian in case of a Muslim child. The court was satisfied that the welfare of the minor was more appropriately with mother and not with father and under section 17(3) of the Act, child's desire should be given preference. In view of the above, the appeal was allowed.

In *Irfan* v. *State of U.P.*,[126] one Shaista Anjum (the mother), through whom the *habeas corpus* writ petition was moved, was married to Mohammad Irfan. The court clarifying on the maintainability of the writ held that the writ jurisdiction was an extraordinary jurisdiction providing a constitutional remedy for enforcement of not only fundamental rights but also for enforcement of any legal right whether civil, criminal, administrative or relating to personal laws and the right to appeal was a statutory right and a person can invoke such right if it is so provided by

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123 AIR 2015 Ker. 21; 2014 (4) KHC 511; 2014 (4) KLJ 567; 2015 (1) KLT 387.

124 *Supra* note 7 at 287, s. 352.

125 2014 (8) ADJ 365.

126 2015 (1) ADJ 620; 2015 (108) ALR 831.

statute.[127] According to the Muslim law, father is the natural guardian of a child and in the present case after divorce between the parties, the father was maintaining his daughter with the help of his family members. For this view, the court reproduced Ameer Ali, who observes:[128]

> The mother can on no account give up her right of *Hizanat* for even if she were to obtain a *Khula* in lieu of abandonment of her right to her child custody *Khula* will be valid and she will retain a right of *Hizanat.*

Further, the court referred apex court's judgment in *Syed Saleemuddin* v. *Dr. Rukhsana*,[129] which held:

> In an application seeking a writ of habeas corpus for custody of minor children, the principal consideration for the court is to ascertain whether the custody of the children requires that the present custody should be changed and the children should be left in the care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration for the court.

Accordingly, the court granted custody of minor to her mother till she attains the age of puberty.

III LAW RELATING TO PROPERTY

The law of property in Islam is a secular law as compared to law relating to status, which may be said to be communal, though similar position is found in other personal laws of the country. For example, a marriage is not permitted under Islam with a person of other religion and in certain cases the marriage is *void ab initio*. However, a Muslim can gift his whole property to any non-Muslim whosoever he is, and whatever are his activities. Similarly, will can be executed by any non-Muslim and even *waqf* can also be administered by a non-Muslim under Islamic law.

Three modes of transferring the property under Muslim law are described as gift, will and *waqf*. Otherwise, the property should automatically devolve amongst heirs of the deceased as per the shares decided in the Quran and other sources of Islamic law. A Muslim is fully competent to transfer his whole property to anyone, irrespective of caste, creed and religion, heirs or strangers, provided he manifests his real intention to donate a thing to another person and the same thing or property should be accepted by the donee. At the same time, the most important part of this

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127 See *Union of India* v. *Inderjit Barua*, 1980 (Supp) SCC 696; *Riya Singh* v. *State of U.P.*, 2011 (89) ALR 779.

128 *Supra* note 42 at 304, Vol. 11.

129 (2001) 5 SCC 247.

type of transfer is that possession should be immediately handed over to the donee, meaning a man can gift his whole property to anyone during his lifetime but he is to put off himself from its ownership and possession immediately. The other form of transfer is will, which is effected only after the demise of a person. The position is that during lifetime a man is complete owner of his whole property whether it is self-acquired, ancestral or acquired from any source or inherited or obtained as a gift, whatsoever, and therefore he being the sole owner, can transfer to anyone provided he disowned himself immediately and possession is handed over at the time of gift. The Prophet is reported to have said that a gift is not valid without seisin.[130] After his demise, a Muslim loses his all rights immediately after taking his last breath including his all properties, movable or immovable and they are automatically devolved among the heirs of the deceased as per the shares determined under the law. If a person feels that his heirs will not take care of some of his close relatives or friends with whom he had very much concerns, in such scenario he can bequeath his one third property. However, this one-third cannot be bequeathed in favor of an heir without the permission of other heirs. Here the problem of orphan children can be resolved through this legal device. Those children who have lost their parents during the life of grandparents, according to doctrine of representation, lost heir-ship of grandparents, in these cases if grandparents make the will in favor of orphaned grandchildren who are no more his or her heir then their problem can also be solved. It is worth mentioning that since they are no more heirs, the permission of other heirs in such cases is not required. Another way of transfer of property is to remain the *corpus* intact and *usufruct* should be used for charitable purposes which is known as *waqf*. The *waqf* can be made in favor of descendants and relatives. In that case, they will be benefitted from the *usufruct* with some amount to be given for strangers. This is known a *waqf-al-aulad* (family *waqf*). This process of transfer of property is recognized rather encouraged by the Prophet himself and his companions had created or dedicated their properties as *waqf*.[131]

Hiba **(Gift)**

Seisin

In *Rasheeda Khatoon* v. *Ashiq Ali*,[132] the question before the apex court was: What is the nature of gift under Muslim Law, and whether the oral gift was valid or not. The court referred to the tradition of prophet that "a gift is not valid unless possessed". The efforts of the court to examine the case under the shadow of Islamic law and collection of material of Islamic jurisprudence must be appreciated which is rarely found now a days, in the decisions of the court.

In *V. Sreeramachandra Avadhani (D)* v. *Shaik Abdul Rahim*,[133] the issue was whether the gift made by Sheikh Hussein in favor of Banu Bibi contemplates the

130 *Supra* note 44 at 482 (col ii), as cited in *Supra* note 36 at 370, section 395.

131 Shaffi, *Al-Umm* III, 281-83 as cited in *Supra* note 111 at 275.

132 2014 (11) SCALE 694.

133 AIR 2014 SC 3464; 2014 (4) AJR 399.

transfer of the *corpus*. The subject of conditional gifts under the fundamentals principles of Muslim law is beautifully explained in the treatise, which runs thus:[134]

> In *hiba* the immediate and absolute ownership in the substance or corpus of a thing is transferred to a donee; hence where a *hiba* is purported to be made with conditions or restrictions annexed as to its use or disposal, the conditions and restrictions are void and the *hiba* is valid.

Reference was also made to the extract from *Baillie*,[135] which runs thus:

> Gift is of two kinds, *tumleek* , and *iskat*, which means literally, to cause to fall, or extinguish. The legal effects of gift are-1st that it establishes a right of property in the donee, without being obligatory on the donor; so that the gift may be validly resumed or cancelled. 2nd that it cannot be made subject to a condition; though if a gift were made with an option to the donee for three days, and were accepted before the separation of the parties, it would be valid. And 3rd that it is not cancelled by vitiating conditions; so that if one should give his slave on condition of his being emancipated, the gift would be valid, and the condition void.

However, under Muslim law, a gift has to be unconditional. The court was, therefore, of the view that any conditions expressed in a gift, are to be treated as void. A conditional gift is valid, but the conditions are void.[136] Agreeing that when

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134 *Supra* note 112. Similarly in *Mulla's Principles of Mahomedan Law, supra* note 7, at 132, s. 164, it runs thus: Gift with a condition.- When a gift is made subject to a condition which derogates from the completeness of the grant, the condition is void, and the gift will take effect as if no conditions were attached to it(s).

135 Neil B.E. Baillie, *Digest of Moohummudan Law,* 516-17 (Premier Book House, Lahore, 1957).

136 *Ibid*. The text relied upon is hereunder:

> When a slave or a thing is given on a condition that the donee shall have an option for three days, the gift is lawful if confirmed by him before the separation of the parties; and if not confirmed by him till after they have separated, it is not lawful. But when a thing is given on a condition that the donor shall have an option for three days, the gift is valid, and the option void; because gift is not a binding contract, and therefore does not admit of the option of stipulation. A person says to another, I have released thee from my right against thee, on condition that I have an option, the release is lawful, and the option void.
>
> A man to whom a thousand dirhems are due by another says to him, 'When the morrow has come the thousand is thine, or 'thou art free from it, or when thou hast paid one-half the property then thou art free from the remaining half, or the remaining half is thine, the gift is void. But if he should say, I have released you on condition that you emancipate your slave, or Thou art released on condition of thy emancipating him by my releasing thee,' and he should say, I have accepted, or I have emancipated him, he would be released from the debt.

one has made a gift and stipulated a condition that is *fasid*, or invalid, the gift is valid and the condition void; if one should give a mansion, or bestow it in alms, on condition that the donee shall restore some part of it, or give some part of it as *iwaz*, or exchange, the gift would be lawful and the condition void.[137] It is a general rule with regard to all contracts which require seizing such as gift and pledge, that they are not invalidated by vitiating conditions.

In general, Muslim law draws no distinction between real and personal property, what it does recognize and insist upon is the distinction between the *corpus* of the property itself (*ayn*) and the *usufruct* in the property (*manafi*). Over the *corpus* of property, the law recognizes only absolute dominion, heritable and unrestricted in point of time; and where a gift of the *corpus* seeks to impose a condition inconsistent with such absolute dominion the condition is rejected as repugnant; but interests limited in point of time can be created in the *usufruct* of the property and the dominion over the *corpus* takes effect subject to any such limited interests.[138] Sir Wazir Hasan in *Amjad Khan* v. *Ashraf Khan*,[139] challenged the doctrine accepted by *hanafi* lawyers that a gift to "A" for life conferred an absolute interest on "A"; a doctrine based on a saying of the Prophet:[140]

> An amree or life grant is lawful to the grantee during his life and descends to his heirs. The meaning of amree is a gift of a house (for example) during the life of the donee, on condition of its being returned upon his death. An amree is nothing but a gift and a condition and the condition is invalid; but a gift is not rendered null by involving an invalid condition.

The donor intended to confer upon his wife not the corpus, but a life interest only.[141] Having given their thoughtful consideration to the text of the gift deed, apex court was of the view that the same contemplates the transfer of the corpus

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137 See *Fatawa Alamgiri* as cited in *supra* note 15 at 215.

138 If a person bequeath the service of his slave, or the use of his house, either for a definite or an indefinite period, such bequest is valid; because as an endowment with usufruct, either gratuitous or for an equivalent, is valid during life, it is consequently so after death; and also, because men have occasion to make bequests of this nature as well as bequests of actual property. So likewise, if a person bequeaths the wages of his slave, or the rent of his house, for a definite or indefinite term, it is valid, for the same reason. In both cases, moreover, it is necessary to consign over the house or the slave, to the legatee, provided they do not exceed the third of the property in order that he may enjoy the wages or service of the slave, or the rent or use of the house daring the term prescribed, and afterwards restore it to the heirs. See *supra* note 44 at 527, Vol. 4, ch. 5, entitled "of Usufructuary Will".

139 (1929) 57 M.L.J. 439 (P.C.).

140 *Supra* note 44 at 309.

141 *Supra* note 42 at 487.

and not the usufruct, the gift deed being valid and the conditions incorporated therein to be treated as void.[142] Allowing the appeal, the court held that the gift deed irrevocably vested all rights in the immovable property; hence the sale of the gifted immovable property was legal and valid.

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142 The apex court gave reasons for arriving at this conclusion: Firstly, the donor records, having purchased the gifted property from his own earning on 16.07.1944, through a registered purchase deed, whereby he was vested with the absolute right of possession and enjoyment of the property. It is then asserted, that there is no dispute about the title of the donor, over the gifted property. All the above rights in the donor, are sought to be transferred by way of gift to Banu Bibi by asserting, "I am conveying in your favour as you are my wife and out of love to you and delivered possession of the same to you forthwith, from now onwards you shall enjoy this immovable property freely....." The words extracted hereinabove clearly establish the transfer of the corpus, which was in the absolute ownership of the donor, to the donee.

Secondly, the use of the words "We shall have no right to cancel this conveyance with silly reasons" also reveals, the intention of the donor to transfer the corpus of the property, to the donee.

Thirdly, the use of the words "Neither myself nor my successors shall raise any objection in respect of this conveyed property either against you or against your successors", recognises the rights of the donee as well as her successors. These words extinguish, not only the donor's rights in the property, but also that of his successors. There is recognition of the rights of the donee and her successors to the extent, that in the event of transfer of the gifted property to the successors of the donee, the same would not be assailable by the donor or his successors. This also depicts, the intention of the donor to transfer the corpus of the gifted property. Fourthly, the gift deed records that ".....after your life time this property shall devolve upon your off spring.....". The use of the words your off spring, expresses an intention which is separate and distinct from "our off spring". In other words, the gift deed contemplates the transfer of the gifted property by the donee, to her children, even if, such children were not the children of the donor. This too shows that the intention of the donor, contemplated the transfer of the corpus.

Fifthly, the gift deed records "I am herewith filing transfer memos, along with this deed for registration, to get your name mutated in revenue records. Therefore from now onwards you shall pay the Municipal Taxes and shall enjoy the same freely and happily." This expression in the gift deed, brings out the intention of the donor, that the transfer of the gifted property should not remain a matter of understanding within the family, but should be an open declaration to the public. The assertion in the gift deed that Municipal Taxes will be borne by the donee shows that the donee was to henceforth bear all liabilities of the gifted property, as its owner.

Lastly, the handing over of the earlier title deeds of the gifted property to the donee, by recording in the gift deed that "I have handed over the link sale deed and the voucher to you" also indicates, that the donor clearly expressed in the gift deed, that he had not retained any documents of title pertaining to the gifted property with himself, but had handed over the same to the donee. This also shows the intention of the donor to relinquish all his existing rights, in the gifted property. This also shows the intent of the donor, to transfer the corpus of the property to the donee.

In *Quamrul Haque* v. *Badruddin*[143] the High Court of Patna referred to section 155 of Mulla,[144] which runs thus:

> Gift to a minor by father or other guardian-No transfer of possession is required in the case of a gift by a father to his minor child or by a guardian to his ward. All that is necessary is to establish a bona fide intention to give.

So far question of law of the execution of gift deed, it held that the said *tamleeknama* dated 07.11.1953 was invalid and inoperative not only because of absence of acceptance and transfer of possession but also because several evidences available on record went to show that no such deed was executed. In the facts and circumstances of the case, the appeal is dismissed.

Musha

In *Parimal Dey* v. *Anita Agarwal*,[145] the main point which was disputed before the High Court of Calcutta hinges primarily on the validity and/or authenticity of the purported deed of settlement. In order to arrive at the conclusion, the court took Islamic legal literature referred to by counsels of both the parties *e.g.* Mulla,[146] where it is stated that Muslim law does not recognize gift of the undivided share in the property unless the said share is divided off and possession is delivered to be a valid gift, it would remain irregular but not void as the same is capable of being perfected and rendered valid by subsequent partition and delivery of the share to the donee by the donor, requires consideration. Further reference was made to the same author defining *musha* to be an undivided share in the property, be it movable or immovable. The author advocates that the *musha* rule should not apply with all its rigidity and there are exceptions. One of the exceptions indicated therein is that where the donor has gifted her entire interest to the donee which is a share in joint property, the donee has a right to sue for partition.[147] The court also produced works of *Ameer Ali.*[148] The principle which was stated was that the gift of *musha* is not void but at best is irregular, capable of being remedied and perfected by possession.

After quoting above sources, the high court opined that since Mulla admits the right of the donee to ask for partition though there is some uncertainty whether a donee of the part of the share of a *musha* or a donee of the entire share of *musha* is entitled to seek for partition. In this regard, judgment of the High Court of Calcutta in *Sk. Anarali Tarafdar* v. *Sk. Omar Ali*[149] was referred to where it was

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143 AIR 2014 Pat 228.

144 *Supra* note 7.

145 2014 (4) CHN (Cal.) 208.

146 *Supra* note 7.

147 *Supra* note 112 at 543.

148 *Supra* note 42.

149 55 CWN 33.

held that the bequest in excess of legal one-third can be made effectual on the consent of the heirs which can be done at the time of death or after the death of the testator. Since there is no prescribed mode for such consent, it may be presumed from the conduct of the parties or from their acquiescence.

The high court, therefore, because of illegality and infirmity of the order of appellate court, set aside the impugned order and the parties were directed to maintain *status quo* with regard to nature and character and possession of the suit property as on today till the disposal of the suit. This case involved law of inheritance, gift as well as will and also involves gift of undivided shares in an immovable property, i.e. *musha*. The high court heavily relied upon sources of Muslim law and enforced the true position of law which is prevalent throughout the country as far as property law of Muslims is concerned.

Hiba zubani

In *Aftab Ahmad* v. *Lt. Governor-Cum-Administrator,*[150] through a petition, the petitioner sought to quash the impugned letter dated 04.12.2012 whereby the application of the petitioner for allotment of an alternative plot had been rejected. Regarding the validity of oral gift, the sub-judge, Delhi in his award had observed:

> According to Muslim personal law, property can be gifted orally. Writing is not necessary. According to the said law, the donor has to declare the gift, the donee is to accept the gift and possession of the property is to be delivered by the donor to the done… Gift was thus complete and irrevocable. It cannot be impeached on the ground that it was orally made. I thus find that the oral gift made by the defendant to the plaintiff was legally valid. Whether the plaintiff is entitled to declaration. Prayed for by him in the plaint? Gift was valid and the title passed to the plaintiff. The plaintiff is owner of the suit property. He is entitled to declaration as prayed for by him. I award accordingly.

In *Kuttian Padmini* v. *Nelliyullaparambath Mathu,*[151] a property covered by Ext. A1, with 83/4 cents land also, belonged to first defendant and her mother Kunkichi. On the death of Kunkichi, entire property vested with the first defendant. The issue before the high court was whether Ext. A1 gift had been accepted by the donee, plaintiff in the suit. Though the matter fell under the Transfer of Property, the court analysed the Mohammendan law of gift. As Delivery of possession of the gifted property was an essential requirement under the Muslim law of gifts for its completeness. Circumstances presented would clearly show that there was acceptance of Ext. B1 gift by the donee. Where the gift became complete on such acceptance, no right remained with the donor (first defendant) to revoke that gift. Hence plaintiff was granted a decree declaring that Ext. A1 gift deed had been

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150 2014 (144) DRJ 454.

151 2014 (1) KHC 759, 2014 (1) KLJ 816.

accepted by her, it was valid and binding on first defendant, and the revocation deed, Ext. B2, was null and void. The court interpreted the law in its true spirit.

***Wasiya* and *wirathat* (Will and inheritence)**

In *Syed Mohammed Abbas Ali Meerza* v. *State of West Bengal*,[152] reliance was placed on a decision of the apex court in *Dattatraya alias Prakash* v. *Krishna Rao alia Lala Saheb Baxi through L.Rs.*.[153] The terms of the original deed of indenture of 1891 and the position under the statutory enactments that followed were duly noted. Succession was required to be governed by the law of primogeniture and not by the Shia Muslim law. Allowing appeal, the apex court held that the appellant was the son of Syed Mohammad Sadeque Ali Meerza, who was a lineal descent from the second son of the original Nawab, and entitled as lawful legal heir to pursue the proceedings pending before the high court.

As far as Islamic law is concerned, feudalism and nawab system is in itself unknown and, therefore, their traditions and customs should not be given any consideration, especially under section 2 of the Shariat Act, 1937.[154]

In *Khairunnisabegum* v. *Nafeesunisa Begum*,[155] the suit as well as the counter claim were filed for partition of certain immovable as well as movable properties. The issue before the High Court of Bombay was whether the plaintiffs were entitled for a share in the property either owned or inherited by the deceased Farooq Mohammad Khan. It was held by the court that there was no dispute that Hanafi Law of Succession was applicable to the parties. While the plaintiffs relied on the table of shares after section 63 of *Mulla*,[156] the defendants placed reliance on the table of residuaries in order of succession as found below section 65 in the same treatise.[157] Thus, in case, no child is left by the person holding the property, then full sister would be normal sharer. However, in case he leaves behind him daughter or daughters as per entry no. 6 of the relevant table, she/they would take the residue.

In *Hussainsab Rajesab Tasewale* v. *Kasimsa Rajesab Tasewale*,[158] a suit for partition was filed by the parties for the properties held and left by Rajesab Tasewale. The issue before Gulbarga bench of High Court of Karnataka was: What were the rights of the parties before the court because of an unregistered document? The court was in agreement with the trial court that unregistered documents did not extinguish the rights of the parties and then held that trial court should have allotted 1/8th share of the suit scheduled properties to the share of the wife of deceased and, thereafter, divided the remainder amongst sons and daughters of Rajesab Tasewale in the ratio of 1:2.

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152 MANU/SC/0780/2014.

153 (1993) Suppl. (1) SCC 32.

154 The Muslim Personal Law (Shariat) Application Act, 1937, s. 2.

155 MANU/MH/1831/2014.

156 *Supra* note 7 at 48A.

157 *Ibid*.

158 MANU/KA/1865/2014

In *Khati* v. *Ali Mohammad Sofi*,[159] a division bench of Jammu and Kashmir high court decided the case of mutation of succession where on the death of one Ramzan Sofi, mutation of succession regarding estate was to be attested. The proceedings initiated in this regard were placed before the naib tehsildar concerned and on spot proceedings were initiated. In the presence of naib tehsildar, co-sharers and four daughters of the deceased Ramzan Sofi, were stated to have entered into a compromise. The judge, while relying on the judgment *Mst. Zaina* v. *Financial Commissioner*,[160] opined that the mutation order passed by naib tehsildar was correct and could not be challenged in revision. He further stated that subsequent to the attestation of mutation, one of the co-sharer executed a sale deed. Thus, there was no question of any further *de novo* enquiry. In this regard, the appellants referred to *Mst. Akhtar* v. *State of Jammu and Kahmir*,[161] where it was held that the limitation was not prescribed for invoking revisional powers. However, in this case, the court found facts different from the case mentioned and thus observing the said judgment was on different set of facts, was not applicable here. Accordingly, the court was in agreement with the single judge who had rightly set aside both the orders. The court further stated that attestation of mutation of succession was for updating the revenue records and such records were maintained for fiscal purposes. While upholding the order of mutation, the court was of the view that it would not deprive the heirs of the deceased from having recourse to other remedies including filing of civil suit, as may be available and permissible. According, the letters patent appeal was found to be without merit, hence dismissed.

In *Gani Mohammad* v. *Gulam Deen*,[162] the court referred to Mulla[163] where it is stated that bequest in excess of 1/3rd part of the property cannot take effect, unless the heirs consent thereto after the death of the testator.

In *Mohammed Ashraf* v. *Tabbasum*,[164] the issue was whether the trial court was justified in granting 1/3rd share to first defendant Tabassum on the ground that Khatunbi had executed a will in respect of the property bequeathing 1/3 share in favour of Tabassum. In *Md. Khalilur Rahman* v. *Md. Fazlur Rahman*,[165] it was stated that "Mohammedan Personal Law dictates that if a Muslim executes a Will bequeathing any of his or all his properties in favor of one of his heirs, consent of the heirs would be necessary to validate the bequest and inaction for a long period by challenging the bequest are sufficient to presume that the said heir had signified consent by his conduct." But in the present case, the petitioner, Ashraf, had not consented to the bequest made by Khatunbi. In the light of the same, Tabassum will not get anything under the will though it had been proved. Therefore, allotment of shares done by the trial court needed to be altered. According to Mohammadan

159 2014 (4) JKJ 106.

160 SLJ 1983 J&K.

161 2009 (I) S.L.J. 20.

162 MANU/HP/0495/2014.

163 *Supra* note 7 at 104, s. 118.

164 2015 (1) KCCR 966.

165 ILR 1986 Kar. 2115.

law, the son takes double the quantum of share of a daughter. In this view of the matter, Tabassum was entitled for 1/3 share and 2/3 share would go to Mohammad Ashraf, the plaintiff. Hence, the trial court was not justified in granting 4/9 share to the plaintiff. According to the high court, the trial court had committed a serious error in not noticing the mandatory provisions of the Muslim law. In this view, only 1/3 share will go to Tabassum and the remaining 2/3 will go to Ashraf. The fact of consent cannot be presumed by the inaction of another heir in challenging the bequest made. Thus, the share of the plaintiff-appellant was declared as 2/3 and the share of first defendant-Tabassum was declared as 1/3. The decision of the trial court stood modified accordingly.

In *Nurjahan Bewa* v. *Manir S.K.*,[166] one Ablesh Seikh instituted a suit for declaration of title and permanent injunction. The issue before the High Court of Calcutta was whether the appellant being the mother of the deceased would be entitled to 1/6th share only and not the entire estate. The court held that the plaintiff in the amended plaint sought to deny the share of the property to such step son or step daughters on a spacious plea that they were instrumental in murdering Ablesh and, accordingly, they had no right to claim inheritance. Accordingly, it logically follows that unless the said step son or step daughters suffer from any legal disability they would be entitled in law to claim share in the property following the Muslim personal law as mentioned in section 63 of the Mulla[167] which has been followed by the appellate court while modifying the decree passed by the trial judge.

In *Jamaluddin Ahmed* v. *Anowara Begum*,[168] one Mansad Ali, the plaintiff instituted title suit stating that his father Nawab Ali had purchased a plot of land. The issue to be decided by the high court was whether under the Muslim law, the property of the mother of the deceased plaintiff could be partitioned amongst the defendants, who were the second wife of the father of the deceased and the daughters of the said second wife. The petitioner argued that substantial question of law on which the appeal could be heard should have been: Whether findings of the lower courts that Mansad Ali was not son of Jarua Bibi, was perverse. It was held by the high court that while arriving at the finding that Mansad Ali was not the son of Jarua Bibi, the courts below had relied on at least some evidence. The question of finding being perverse can only arise if such finding is not based on any material at all. On the fact of such factual circumstances including pleadings and evidence of the parties, the sole substantial question of law as to finding that Mansad Ali was not a son of Jarua Bibi could not be said to be perverse. The question was decided against the appellant and in favor of the defendants.

In *Manappurath Abdulla* v. *Assiya*,[169] the suit was one for partition. The issue before the high court was whether co-sharer who has a major share in the property is entitled to purchase the shares of the other sharers by applying the

166 (2014 (4) CHN (Cal) 283).

167 *Supra* note 7 at 48.

168 MANU/GH/0341/2014.

169 AIR 2014 Ker 193.

principles of owelty on the ground of equity. It has been held that where the suit property is so small that it cannot be conveniently partitioned by metes and bounds without destroying its intrinsic worth, there is no alternative but to resort to the process called owelty**,** according to which the rights and interests of the parties in the property will be separated, only by allowing one of them to retain the whole of the suit property on payment of just compensation to the other**.** Equity demands the principle of owelty to come into play under section 3 of the Partition Act, 1893. The court was of the view that the appellant being a major shareholder, presently holding 4/7 shares, was entitled to purchase the shares of the other sharers by applying the principle of Owelty on the ground of equity. It is respectfully submitted that the principle of owelty is unknown to Muslim law of inheritance, where the property of the deceased immediately devolves among the heirs and they become the sole owner of the property irrespective of their shares allocated to them by the law.

In *Mukbul Khan* v. *Harkhas Va Aam*,[170] an appeal under section 384 of the Indian Succession Act, 1925 had been filed against the judgment dated 25.01.2002 passed by the additional district judge, Neemka Thana, District Sikar dismissing an application for issue of succession certificate seeking grant of Rs.1,69,491.60 thereunder. The issue before Jaipur Bench of High Court of Rajasthan was whether Hasina Bano was entitled to 1/4th share of her deceased husband's property. It has been held that succession opens immediately on the death of a person. The court below had rightly dismissed the application for succession certificate. There was no perversity or error of law apparent in the impugned order and it occasioned no manifest injustice to the appellants. There was no merit in the appeal and the same was dismissed. The high court must be appreciated for its judgment after proper perusal and due confirmation of the true Islamic law of inheritance.

***Waqf* and its administration**

The sheer volume of the matters relating to *Waqf* and its administration covered under this survey necessitated that further sub-categorization be resorted to for the convenience of the reader. However, the reader is advised that the sub-categorization is not water-tight and often the courts were called upon to adjudicate matters that involved more than one issue. Some of the matters in which categorization was not possible have also been placed under the head of miscellaneous matters. These are different from the miscellaneous matters of Muslim law covered elsewhere in the survey.

Nature of *Waqf* and *Waqf* property

In *Syed Ameen* v. *Andhra Pradesh State Wakf Board, Represented by its Chief Executive Officer and Mrs. Sabera Bee* and *Ravala Madhava Reddy* v. *Andhra Pradesh State Waqf Board, Represented by its Chief Executive Officer*,[171] one Zaheda Begum filed OS. no. 43 of 1987 against Lal Mohammed, Andhra Pradesh

170 2014 (3) WLN 441 (Raj).

171 2014 (6) ALD 411 : 2014 (6) ALD (Cri) 411 : 2014 (5) ALT 386.

Wakf Board and three others in the court of subordinate judge, Bhongir for declaration of her title and for a perpetual injunction restraining the defendants from interfering with her peaceful possession and enjoyment of Ac.1.00 of land in Sy. No. 356 which had been gifted to her under the registered gift deed dt.16.10.1984 by Lal Mohammed. She alleged that this property was gifted to her by Lal Mohammed (who was 4th defendant in that suit); that she was put in possession and enjoyment of the same by him and now he was asserting that he was the owner of Acs.2.21 gts in Sy. No. 356 even after gifting Ac.1.00 gts therein to her and was trying to encroach over the land gifted to her by him. The subordinate judge held:

> In the absence of any documentary and oral evidence produced by the defendants, I hold that the gift deed was executed by Lal Mohammed and since Lal Mohammed's name is shown as pattedar in the revenue records in respect of survey No. 356, it cannot be said the Lal Mohammed has no right to gift away the suit property to the plaintiff. As such I hold that the plaintiff has proved the gift deed. Hence I answer this issue in favor of the plaintiff and against the defendants....

The defendant no. 5 did not chose to examine any witnesses and produce any documents to show that the suit survey no. 356 was Inam land. It was held that the suit land was not the Inam land. This judgment became final as no appeal was preferred against it by the *waqf* board. Subsequently, an application was filed by the legal heirs of Khaja Moinuddin against the legal representatives of Lal Mohammed and also Zaheda Begum and several others for partition and separate possession of Acs.2.21 gts in Sy. No. 356 alleging that it was the *matruka* (joint) property of Lal Mohammed and Khaja Moinuddin. The *waqf* board countered through state *waqf* tribunal, Hyderabad, contending that the said property was a *waqf* property attached to the *dargah.* The cases were transferred to the *waqf* tribunal which framed these issues: Whether the suit property was *waqf* property or not; and whether the plaintiff was entitled for perpetual injunction as prayed for.

It held that in view of the *gazette* dated 15.02.1990 as amended dated 13.01.2000, the disputed land was a property attached to the *dargah* and it was a service Inam land. It further held that the earlier decision in this regard would not act as *res judicata* since there was no declaration therein that the land was not *waqf* property; the only decision in that case was that it was not Inam land, and therefore, not binding on the *waqf* board. On appeal, the high court held:

> The Tribunal, in my opinion, erred in holding that the judgment in OS. No. 43 of 1987 would not operate as *res judicata* on the ground that there is no declaration in OS. No. 43 of 1987 that the land in Sy. No. 356 is Wakf property. In fact the Court in O.S.43 of 1987 categorically observed that there is no evidence adduced by the Wakf Board that land in Survey no. 356 is Wakf property. The Tribunal ought to have seen that when the court in OS. No. 43 of 1987 declared

> that the property is owned by Zaheda Begum, it also clearly rejected the plea of the Wakf Board that it is Wakf property.

The court has further observed that the tribunal also erred in holding that, since the *waqf* board did not adduce any evidence, and on that basis the decree was passed, its decision was not on merits and the *waqf* board would have adduced leading evidence in support of the plea that said land was *waqf* property. According to the court, it was not necessary for the applicants to prove that they were cultivating the land. Since the entries about possession of the *waqf* board in the subsequent records were made on the basis of the order of the joint collector in an appeal under the Andhra Pradesh (Telangana Area) Abolition of Inams Act, 1955, and the said order was held to be without jurisdiction. Therefore, it is held that Syed Ameen and Syed Rasool were in possession of the said land and entitled to perpetual injunctions restraining the wakf board and other defendants from interfering with their possession and enjoyment. The said act has diluted the spirit of the dedicator of the property as well as the state's long efforts to ensure that the *waqf* property should be saved from the persisting encroachment. The government records in this regard are not reliable and, therefore, mere technicalities should not be the criteria for the decision. Rather it should be kept in mind that the illegal encroachment on the *waqf* properties and possession thereon would frustrate the purpose of *waqf* and its administration.

In *Punjab Wakf Board* v. *Kulbir Inder Pal Singh*,[172] it was alleged that the defendants were in illegal possession of the suit land and they were liable to be ejected. The high court held that both the courts below, while recording the finding of facts, rightly came to the conclusion while applying the law laid down in various judgments of the court in *Punjab Wakf Board* v. *Joint Development Commissioner*,[173] *Punjab Wakf Board, Jalandhar* v. *Nagar Panchayat Shahkot, District Jalandhar*,[174] and *Punjab Wakf Board* v. *Gram Panchayat, Dakha, Tehsil and District Ludhiana*,[175] that to hold a particular property to be a *waqf* property it is to be proved that the said property was dedicated to public *waqf* or that the same was being used as *waqf* property for a long time. Until and unless the said evidence is led, a property cannot be held to be a *waqf* property. Hence, the appeals were dismissed on the basis of findings of fact.

In *Prabhu Singh* v. *The Rajasthan Board of Muslim Wakfs*,[176] the plaintiff-respondent filed a suit for possession, injunction and demolition and for *mesne* profit on the ground that in town Kotkasim, there was a *jama masjid* and on the southern side of the said *jama masjid*, there was a *chowk* of *jama masjid* which was its property. On appeal, the high court framed three substantial questions: (i)

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172 (2014) 176 PLR 379.

173 2008 (4) RCR (Civil) 693.

174 (2011-1) 161 PLR 405.

175 2012 (3) R.C.R. (Civil) 347.

176 MANU/RH/1204/2014.

whether the land in dispute on which the *chabutra* had been constructed and shops opened was a *waqf* property when no record was placed before the court as to whether any entry had been made as required under section 5 of the Wakf Act, 1954; (ii) Whether the *chowk* in dispute was a thoroughfare and meant for opening shops when the shops already existed on the three side of this *chowk;* (iii) Whether in the facts and circumstances of the case the decree passed by the courts below was justified.

The court held with regard to the first question that the chowk was never a *waqf* property as it was not entered in the notification dated September 23, 1965. Only the *jama masjid* and some other properties were mentioned as *waqf* properties at sr. no 55 of the notification. The *waqfnama* presented by the respondent-petitioner did not show as to how the chowk was a *waqf* property. Therefore, both the lower courts had erred in their judgment and wrongfully held the *chowk* as a *waqf* property. The court decided second and third questions in favor of the defendant-appellant because the gram panchayat was the actual owner of the *chowk* since it was maintaining it and had also demolished a *chabutra* which was not disputed by the respondents hence it was not a *waqf* property. Furthermore the evidence showed that the defendant-appellant was in no way restraining the thoroughfare of general public by opening of doors in the *chowk*. Therefore the decree passed by the courts below as regards closing of the doors and allowing *mesne* profit to the plaintiff-respondent was set aside.

In *Yasarapu Simhachalam* v. *Andhra Pradesh Wakf Board*,[177] entitlement for ownership under section 6 of Waqf Act, 1995 was involved with respect to *waqf* property. Three appeals were disposed of by the common judgment of High Court of Andhra Pradesh, which arose out of common judgment of the subordinate judge. The subordinate judge had dismissed three suits and, therefore, the plaintiff's filed appeals for declaring that they were absolute owners and enjoyers of the schedule property along with permanent injunction. It was dismissed. Identical issues were framed in all the three suits, namely: (i) Whether the plaintiff was entitled to declaration and consequential injunction as prayed for? (ii) Whether the suit was barred by limitation? (iii) To what relief?

The trial judge had dismissed all the three suits holding the schedule properties were the *waqf* properties and, therefore, the plaintiffs were not entitled to be declared as owners thereof. It was further held that even though the 1st defendant claimed the relief of recovery of possession by way of counter claim but since no court fee thereon was paid, the 1st defendant was not entitled to recover the possession. The trial judge further held that the suits and also the counter claims were barred by limitation in view of sub-section (1) of section 6 of the Wakf Act. Aggrieved by the said judgment and decree, the plaintiffs preferred the appeals. On appeal, the court considered the following questions:

(i) Whether the plaintiffs were entitled to be declared as the absolute owners and possessors of the suit schedule lands?

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177 2014 (3) ALT 313.

(ii) Whether the proceedings of the respondents-defendants without complying with the requirements of section 56 of the Wakf Act were not tenable?

(iii) Whether the suits of the plaintiffs were barred by limitation in view of section 6(1) of the Wakf Act?

After going through unsubstantiated averments, the court was of the opinion that the schedule lands had been put to religious use and there existed mosques and tombs which the villagers visit frequently for offering their prayers. The settler Mahaboob Unnisa Begum had no authority to settle such property in favour of Habibuddin, her husband, who was the *mutawalli* and his/their children. In this regard, the court reproduced the precedents of the apex court relied upon by the plaintiffs,[178] which state that the dedication to charity need not necessarily be by instrument or grant and that it can be established by cogent and satisfactory evidence of conduct of the parties and user of the property which show extinction of the private secular character of the property and its complete dedication to charity. However, the court did not find these authorities applicable to the facts of the present case.

The specific contention of the defendant was that the schedule lands were *waqf* properties and, therefore, the alleged sale deeds in favor of the plaintiffs were invalid. In support of their contentions, reliance was placed upon the documentary evidence, placed before the court. However, court found that in none of the revenue records, the schedule lands were shown to be the private properties of any individual. Moreover, the plaintiffs having purchased the schedule lands under the registered sale deeds, their vendors claimed that the schedule lands had been settled on them by their mother under the registered instrument of the year 1953 and the settler was none other than the wife of Habibuddin, who had been shown in the records long before purchase by the plaintiffs, as *mutavalli* in respect of the schedule properties. The court referred to the decisions of the same high court,[179] where it was held that where before notifying the property as *waqf* property no notice was issued to the petitioners who were occupants of the property and recorded as such in revenue register, nor any enquiry was conducted by survey commissioner as required by section 4 of the Wakf Act, as to whether the property in question was *waqf* property or not, writ petition challenging the notification notifying the property in question as *waqf* property was maintainable. This authority is not relevant since in the case in hand, neither the name of the plaintiffs, their vendors nor the settler Mahaboob Unnisa Begum were recorded in any revenue records as occupants of the suit lands.

As regards the plaintiffs' submission that their title was perfected by adverse possession, the court held that for possession to be adverse, it has to be actual,

178 *Menakuru Dasaratharami Reddi* v. *Duddukudru Subbu Rao,* AIR 1957 SC 797. In this regard another case was also referred; see *P.V. Bheemsena Rao* v. *Sirigiri Pedda Yella Reddi*, AIR 1961 SC 1350.

179 *B. Gowra Reddy* v. *Govt. of A.P.,* 2002 (3) ALT 439; AIR 2002 AP 313.

open and notorious, exclusive and continuous over the requisite frame of time as provided in law so that the possessor perfects his title by adverse possession. After examining various constituents for adverse possession, the court held that the plaintiffs, in the facts and circumstances of the case, could not claim adverse possession in respect of the properties.

As far as the second point was concerned, the court was of the view that the peculiar facts of the case were such that the suits could not be said to be hit by the provisions section 56 of the Wakf Act, 1995 because of the reason that the suits came to be filed in pursuance of the liberty given by the high court, which was filed by the plaintiffs against the defendants. The object underlying the requirement of issuance of notice prior to filing of a suit with a clear two months' time to the board was intended to address the grievances of the plaintiffs so as to obviate legal proceedings being initiated. By filing writ petition, which was duly contested, the defendants had notice of the intention of the plaintiffs to initiate legal proceedings for ventilating their grievance and in the peculiar facts of the case, there was no need for the plaintiffs to issue fresh notice after the writ petition had been disposed of, in which there was also direction to both the parties to maintain *status quo* and the defendants were specifically restrained from interfering with the possession and enjoyment of the plaintiffs over the schedule lands for a period of three months. When the writ petition was disposed, the suits came to be filed within the stipulated time.

As far as limitation part was concerned, the contention was that as per the provisions of sub-section (1) of section 6, no suit shall lie against the *waqf* property after one year from the date of the *gazette* notification. The Act further provides that once the lands have been notified, till they are modified the *gazette* notification, the same shall be final and conclusive. In this regard, a judgment was referred to,[180] where a division bench of High Court of Andhra Pradesh held that as per section 6(4) of the Act, the list of *waqfs* shall, unless it was modified pursuant to a decision of the tribunal, final and conclusive and that once such list has been published, the lands are in the character of *waqf* property. In this case, when the *gazette* notification was issued in 1962, the suits came to be filed on 17-3-1986. Before that, however, the plaintiffs had filed a petition before the court, which was disposed of on December 15, 1982 directing the plaintiffs to approach the civil court for redressal of their grievances. Admittedly, the 1st defendant had issued notice to the plaintiffs on September 2, 1979, calling upon the plaintiffs to deliver possession of the suit schedule properties since the properties were *waqf* properties. The plaintiffs admitted having received the originals of exhibits. Even after receiving such notices in January, 1979, for more than three years, no proceedings whatsoever were initiated by the plaintiffs. Only in the year 1982, they filed a writ petition and after its disposal, filed the suits in the year 1986.

The court was of the view that at least on or after service of legal notice dated January 29, 1979 the plaintiffs had clear notice that the suit schedule properties

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180 *B. Govinda Rao* v. *A.P. State Wakf Board*, 2008 (2) ALT 429.

were *waqf* properties and if at all they wanted to question the same, they ought to have taken appropriate steps within one year and should not have waited for more than three years and thereafter approach the high court questioning the notices issued by the wakf board. In view of the above, the suits filed by the plaintiffs in March, 1986, were clearly barred by limitation in view of the provisions of section 6(1) of the Wakf Act, which mandates that the entries in the *gazette* can be questioned within one year, failing which they will become final and conclusive. In this regard, high court relied upon Supreme Court decision of *Sayyed Ali* v. *Andhra Pradesh Wakf Board*,[181] where it laid down:

> It is open for any person to raise a dispute within one year from the date of publication of the list of Wakf under sub-Section (2) of Section 5 of the Act. Under Section 6(4) of the Act the list of wakfs published under sub-Section (2) of Section 5, unless it is modified pursuant to the decision of the Tribunal shall be final and conclusive. Any occupancy rights under the Inams Abolition Act in respect of the wakf properties is of no avail as the Tahsildar under the Inams Act is not competent to enquire into or give any decision in respect of the character of the wakf property. It is held that wakf is a permanent dedication of the property for the purpose recognized by the Muslim law as pious, religious or charitable and the property having been found as Wakf would always retain its character as a Wakf Once a Wakf always a Wakf and the grant of patta in favour of Mokshadar under the Imams Act does not, in any manner, nullify the earlier dedication made of the property constituting the same as Wakf After a wakf has been created, it continues to be so far all time to come and further continues to be governed by the provisions of the Wakf Act and a grant of patta does not affect the original character of the Wakf property.

Further, in *Punjab Wakf Board, Ambala Cantt.* v. *Capt, Mohar Singh*,[182] it was laid down that a property cannot become *waqf* property by the mere use of the word *idgah* in rent demand and collection register. Similarly, in *The Board of Muslim Wakfs, Rajasthan* v. *Radha Kishan*,[183] it was held:

> The answer to these questions must turn on the true meaning and construction of the word 'therein' in the expression 'any person interested therein' appearing in sub-s. (1) Of S. 6. In order to understand the meaning of the word 'therein' in our view, it is necessary to refer to the preceding words 'the Board or the mutawalli of the wakf. The word 'therein' must necessarily refer to the wakf which immediately precedes it. It cannot refer to the 'wakf property'.

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181 1998 ALT (Rev.) 188 (SC).

182 AIR 1975 SC 1891.

183 AIR 1979 SC 289.

> Sub-section (1) of S. 6 enumerates the persons who can file suits and also the questions in respect of which such suits can be filed. In enumerating the persons who are empowered to file suits under this provision, only the Board, the mutawalli of the wakf, and 'any person interested therein', thereby necessarily meaning any person interested in the wakf, are listed. It should be borne in mind that the Act deals with wakfs, its institutions and its properties. It would, therefore, be logical and reasonable to infer that its provisions empower only those who are interested in the wakf, to institute suits.

The court examined the two provisions of the Wakf Act, 1995, section 6(1) and section 3(h), as both were same in content except that the language of the main enacting part has been altered in sub-section (1) of section 6 and put in a proper form. In redrafting the section, the sequence of the different clauses has been changed and, therefore, for the expression "any person interested in a *waqf*", the legislature had used the expression "any person interested therein." The word 'therein' appearing in sub-section (1) of section 6 must, therefore, mean any person interested in a *waqf* as defined in section 3(h) the object of sub-section (1) of section 6 is to narrow down the dispute between the board of wakfs, the *mutawalli* and the person interested in the *waqf,* as defined in section 3(h). The court then considered right of a stranger non-Muslim in possession of a certain property whose right, title and interest therein cannot be put in jeopardy merely because the property is included in the list. Such a person is not required to file a suit for a declaration of his title within a period of one year. The special rule of limitation laid down in proviso to sub-section (1) of section 6 is not applicable to him. In order words, the list published by the board of *waqfs* under sub-section (2) of section 5 can be challenged by him by filing a suit for declaration of title even after the expiry of the period of one year, if the necessity of filing such suit arises. The court, after perusing the authorities, opined that nothing was applicable in this case, where the suits were neither initiated by the *mutawalli,* wakf board nor the persons interested therein and since the plaintiffs were purchasers of the schedule lands, they had no concern with the *waqf.*

The court further opined that since the plaintiffs were non-Muslims and claiming to be in possession of property which had been on the records for several decades to be the *waqf* property, though may not be required to challenge the declaration issued by the *waqf* board in the *gazette* in 1962 within one year, they were certainly required to challenge at least within a period of one year after they were specifically served with notices by the *waqf* board on 21-9-1979. On the other hand, the court viewed that the schedule lands were registered as *waqf* and, therefore, treated as *waqf* property. Though, Habibuddin was the *mutawalli,* who was a mere manager of the *waqf* property which did not vest in him. The ownership of the property vested in God and the *mutawalli* could not transfer the property through the sale deeds in favour of the plaintiffs by the *mutawalli,* as was done fraudulently. The property was gazetted as *waqf* property, as classified by the government of Andra Pradesh in the *gazette,* dated 19-4-1962 and, therefore, subsequent alienations made by the *mutawalli* in their favor were void, having no

legal effect. According to the court, this point went against the plaintiffs, and accordingly it was held that the appellants-plaintiffs were not entitled to relief.

In *Paramjit Singh* v. *The Punjab Wakf Board*,[184] the appellants appealed against the judgment of the *waqf* tribunal, Ludhiana under the Waqf Act, 1995 wherein the court had declared the board to be the owner and the petitioners were called upon to pay 42,000/- as *mesne* profits. The appellants claimed that they were the owners in possession of the suit land and the adjudication by the tribunal in favor of the board was not valid in law. They cited several cases like *Punjab Wakf Board* v. *Kartar Singh*,[185] *Punjab Wakf Board, Jalandhar* v. *Nagar Panchayat Shahkot*,[186] and *Karnataka Boad of Wakf* v. *Anjuman-E-Ismail Madris-Un-Niswan*,[187] and urged that the *gazette* notification in favor of the Punjab Wakf Board by itself was not sufficient to prove its ownership and dedication of property for a purpose recognized by the Muslim law as pious or religious or charitable, was to be established.

By citing *Parkash Singh* v. *Joint Development Commissioner, Punjab*,[188] it was a conceded fact by the petitioners that earlier Major Singh was in possession of the land in dispute under the respondent board. He continued paying lease in terms of *pattanama* and after his death his son, petitioner Paramjit Singh, admitted *pattanama* in favor of his father and also the regular payment of lease amount and also the fact that the property in litigation was the same which was earlier on lease with his father. It was also not disputed by the petitioner that earlier even his father had filed a suit against the respondent board which had been dismissed as withdrawn. In light of these facts, the court held the possession of the land by the petitioner-defendants to be illegal and unauthorized, the petitioner-defendants were rightly called upon to pay *mesne* profits @ 700/- per canal per annum, totaling ' 42,000/- which they were required to pay within two months. The non-payment within two months was to incur further liability of interest @ 6% *per annum*.

In *Deelip and Kulbhushan* v. *Maharashtra State Board of Wakfs*,[189] a revision application was filed before the High Court of Bombay (Aurangabad Bench) under section 83(9) of WaKf Act, 1995 to challenge the judgment and order of *waqf* tribunal Aurangabad. The question before the *waqf* tribunal was pertaining to the validity of transaction of lease made by the chief officer in favor of the applicants. The tribunal after hearing both the parties held that the chief officer had no power to sanction the lease for such period. The tribunal was furtherof the view that the transaction was unconscionable and against the interest of the *waqf*. The tribunal adopted the view expressed by the Andhra high court[190] that the *waqf* board needed to exercise its powers and it could not delegate its powers forever to the chief

184 2015 (2) RCR (Civil) 371.

185 1987 PLJ 95.

186 2011 (2) RCR (Civil) 243.

187 1999 (3) R.C.R. (Civil) 639 : JT 1999 (5) SC 573.

188 2014 (2) RCR (Civil) 721.

189 2014 (4) Bom CR 451.

190 *M.A. Aziz* v. *State Wakf Board*, AIR 1998 AP 61.

officer or other officer and sit by itself quiet. The High Court of Bombay held that the alienation of *waqf* property was illegal in view of section 51 of the Act[191] and, even before this provision came into existence, the alienation of *waqf* property was not permissible. *Waqf* property is everlasting devotion to almighty God for religious function. It was further held that if there is actually giving of rights as owner and to conceal the real transaction, lease is made, such transaction needs to be treated as void. Lastly, the court held that whenever public property is involved as there is virtually nobody in such cases to protect public interest; the courts need to give serious thought before granting relief of *interim* nature. Therefore, the revision application was dismissed.

In *Maharashtra State Board of Waqf, through its District Wakf Officer* v. *Digvijay, through its G.P.A.*,[192] proceedings were filed under section 83(9) of the Wakf Act, 1995, challenging the order made by the wakf tribunal, Aurangabad.[193] The court, while examining the tribunal award, found that the tribunal had observed the dispute in respect of nature of property.[194] The tribunal refused temporary injunction due to the orders made by the authority under the Inam Abolition Act.[195] The court cited a few decisions on the wakf tribunal given by the authority under the Inam Abolition Act.[196] With reference to the apex court's decision, court found that wakf tribunal can decide the nature and character of *waqf* property and the authority under Inam Abolition Act cannot adjudicate upon character of *waqf* property, especially in view of the powers given to the authority under the Inam Abolition Act, which were subject to the limitations mentioned in section (2)(i). The decision of the authority created under the Inam Abolition Act could not come in the way of the wakf tribunal to decide the character of the suit property.[197] The court disregarded respondent's argument that huge amount was spent for purchasing the property and in making construction, a loan of rupees two crores had been taken. The court rejected the submission for changing the nature of the

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191 The Waqf Act, 1995

192 2014 (4) ABR 305 : 2014 (6) MhLj 757.

193 The tribual has refused the relief of temporary injunction claimed by the applicant plaintiff.

194 The issue before tribunal was whether it is waqf property or not.

195 The tribunal observed that in the Inam Pahani Patrak of 1977-78 the land was not shown as service Inam and so if cannot be presumed that it was service Inam land.

196 *Sayyed Ali* v. *A.P. Wakf Board, Hyderabad,* AIR 1988 SC 972.

197 Similar view was expressed by the Aurangabad bench of the Bombay High Court in *Mohammad Khairuddin* v. *Moinuddin,* 2008 (2) B C J 642. See also *Chhedi Lal Misra* v. *Civil Judge, Lucknow* (2007) 4 SCC 672. Even s. 51 of the Wakf Act, 1995 supports the view. Once a *waqf* is created, it continues to retain such character which cannot be extinguished by any act of the *mutawalli* or anyone claiming through him. In view of the record from prior to the year 1954-55 already mentioned, it can be held *prima facie* that the Muntakhab holder was also *mutawalli*. Even as Mutawalli, as per the provisions of Muslim law, he had no power to alienate the property. Under the provision the Wakf Act, 1954 and the Wakf Act 1955 alienation of *waqf* property is illegal and void.

property on that ground. The court referred to the provisions of Muslim Law and the provisions of the Wakf Act and found that the said suit property could not be allowed to be used for the purpose other than the purpose for which the property was dedicated. The court further held that when the defendant purchased the property even when there was record of aforesaid nature, he must blame himself for finding himself in the present situation. The court, while allowing the appeal, allowed temporary injunction to the plaintiff and restrained the defents from making construction on the site and making any development on the suit property.

The *Waqf* Act and its operation

In *S. Manikya Reddy* v. *The A.P. State Wakf Board*,[198] the contentions before the high court were: (i) the disputed property was not notified under section 5(2) of the A.P. Wakf Act, 1995 and thus it was not a notified *waqf*; (ii) the disputed property was not registered with the A.P. wakf board, which is a necessary condition for the tribunal to exercise its jurisdiction; and (iii) the wakf board for the first time after 25 years claimed ownership and title while HUDA executed a sale deed in favor of the vendor of the petitioner and since then the vendor and later, the petitioner were enjoying the property and *prima facie* title and possession was recognized by the civil court while granting injunction in favor of the petitioner. Thus, when the civil court was already seized with the matter, the tribunal could not have entertained the suit.

Every *waqf* institution is required to be notified and registered as the *waqf* property and same is required by the provisions of Wakf Act, 1995. Then only any *waqf* can approach the tribunal.[199] The board contended that creation of a *waqf* may be under different categories, as is evident from the definition of *waqf* under the Act. The definition includes a *waqf* by user even if there is no dedication and in this case, the *Masjid* on the suit schedule property exists from over decades. This was supported through memos, countering the affidavit that the wakf board had already appointed a managing committee to manage the affairs of the said *masjid* and it also examined the proposals and approved the proposal and had sent to the government for permission to construct a new *masjid*. Further, it contended that the *masjid* was in existence and on account of attempts of encroachment, the suit had to be filed before the tribunal, which is clearly maintainable as any dispute relating to a *waqf* property is triable only by the tribunal. In para 14, it was reiterated:[200]

> It may be stated that a wakf is a permanent dedication of property for purposes recognized by Muslim law as pious religious or

198 2014 (5) ALD35, 2014(6) ALT525.

199 *Bhanwar Lal* v. *Rajasthan Board of Muslim Wakf* (2013) 11 SCALE 210; *Board of Muslim Wakfs, Rajasthan* v. *Radha Kishan* (1979) 2 SCC 468; *Ramesh Gobindram (Dead) Through L.Rs*. v. *Sugra Humayun Mirza Wakf* (2010) 8 SCC 726.

200 Reliance was placed upon a decision of the decision of the Supreme Court in *Sayyed Ali* v. *Andhra Pradesh Wakf Board*, AIR 1998 SC 972.

> charitable and the property having been found as Wakf would always retain its character as a Wakf. In other words, once a Wakf always a Wakf and the grant of patta in favour of Mokhasadar under the Inams Act does not, in any manner, nullify the earlier dedication made of the property constituting the same as Wakf… further continues to be governed by the provisions of the Wakf Act and a grant of patta in favor of Mokhasadar does not affect the original character of the Wakf property.

The court also referred to a division bench judgment of High Court of Andhra Pradesh where provisions of the Wakf Act, 1995 were considered, which runs thus:[201]

> In view of Sections 6, 7, 83 and 85 and also the power of the Wakf Board to cause registration of wakf or to amend registration of the wakfs under Section 41, we have no hesitation to hold that this Court cannot entertain writ petitions filed by the State and others to whom either the government or the A.P.I.I.C. allotted portions of Manikonda lands.

The high court, after hearing the rival contentions of the parties, felt it necessary to survey the relevant provisions of the Wakf Act, 1955 as amended by the Wakf (Amendment) Act, 2013, particularly section 3 (r) which defines *waqf*.[202] The court observed that as per regulation of the *waqf* like the Hindu religious institutions under the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, is governed by the Wakf Act, 1995 and now the Wakf (Amendment) Act, 2013 with effect from 20.09.2013. Further, before the present Waqf Act, in the Hyderabad state, the Hindu charitable and religious institutions as well as the *waqfs* were regulated by the Hyderabad endowments regulations. The position of the charitable institutions of Andhra Pradesh was clarified as under:

> After the enactment of the Wakf Act, 1954, the Hyderabad Endowments Regulation in Telangana area was repealed and the Wakf Act, 1954 provided for regulation of administration of wakf through the Wakf Boards created under the aforesaid Act. The

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201 *D. Venkata Krishna Rao* v. *Government of AP*, 2012 (4) ALD 144, para. 72.

202 Wakf (Amendment) Act, 2013, s. 3(r) "wakf" means the permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes-

(i) a wakf by user but such wakf shall not cease to be a wakf by reason only of the user having ceased irrespective of the period of such cesser;

(ii) "grants", including mashrut-ul-khidmat for any purpose recognised by the Muslim law as pious, religious or charitable; and

(iii) a wakf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable, and "wakf" means any Person making such dedication.

> resolution of disputes under the Wakf Act, 1954 were, however, with the common law Courts namely, civil Courts and it is only under the Wakf Act, 1995, separate Tribunal was created under Chapter VIII of the Act and particularly, under Section 83 of the Act, the power and jurisdiction was vested with the tribunal with regard to resolution of all disputes relating to wakf properties. Under Section 6 of the Act, even the disputes as to whether the property is a wakf property or not was also subject to exclusive adjudication by the Tribunal.

The court further noticed that while conferring jurisdiction on the tribunal, the enactment does not prescribe that the said jurisdiction is confined only with respect to *waqfs*, which are registered and the *waqfs*, which are notified *waqfs*. Section 2 the Act itself is applicable to all the *waqfs*, and therefore, irrespective of notification or registration every *waqf* fails within the sweep of the Act and when the Act applies, undoubtedly, the tribunal would have jurisdiction. After referring the jurisdiction of *waqf* with section 1(3)(a) of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987 the court opined:

> The registration ability of the institution under the Act is merely an enabling provision and the applicability of the regulating Act does not depend upon the registration or otherwise.

The court after referring various decisions finally arrived at the following:[203]

> In our opinion, all matters pertaining to Wakfs should be filed in the first instance before the Wakf Tribunal constituted under Section 83 of the Wakf Act, 1995 and should not be entertained by the Civil Court or by the High Court straightaway under Article 226 of the Constitution of India.

The question whether a property was a *waqf* property and whether the notification issued by the wakf board was final in relation to such property is always a mixed question of fact and law and the notification can only be sustained subject to the finding of the wakf tribunal that such property has characteristics of *waqf*.[204]

As far as, reading sections 7, 84 and 85 together, the only forum which can decide it is the tribunal created under the Wakf Act, 1995. In this regard high court referred to the judgments of the same court in. *T. Shiavalingam* v. *A.P. Wakf Tribunal*[205] and *M. Bikshapathi* v. *Government of A.P.*,[206] where similar principle was laid down.

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203 *Board of Wakf, West Bengal* v. *Anis Fatima Begum*, 2011 (1) ALD 61 (SC).

204 In this regard, reference was made by the court to *Jai Bharat Co-operative Housing Society Ltd.* v. *A.P. State Wakf Board*, 2000 (5) ALD 743.

205 1999 (3) ALT 603.

206 1999 (6) ALD 270.

On the ground of above discussion, the court held that neither notification of property as a *waqf* in the A.P. *gazette* nor the registration of the *waqf* institution under the provisions of the Act, would affect a *waqf* otherwise created and consequently, the applicability of the Act to such institution is not affected in any manner. The court beautifully translated various provisions of *waqf* under the Act of 1995.

In *Anwar Hussain* v. *Rajasthan Board of Muslim Waqf*,[207] the chief executive officer of Rajasthan board of Muslim wakf vide its order dated July 16, 2013 constituted a wakf committee for managing the affairs of the properties of certain villages and the petitioner was appointed as secretary to the committee. As per the order, the term of the committee was specified as one year. In the order, it was specifically mentioned that the committee shall strictly adhere to the provisions of the Wakf Act 1995 and the rules made thereunder and the committee shall be obliged to handover charge to the board, committee constituted by the board or any incumbent appointed by the board. In pursuance of the order dated July 16, 2013, the committee assumed the charge and started functioning. On March 4, 2014, the chief executive officer, wakf board, passed an order superseding the wakf committee.

Categorizing the order as illegal, the petitioner pleaded that the same had been issued in contravention of statutory provisions of law as per sub-section (2) of section 67 of the Act of 1995. It was pleaded that although petitioner has assailed the said order before the Rajasthan wakf tribunal by preferring an appeal but in want of presiding officer of the tribunal the same was not functioning since more than a year. It was in these circumstances that the petitioner invoked the extraordinary jurisdiction of the court to assail the impugned order. The instant petition was filed on May12, 2014 and taking cognizance of the subsisting grievance of the petitioner, notices were issued on May 19, 2014. Taking into account the peculiar facts and circumstances of the case, even during the pendency of appeal before the tribunal, the court granted indulgence to the petitioner for the reason that tribunal was not functioning. Subsequently, on May 28, 2014, considering the fact that impugned order had not been given effect to, it was kept in abeyance facilitating continuance of the wakf committee established vide order dated July 16, 2013.

Section 18 of the Act of 1995 provides for establishment of committees of the board and by virtue of sub-section (2) of section 18, board is empowered to determine constitution, functions, duties and term of such committees. There is no quarrel in the factual position that at the threshold the committee was constituted for a period of one year and that term had come to an end and the committee had lived its life for which it was established. The court was of the view that the argument of the petitioner about violation of principles of natural justice and proviso to sub-section (2) of section 67 of the Act of 1995 requiring judicial scrutiny at the threshold before expiry of one year, remained academic only in the changed scenario when the term of the committee had come to an end by afflux of time.

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207 2014 (4) RLW 3012 (Raj.).

The court held that in view of completion of the tenure of the committee established by order dated July 16, 2013 no further adjudication was required in the appeal preferred by the petitioner before the tribunal and the said appeal should also be treated as having become infructuous.

In *K.S. Sharfudeen* v. *Union of India*,[208] it was held by the court that the Wakf Act, 1995 itself has nothing to do with educational institutions run by Muslims. As seen from the preamble to the Act, it is an Act intended to provide for the better administration of the *waqfs* and for matters connected therewith or incidental thereto. The word *waqf* is defined under section 3(r) to mean the permanent dedication by a person professing Islam of any moveable or immovable property for any purpose recognized by Muslim Law as pious, religious or charitable. It includes a *waqf* by a user, grants as well as a *waqf-alal-aulad*. The statement of objects and reasons of the Wakf Act, 1995, shows that the attempts to revamp the working of the Wakf Act, 1954 in the year 1984 by way of an amendment had met with stiff resistance. Insisting over the significance Wakf Act, 1995 and the tribunals constituted under it, a complete overhaul was done and the 1995 Act was put in place, predominantly for (i) the creation of wakf tribunals to consider the questions and disputes relating to *waqfs* and (ii) to provide for better administration and supervision of the *waqfs*. Therefore, the Wakf Act, 1995 is primarily an Act intended to improve the management and administration of trusts created by persons professing Islam for a purpose recognized by Muslim law as pious, religious or charitable. The main object of such a trust or *waqf* could be the establishment of an educational institution. But the mere establishment of an educational institution will not make such a trust anything other than a *waqf* within the meaning of the Act.

The second contention of the petitioner was that even if the other limbs of section 32(1) and (2) are taken to be valid, the explanation to section 32(1) which empowers the Tamil Nadu wakf board to set at naught a scheme framed by the civil court, cannot receive a seal of approval from the high court. By the explanation to section 32(1), the legislature has usurped the judicial powers. The court held:

> The Explanation to Section 32(1) merely replaces the forum for supervisory control over the *waqfs*, from that of Civil Court to the Wakf Board. No court ever declared at any point of time, that a Wakf Board like the Hindu Charitable and Endowments Board cannot have any power of superintendence over *waqfs*. Only if a Court had earlier come to the conclusion that the Wakf Board cannot have general power of superintendence over *waqfs* and only if the Explanation to Section 32(1) had been inserted to annul the effect such a judgment, can it be said that there is usurpation of the judicial powers by the legislature. Therefore, the second contention also does not merit acceptance.

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208 2014-4-LW 1 : MANU/TN/1319/2014.

The petitioner further contended that even if the explanation to section 32(1) was to be held as valid, the provision has to be read down in such a manner as to save scheme decrees that have earlier been passed by the civil courts. The court held:

> A careful consideration of the scheme of Sections 83, 84 and 86 would show (i) that a Wakf Tribunal virtually replaces the Civil Court for all purposes and (ii) that in view of the same, there is a bar of jurisdiction of Civil Courts. Any order passed under Section 32(1) and (2) can even be challenged before the Wakf Tribunal in a suit under sub Section (3) of Section 32.Therefore, despite the fact that the Wakf Board is conferred under the Explanation to Section 32(1) and under clause (g) of Section 32(2) to modify a scheme already framed by the Civil Court, any such modification made by the Wakf Board is again made subject to an appeal before the Wakf Tribunal under Section32(3). This Wakf Tribunal is deemed to be a Civil Court under Section 83(5). Therefore, these impugned provisions have only incorporated one more tier of redressal rather than usurping the jurisdiction of the Civil Court. Hence, it is not possible to accept the third contention that the Explanation to Section 32(1) has to be read down.

It further held that:

> By merely allowing the Civil Revision Petitions and setting at naught the order dated 21.09.2012 of the Principal District Judge, the problem may not get resolved. If the order dated 21.09.2012 of the Principal District Judge is invalid on account of the Civil Court having lost its jurisdiction, the previous orders passed by the very same District Judge, after the 1995 Act came into force are also equally invalid. Therefore, by setting aside the order dated 21.09.2012, passed by the Principal District Judge, we cannot allow the restoration of the previous order of the Principal District Judge. Therefore, while allowing the Civil Revision Petitions, we direct the Tamil Nadu Wakf Board to appoint trustees to the trust in question, strictly in accordance with the directives, contained in the deeds of trust and also keeping in mind the manner in which the Civil Court had handled the question of appointments in the past.

Role of *Muttawali* and the *Waqf* Board

In *Moulana Syed Mohammed Ibrahim* v. *The State of Karnataka*,[209] appeals were preferred against the order of a single judge. The court held that the controversy was not as to whether respondent nos. 5 and 6 possessed the

209 2014 (3) AKR 346; ILR 2014 Kar. 2661; 2014 (6) Kar LJ 408; 2014 (3) KCCR 2440.

qualifications or were eligible as prescribed under section 14 or not. It was the manner in which discretion had been exercised by the administrative authority that was considered by learned single judge. The court was of the view that the single judge had rightly come to the conclusion that there was an abdication in the exercise of discretion by the authority and, therefore, he had not gone into the question as to whether there was any material on which the impugned nomination could have been sustained or whether the chief minister had derived a subjective satisfaction in a right manner or not on the available materials on the eligibility of the respondents. The high court held that the respondent's qualification and eligibility for nomination to the board depended on the available materials. Thus, the nomination based on the recommendation of the then party president was an instance of non-exercise of discretion by the chief minister who was the authority to nominate eligible persons on the board.

One more contention that raised on behalf of the appellant was with regard to contradiction in the directions issued by single judge in the operative portion of the order wherein it was stated that respondent no. 1, *i.e*. state of Karnataka had to consider the name of respondent nos. 5 and 6 afresh. While doing so, single judge directed that it had to be in terms of amended section 14 as by then Amendment Act 27 of 2013 had been enforced and section 14 had been amended. The court held that the contention was that if the amended provision was to be applied, then respondent no. 5 could not be considered at all and that in place of respondent no. 6, a fresh nomination had been issued about which court did not express any opinion. It was also contended that since the direction had been given pursuant to the quashing of the nominations of respondent nos. 5 and 6, the provision as prevailed when the nominations were initially made must be applied. There was considerable force in that contention and, therefore, the high court modified the operative portion of the order of the single judge and directed state of Karnataka to consider the nomination of respondent no. 5 in terms of section 14 as it stood prior to the amendment made in 2013, in accordance with law. Thus, the appeals were allowed in part.

In *Zaheer Ahmed Khan* v. *M.A. Gaffor, Chief Executive Officer*,[210] the main issue adjudicated by the high court of Allahabad was whether the absence of reasons by the special officer or any indication by him about accepting or negating the enquiry report and recommendation of M.A. Hafeez Siddiqui to remove the petitioner as *mutawalli* vitiates the order terminating the services of the petitioner. The court held that non-indication by special officer as to whether he accepted the findings of the enquiry officer or not, or the recommendation of the enquiry officer as to the quantum of punishment, and non-furnishing of reasons indicated non-application of mind by him to the issue as to whether the petitioner was guilty of misconduct alleged against him and whether the punishment of removal from service was appropriate punishment to be imposed on him. The tribunal in the opinion of high court committed a serious error in brushing aside the objections of the petitioner and not giving importance to this aspect.

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210 2014 (3) ALD51; 2014 (2) ALT68.

As to the second issue whether the chief executive officer of the board was empowered to remove the *mutawalli* under section 64(3) of the Act, the court held that under section 64 only the board was empowered to remove a *mutawalli* from his office provided that he was found guilty of one of the enumerated misconducts in sub-section (1) of section 64. No power has been conferred on the chief executive officer by the Act to impose any order of punishment including the punishment of removal. The counsel for the board was not able to place any proceeding/provision of law before the court in support of his plea that the chief executive officer of the board was empowered to impose any punishment on a *mutawalli* and the petitioner was removed by the chief executive officer of the board by exercising such a power. Therefore, the said order of the chief executive officer of the board has to be held as one passed without jurisdiction and as such a nullity.

As to the third issue whether order dated 16-06-2008 of the tribunal in A.S. no. 1 of 2005 confirming the order dated 19-02-2005 of the chief executive officer of the board removing the petitioner as *mutawalli* of the institution was sustainable. The court referred to the decisions of *Council of Scientific and Industrial Research* v. *K.G.S. Bhatt*,[211] *Alhaj Iftekhar Ahmad* v. *M.P. Wakf Board*,[212] and *K.P. Zainulabdeen* v. *Tamil Nadu Wakf Board, Madras*[213] and held that the issue was to be answered in favor of the petitioner and against the board. The court set aside the findings on the above issues, the impugned order of the Andhra Pradesh Wakf Tribunal, Hyderabad and the proceeding of the chief executive officer of the board. The petitioner was reinstated as *mutawalli* of Dargah Hazrath Kohe Moula Ali by the board.

In *Karnataka Wakfs Protection Joint Action Committee (Regd.), Represented by its General Secretary and S. Moinuddin* v. *The State of Karnataka, Represented by Chief Secretary*,[214] the challenge in these writ petitions was to the appointment/ nomination of the respondents as members of the Karnataka state board of wakfs. By the said notification, in exercise of the powers conferred under section 14(9) of the Wakfs Act, 1995 and rule 32 of the Karnataka Wakfs Rules, 1997, the persons named therein were appointed as members of the board for a period of five years under section 15 of the Act. The chief minister sent a note regarding approval for nomination of five persons to the Karnataka board of wakfs for which neither any enquiry was made nor any other report was called for with regard to qualifications prescribed under section 14(1)(c) and (d) of the Act, by the persons, whose names were recommended. The court viewed that the state government must have been reasonably satisfied that the member sought to be nominated was a representative of an eminent Muslim organization in the case of section 14(1)(c) and in the case of section 14(1)(d) that the proposed member was a recognized scholar in Islamic theology. The court held that the said recommendation, unsubstantiated by any other material and without any kind of verification, could

211 1998 (5) ALT 761 (DB).

212 AIR 1992 Mad 298.

213 (1971) 2 SCC 102.

214 2014 (1) AKR 851; ILR 2014 Kar 2618; 2014 (1) KCCR 814.

not be the basis for the nomination of respondents 5 and 6. Without finding out whether the respondents 5 and 6 satisfied the required qualification stipulated in the relevant provisions, they had been nominated. Whimsical exercise of power was very much apparent. The decision making process of respondent no. 1 with regard to the nomination of respondents 5 and 6 to respondent no. 3 was flawed. Hence, the said nominations could not be sustained. Consequently, the writ petitions were allowed and the nomination and appointment of respondents 5 and 6 as the member of the board by the chief minister was quashed.

In *Salahuddin* v. *Kazi Mohd. Raisuddin,*[215] the court held that as per section 63 of the Wakfs Act, the power to appoint *mutawallis* can be used by the wakf board when there is dispute or also when there is a vacancy. If wakf board wants to make appointment under this section, the period needs to be mentioned and that is mandatory in nature. It was further held that unless previous *mutawalli* is removed, no new *mutawalli* can be appointed. The court explained various provisions of the Act thus:

> The Provision of Section 32(2)(d) of the Act which shows that Board can settle schemes of management for wakf after giving opportunity of being heard to affected parties. When such scheme is settled, the persons aggrieved can file suit under Section 32(3) of Wakf Act before Tribunal. The provision of Section 69 of Wakf Act shows that when no scheme is in existence and new scheme is to be prepared, the procedure given in Section 69 needs to be followed. Such new scheme can provide for removal of mutawalli including the hereditary mutawalli. The decision taken under Section 69 of Wakf Act can be challenged by filing appeal before Tribunal. Thus, there is the power with the Board to frame new scheme or to modify the old scheme and different remedies are provided for persons aggrieved.

In *Ibrahim Bin Abdullah Masquati* v. *A.P. State Waqf Board, rep. by its Chief Executive Officers,*[216] the High Court of Andhra Pradesh clarified that in cases where there was change of composition of managing committee of any *waqf* institution, the wakf board has to be intimated or informed of any such change. Thereupon, the *waqf* board has no jurisdiction to do anything in the matter except to receive and record such intimation. It has no power to pass any separate order as[217] was done in the present case. It was further clarified that the Wakf Act itself contains no provision regarding what ought to be done in such cases thereby lending weight to the conclusion that the board should only be notified and there is no need for it to pass any separate order(s) in such case(s). However, it was stated that the board can certainly record the change in its register or record under section 32(2) (o) of the Wakf Act. It was also made "clear that noting of this fact recorded

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215 2014 (6) MhLj 774.

216 2014 (3) ALD 78.

217 *Ibid.*

by the Wakf Board will not create any extra right nor destroy any existing right or extinguish any such right. Whatever rights and liabilities are prevailing upon this change will remain."[218]

Waqf tribunal- Powers and jurisdiction

In *Faseela M*. v *Munnerul Islam Madrasa Committee*,[219] Munnerul Islam Madrasa Committee filed a suit for eviction against the appellant before the waqf tribunal pleading that the respondent was the landlord and the appellant was the tenant in the subject property. The appellant denied that the subject property was *waqf* property besides challenging the jurisdiction of the waqf tribunal to determine the dispute between the parties. The tribunal, after hearing the parties, directed the plaint to be returned to the civil court having jurisdiction in the matter. However, on the next date, the tribunal *suo motu* recalled the earlier order.

A suit seeking eviction of the tenants from what was admittedly *waqf* property could, therefore, be filed only before the civil court and not before the tribunal.[220] Further, the court explained that there was nothing in section 83 which pushes the exclusion of the jurisdiction of the civil courts beyond what has been provided for in section 6(5), section 7 and section 85 of the Act. It simply empowers the government to constitute a tribunal or tribunals for determination of any dispute; question of other matter relating to a *waqf* or *waqf* property does not *ipso facto* mean that the jurisdiction of the civil courts stands completely excluded by reasons of such establishment.[221]

It is submitted that the history behind enactment of the Wakf Act, 1995 clearly reveals that the jurisdiction in the matters pertaining to *waqf* should be exclusively in the hands of tribunals in order to avoid the illegal encroachment of the *waqf* properties throughout the length and breadth of the country. The speedy disposal in such matters are inevitable and the apex court has approved this position in their earlier judgments.[222] The civil procedure is very lengthy and that is why in order to avoid unnecessary delay the provisions of exclusion of civil court jurisdiction in the matters of *waqfs* and their administration through wakf tribunal was initiated. A bare reading of the above mentioned sections, keeping aside the objectives of the *waqf* legislation, frustrates the very purpose of enacting and modifying these legislations to improve and protect the *waqf* properties in the country and to provide better *waqf* administration.

In *Mohammad Mukhtar Ahmad* v. *Ghulam Abdul Qadir Alvi*,[223] the plaintiff-respondent instituted an original suit for a declaration that he was the *sajjadanashin*

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218 *Ibid*.

219 AIR 2014 SC 2064.

220 *Ramesh Gobindram* v. *Sugra Humayun Mirza,* (2010) 8 SCC 726 at738.

221 *Bhanwar Lal* v. *Rajasthan Board of Muslim Wakf*, 2013 (11) SCALE 210; Board *of Wakf, West Bengal* v. *Anis Fatma Begum*, (2010) 14 SCC 588; *Sardar Khan* v. *Syed Nazmul Hasan*, (2007) 10 SCC 727.

222 See Author's Survey, "Muslim Law", *ASIL* (2013).

223 2014 (9) ADJ193 : 2015 (1) ALJ 217 : 2014 (105) ALR 595; 2014 5 AWC 4885 AII; 2014 125 RD 78.

of Khankha Faizur-Rasool situated in village Baraun Sharif and *Nazim-e-Ala* (Manager-in-Chief) of Darul-UloomFaizur-Rasool (*Madarsa*). During pendency of the suit, after the commencement of the Wakf Act, 1995, an additional written statement was filed claiming that the suit was barred by section 85 of the Wakf Act, 1995. On the aforesaid plea, apart from other issues, issue nos. 4 and 10 were framed, *viz*. whether the suit was barred under order VII, rule 11, CPC. and whether the suit was barred by s. 85 of the Wakf Act, 1995. The trial court decided both the issues against the plaintiff and held that the suit was barred by section 85 of the Wakf Act inasmuch as the dispute in the suit related to office of a *sajjada nashin* in respect of a *waqf* property, which could only be decided by a wakf tribunal constituted under the Wakf Act, 1995. Aggrieved by the order, the plaintiff preferred civil appeal which was allowed on ground that the Wakf Act, 1995 came into operation with effect from 1.1.1996 and as the suit was instituted before coming into force of the Wakf Act, 1995, it was not barred by section 85. While deciding as above, it relied on a decision of the apex court in *Sardar Khan* v. *Syed Najmul Hasan*[224] and also on the provisions of section 7(5) of the Wakf Act, 1995. In *Sardar Khan*, the apex court had clearly laid down that the bar of section 85 will not be applicable to the pending suits or proceedings which had commenced prior to January 1, 1996. Therefore, the court held that the instant suit, which was instituted prior to the commencement of the Wakf Act, 1995, would not be barred by section 85. The decision of the lower appellate court that the suit of the plaintiff was not barred by section 85 of the Wakf Act, 1995 was upheld and the plaint was not liable to be rejected under Order VII, Rule 11, CPC.

In *Dr. Mirza Sajjad Hussain* v. *M/s. Bayan Bai Wakf, Represented by its Muthavali*,[225] the main issues before the High Court of Karnataka were whether the suit filed before the trial court was maintainable and whether the decree of the trial court was bad in law. The High Court of Karnataka while placing reliance on *Ramesh Gobindram (dead) through LRs.* v. *Sugra Humayun Mirza Wakf*[226] and *Bhanwar Lal* v. *Rajasthan Board of Muslim Wakf*,[227] held that section 6 read with section 7 of the Wakf Act[228] bars the jurisdiction of the civil court only to the extent of trial of suits regarding questions specifically enumerated therein. All disputes pertaining to eviction of tenants are maintainable only before the civil court. The court, while dismissing the appeal, held that the judgment of the trial court did not call for any interference.

In *Maulana Mumtaz Ahmed Quasmi* v. *Himachal Pradesh Wakf Board*,[229] Himachal Pradesh Wakf Board filed a suit before the district judge, Shimla (wakf tribunal) for possession, permanent injunction and recovery of use and occupation

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224 2007 (67) ALR 303 (SC).

225 2014 (2) AKR 503.

226 (2010) 8 SCC 726.

227 2013 AIR SCW 5210.

228 The Wakf Act, 1995.

229 MANU/HP/0838/2014.

charges against the appellant. The court decreed the suit and held that the board was entitled to the possession of residential accommodation of *imam* under the occupation of the appellant. The court also held that the board was entitled to possession of guest house of the mosque along with goods lying therein. A permanent injunction was also issued against the appellant restraining him from running school of Muhammadan studies in the mosque. It was contended by the appellant before the High Court of Himachal Pradesh that that the *waqf* tribunal had no jurisdiction to adjudicate upon the matter and that the tribunal had not correctly appreciated the evidence led by the parties. The high court held that the court below has correctly appreciated the oral as well as documentary evidence on record. Furthermore, it was held that the tribunal having all powers of civil court can determine all rival contentions. Any interpretation to the contrary would render the provisions of the Act, empowering the board to protect and preserve the property, to be superfluous and redundant. Thus, the appeal was dismissed.

In *Javed Ahmed Khatib* v. *Mohammed Arif Shafeeq Ahmed Patel*,[230] the dispute was in respect of management of jumma masjid, Patel Mohalla, Panvel, Tahsil Panvel, District Raigad. An application for relief of temporary injunction was filed by the petitioner before the wakf tribunal. The High Court of Bombay held that in view of provisions of section 83(5) of Wakf Act, 1995, the tribunal had power of a civil court. The court while referring to section 22 of the Act further observed that the tribunal can give decision in respect of the dispute involved and there was nothing wrong in making order by the chief officer by which the divisional officer was directed to continue the construction with the help of villagers and with the cooperation of both the sides involved in the dispute.

In *S.A.K. Ibrahim* v. *The Chief Executive Officer*,[231] the *waqf*, relying on *Board of Wakf, West Bengal* v. *Anis Fatma Begum*,[232] contended that the petitioners cannot maintain the writ petitions as they had an alternative remedy before the government and high court should not straight-away entertain writ petition under article 226 of the Constitution of India concerning *waqf*. The court formulated the following issues:

> (i) Whether the impugned order has been passed in violation of the fundamental rights and principles of natural justice and without jurisdiction? The court held that a perusal of the notice as well as impugned order would show that the petitioners were put on notice and they had been heard by the Wakf Board before passing the impugned order. Hence, the contention of the learned counsel for the petitioners that they have not been issued with any notice before passing the impugned order cannot be sustained. Therefore, there is no violation of principles of natural justice in passing the impugned order.

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230 2015 (1) MhLj 99.

231 2014-3- LW 685.

232 2011 (1) CTC 636.

> (ii) Whether the impugned order passed by the 1st respondent taking over the management of the *waqf* is liable to be set aside since the said order has been passed without framing the scheme and without forming an opinion as required under Section 38 of the Wakf Act?

The court has held that, the wakf board is empowered to take over the administration of the *waqf* if no suitable person is available for appointment as a *mutawalli* of the *waqf*. In the impugned order, it has been clearly stated that the management of the *waqf* was ordered to be taken over by the wakf board only for better and proper management of the *waqf*. Moreover, the impugned order had been passed only as an interim measure to protect the interest of the institution pending the framing of the scheme. Under such circumstances, it had to be construed that the impugned order had been passed in terms of section 65 of the Act also. Since the impugned order had been passed by the 1st respondent only after conducting due enquiry, the court declined to accept the submission of the petitioners that the impugned order had been passed only based on the opinion of the law officer.

Is a writ petition liable to be dismissed since there is an alternative remedy available to the petitioners? The court, while relying on *Board of Wakf, West Bengal* v. *Anis Fatma Begum*,[233] held that the Wakf Act, 1995 is a recent parliamentary statute which has constituted a special tribunal for deciding disputes relating to *waqfs*. The obvious purpose of constituting such a tribunal was that a lot of cases relating to *waqfs* were being filed in the courts in India and they were occupying a lot of time of all the courts in the country, which resulted in increase in pendency of cases in the courts. Hence, a special tribunal has been constituted for deciding such matters. It further held that the wakf tribunal can decide all disputes, questions or other matters relating to a *waqf* or *waqf* property. The words "any dispute, question or other matters relating to a Wakf or Wakf property" are words having broad connotation. Any dispute, question or other matters whatsoever and in whatever manner which relating to a *waqf* or *waqf* property can be decided by the wakf tribunal. The word *waqf* has been defined in section 3(r) of the Wakf Act, 1995 and hence once the property is found to be a *waqf* property as defined in section 3(r), any dispute, question or other matter relating to it should be agitated before the wakf tribunal. The court observed:

> Under Section 83(5) of the Wakf Act, 1995 the Tribunal has all powers of the Civil Court under the Code of Civil Procedure, and hence it has also powers under Order 39 Rules 1, 2 and 2A of the Code of Civil Procedure to grant temporary injunctions and enforce such injunctions. Hence, a full-fledged remedy is available to any party if there is any dispute, question or other matter relating to a Wakf or Wakf property.

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233 2011 (1) CTC 636.

It has been further observed that even if no order has been passed under the Act, the party can approach the wakf tribunal for the determination of any dispute, question or other matters relating to a *waqf* or *waqf* property as the plain language of sections 83(1) and 84 indicates. Therefore, the writ petitions were dismissed.

Waqf Property Miscellance Issues

In *Imteyaz Ahmad* v. *The Bihar State Sunni Wakf Board*,[234] one Maharani Janki Kuar was the proprietor of Bettiah estate in whose name, the khewat no. 1 was prepared. The ancestor of petitioners was an employee of Bettiah raj and he was allowed to occupy 17 *dhurs* of land out of municipal plot no. 3638 in the year 1901. The Bettiah raj got constructed *jama masjid* over the nearby plot. However, the local people used some portion of plot no. 3638 to go to the aforesaid mosque. The municipal plot no. 3639 and municipal plot no. 3638 have separate identity and Bettiah estate never allowed amalgamating municipal plot no. 3638 with municipal plot no. 3639 nor the municipal plot no. 3638 was ever settled to any mosque. The ancestor of petitioners was also trusted by the Bettiah estate to keep the records of mosque, without any remuneration. Sometime in the year 1919-20, 7 *dhurs* of plot no. 3638 was settled to the ancestor of petitioners by Bettiah raj and, thereafter, the ancestor of petitioners got constructed tilted house over the aforesaid land and since then, petitioners were possession of the aforesaid land. The ancestor of petitioners died in the year 1958 and, thereafter, a pucca house was constructed by the petitioners on the above-said land but unfortunately, some persons started creating nuisance in the peaceful possession of the petitioners over the above-said area of plot no. 3638. The petitioners filed title suit no. 278 of 2008 against those persons in civil court. One of the defendants filed written statement, claiming that the disputed property belongs to the mosque. A pleader commissioner was appointed who inspected the place and found a *pucca* house on the disputed land but during pendency of the aforesaid suit, the respondent no. 2 issued impugned notices. The petitioners stated that municipal plot no. 3638 was never a *waqf* property and only municipal plot no. 3639 was registered as *waqf* property.

Both the above-said writ petitions related to plot no. 3638, situated at Bettiah town, and the questions involved in them were almost similar in nature. Petitioners filed petition application for quashing the notices, issued by the chief executive officer, Bihar estate Sunni wakf board u/s 54 of the Wakf Act, 1995 by which, the petitioners had been asked to explain as to why an order for removal of their houses, standing over plot no. 3638, be not passed. Similarly, petitioners had also preferred application for quashing the order passed by sub-judge, Bettiah by which the latter passed the order for transferring of case to the waqf tribunal, Bihar. The defendants filed a suit under section 85 of the Wakf Act, 1995 praying that the said suit was not maintainable.

The state wakf board stated that the property in question belonged to the wakf board and the said *waqf* was registered in the *waqf* register and numbered as 415 as Ramjan Ali wakf estate, Bettiah raj. Further, the wakf board states that the property in question was part of *babri masjid* of the Bettiah town, which was

234 AIR 2015 Pat 32; 2014(4) PLJR689.

constructed in the year 1870 and the grandfather of the petitioners was record keeper as well as *muazzin*. Further, zrespondents stated that the then managing committee of the *bari masjid* gave him an accommodation in the outer house of the *masjid* for use as *hujra* for *muazzin* or *imam* and the property in question was never settled by Bettiah estate with ancestor of the petitioners.

The petitioners contended that property in question belonged to them and it was not a *waqf* property and, therefore, notice under section 54 of the Wakf Act, 1995 was illegal and without jurisdiction. Under the Act, the state government shall appoint a survey commissioner as well as additional survey commissioner of *waqf* for the purpose of making a survey of *waqf* existing in the state of Bihar on the date of commencement of the aforesaid Act and after inquiry, the above-said survey commissioners shall submit their report in respect of *waqf*, and any dispute in respect of nature of the *waqf* shall be decided by the said commissioners.[235] Under section 5 of the Act list of *waqfs* shall be published in official *gazette*. Section 6 provides that if any question arises where a particular property specified as *waqf* property in the list of *waqfs* is *waqf* property or not or where a *waqf* specified in such list is a *Shia waqf* or a *Sunni waqf*, the board or the *mutawalli* of the *waqf* or any person interested therein may institute a suit in the tribunal for the decision of the question and the decision of the tribunal shall be final. Further, it was submitted that the property in dispute had never been shown in the list of *waqfs* and, therefore, it could not be said that the property was not a *waqf* property and when the property was not *waqf* property, no notice under section 54 could be issued. In support of the contention, the decision in *Subrat Shankar Bhaduri* v. *The Bihar State Sunni Waqf Board*[236] was relied upon. In that case, it was held that mere mention of the *waqf* was not sufficient and the property dedicated to the *waqf* should be entered in the register. If the property has not been entered into register maintained for *waqf* properties, the board has no jurisdiction to issue requisition under section 36B of the Act. The petitioner was a stranger to the *waqf* and he did not come under the ambit of interested person and, therefore, the title of the petitioner in respect of property in question could only be decided by a competent civil court and not by the tribunal. In this regard, the court referred to *Board of Muslims Wakfs, Rajasthan* v. *Radha Kishan*,[237] where it was held by the apex court that section 6(1) covered only disputes between the board, the *mutwalli* and any person interested in the *waqf*. The judge also referred to *Waqf Board* v. *Gram Panchayat @ Gram Sabha*[238] where it was held that if a dispute is raised between the wakf board and a third party, the notification issued under section 5(2) did not come in the way of the suit. Finally, the petitioner submitted that, he being stranger to the *waqf*, had every right to pursue the suit in respect of his right, title and possession before the competent civil court and, therefore, the lower court wrongly transferred the title suit in favor of the wakf tribunal, Bihar.

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235 The Wakf Act, 1995, s. 4.

236 AIR 1976 Pat 271.

237 (1979) 2 SCC 468.

238 (2000) 2 SCC 121.

The respondent, while refuting the above submissions, argued that after the enforcement of the Wakf Act, 1995, only wakf tribunal had jurisdiction to decide matters relating to *waqf*. Section 6(5) of the Act clearly states that no suit or other legal proceeding shall be instituted or commenced in a court, in relation to any question in respect of nature of the *waqf* property except by the wakf tribunal. Reliance was placed on *Board of Wakf Act, West Bengal* v. *Anis Fatima Begum,*[239] in which the apex court had held that all matters pertaining to *waqf* should be decided by the wakf tribunal, constituted under section 83 of the Wakf Act, 1995 and no civil court or high court under article 226 of the Constitution of India, should entertain the same. Defendant further submitted that the plot no. 3638 had been entered in *waqf* register and, therefore, petitioners could only approach to the tribunal. The court observed:

> Sections 4 & 5 of Waqf Act, 1995 deal with appointment of Survey Commissioners, Survey of works and publication of list of waqfs and Section-6 of the aforesaid act gives a right to the Board, Muttawali or any person, interested thereunder to institute a suit in a Tribunal to get the question, decided as to whether any property is waqf property or not. Admittedly, the survey of property, in dispute has not been done neither the property, in dispute was mentioned in the list of waqfs but much prior to commencement of Waqf Act, 1995, the property in question had already been registered as waqf property of Ramjan Ali Waqf State, Bettiah, West Champaran bearing registration No. 415 and the aforesaid registration was done in the year, 1950. The provisions of Sections-4 & 5of Waqf Act, 1995 have been made only to ascertain to waqfs existing in the State on the date of commencement of the Act. Section-4 is a preliminary survey of waqfs and therefore, it cannot be said that if, any waqf is left to be detected at the time of survey, later on, the aforesaid waqf cannot be included in the list of waqfs. Moreover, in this case, the property in dispute was shown in the register, prepared under Section-33 of Bihar Waqf Act, 1947 and it is well settled principle of law that if, an act has been done under the provision of previous act, the same shall be deemed to have been done under the new provision by virtue of a legal fiction.

The court then referred to section 85 of the Wakf Act, 1995 which provides that "no suit or other legal proceeding shall lie in any civil court in respect of any dispute, question or other matter relating to any *waqf* property or other matter, which is required by or is said to be determined by a tribunal. The aforesaid Section clearly indicates that the tribunal has got jurisdiction to decide the other matter which is required by or determined by a tribunal."

Interpreting section 85 and other provisions of the Act and after analyzing judicial precedents, the court was of the opinion that if a question arises as to

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239 2011 (112) RD 280 (SC).

whether a particular property specified as *waqf* property in the list of *waqfs* is *waqf* property or not, the same shall be decided by the tribunal and by virtue of section 85, the civil court has no jurisdiction to decide matter relating to *waqf* property and its administration. It further referred to section 85A, introduced by the Wakf (Bihar Amendment) Act, 2006 which provides that "any suit or other proceeding, pending before any court, immediately before the date of constitution of a tribunal under this Act and after the date of commencement of the Act, the cause of action of which is based on such facts, that if the tribunal would have been constituted, it would have been within the jurisdiction of such tribunal, shall be deemed to be transferred to such tribunal on the date of constitution of the tribunal." In court's opinion, the subordinate judge had no option except to transfer the suit to the wakf tribunal. Thus, the cases referred to by the petitioners in this case were not applicable because they related to Wakf Act, 1947 or Wakf Act, 1954, which had no provision for the constitution of tribunals and the waqf tribunals had been constituted for the first time under the Wakf Act, 1995. The case was only covered by the decision of the board of *wakf*, West Bengal and both writ petitions were dismissed with liberty to the petitioners to challenge the notice issued against them under section 54 of the Wakf Act, 1995 before wakf tribunal, Patna, Bihar and the wakf tribunal, Patna should consider the condoning of delay.

It is submitted that high court decided the case in right perspective, keeping in view the real intent to transfer the remote in the hands of tribunals relating to the matters of *waqf* so that mismanagement and illegal occupation of the *waqf* property is not misused or destroyed against the wish of the dedicator.

In *Javed Ahmed Khatib* v. *Mohammed Arif Shafeeq Ahmed Patel, Mohammed Saeed Abdul Hamid Mulla, Haseeb Mohammed Yusuf Mulla and Maharashtra State Wakf Board*,[240] a revision application was filed before the High Court of Bombay against the order of the wakf tribunal. The court held:

> The provisions of Section 32(2)(d) and Section 69 of Waqf Act show that Board can settle the scheme if it is necessary to do so in the interest of waqf. However, when the scheme is already in existence and somebody under the scheme is claiming to be mutawalli, the Board cannot record the change on the basis of report given under Section 42 of Waqf Act unless and until it is satisfied that the change has taken place as per the procedure given in the scheme.

In *N.V. Ali Akbar* v. *Abdul Azeez Mannisseri*,[241] the petitioners had approached the high court by invoking article 227 of the Constitution of India on the ground that they were unable to seek redressal of grievances from the wakf tribunal under section 83 of the Wakf Act, 1995 as the said Act was amended in 2013 which, while enlarging the jurisdiction of the tribunal, changed the composition of the

240 2014 (4) ABR 49, para. 12.

241 ILR 2014 (3) Ker. 603 : 2014 (3) KHC 155 : 2014 (3) KLJ 319 : 2014 (3) KLT 307.

tribunal. The petitioners were also precluded from suing in the civil courts due to bar of jurisdiction under section 85 of the Wakf Act. The amendment to section 83 of the Wakf Act enlarged the jurisdiction of the tribunal, its composition was enlarged from a single-member tribunal to a three-members: one member was to be from the state judicial service, who shall be the chairman; one from the state civil services and one from persons having knowledge of Muslim jurisprudence. The amendment to section 85 of the Wakf Act not only barred the jurisdiction of civil courts but also widened the scope of the bar from civil courts to revenue courts and other authorities. Going by the object of the Act, the tribunal was ought to be made full time body, but by insertion of clause 4A to section 83, the inclusion of ex-officio members raises doubts, given the fact that such a member has other duties to perform.

Article 50 of the Constitution states that "the State shall take steps to separate the judiciary from the executive in the public services of the State." Therefore, if the nomination of a member from the state civil services is to be made on a part-time or ad hoc or *ex officio* basis, that would demean that the avowed goal of insulating judicial function from executing function and would infringe independence of judiciary which is a basic feature of the Constitution. The court cited *Abdulla Shahul Hameed* v. *State of Kerala*,[242] wherein it was held that in cases where there was delay in governmental notifications regarding the general transfers and other transfer orders of judicial officers of the subordinate judiciary from time to time, the person manning any wakf tribunal, on transfer, will hand over charge as may be ordered by the high court in its proceedings on the administrative side and such handing over charge was sufficient to clothe the person put in charge of the tribunal to discharge all functions and powers of the tribunal in terms of the provisions of the Act.

In *Devki Nandan Pathak* v. *Jumma Khan*,[243] the high court held that there was nothing on record to suggest that on the date of filing the application, the suit premises was *waqf* and the respondent was appointed as the *mutawalli* either verbally or any deed or instrument by which the *waqf* was created in respect of the property in question. There being no order made by any authority under the said Act, he could not be said to be the person aggrieved also as contemplated in section 83(2) of the said Act. Under the circumstances, the case itself filed by the respondent-applicant before the tribunal under section 83(2) of the Act was not maintainable in the eyes of law. The respondent-applicant had filed the application seeking permanent injunction and, in the alternative, sought a declaration in respect of the suit premises to the effect that the sale deed dated January 1, 1997 executed by the petitioner no. 5 in favor of the petitioner nos. 1 to 4 be declared as null and avoid. The court held that the dispute being not the dispute covered under section 6 or section 7 or under any other provision of the Act, the tribunal had no jurisdiction

242 2012 (3) KLT 324.

243 AIR 2014 Raj 70, 2014 (2) CDR 803 (Raj), 2014(2) RLW 1569 (Raj), 2014(2) WLN 509 (Raj.), 2015 (1) WLN 509 (Raj).

to decide the same. As held by the apex court in *Bhanwar Lal* v.*Rajasthan Board of Muslim Wakf*,[244] that the relief of cancellation of sale deed was to be tried by the civil court for the reason that it was not covered by section 6 or section 7 of the Act, which confer jurisdiction upon the tribunal to decide such an issue. In view of the said legal position, the application/suit filed by the respondent seeking cancellation of the sale deed at the instance of the respondent in respect of the suit premises was not maintainable before the tribunal. The respondent had prayed for a declaration in respect of the sale deed executed by the petitioner no. 5 in favor of the petitioner nos. 1 to 4. The tribunal, without framing any issue in that regard and recording any finding on such issue, had set aside the said sale deed, which was a registered sale deed executed by the petitioner no. 5, declaring it to be null and void. The high court was of the view that the order passed by the tribunal was *ex facie* arbitrary, illegal and without jurisdiction and, therefore, set aside.

In *Sohan Singh Rawat* v. *State of Uttarakhand*,[245] the petitioner, an employee of Uttarakhand wakf board, was deprived of taking benefits of sixth pay commission. The high court held that the state government was always at liberty to take a suitable action against the petitioner in accordance with law but the denial of benefit of sixth pay commission to the petitioner did not seem to be justified. Allowing the writ petition, the court, after going through the provisions of Wakf Act, 1995 namely, section 77 dealing with 'Wakf Fund' and some other sections pertaining to officers duties and their terms of appointment and benefits, viewed that the decision taken by the board in its meeting regarding withdrawal of the benefit of sixth pay commission from the petitioner was quashed.

In *Kajodi* v. *Rajasthan Wakf Tribunal*,[246]a petition for eviction, permanent injunction and declaration was filed by the Rajasthan Board of Muslim Wakf. The court held that if the answer be in the affirmative, the jurisdiction of civil court would be excluded *qua* such a question, for in that case the tribunal alone can entertain and determine any such question. The bar of jurisdiction contained in Section 85 was in that sense much wider than that contained in section 6(5) read with section 7 of the Wakf Act. While the latter bars the jurisdiction of the civil court only in relation of questions specified in Sections. 6(1) and 7(1), the bar of jurisdiction contained in section 85 would exclude the jurisdiction of the civil courts not only in relation to matters that specifically fall in sections 6 and 7 but also other matters required to be determined by a tribunal under the Act.

The court further held that the impugned order of the tribunal did not discuss other litigation with its effect. Even though the petitioners were declared to be encroachers and had even signed the report in token of acceptance but the same had been challenged by them by way of appeal and a revision petition was pending before the board of revenue. The effect of pendency of the case before the board of revenue and even for sending the matter for reference by the tehsildar to the collector had not been dealt with by the tribunal. It may be because petitioners did

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244 AIR 2014 SC 758.

245 2015 Lab IC 768.

246 MANU/RH/1809/2014.

not appear before the tribunal. The impugned order though made a reference about the order passed by the revenue appellate authority but arguments had not been dealt with while discussing the issues 1 and 2. The tribunal had not decided the issue as to what would be the impact of the challenge to the order passed by the revenue appellate authority in pending revision petition as the application of the tehsildar to the collector for reference to record land in dispute to be a pasture land. In this background, the impugned order could not be allowed to stand hence the same was set aside with remand of the case to the tribunal to decide it afresh on its merit and specially after considering the facts pertaining to various litigation pending before the revenue courts.

IV OTHER MISCELLANEOUS ISSUES

***Kafala* system**

In *Shabnam Hashmi* v. *Union of India*,[247] recognition of the right to adopt and to be adopted as a fundamental right under Part III of the Constitution was in issue. Alternatively, a prayer requesting the court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed and further for a direction to the Union of India to enact an optional law. The petitioner before the apex court argued that the Juvenile Justice Act, 2000 was a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption, somewhat akin to the Special Marriage Act, 1954. The All India Muslim Personal Law Board contended that under section 41 of the Juvenile Justice Act explicitly recognizes foster care, sponsorship and being look after by after-care organizations as other alternative modes of taking care of an abandoned/surrendered child. It was contended that Islamic law did not recognize an adopted child to be at par with a biological child. The board contended that the "*kafala*"[248] system which is recognized by the United Nation's Convention of the Rights of the Child under article 20(3) is one of the alternate systems of child care contemplated by the Juvenile Justice Act and, therefore, a direction should be issued to all the child welfare committees to keep in mind and follow the principles of Islamic law before declaring a Muslim child available for adoption under section 41(5) of the Juvenile Justice Act.

The court was of the view that a person is always free to adopt or choose not to do so and follow what he/she comprehends to be the dictates of the personal law applicable to him/her. According to the court, this Act is a small step in reaching the goal enshrined by article 44 of the Constitution, irrespective of personal beliefs and faiths. The view of court was that "an optional legislation that does not contain an unavoidable imperative cannot be stultified by principles of personal law which, however, would always continue to govern any person who chooses to so submit

247 AIR 2014 SC 1281.

248 Islamic law professes what is known as the '*Kafala*' system under which the child is placed under a '*Kafil*' who provides for the well-being of the child including financial support and thus is legally allowed to take care of the child though the child remains the true descendant of his biological parents and not that of the adoptive parents.

himself until such time that the vision of a uniform Civil Code is achieved."[249] As far as the board's objection on the petitioner's prayers for first of all, declaring right of a child to be adopted and, then, also declaring the right of the prospective parents to adopt as fundamental rights under article 21 of the Constitution,[250] it was stated that Muslim law does not recognize adoption though it also does not prohibit a childless couple from taking care and protecting a child with material and emotional support. Treating fundamental right at par with the basic human rights, the apex court took the view that at present it was not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right encompassed by article 21 of the Constitution.

***Qada* system**

In *Viswa Lochan Madan* v. *Union of India*,[251] the prayer before the apex court was to restrict *dar-ul-qad*as and Shariat courts from adjudicating matrimonial disputes under Muslim personal law. It was also prayed that direction should be given to the union of India and other states to stop all *dar-ul-qadas* throughout the country from adjudication of cases pertaining to family relations among the Muslims. The Supreme Court, while refusing to grant the relief sought by the petitioner, allowed such institutions to give verdict on the right, status and obligation of individual, as and when an individual approaches them. The court observed that the petitioner's plea had no force as these arbitrary forums were running as a parallel judicial system as they had no sanction under law and cannot be enforced. The court admitted MPLB's statement that such network of judicial system is a necessity throughout the country and admitted that "the establishment of such courts might be laudable" and they are "informal justice delivery system with an object of bringing about amicable settlement between parties". But after having said that the court also observed that "it has no legal status" and is "not part of *corpus juris* of the state".

The court referred one incident where a woman having five children was raped by her father-in-law and the *fatwa* was issued declaring her marriage with her husband unlawful and restrained them from keeping physical relationship. The court observed that "she was victim of lust of father-in-law" and "a country governed by rule of law cannot fathom it". The court observed that since the *fatwa* gets strength from religion, it causes "serious psychological impact on person intending not to abide by it". Further the court advised the *dar-ul-qadas* not to give response or issue *fatwas* unless asked by the person involved or directly interested in the matter. The court held that the *fatwas* are not sanctioned under

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249 *Supra* note 247, para 11.

250 Petitioners placed reliance on the views of the Bombay and Kerala High Courts in *In re: Manuel Theodore D'souza* (2000) 3 BomCR 244 and *Philips Alfred Malvin* v. *Y.J. Gonsalvis* AIR 1999 Ker 187.

251 2014 (8) SCALE 330 : (2000) 6 SCC 224, paras. 7, 8, 37, 38 and 40; *Ahmedabad Women Action Group* v. *Union of India* (1997) 3 SCC 573; *Sarla Mudgal* v. *Union of India*, 1995 AIR 1531 : (1995) 3 SCC 635.

our constitutional scheme; however, they cannot be declared illegal in their existence as such.

It is of vital importance to acknowledge that the presence of *qada* system and that of *qadi's* has been since time immemorial, both the pre- and post-British era. Under Islamic law, juristic verdict called *fatwa* is a source of law and has precedent over judicial verdict because Islamic law is in fact jurist-made, and not judge made. These juristic verdicts known as *fatwas* have brought revolution in the history of Islamic law in the early 20th century of India in order to ensure justice to Muslim women victims also leading to the passage of the Dissolution of Muslim Marriage Act, 1939. Its background reveals that as to how judicial verdicts of Indian Muslim jurists became successful in order to emancipate women from their undesired husband about one hundred years ago, when no law on the soil permitted women to get rid of their undesired husband. Outside, Egypt Sheikh Ali Tantavi in Syria, Sheikh Mohammad Juayt, and jurists in other Islamic countries have been the architects of the modern personal law in their respective countries.[252] It may also be mentioned that for their progressive juristic verdicts, some of them faced adverse circumstances by the respective conservative governments.

The decision of the apex court in this case is very balanced. On one hand it is a warning for those who issue flimsy *fatwas* without understanding the interest of the parties and on the other hand it also preserves the ancient prevalent system having its own merits. The *qada* system has not only been recognized; it has even been applauded by the court. Therefore, the approach of the apex court in this regard must be appreciated. It may be mentioned that the fatwa issued in *Imrana* case is very surprising because under Islamic criminal law system, *Imrana's* father-in-law had no right to survive any more as the punishment for the *zina* (extra-marital intercourse) in Islamic legal system is stoning to death as applicable in certain Muslim countries. Under Islamic Law, father-in-law is the only relative in the husband's family who comes under prohibited relationship as he is treated to be the father of the bride. The present author is unable to answer the question as to what would be the effect of her rape by her father-in-law on Imrana's marriage with her husband.

V CONCLUSION

The cases reported during, 2014 illuminate the judicial understanding of Muslim law. It is seen that while interpreting the issues relating to Muslim law, the courts referred to Mulla.[253] However, in the author's opinion, taking help of secondary sources should be discouraged in deciding serious legal issues. The permission of dual regime, *i.e.*, section 125, Cr PC as well as the Act of 1986 for the maintenance of wife creates problem for the parties. This tends to impose burden on the courts and the lawyers misuse it to exploit their clients. In matters of marriage, the cases of conversion in order to marry and consequent disputes tend

252 For detail see J.N.D. Anderson, *Islamic law in the Modern World* (New York University, New York, 1959).

253 *Supra* note 7.

to make mockery of Islamic law. Conversion should be resorted to if one feels for a religion from the heart and not when one merely wants to exploit some of the religious norms regarding multiple marriages by the husband. In one of the reported cases, after conversion of a girl from Sikh to Muslim, marriage of the girl with a doctor because of love and affection, had chequered a history of hide and seek.[254] The concept of puberty is another novel issue. The law of puberty is fully recognized and in this regard in one case the court profusely quoted from the original sources of Islamic law. Similarly, the judicial trend on dissolution of Muslim marriage was decided according to the spirit of Act of 1939 as well as the *Sharia*, the dissolution of marriage on the grounds of apostasy, on the initiative of woman. The law of *hizanat*, *i.e*., custody of child till certain age should be with the mother is a peculiar feature of Islamic law in the welfare of child. The court beautifully interpreted the law in one of the cases where the mother was reluctant to get access of father to his child and the court ordered that mother during custody of child cannot stop the visit of father to look and enjoy companionship of his child.[255]

This survey covers gift, will, inheritance and *waqf*. The judiciary has interpreted the matters by applying the law in its true spirit. If more than two-third property is transferred by will then consent of heirs is necessary and herein we find a slight difference between the *shia* and *sunni* law and accordingly the court beautifully summarized and applied.[256] The law of inheritance is very comprehensive in Islam and that is why the Prophet says "Learn the laws of Inheritance, and teach them to the people; for they are one-half of the useful knowledge."[257] The deceased wife inherited her 1/4th share on the demise of her former husband, and after sometime her second marriage cannot stop her to get her 1/4th share from the property of her pre-deceased husband.[258]

Waqf has now come under the category of socio-economic laws. Therefore, both the states as well as courts are determined to secure the *waqf* properties for the betterment of Muslim community which are generally decided according to the *Sharia* law. The court followed a pragmatic approach mostly not to interfere with the powers of the wakf tribunals and kept the objective to save the properties from illegal encroachments and unauthorised possession. Accordingly, they have given wide interpretation to the jurisdiction of the wakf tribunals. However, sometimes prominence has been given to encroachers as well where the justice so demanded. It may be submitted that the technicalities should not be given much importance in social laws, rather encroachments on *waqf* properties should be discouraged and the decision should be according to the spirit of the *waqf* legislations. Similarly, the nature and purpose of the *waqf* has also been debated and interpreted by the courts in their true spirits as it is given in *sharia*.

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254 *Supra* note 23.

255 *Supra* note 24.

256 *Supra* note 164.

257 A. Rumsey, *Sirajiyyah* (English trans.) 11 (K. P. Basu Publishing Co., Calcutta, 2nd edn., 1890).

258 *Supra* note 170.

An important issue is the maintenance of orphan children. The law of juvenile justice for adopting the orphan or unattended children and the Muslim law of *kafala* do not have much difference as the object and purpose to maintain unattended children is found in both the regimes. Since long, petty matters on the local level were decided by the *qazi's* according to the *sharia* law and this practice in India was approved by Hindu rulers for their non-Muslim subjects[259] as well as by the British rulers in India. Recently, the apex court in *Viswa Lochan Madan*[260] allowed such institutions to give verdict on the right, status and obligation of an individual as and when he/she approaches them. However, the authorities should conduct a survey and analyse why poor and helpless individuals incur high cost of litigation when a *sharia* system or court is available. Efficient working of *sharia* system will save much trouble. Today, mostly divorce and maintenance cases come where matter boils down to determination and/or return of the payment of *mehar*, jewellery or *jahaez*. This becomes difficult unless the marriage and its terms are registered. It is even more difficult in cases of oral *nikah.* Therefore if all marriages are duly registered with details of *mehar*, parties whereabouts, *jahaez* and other related items, the problem can be solved to certain extent. In various state laws registration of marriage already exists. In this regard, as mentioned above, Qazi's Act, 1881 needs to be reviewed and improved as the *qazi* can be mobilised to act as standing arbitrators in regard to matrimonial or family disputes. In order to solve the interpretation problem of Muslim law and settlement of disputes thereunder, registered *qazi's* should be recognised as arbitrators and empowered to resolve matrimonial and other family disputes. Upendra Baxi is also of the view that "this suggestion has the great merit of leaving the administration of Islamic law to Muslims, well- versed in law and religion, effective in the context and legitimated by cultural values and recognised by an existing old law."[261]

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259 Sulaiman Nadvi, *Indo-Arab Relations*, 150-153 (Institute of Indo-Middle East Cultural Studies, Hyderabad, 1962).

260 *Supra* note 251.

261 Upendra Baxi, "Muslim Law Reform, Uniform Civil Code and Crisis of Common Sense", in Tahir Mahmood (ed.), *Family Law and Social Change*, 44 (N.M. Tripathi Ltd., Bombay, 1975).