Mulla: Mahomedan law, Updated 20th edition/CHAPTER I INTRODUCTION OF MAHOMEDAN LAW INTO INDIA/1. Administration of Mahomedan Law

CHAPTER I

INTRODUCTION OF MAHOMEDAN LAW INTO INDIA

1.

Administration of Mahomedan Law

The Mahomedan law is applied by Courts in India to Mahomedans not in all, but in some matters only. The power of Courts to apply Mahomedan law to Mahomedans is derived from and regulated partly by Statutes Art. 225 of the Constitution of India but mostly by Indian legislation.[1]

For Statutes, *see* 7; for Acts, *see* 6, and 8 to 17.

1 *Sheikh Kudratulla v. Mahini Mohan* (1869) 4 B.L.R. 134, 169; *Ibrahim v. Muni* (1870) 6 M.H.C. 26, 31; *Braja Kishor v. Kirti Chandra* (1871) 7 B.L.R. 19, 25.

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2.

Extent of application

As regards India, the rules of Mahomedan law fall under three divisions, namely:--

(i) those which have been *expressly* directed by the Legislature to be applied to Mahomedans, such as rules of Succession and Inheritance;
(ii) those which are applied to Mahomedans as a matter of *justice, equity and good conscience*, such as the rules of the Mahomedan law of Pre-emption;
(iii) those which are not applied at all, though the parties are Mahomedans such as the Mahomedan Criminal Law, and the Mahomedan law of Evidence.

The only parts of Mahomedan law that are applied by Courts in India to Mahomedans are those mentioned in cls. (i) and (ii). In other respects, the Mahomedans in India are governed by the general law of India.

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3.

Matters expressly enumerated

The rules of Mahomedan law that have been *expressly* directed to be applied to Mahomedans are to be applied except in so far as they have been altered or abolished by legislative enactment.

Thus, the rules of the Mahomedan law of Inheritance are expressly directed to be applied to Mahomedans. One of those rules is that a Mahomedan renouncing the Mahomedan religion is to be excluded from inheritance. But this rule was abolished by the Freedom of Religion Act XXI of 1850.

In cases of Hindu or Mahomedan law, it is the duty of the Courts to interpret the law and not to depend upon the opinion of experts however learned.[2]

2 *Shahidganj v. Gurdwara Parbandhak Committee* (1940) Lah. 493, 67 I.A. 251, ('40) A.P.C. 116; observations of Sulaiman, J., in *Aziz Banu v. Muhammad Ibrahim* ('25) A.A. 720; (1925) 47 All. 823 approved.

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4.

Matters not expressly enumerated

No rules of Mahomedan law that have not been expressly directed to be applied to Mahomedans can be applied if they have been excluded either expressly or by implication by legislative enactment.

Thus, the rules-of the Mahomedan law of Pre-emption are nowhere expressly directed to be applied to Mahomedans. In places where those rules are applied to Mahomedans, they are applied on the ground of justice, equity and good conscience (227). They are not applied, for example, to Mahomedans in Oudh and in East and West Punjab, for there are *Special Acts*relating to pre-emption for Oudh and East and West Punjab, and those Act s apply to Mahomedans also (228).

Again, the rules of the Mahomedans Criminal Law are nowhere expressly directed to be applied to Mahomedans. But there are *legislative enactments*relating to criminal law in India such as the Indian Penal Code and the Code of Criminal Procedure. Hence, those rules cannot be applied on grounds of justice, equity and good conscience. The result is that Mahomedans in India are governed by the criminal law of India.

The Courts in India are governed by their own law as to procedure and Mahomedan law dealing with matters purely of procedure is not applicable.[3]

3 *Sabir Hussain v. Ferzhand Hasan* (1938) 65 I.A. 119, (1938) All. 314, 173 I.C. 1, ('38) A.P.C. 80; *Mohd. Sulaiman v. Mohd. Ismail* (1966) 1 S.C.R. 937.

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5.

Justice, equity and good conscience

The rules referred to in 2, cl.(ii) may not be applied if they are in the opinion of the Court opposed to justice, equity and good conscience. But the rules referred to in cl. (i) of that section, that is, rules that have been *expressly* directed by the Legislature to be applied to Mahomedans, must be applied though they may not in the opinion of the Court conform with justice, equity and good conscience. (*see* 38)

Thus, the rules of the Mahomedan law of Pre-emption come under 2, cl.(ii), and they have not been applied by Courts in the Madras State on the ground that they are *opposed* to justice, equity and good conscience, inasmuch as the law of Pre-emption places restrictions upon the liberty of transfer of property by requiring the owner to sell it in the first instance to his neighbour. The High Courts of Bombay and Allahabad, on the other hand, have applied the Mahomedan law of Pre-emption to Mahomedans, with this remarkable result that the notion of "justice, equity and good conscience"-- held by those Courts differs from that held by the Madras High Court.[4](*see* 227 below)

In the undermentioned case[5] it was *inter alia* held by a single judge of the Calcutta High Court that the rule of the Mahomedan law that, where one of two spouses embraces the Islamic faith, if the other, on its being presented to him does not adopt it, the parties are to be separated, was obsolete and opposed to public policy. (*See* 20(4) "Conversion to Mahomedanism and marital rights.")

As regards rules which the Courts have been *expressly* directed apply to Mahomedans, they must of course be applied regardless of considerations of justice, equity and good conscience. Thus the rules of the Mahomedan law of Marriage have been expressly directed to be applied to Mahomedans in Bengal, the former United Provinces and Assam (8). One of those rules is that a divorce pronounced by a husband is valid, though pronounced under compulsion (315). Hence the Courts of India will not be justified in refusing to recognize such a divorce, though it may be opposed to their notions of justice, equity and good conscience.[6]

Where a rule of Mahomedan law is well-settled in the view of the ancient expositors thereof, it is not open to the Court to disregard or reject it on the ground that it is illogical or unsound, provided of course, it is not contrary to justice, equity and good conscience, on which ground alone the right is enforced at the present day.[7]

4 *Ibrahim Muni*(1870) 6 M.H.C. 26.

5 *Noor Jehan v. Eugene Tischenko* (1941) 45 C.W.N. 1047, 74 C.L.J. 212, ('41) A.C. 582.

6 *Ibrahim v. Enayetur* (1869) 4 B.L.R., A.C. 13.

7 *Mohd Ismail v. Abdul Rashid* (1956) 1 All. 143, 154,(F.B) .

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6.

Shariat Act, 1937

(l) From the 7th October 1937 section 2 of Act XXVI of 1937, in cases where the parties are Muslims, applies the Muslim Personal Law in a number of important matters. The Act operates throughout India. The section is as follows:--

&uot;2. 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, han, khula and Mubara'at*,[8] maintenance, dower, guardianship, gifts, trust 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).&uot;

It is not considered that the Shariat Act has the effect of repealing expressly or impliedly any enactment other than those specified in s. 6. The scope and purpose of s. 2 is to abrogate custom and usage in so far as these have displaced the rules of Mahomedan law.[9] Customary law as it obtains in East and West Punjab and elsewhere has been objected to on the ground of uncertainty of the expense of ascertaining it and also in that the rights granted to women thereunder are inadequate and in marked contrast the fuller rights recognized by the Mahomedan law. That a custom or usage has been recognized by the Courts will not save it; unless it has been embodied in an enactment, it will cease to have effect in respect of the matters mentioned in the section. The word *Shariat*[10] is used in the Act as a synonym for the Mahomedan Personal Law and the use of the word is not thought to import any variation; in particular, the Mahomedan law appropriate to each sect will be applied as mentioned in 30 (*infra*). The exclusion from the subject-matters specified in s. 2 of the Shariat Act, of agricultural land, charities, charitable institutions and charitable and religious endowments is explained by the fact that these subjects are within the competence of the State legislatures. The exception of agricultural land is very important as only a small proportion of the land in India can be excluded from this category, and the law as it stood before the passing of the Act must continue to be applied thereto. The exception is so expressed as to cut down the effect of all the subsequent words, e.g., if the question relates to agricultural land the Mahomedan law is not made the rule of decision in a question regarding gifts. The phrase &uot;where the parties are Muslims&uot; has been taken from the Civil Courts Acts--see *infra*. It may be noted as regards the provinces of Bengal, Agra and Assam that the Act (XII of 1887) made no provision for giving effect to custom in modification of the Mahomedan law and the Allahabad High Court refused to permit custom to be set up in variation of the revealed law[11] until in 1912 it was overruled on the point by the Judicial Committee.[12]

The Act does not purport to disturb settled transactions or to dispossess persons who lawfully obtained possession in the past. Whether it would be applied in cases which were pending at the commencement of the Act is doubtful.[13]

Intestate succession

Customs altering the Mahomedan law of intestate succession seem to be the chief grievance which the Act is designed to redress. The general rule of customary law is agnatic succession which excludes all females except a widow and daughter and these are allowed only a life interest or merely bare maintenance. This custom has the added inconvenience of being subject to many exceptions.[14] The custom of agnatic succession among Muslims prevails chiefly in Northern India, but in Western India the Act will abolish the customary law of succession according to Hindu law for Khojas, Cutchi Memons, Halai Memons and Sunni Bohras and Molasalam Girasias. In the case succession to a *tarwad* in Malabar, where the deceased belonged to a joint family which followed the custom of Hindu law in spite of being Muslims, it was held that if the custom was established, there would be no property left by the deceased which could devolve as on intestate succession and there would be no scope for the application of the Shariat Act; but if there is a property which could be the subject of intestate succession then any custom in derogation of the rules of Muslim Shariat Law, such as a custom which merely excludes females from inheritance and succession cannot be pleaded.[15] In Southern India it will abolish the law of succession of Moplas,[16]many of whom follow the Marumakhatayam law of matriarchal succession. On the other hand as the Act does not by implication repeal any Act not specified in s. 6, it will not affect the rule of succession by primogeniture enacted for some talukdari and zemindari estates. Nor will the Act affect the custom of succession to the office of Mutawalli of a wakf or *Sajjadanishin* of a *khanka*, for charitable and religious institutions are excluded from its scope, nor will it affect the operation of the provisions of s. 488 of the Code of Criminal Procedure with regard to maintenance.[17]

8 See Chapter XVI *infra*.

9 *Mahomed Aslam Khan v. Khalilul Rehman* (1947) 51 C.WN. 832, 231 I.C. 55, ('47) APC. 97.

10 The verb means literally begun, led, ordained, instituted, prescribed. Hence meaning of the noun include the way to the watering place, the path to be followed, code, divine law. It might be rendered in English as "The Way". It is a doctrine of duties and has a wider scope than the word "law" suggests. The word *Fiqh* which literally means "intelligence" is used to indicate the science of Muslim law. Both words carry a distinct religious implication. According to the Shafi jurists' definition *Shariat*, which may be translated as the Islamic Code, means "matters which would not have been known but for the communications made to us by the lawgiver". (Sir Abdur Rahim, Muhammadan Jurisprudence, p. 50).

11 *Jammya v. Diwan* (1900) 23 All. 20.

12 *Muhammad Ismail v. Lala Sheomukh* (1912) 17 Cal. W.N. 97, 15 Bom. L.R. 76, 18 I.C. 57 P.C.

13 See, However, *Syed Unnisa v. Rahimuthunissa* ('53) A.M. 445.

14 *Beg v. Alla Ditta* (1917) 44 Cal. 749, 44 I.A. 89, 38 I.C. 354, 19 Bom. L.R. 388.

15 *Mohammad Sandnu Khan v. Ratnam* ('58) A.M. 144.

16 *Puthiya Purayil Abdurahiman v. Thayath Kancheenavida* (1956) 1 M.LJ. 119.

17 *Badruddin v. Aisha Begum* (1957) All. LJ 300.

Special property of females

This probably refers to and abolishes a custom whereby property received by a female by inheritance or gift is not her special property but reverts to the heirs of the last male owner.[18]

18 *Muhammad v. Amir* (1889) P.R. 31; *Kann Din v. Umar Baksh* (1888) P.R. 3.

Marriage

The customary law of the East and West Punjab does not recognize the Mahomedan law as to *iddat*.

[19] This custom is abolished.

19 *Bhagwat Singh v. Mt. Santi* (1919) P.R, 102, 50 I.C. 654.

Dissolution of marriage, maintenance, dower

These subjects seem to have been included *ex majori cautela*or because they are specified in s. 5 of the Punjab Laws Act, 1872. The right of a Muslim wife to obtain a decree for the dissolution of her marriage is now governed by the Dissolution of Muslim Marriages Act, 1939 (see 323 to 332).

Guardianship

The Act will not affect the provisions of the Indian Majority Act, 1875, or of the Guardian and Wards Act, 1890.

Gifts, trusts and trust properties and wakfs

Gifts may have been included to abolish customs which restrict the power to make gifts to hon-agnates. For the same reason trusts and wakfs by way of family settlements are also included. It has been held that the effect of s. 2 is to make the Mussalman law expressly applicable to wakfs and the subjects enumerated therein which under the terms of previous Act s and Regulations had to be decided on principles of equity and good conscience. But there is nothing in the Shariat Act to affect the decisions of the Privy Council before the Wakf Validating Act of 1930 as those decisions expressly interpreted the Mussalman law in respect of wakfs.[20] But it is believed that gifts and family settlements of agricultural land will continue to be subject to customary law where that law has hitherto applied. However it has been held by the Patna High Court that after the Shariat Act of 1937, the Mahomedan law of gifts applies to non-agricultural property on account of s. 2 of that Act and to the agricultural land on the ground of justice, equity and good conscience.[21] In cases not affected by the exception to s. 2 of the Act the Mahomedan law of gifts is now applicable as such and not as the rule of justice, equity and good conscience. This will obviate the difficulty which was felt in the undernoted case[22]as regards applying s. 129 of the Transfer of Property Act . Public endowments are the subject of a number of enactments. (*see* 225, *infra*)

6(2) Section 3(1) of the Shariat Act is as follows:--

&uot;Any person who satisfies the prescribed authority--

(a) that he is a Muslim; and
(b) that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872 (9 of 1872); and
(c) that he is a resident of[23][the territories to which this Act extends],

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of the provisions of this section,[24] and thereafter the provisions of section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.&uot;

20 *Mohiuddin Ahmed v. Sofia Khatun* (1940) 2 Cal. 464, 44 C.W.N. 974, 192 I.C. 693. ('40) A.C. 501.

21 *Bibi Maniran v. Mohd. Ishaque* (1963) A.P. 229.

22 *Ma Asha v. B.K. Haldar* (1936) 14 Rang, 439, 164 I.C. ('36) A.R. 430.

23 Subs. by the Adaptation of Laws (No. 3) Order, 1956 for &uot;a Part A State or a Part C States.&uot;

24 Amended by s. 2 of the Muslim Personal Law (Shariat) Application (Amendment) Act, 1943.

Section 3 refers to adoption, wills and legacies

These cases depend not on the religion &uot;of the parties&uot; but on that of the individual whose family law is in question, i.e. the testator. Customs on these subjects which contravene the Mahomedan law are not invalidated; but any person affected may abandon the custom and adopt the Mahomedan law. Adoption is not recognized by Mahomedan law but there is a custom of a sort of adoption in East and West Punjab which is said to be the nomination of an heir.[25] Again in Sind a custom of adoption was set up by a tribe which was originally Hindu.[26] There is a custom in derogation of the Mahomedan law as to wills in East and West Punjab.[27]In Bombay, the Khojas can under their customary law dispose of the whole of their property by will. Until the passing of the Cutchi Memons Act (X of 1938) the Cutchi Memons also could dispose of the whole of their property by will. Now however, even with regard to testate succession they are governed by Mahomedan law (*see* 22). Section 2 of the Shariat Act is said to be &uot;coercive&uot; while section 3 is said to be &uot;persuasive.&uot; The power given by this section will in some cases meet the difficulty illustrated by the case[28] where an attempt to give up custom in favour of Mahomedan law was held to fail.

6(3) Section 5 of the Shariat Act which has been repealed by section 6 of the Dissolution of Muslim Marriages Act, 1939, was as follows:--

> &uot;5. The District Judge may, on petition made by a Muslim married woman, dissolve a marriage on any ground recognized by Muslim Personal Law (Shariat).&uot;

Section 5 of the Shariat Act in effect overruled the decision of the Calcutta High Court in the case of *Burhan Mirda v. Mt. Khodeja Bibi,* [29]that a suit for dissolution of marriage should be filed before a Munsiff or the Court of the lowest jurisdiction competent to try it, and confirmed the practice to file such suits in the District Court. Now that s. 5 has been repealed by s. 6 of the Dissolution of Muslim Marriages Act, 1939, the authority of this case has been revived, and a suit for dissolution will have to be filed under the provisions of the Civil Procedure Code, 1908, that is, in the Court of the lowest jurisdiction competent to try it. (For the provisions of the Dissolution of Muslim Marriages Act (VIII of 1939)*see* 323 to 333).

6(4) Section 6 of the Shariat Act is as follows:--

&uot;The undermentioned provisions[30] of the Acts and Regulations mentioned below shall be repealed in so far as they are inconsistent with the provisions of this Act, namely:--

(1) Section 26 of the Bombay Regulation IV of 1827;
(2) Section 16 of the Madras Civil Courts Act, 1873 (3 of 1873);
(3) [31] [* * *]
(4) Section 3 of the Oudh Laws Act, 1876 (18 of 1876);
(5) Section 5 of the Punjab Laws Act, 1872 (4 of 1972);
(6) Section 5 of the Central Provinces Laws Act, 1875 (20 of 1875); and

(7) Section 4 of the Ajmere Laws Regulation, 1877 (Regn. 3 of 1877).&uot;

25 *Nur Muhammad v. Bhawan Shah* (1936) 17 Lah. 96, 162 I.C. 854, ('36) A.L. 465.

26 *Usman v. Asat* ('25) A.S. 209.

27 *Rahim Baksh v. Umar Din* (1915) P.R. 9.

28 *Sardar Bibi v. Haq Nawaz Khan* (1934) 15 Lah. 425, 149 I.C. 575, ('34) A.L. 371.

29 (1937) 2 Cal. 79, 41 Cal. W.N. 314, 65 Cal. L.J. 21, 168 I.C. 639 (37) A.C. 189.

30 Amended by s. 3 of the Muslim Personal Law (Shariat) Application (Ahmedabad) Act, 1943.

31 For the purpose of reviving the operation of s. 37 of the Bengal, Agra and Assam Civil Courts Act, 1897, entry (3) has been omitted by s. 3 of the Muslim Personal Law (Shariat) Application (Amendment) Act, 1943.

Section 6

It will be noticed that the Civil Courts Acts or their equivalent in the various States are only repealed *sub modo*--in effect only in so far as they permit custom to override the Mahomedan law in cases where the parties are Muslims and the question is one regarding the matters specified in ss. 2 and 3 of the Act . It is, therefore, still necessary to consider the various Acts in detail.

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CHAPTER I

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7.

Mahomedan law in Presidency-towns

(1) As to the Presidency-towns of Calcutta, Madras and Bombay, s. 223 of the Government of India Act,1935 (26 Geo. V.c.2) enacts that the law to be administered shall be the same as before the commencement of Part III of the Act.[32]That is the law in s. 112 of the Government of India Act, 1915 (5 & 6 Geo. V. c.61) which is as follows:--

&uot;The High Courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and, when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject.&uot;

The effect of this section is that the law to be applied in the matters aforesaid is the Mahomedan law if both parties are Mahomedans. Similarly, when a dealing takes place between two parties of whom one is a Hindu and the other a Mahomedan, and a suit is brought in respect of that dealing by the Hindu against the Mahomedan, the dispute

between them is to be decided according to the Mahomedan law.[33] But that law cannot be applied in either case if it has been altered or abolished by legislative enactment (*see* notes below).

(2) The law to be applied by the Presidency Small Causes Courts is the same as that administered for the time being by the High Courts in the exercise of their ordinary original civil jurisdiction; (*see*Presidency Small Cause Courts Act XV of 1882, s. 16).

Custom

Most customs have been abolished by the Shariat Act, 1937.

32 See now Art. 225 of the Constitution of India .

33 *Azim Un-Nissa v. Dale* (1871) 6 Mad. H.C. 455, 475; West and Buhler's Digest of Hindu Law, p. 6.

Earlier statutes

Provisions similar to those in 7(1) were contained in the East India Company Act, 1780, s. 17 [21 Geo.3, ch.70], which applied to the Supreme Court at Calcutta, and the East India Act, 1797, s. 13 [37 Geo.3, ch. 142], which applied to the Recorder's Courts at Madras and Bombay. These Acts as well as the High Courts Act s of 1861, 1865 and 1911 have been repealed and re-enacted by the Government of India Act of 1915. But the repeal does not affect the validity of any charter or letters patent under those Acts [Government of India Act, 1915, s. 130]. (*See* now Art. 225 of the Constitution of India).

Law to be administered in cases of inheritance, succession, contract and dealing between party and party

The law as enacted in s. 112 of the Government of India Act, was subject to alteration by the Indian Legislature. This was so enacted in s. 131 of that Act (replacing s. 22 of the India Councils Act, 1861) and was enacted in s. 223 of the Government of India Act, 1935. In fact the Mahomedan law of contract has been almost entirely superseded by the Indian Contract Act, 1872, and other enactments, and this was done in the exercise of the power given to the Governor General in Council by the India Councils Act, 1861. The latter Act has been repealed and to a large extent re-enacted by the Government of India Act of 1915.[34]As regards interest, it is doubtful whether the Mussalman rule prohibiting usury has been repealed by the Usury Laws Repeal Act 28 of 1855.[35] The point arose in a Privy Council case, but it was not decided.[36](*see*s. 65 of the Government of India Act of 1915, and cls. 19 and 44 of the letters patent of the High Courts for Calcutta, Madras and Bombay.)

34 See *Madhub Chunder v. Rajcoomar* (1874) 14 B.L.R. 76; *Nobin Chunder v. Romesh Chunder* (1887) 14 Cal. 781.

35 *Ram Lal v. Haran Chandra* (1869) 3 B.L.R. 130, 134(O.C.) [not abrogated]; *Mia Khan v. Bibijan* (1870) 5 B.L.R. 500 [abrogated].

36 *Hamira Bibi v. Zubaida Bibi* (1916) 43 I.A. 294, 300, 38 All. 581, 587-588, 36 I.C. 87.

Law to which the defendant is subject

It is provided by the latter portion of s. 112 of the Government of India Act of 1915, that when the

parties are subject to different personal laws, the dispute between them is to be decided according to the law to which the defendant is subject. But these words do not mean this, that where a Hindu purchases land from a European which is subject to his wife's claim for dower, and a suit is brought by the wife against the Hindu purchaser to enforce her right, the Hindu purchaser can resist her claim on the ground that the Hindu law does not recognize dower. The Hindu purchaser is in no better position than a European purchaser would be, simply because the Hindu law recognizes no rule of dower.[37]

37 *Sarkies v. Prosonomyee* (1881) 6 Cal. 794, 805-806 [21 Geo. 3, Ch. 70, s. 17] See also *Azim UnNissa v. Dale,* (1871) 6 Mad. H.C. 455, 474-475 [37 Geo 3, Ch. 142, s. 13]; *Lakshmandas v. Dasrat* (1880) 6 Bom. 168, 183-184; *Mahomed v. Narayan* (1916) 40 Bom. 358, 363, 368, 32 I.C. 939.

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8.

In West Bengal, Bihar, Agra and Assam

As to these territories except such portions of those territories as for the time being are not subject to the ordinary civil jurisdiction of the High Courts, it is enacted that the Civil Courts of those States shall decide all questions relating to &uot;succession, inheritance, marriage or any religious usage or institution,&uot; by the Mahomedan law in cases where the parties are Mahomedans, except in so far as such law has, by legislative enactment, been altered or abolished. In cases not mentioned above nor provided for by any other law for the time being in force the decision is to be according to justice, equity and good conscience.

This is the substance of the Bengal, Agra and Assam Civil Courts Act XII of 1887, s. 37, as read with the Bengal and Assam Laws Act, 1905, s s. 2 and 3.

Law after the Shariat Act, 1937

The Shariat Act, 1937, which invalidates customs in derogation of the Mahomedan law had by s. 6(3) repealed this section so far as it was inconsistent with its provisions. The section makes no reference to custom, but it had been construed by the Privy Council as subject to proof of family custom at variance with the Mahomedan law.[38]This construction of the section is no longer admissible except as to customs (e.g., affecting agricultural land) to which the Act does not apply. Section 37 of the Bengal, Agra and Assam Civil Courts Act is in no way inconsistent with the provisions of the Shariat Act, and therefore sub-s. (3) of s. 6 of that Act was not necessary. Sub-section (3) has, therefore, been omitted by the Amending Act XVI of 1943. (*see* 6 *supra*)

38 *Muhammad Ismail v. Lala Sheomukh* (1913) 15 Bom. L.R. 76, 17 Cal. W.N. 97, 18 I.C. 571P.C.

Law before the Shariat Act, 1937

The section makes no reference to custom and in an old Allahabad case it was construed as

excluding evidence of custom.[39] But since the decision of the Privy Council referred to in the last paragraph it was construed as subject to proof of family custom in suppersession of the Mahomedan law.[40] The custom must be ancient and reasonable and the burden of proof lies upon the party who set up the custom.[41] It may be proved by instances or by the *wajib-ul-arz or riwaz-i-am* but cannot be enlarged by parity of reasoning.[42] As to the evidentiary value of a *wajib-ul-arz*[43] or *riwaz-i-am*[44] (*see* the undermentioned cases.)

39 *Jammya v. Diwan* (1900) 23 All. 20.

40 *Ali Asghar v. Collector of Bulandshahr* (1917) 30 All. 574, 40 I.C. 753; *Mt. Jaffro v. Chatta* (1936) All. L.J. 493, 163 I.C. 650, ('56) A.A. 443; *Roshan Ali Khan v. Chaudhri Asghar Ali* (1930) 57 I.A. 29, 5 Luck. 70,121 I.C. 517, ('30) A.P.C. 35 (an Oudh case.).

41 *Abdul Hussein v. Sona Dero* (1918) 45 I.A. 10, 45 Cal. 450, 43 I.C. 306 approving *Daya Ram v. Sohel Singh* (1906) P.R. 110.

42 *Muharram Ali v. Barkat Ali* (1931) 12 Lah. 286, 125 I.C. 886, ('30) A.L. 695.

43 *Uman Parshad v. Gandharp Singh* (1887) 14 I.A. 127; *Balgobind v. Badri Prasad* (1923) 50 I.A. 196, 45 All. 413, 74 I.C. 449, ('23) A.P.C. 70; *Roshan Ali Khan v. Chaudhri Asghar Ali, supra* .

44 *Beg v. Allah Ditta* (1914) 44 I.A. 89, 44 Cal. 749, 38 I.C. 354; *Ahmad Khan v. Channi Bibi* (1925) 52 I.A. 379, 6 Lah. 502, 91 I.C. 455, ('25) A.P.C. 267; *Vaishno Ditti v. Rameshri* (1928) 55 I.A. 407, 10 Lah. 86, 113 I.C. 1, 49 C.LJ. 38. ('28) A.P.C. 294; *Kunwar Basant Singh v. Kunwar Brij Raj Saran Singh* (1935) 621 A. 180, 193, 57 All. 494, 156 I.C. 864. ('35) A.P.C. 132.

Justice, equity and good conscience

For the previous history of this provision cf. Field's Regulations of the Bengal Code, pp. 109-117.

On a question whether a Hindu talukdar was bound to pay a debt contracted by his guardian on his account it was said by Lord Hobhouse:--

&uot;In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India&uot;.[45] In the case of a Muslim lady's transfer for consideration with a partial restraint on alienation Sir George Lowndes referred to this passage and held the restraint was valid though not in exclusive reliance upon English law.[46] On the other hand the Mahomedan law is applied in cases of preemption as the rule of justice, equity and good conscience--see Chapter XIII below. Again in cases of gifts in States where the Legislature has not expressly applied the Mahomedan law to gifts that law has been restored to as regards gifts made by Muslims both before[47] and after[48]the Transfer of Property Act took effect. This application of Mahomedan law can only be put on the ground of justice, equity and good conscience;[49] though at one time a contrary opinion was entertained by individual judges.[50]

45 *Waghela v. Sheikh Masludin* (1887) 11 Bom. 551, 561, 14 I.A. 89, 96.

46 *Muhammad Raza v. Abbas Bandi Bibi* (1932) 59 I.A. 236; 137 I.C. 321. ('32) A.P.C. 138.

47 *Kamar-Un-Nissa Bibi v. Hussaini Bibi* (1880) 3 All. 266; *Mogulsha v. Muhammad Sahib* (1887) 11 Bom. 517; *Mahomed Buksh Khan v. Hosseini Bibi* (1888) 15 Cal. 684.

48 *Karan Ilahi v. Sharf-ud-din* (1916) 38 All 212, 35 I.C. 14; *Bava Sahib v. Mahomed* (1896) 19 Mad. 343; *Vahazullah Sahib v. Boyapati Nagayya* (1907) 30 Mad. 519; *Nasib Ali v. Wajed Ali* (1927) 44 Cal. L.J. 490, 100 I.C. 296 ('27) AC. 197; *Sultan Miya v. Ajibakhatoon Bibi* (1932) 59 Cal. 557. 138 I.C. 733. (32) AC. 497.

49 *Alabi Koya v. Mussa Koya* (1901) 24 Mad. 513 and *Vahazullah Sahib v. Boyapati Nagayya* (1907) 30 Mad. 519

where the principle was fully discussed though with different results.

50 *Gobind Dayal v. Inayatullah* (1885) 7 All. 775.

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9.

In the Mufassal of Madras

As to the Mufassal of Madras, it is enacted by the Madras Civil Courts Act III of 1873, s. 16, that all questions regarding &uot;succession, inheritance, marriage,. or any religious usage or institution&uot; shall be decided, in cases where the parties are Mahomedans, by the Mahomedan law or by*custom* having the force of law, and in cases where no specific rule exists, the Courts shall act according to justice, equity and good conscience.

Law after the Shariat Act, 1937

The provisions of this section as to custom have been repealed by the Shariat Act, 1937, so far as they are inconsistent with that Act . By Act 18 of 1949 the Madras State has made the Shariat Act applicable to agricultural land. Consequently, the widow of a member of a *Tarwad* is entitled to inherit under Muslim law the share of her husband in the *Tarwad* property.[51]

51 *Ayisumma v. Mayomoothy Umma* (1952) 2 Mad. L.J. 933. ('53) A.M. 425.

Law before the Shariat Act, 1937

Before the Shariat Act the section was applied in a Madras case in which a custom excluding females of the Lubbai Mahomedans of Coimbatore was held not proved.[52]

52 *Muhammad v. Shaikh Ibrahim* (1922) 49 I.A. 119. 45 Mad. 308, 67 I.C. 115. ('22) A.P.C. 59.

Justice, equity and good conscience

See notes to 8 above.

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10.

In the Mufassal of Bombay

As to the Mufassal of Bombay, it is enacted by the Bombay Regulation IV of 1827, s. 26, that "the law to be observed in the Trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Act s and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone."

Not a single topic of Mahomedan law is expressly mentioned in this section. The Mahomedan law that is applied to Mahomedans by Courts in the Mufassal of Bombay is applied presumably as the law of the defendant.[53]

Law after the Shariat Act, 1937

The provisions of s. 26 of the Bombay Regulation (IV of 1827) have been repealed by the Shariat Act, 1937 so far as they are inconsistent with the Shariat Act, 1937. Evidence of usage of the country is therefore inadmissible to prove a custom contrary to the Mahomedan law, unless it is in respect of agricultural land or other matter outside the Act, (*see* 6).

53 *See Musa Miya v. Kadar Bux,* (1928) 55 I.A. 171, 52 Bom. 316, 109 I.C. 31, ('28) A.P.C. 108 explained in *Ma Asha v. B.K. Haldar* (1936) 14 Rang. 439. 164 I.C. 984, ('36) A.R. 430.

Law before the Shariat Act, 1937

Before the Shariat Act it was held that though usage is mentioned in the Regulation before the law of the defendant, there is no presumption in favour of custom. It must be proved that the matter is governed by custom and not by personal law. Evidence may be given under this section of a custom excluding women from any share in the inheritance of a paternal relation.[54] The High Court of Bombay gave effect to a usage prevailing in the State of performing rites and ceremonies at the graves of deceased Mahomedans, and granted an injunction at the suit of the Mahomedan residents of Dharwar restraining the purchaser of a graveyard from obstructing them in performing religious ceremonies at the graveyard.[55]

54 *Abdul Hussein v. Sona Dero* (1918) 45 Cal. 450, 45 I.A. 10, 43 I.C. 306.

55 *Ramrao v. Rastumkhan* (1901) 26 Bom. 198.

Mulla: Mahomedan law, Updated 20th edition/CHAPTER I INTRODUCTION OF MAHOMEDAN LAW INTO INDIA/11. In the East Punjab

CHAPTER I

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11.

In the East Punjab

As to the East Punjab it is enacted by the Punjab Laws Act IV of 1872, s s. 5 and 6, as follows:--

&uot;5. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions or any religious usage or institution, the rule of decision shall be--

(1) any custom applicable to the parties concerned which is not contrary to justice, equity or good conscience and has not been, by this or any other enactment, altered or abolished, and has not been declared to be void by any competent authority;
(2) the Mahomedan law, in cases where the parties are Mahomedans,. except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of the Act, or has been modified by any such *custom* as is above referred to.

&uot;6. In cases not otherwise specially provided for, the Judges shall decide according to justice, equity and good conscience.&uot;

Law after the Shariat Act, 1937

The Shariat Act repeals s. 5 of the Punjab Laws Act, 1872, in so far as it is inconsistent with its provisions. Evidence of custom contrary to the Mahomedan law is therefore not admissible on questions of succession, special property of females, marriage, divorce, dower, adoption, guardianship and gifts. As to agricultural land the law remains as declared in the Punjab Act . (*see* 6.) In the matter of wills and legacies a Mahomedan is given by s. 3 of the Shariat Act the option of remaining under the customary law or of adopting the Mahomedan Law. The Shariat Act is retrospective.[56]

56 *Ata Mohammad v. Mohammad Shafi,* (1944) 217 I.C. 17, ('44) A.L. 121.

Law before the Shariat Act, 1937

Before the Shariat Act, evidence was admissible to prove a custom contrary to the Mahomedan law. This will appear from the following paragraphs:

Custom

This subject was considered by the Judicial Committee under these enactments in *Abdul Hussein v. Sona Dero* [57] and *Vaishno Ditti v. Rameshri* .[58] In the latter case it was said:

> &uot;In putting custom in the forefront, as the rule of succession, whilst leaving the particular custom to be established, as it necessarily must be, the Legislature intended to recognise the fact that in this part of India inheritance and other matters mentioned in the section are largely regulated by a variety of customs which depart from the ordinary rules of Hindu and Mahomedan law. In these circumstances it has been rightly held by the Lahore Court [*Daya Ram v. Sohel Singh* (1906) P.R. 110] that, where a custom is alleged, a duty is imposed on the Courts to endeavour to ascertain the existence and nature of that custom&uot;.

Abrogation of custom

The abrogation of custom in favour of Mahomedan law may be inferred from a continuous course of conduct. But an individual cannot by a mere declaration abolish a long established custom.[59]

Invalid custom

As regards Mahomedans, prostitution is not looked upon by their religion or their laws with any more favourable eye than by the Christian religion and laws. Accordingly the Chief Court of the Punjab refused to recognize a custom of the Kanchans which aimed at the continuance of prostitution as a family business, and the decision was upheld by the Privy Council on appeal.[60](*see* notes to 8 above)

Custom of Succession

The ordinary rules of Mahomedan law may be varied by proof that succession in a particular family is regulated by the custom of *stribant*[61] according to which the sons of each wife fall into a separate group, taking an equal share. But this does not necessarily involve that in cases of collateral succession arising in respect of a property so obtained from a common ancestor the full blood excludes the half blood, nor that the sons of each wife and their descendants are constituted separate stocks for purposes of inheritance, and in any case the custom of *stribant* has no application to a case where the choice of heirs lies between persons of different degrees. The general law must apply except in so far as the custom alters it.[62]

But in East and West Punjab customary law there is a distinction between the *Pagwand* and *Chundawand*[63] customs: under the former the division among sons is *per capita* and each son takes an equal share; under the latter the sons of each wife divide an equal share (as in the *stribant* custom above-mentioned). In these customs however is involved the principle that the portion allotted to a group should belong as an entirety to the members who for the time being form or represent the group until the group is extinct. This means in effect that the half blood cannot compete with the whole blood. Even if the property of the common ancestor was distributed on the *Pagwand* system, separate possession of a specific portion having been held by the sons of one wife, the *Pagwand* rule though it applies, is to be applied within the family of that wife's children.[64]

Justice equity and good conscience

See notes to 8 above.

57 (1917) 45 I.A. 10, 45 Cal. 450, 43 I.C. 306.

58 (1928) 55 I.A. 407, 421, 10 Lah. 86, 113 I.C. 1, 49 Cal. L.J. 38, ('28) A.P.C. 294.

59 *Sardar Bibi v. Haq Nawaz Khan* (1934) 15 Lah. 425, 149 I.C. 575, ('34) A.L. 371; *Rajkishen Singh v. Ramjoy Mazoomdar* (1872) 1 Cal. 186PC .

60 *Ghasiti v. Umrao Jan,* (1893) 21 Cal. 149, 156, 20 I.A. 193.

61 From *stri*, a woman.

62 *Karamat Ali v. Sadat Ali,* (1933) 8 Luck. 228, 141 I.C. 27, ('33) A.O. 4.

63 From *chunda* the knot of hair on a woman's head.

64 *Nabi Baksh v. Ahmed Khan,* (1924) 51 I.A., 199, 5 Luck. 278, 80 I.C. 158, ('24) A.P.C. 117.

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12.

In Ajmer-Merwara

The provisions of the Ajmer-Merwara Laws, Regulation III of 1877, ss. 4 and 5, are almost to the same effect as the Punjab Laws Act IV of 1872 (*see* 11 above).

Law after the Shariat Act, 1937

The Shariat Act repeals s. 4 of the Ajmere Laws Regulation, 1877, in so far as it is inconsistent with its provisions. It affects the law under the Regulation in the same way as in the East Punjab. (*See* 11, *supra*.)

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13.

In Oudh

The provisions of the Oudh Laws Act XVIII of 1876, s. 3, as regards the law to be administered in the case of Mahomedans are the same as in the East Punjab.

Law after the Shariat Act, 1937

The Shariat Act repeals s. 3 of the Oudh Laws Act in so far as it is inconsistent with its provisions. It affects the law in Oudh in the same way as in the East Punjab, (*see* 11 *supra*). A case decided under section 3 before the Shariat Act is *Roshan Ali Khan v. Chaudhri Asghar Ali* .[65]

65 (1930) 57 I.A. 29, 5 Luck. 70, 121 I.C. 517, ('30) A.P.C. 35.

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14.

In Madhya Pradesh

As to Madhya Pradesh, it is enacted by the Central Provinces Laws Act XX of 1875, s. 5, as follows:--

&uot;In questions regarding inheritance,. betrothal, marriage, dower,. guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be the Mahomedan law in cases where the parties are Mahomedans. except in so far as such law has been by legislative enactment altered or abolished, or is opposed to the provisions of this Act :

&uot;Provided that, when among any class or body of persons or among the members of any family any *custom* prevails which is inconsistent with the law applicable between such persons under this section, and which, if not inconsistent with such law, would have been given effect to as legally binding such custom shall, notwithstanding anything herein contained, be given effect to.

In cases not provided for [by the above clause], or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience.&uot;

Law after the Shariat Act, 1937

The Shariat Act, 1937, repeals s. 5 of the Central Provinces Laws Act, 1875, in so far as its provisions are inconsistent with it. It affects the law in Madhya Pradesh in the same way as in the Punjab. (*see* 11)

Custom

Among the Mewatis of former Madhya Bharat a custom of exclusion of females from inheritance will be applied if it can be proved.[66]

66 *Hooriya v. Munna* ('56) A. Madh. Bh. 56.

Justice, equity and good conscience

See notes to 8 above. *See* also 5 and 50.

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15.

In Sind and Orissa

By s. 289 of the Government of India Act, 1935, establishing Sind and Orissa as new provinces it was provided [sub-sec, 2 (c)] that an order in Council might contain (*inter alia)*:--

(c) such provisions with respect to the laws which subject to amendment or repeal by the Provincial, or as the case may be, the Federal Legislature, are to be in force in, or in any

part of, Sind or Orissa respectively, as His Majesty may deem necessary or proper.

The Orders in Council (dated 3rd March 1936 and numbered 1936 No. 164 and No. 165) do not effect any change as regards Mahomedan law.

Before the creation of this province by the Government of India Act, 1935, Bombay Regulation IV of 1827 applied to Sind and the Bengal, Agra and Assam Civil Courts Act, 1897 to Orissa. The new province became subject to the Shariat Act, 1937 after its enactment.

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16.

In Hyderabad

In the former Hyderabad State area it is not open to a Mahomedan to set up and lead evidence of a custom which is at variance with, or against the principles of Mahomedan law. There is no exception to this rule in respect of any kind of property, such as *atiyat* or *jagirs*.[67]

It was held by the Supreme Court in *Noorbanu v. Dep. Custodian General, E.P.,* [68] that where Khojas had migrated to Hyderabad from an area in which they were governed by custom by Hindu law, after migration to Hyderabad it was incompetent to them to plead a custom which was at variance with Mahomedan law.

All the principles of Mahomedan law relating to succession apply to *atiyat* (grant) property as well; the only departure being that contained in Regulation 6(8) of the Hyderabad Abolition of Jagirs Regulation (No. LXIX of 1358F).[69]

67 *Jahandarunnisa Begum v. Mohd. Mohiuddin* (1953) Hyd. 78. ('53) A.H. 117.

68 ('65) A.S.C. 1937.

69 *Mushtaq Husain v. Syed Husain* (1959) 2 Andh. W.R. 487.

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CHAPTER I

INTRODUCTION OF MAHOMEDAN LAW INTO INDIA

17.

Applicability of Mahomedan law to gifts

Apart from the Shariat Act s, the effect of the enactments summarized above is to apply the Mahomedan law expressly to gift in East and West Punjab, Madhya Pradesh, the N.-W. Province,

Ajmer-Merwara and Oudh. It is also applied as the law of the parties or of the defendant in the Presidency-towns, the Courts of Rangoon and the Mufassal of Bombay. But it has not been applied to gifts in Bengal, Bihar, Agra, Madras, Assam or Burma. Nevertheless as above mentioned,[70]the Courts of certain of these States have, notwithstanding s. 123 of the Transfer of Property Act, applied the Mahomedan law to gifts[71]as the rule of justice, equity and good conscience, on the view that s. 129 of the Transfer of Property Act rendered the provisions of s. 123 inapplicable. A Full Bench of the Rangoon High Court have held that this is an erroneous assumption. The reason for this decision is as follows:--Mahomedan law was applied to gifts in Burma not as a rule of Mahomedan law but as a rule of justice, equity and good conscience; there was therefore no rule of Mahomedan law to be saved by s. 129; that section does not operate to save a rule of justice, equity and good conscience; therefore s. 123 applies to gifts in Burma.[72] It may be contended in support of the older view (and of titles dependent thereon) that the Rangoon High Court has taken too narrowly the words of s. 129 "affect any rule of Mahomedan law"; and that the statute was not intended to operate differently from State to State upon the Mahomedan law according as that law was applied as being, e.g., the law of the parties or as the rule of conscience applicable to the case. As to the effect of the Shariat Act, (*see* 6).

Before the Transfer of Property Act was applied to Burma, a notification was issued applying in a district of Burma s. 123 of the Transfer of Property Act alone without also applying s. 129. The Privy Council assumed that the Mahomedan law applied to gifts in Burma and held that though s. 129 was not applied that law was not abrogated by the application of s. 123. The effect attributed to the notification was to superimpose the requirements of s. 123 as to deed registered and attested upon the Mahomedan law requirement as to delivery of possession.[73]The notification was superseded by subsequent notifications applying the whole Act to Burma.

70 See note "Justice, equity and good conscience" under s. 5,*supra*.

71 *Karam Illahi v. Sharaf-ud-din,* (1916) 38 All. 212, 35 I.C 14; *Bava Sahib v. Mohamed,* (1896) 19 Mad. 343; *Vahazullah Sahib v. Boyapati Nagayya* (1907) 30 Mad. 519; *Nasib Ali v. Wajed Ali* (1927) 44 Cal. L.J. 490, 100 I.C. 296, ('27) A.C. 197; *Sultan Miya v. Ajibakhatoon Bibi* (1932) 59 Cal. 557, 138 I.C. 733, ('32) A.C. 497.

72 *Ma Asha v. B.K. Haldar,* (1936) 14 Rang. 439, 164 I.C. 984, ('36) A.R. 430.

73 *Ma Mi v. Kallandar Ammal,* (1927) 54 I.A. 23, 5 Rang. 7, 100 I.C. 32, ('27) A.P.C. 22, *N.B.*--In this case there was a registered deed and no question arose as to compliance with s. 123. But it is thought that the effect of the decision is as stated in the text, though that was doubted by Mosley, J., in 14 Rang. 439, *supra* at p. 445, where the words in brackets ("or rather tried to effect") appear to have been added to the Privy Council judgment by mistake.

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CHAPTER I

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18.

Before the merger of Cooch-Behar and before it became as a result of such merger one of the districts of West Bengal, the Mahomedan subjects of Cooch Behar State were being governed by the Hindu Law in matters of inheritance. According to the provisions of the Mahomedan Inheritance Act (II of 1897) which came into force on 1st April, 1897, any Mahomedan subject to Cooch-Behar State desiring to be governed by the Mahomedan Law was required to make a declaration in the manner provided in that Act, that he desired to be governed by the Mahomedan Law in matters of inheritance. On such declaration being made, in the manner prescribed, the declarant would thenceforth continue

to be governed by the Mahomedan Law of inheritance and would cease to be governed by the Hindu Law of inheritance, notwithstanding any custom to the contrary. If there was no such declaration under the provisions of the Act II of 1897 the Mahomedan who was a subject of the State of CoochBehar or the estate left by him did not come to be governed by the Mahomedan Law of inheritance.

Held that, on 26th February, 1978, on which date the Mahomedan subject of Cooch-Behar died, the deceased continued to be governed by the Hindu Law, and in a suit filed by him, the question of substitution in his place, on his death pending suit was to be determined in accordance with the Hindu Law of inheritance inasmuch as the deceased had not made a declaration as required under the provisions of the Mahomedan Inheritance Act (1897) to the effect that he desired to be governed by the Mahomedan Law in matters of inheritance.

Held,further, that despite the provisions of sub-s.(l) of s. 3 of the Cooch-Behar (Assimilation of Laws) Act, 1950 (Act LXVII of 1950) which came into force on 1st January, 1951, the Muslim Personal Law (Shariat) Application Act, 1937, also did not apply to the Mahomedan subjects of Cooch-Behar district till 1st July, 1980 which was the date appointed by tne State Government by a Notification under sub-s.(2) of s. 3 of the Act (LXVII of 1950) on which date the Mahomedan Inheritance Act, 1897, ceased to be in force and the Muslim Personal Law (Shariat) Application Act, 1937 came into force in Cooch-Behar.[74]

74 *Anisur Rahaman v. Jalilar Rahaman.* A.I.R. 1981 Cal. 48 [D.C. Chakravorti, J.].

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CHAPTER I

INTRODUCTION OF MAHOMEDAN LAW INTO INDIA

18A.

Where the question was whether the parties who belong to Kamboj community are primarily agricultural tribe or not.

Held that there is no legal and acceptable evidence on the record to prove that Kambojs of Malerkotla State are not an agricultural community. It is proved that Kambojs are pre-dominantly an agricultural tribe and are governed by custom in the matter of inheritance.[75]

75 *Babu v. Mst Halima,* (1983) 85 Punj. L.R. 335 [J.V. Gupta, J.].

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CHAPTER II

CONVERSION TO MAHOMEDANISM

19.

Who is a Mahomedan

Any 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.[1] Such a person may be a Mahomedan by birth or he may be a Mahomedan by conversion.[2] It is not necessary that he should observe any particular rites or ceremonies, or be an orthodox believer in that religion; no Court can test or gauge the sincerity of religious belief.[3] It is sufficient if he professes the Mahomedan religion in the sense that he accepts the unity of God and the prophetic character of Mahomed.

"If one of the parents of an infant be a believer, the construction of law is in favour of the Islam of the infant"; Baillie, II, 265 (Shia law); *Hedaya*, 64 (Sunni law), But this presumption may be rebutted by general conduct and surrounding circumstances. Thus an illegitimate son of a Hindu by a Mahomedan woman, who is brought up as a Hindu and married to a Hindu girl in the Hindu form of marriage, may well be regarded as a Hindu, though his mother was a Mahomedan.[4]

A person born a Mahomedan remains a Mahomedan until he renounces the Mahomedan religion.[5] The mere adoption of some Hindu forms of worship does not amount to such a renunciation.[6]

1 *Narantakat v. Prakkal* (1922) 45 Mad. 986, 71 I.C. 65, ('23) AM'. 171 [Ahmadees are not apostates from Islamism]; *Hakim Khalil v. Malik Israfi* (1917) 2 Pat. L.J. 108, 37 I.C. 302 [Ahmadees are not apostates from Islamism]: Ahmadiyas are only a reformed sect of Mahomedans. Although they regard Mirza Gulam Ahmad as a Prophet they are not apostates only because they do not accept that Mahomed was the 'last' Prophet. Since they believe in the oneness of God and the prophethood of Mahomed, they must be regarded as Mahomedans. *Shihabuddin Imbichi Koya Thangal v. Ahammed Koya* ('71) A.K. 206; *Queen-Empress v. Ramzan* (1885) 7 All. 46l; *Ata-Ullah v. Azim-Ullah* (1890) 12 All. 494; *Jiwan Khan v. Habib* (1933) 14 Lah. 518, 144 I.C. 658, ('33) A.L. 759. Pakistan: *Atia Waris v. Sultan Ahmad Khan* ('59) P. Lah. 205.

2 *Abraham v. Abraham* (1863) 9 Moo. I.A. 199, 243.

3 *Abdool Razack v. Aga Mahomed* (1894) 21 I.A. 56, 64.

4 *Bhaiya Sher Bahadur v. Bhaiya Ganga Bakhsh Singh* (1914) 41 I.A. 1, 36 All. 101, 22 I.C. 293.

5 *Bhagwan Bakhsh v. Drigbijai* (1931) 6 Luck. 487, 132 I.C. 779, ('31) A.O. 301.

6 *Azima Bibi v. Munshi Samalanand* (1912) 17 C.W.N. 121, 40 Cal. 378, 17 I.C. 758.

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CHAPTER II

CONVERSION TO MAHOMEDANISM

20.

Conversion to Mahomedanism and marital rights

(1) 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 s. 494 of the Indian Penal Code .[7]

(2) In *Skinner v. Orde* ,[8] a Christian man, married to a Christian wife, declared himself a Mahomedan, and went through a ceremony of marriage with another woman. The Privy Council agreed with the High Court in thinking that the marriage was of doubtful validity. The Calcutta High Court has held that where an Indian Christian domiciled in India and

married to an Indian Christian also domiciled in India embraces the Islamic faith, he may enter into a valid contract of marriage with a Mahomedan woman, though the first marriage with the Christian wife subsists.[9]

In *Khambatta v. Khambatta* ,[10] a Mahomedan married a Christian woman in Christian form. The wife became a convert to the Mahomedan religion and the husband divorced her by talak. The Bombay High Court held that on the wife renouncing Christianity the *lex domicilii* applied the law of their religion and that the divorce was valid.

See 321, &uot;Apostasy from Islam&uot;.

(4) According to Muslim law a distinction is made between conversion to Islam of one of the spouses when such conversion takes place:
(1) in a country subject to Muslim law, and
(2) in a country where the law of Islam is not the law of the land.

In the first case, when one of the parties embraces Islam, he or she should offer Islam to the other spouse, and if the latter refuses the marriage can be dissolved. In the second case the marriage is automatically dissolved after the lapse of a period of three months after the adoption of Islam by one of the spouses. This, however, is not the law in India. In India the spouse who has embraced Islam cannot file a suit for divorce or for a declaration that the marriage is dissolved against the spouse who refuses to embrace Islam.[11]

It is well settled that even in International Law, a wife on her marriage, acquires the nationality of her husband, unless the Municipal Law prevents such an acquisition. In this case the petitioner who was originally a Hindu embraced Islam and married a Muslim. By reason of such marriage which is recognised by Muslim Law, she became a Muslim. In practice and in reality, at any rate in this part of the country, Muslims are classified on the basis of the community.

That is obvious from the list of the backward classes prepared by the Government of Tamil Nadu containing the name of Labbai, which is a community of Muslims. On the same principle it stands to reason that a wife must belong not only to the religion to which her husband belongs but to the community as well. If therefore, this statutory principle is adopted that by marriage from one community into another within the same religion or in the Hindu Religion or from one religion to another the husband's community alone is to prevail. The revised view of the Government that by marriage alone a forward community person could not be considered as a backward community candidate and that by changing religion the petitioner in the instant case,who was a member of a forward community, had become a Muslim had not because a Labbai Muslim, a backward class and she was not entitled to the benefit given to backward classes, was wrong. Of course, if the case on hand happens to be the reverse it would be different. The golden rule appears to be, it is the community or the religion to which the husband belongs that should matter.[12]

7 *Government of Bombay v. Ganga* (1880) 4 Bom. 330; *In the matter of Ram Kumari*(1891) 18 Cal. 264; *Mst Nandi v. The Crown* (1920) 1 Lah. 440, 59 I.C. 33.

8 (1871) 14 Moo. I.A. 309.

9 *John Jiban Chandra v. Abinash* (1939) 2 Cal. 12, 183 I.C. 75, ('39) A.C. 417.

10 (1935) 59 Bom. 278, 36 Bom. L.R. 1021, 154 I.C. 1075, ('35) A.B. 5 affirming 36 Bom. L.R. 11, 149 I.C. 1232, ('34) A.B. 93.

11 *Robasa Khanum v. Khodadad Bomanji* (1946) 48 Bom. L.R. 864. ('47) A.B. 272; *Norr Jehan v. Eugene Tischence* (1941) 45 C.W.N. 1047, 74 Cal. L.J. 212, ('41) A.C. 582; *Sayad Khatoon. v. M. Obadiah* (1945) 49 C.W.N. 745; *Budansa Fatma Bi*(1914) 26 Mad. L.J. 260, 22 I.C. 697; contra *Mt. Ayesha Bibi v. Subodh Chakravarty* (1945) 49 C.W.N. 439.

12 *K S. Ameena Shafir v. The State of Tamil Nadu* , represented by its Secretary, Social Welfare Department, (1984) 1 M.L.J. 237 [*S. Mohan, J.*].

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CHAPTER II

CONVERSION TO MAHOMEDANISM

21.

Conversion to Mahomedanism and right of inheritance

In the absence of a custom to the contrary (*see* 22 and 26), succession to the estate of a convert to Mahomedanism is governed by the Mahomedan law.[13]

According to the Mahomedan law, a Hindu cannot succeed to the estate of a Mahomedan. Therefore, if a Hindu, who has a Hindu wife and children, embraces Mahomedanism, and marries a Mahomedan wife and has children by her, his property will pass on his death to his Mahomedan wife and children, and not to his Hindu wife or children.[14]

Mahomedan Law applies not only to persons who are Mahomedans by birth but by religion also,[15] a convert changes not only his religion but his personal law also.[16] These rigid logical rules may apply to individual conversions, but in a case of a community conversion the converts may retain a portion of their personal law according to their social habits and surroundings. They retain their personal law unless they consciously adopt another.[17]

13 *Mitra Sen Singh v. Maqbul Hasan Khan* (1930) 57 I.A. 313, 35 C.W.N. 89, 128 I.C. 268, ('30) A.P.C. 251; *Chedambaram v. Ma Nyein Me* (1928) 6. Rang. 243. 111 I.C. 2, ('28) A.R. 179; *Bhagwan Bakhsh v. Drigbijai* (1931) 6 Luck. 487, 132 I.C. 779, ('31) AO. 301; *John Jiban Chandra v. Abinash* (1939) 2 Cal. 12, 183 I.C. 75, ('39) A.C. 417.

14 (1928) 6 Rang. 243, 111 I.C. 2, ('28) A.R. 179, *supra* 13; *Chandrasekharappa v. Government of Mysore* (1935) Mys. 621; *Poniah Nadar v. Essaki Devania* ('55) A. Trav.-Co. 180.

15 *Jowala Buksh v. Dharun Singh* (1866) 10 M.I.A. 511.

16 *Mittar Sen Singh v. Maqbul Hasan Khan* (1930) 57 I.A 313.

17 *Fidahusein v. Monghibai* (1936) 38 Bom. L.R. 397, 400.

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CHAPTER II

CONVERSION TO MAHOMEDANISM

22.

Khojas and Cutchi Memons

In the absence of proof of special usage to the contrary, Khojas and Cutchi Memons in the Bombay State were governed in matters of succession and inheritance, not by the Mahomedan, but by the Hindu Law.[18]But this customary law has been to a great extent abolished by the Shariat Act, 1937.

Law after the Shariat Act, 1937

The effect of the Shariat Act is to abolish (except as to agricultural land and other matters to which the Act does not apply) the customary law of succession of Khojas and Cutchi Memons and to make them subject to the Mahomedan law.

18 *Khojas and Memons Case* (1847) Perry's O.C 110; *Hirbai v. Gorbai* (1875) 12 Bom. H.C. 294 [Khojas]; *Abdul Cadur v. Turner* (1884) 9 Bom. 158 [Cutchi Memons]; *Mahomed Sidick v. Haji Ahmed* (1885) 10 Bom. 1 [Cutchi Memons] *Moosa Haji Joonas v. Haji Abdul Rahim* (1905) 30 Bom. 197; *Saboo Sidick v. Ally Mahomed* (1904) 30 Bom. 270; *Jan Mahomed v. Dattu* (1914) 38 Bom. 449, 22 I.C. 195; *Mangaldas v. Abdul* (1914) 16 Bom. L.R. 224, 23 I.C. 565; *Fidahusein v. Monghibai* (1936) 38 Bom. L.R. 397, 164 I.C. 533, ('36) A.B. 257. See however: *Noorbanu v. Dep. Custodian General, E.P.,* ('65) A.S.C. 1937, and 17, *supra*.

Law before the Shariat Act, 1937

Khojas and Cutchi Memons were originally Hindus. They became converts to Mahomedanism about 400 years ago, but retained their Hindu law of inheritance and succession as a customary law. Hence the Hindu law of inheritance and succession is applied to them on the ground of custom. The application of the rules of Hindu law by custom was limited to rules of inheritance and succession and did not extend to the rules relating to joint property.[19] This custom was so well established among them that if any member of either of these communities set up a usage of succession opposed to the Hindu law of succession, the burden lay upon him to prove such usage.[20] This custom was so well established among them that if any member of either of these communities set up a usage of succession opposed to the Hindu law of succession, the burden lay upon him to prove such usage.[20] Where, however, Cutchi Memons migrate from India and *settle among Mahomedans* as in Mombasa, the presumption that they have adopted the Mahomedan custom of succession should be readily made.[21] In matrimonial matters Cutchi Memons are governed by Mahomedan law and in such matters a Cutchi Memon girl is a free agent.[22]

19 *Haji Oosman v. Haroon Saleh Mahomed* (1923) 47 Bom. 369, 68 I.C. 862, ('23) A.B. 148; *Jan Mahomed v. Dattu supra* ;

20 Abdulrahim v. Halimabai.&uot;>Fidahusein v. Monghibai, supra.

20 *Abdulrahim v. Halimabai.* (1915) 43 I.A. 35, 39, 18 Bom. L.R. 635, 639, 32 I.C. 413; *Hirbai v. Gorbai* (1875) 12 B.H.C. 294, 305; *Rahimatbai v. Hirbai* (1877) 3 Bom. 34; *In re Haji Ismail*(1880) 6 Bom.452; *Ashabai v. Haji Tyeb* (1882) 9 Bom. 115; *Mahomed Sidick v. Haji Ahmed* (1885) 10 Bom. 1; *In the goods of Mulbai*(1866) 2 B.H.C. 276. The Hindu law as to joint family property does not apply to Cutchi Memons; *Haji Oosman v. Haroon* (1923) 47 Bom. 369, 68 I.C. 862, ('23) A.B. 148; *Allyarkhan v. Rambhau* (1947) 49 Bom. L.R. 793, ('48) A.B. 162.

21 (1915) 43 I.A. 35, 18 Bom. L.R. 635, 32 I.C. 413, *supra*.

22 *Abdul Razak v. Adam Usman* (1935) 37 Bom. L.R. 603, 159 I.C. 650, ('35) A.B. 367.

Cutchi Memons Act

It was provided by s. 2 of the Cutchi Memons Act XLVI of 1920 and the Cutchi Memons (Amendment) Act XXXIV of 1923, that any person who satisfies the prescribed authority--

(a) that he is a Cutchi Memon and is the person whom he represents himself to be;
(b) that he is competent to contract within the meaning of s. 11 of the Indian Contract Act, 1872; and
(c) that he is resident in India;

may by declaration in the prescribed form and filed before the prescribed (authority declare that he) desires to obtain the benefit of this Act, and thereafter the declarant and all his minor children and their descendants will in matters of succession and inheritance be governed by the Mahomedan law. The Act, however, governed the succession to the estate of the declarant and did not affect the right of the declarant himself to succeed as a Cutchi Memon to the property of another Cutchi Memon who has signed no such declaration.[23]

The Cutchi Memons Act of 1920 is now repealed by the Cutchi Memons Act X of 1938, which came into force on the 1st day of November, 1938. The Act is as follows:--

1.
(1) This Act may be called the Cutchi Memons Act, 1938.
(2) It shall come into force on the 1st day of November, 1938.
2. Subject to the provisions of s. 3, all Cutchi Memons shall, in matters of succession and inheritance, be governed by the Muhammadan law.
3. Nothing in this Act shall affect any right or liability acquired or incurred before its commencement, or any legal proceeding or remedy in respect of any such right or liability; and any such legal proceeding or remedy may be continued or enforced as if this Act had not been passed.

In *Bayabai v. Bayabai* [24]it was held by a single judge of the Bombay High Court that the Act applies not only to wills made by a Cutchi Memon after the passing of the Act but also to those made before the Act was passed, provided the testator dies after the passing of the Act and such wills have to be construed and looked at from the point of view of Mahomedan law. The law as to succession and inheritance in the case of Cutchi Memons, therefore, is as follows;--Prior to 1920 a Cutchi Memon was governed by Hindu law in matters of succession and inheritance. Under Act XLVI of 1920 he had the option to declare himself to be governed by Mahomedan law and on his exercising the option, not only he but his minor children and their descendants would be governed by the Mahomedan law in this respect. Thereafter under the Shariat Act of 1937 he was governed by Mahomedan law in the matter of intestate succession, and as to testate succession he would be subject to that law if he made the necessary declaration under s. 3 of the Act . Now under the Cutchi Memons Act, 1938, a Cutchi Memon is governed by Mahomedan law in all matters of succession and inheritance.

23 *Abdulsakur v. Abubakkar* (1930) 54 Bom. 358, 362, 127 I.C. 401, ('30) A.B. 191.

24 (1942) 44 Bom. L.R. 792, ('42) A.B. 328.

Effect of repeal of the Cutchi Memons Act, 1920

It is submitted that it was not within the competence of the Indian Legislature to repeal this Act so far as it affects agricultural land in the Governors' Provinces. The powers of the Central Legislature to repeal and alter laws are made precisely co-extensive with their powers of direct legislation.[25] By their decision[26] the Federal Court of India held that the Hindu Women's Right to Property Act, 1937, was beyond the competence of the Indian Legislature so far as its operation might affect agricultural land in the Governors' Provinces. It would thus seem that the repeal of the Act of 1920 so far as it operates

to affect succession to agricultural land in the Governors' Provinces was *ultra vires*the Indian Legislature. The result then is that succession to such land is still governed by the Cutchi Memons Act, 1920, and in this respect the position is not altered by the subsequent repeal of the repealing section (s. 4) by the Cutchi Memons (Amendment) Act, XXV of 1942.

25 Section 292 of the Government of India Act, 1935. See*Dobie v. Temporalities Board* (1881) 7 App. Cas. 136.

26 *In re Hindu Women's Right to Property Act*(1941) F.C.R. 12, ('41) A.F.C. 72.

Property of Khoja community

If Khojas ceased to be Aga Khanis they could be debarred from places of Aga Khani worship. As to secular property, the dissident members could be debarred from enjoying it, if their beliefs were such that they were repugnant to the Aga Khani Khojas,[27]but this power has been largely taken away by the Bombay Prevention of Excommunication Act, (Bom. Act XLII of 1949).

27 *Ladha Danani v. Hasam Ismail* ('49) A. Kutch 17.

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CHAPTER II

CONVERSION TO MAHOMEDANISM

23.

Testamentary power of Cutchi Memons

(1) A Mahomedan cannot by will dispose of more than one-third of his property without the consent of his heirs (118). But a Cutchi Memon could dispose of the whole of his property by will; this was founded on custom.[28]The Cutchi Memons Act, 1920, however, gave a Cutchi Memon the option, by making a statutory declaration, to subject himself and all his descendants in matters of succession and inheritance to the Mahomedan law. But in the absence of such a declaration, he was subject to the Hindu law.

The Shariat Act, 1937, applied the Mahomedan law to the Cutchi Memons in respect of intestate succession but left the position unaltered so far as testamentary power was concerned.

Finally, the Cutchi Memons Act, 1938, applied Mahomedan law to the Cutchi Memons as regards (both testate and intestate) succession, thus making their position the same as that of all other Mahomedans in all respects.

(2) A Cutchi Memon will was construed by the rules of Hindu law relating to wills.[29]But this rule will not apply in cases governed by the Mahomedan law under the Cutchi Memons Act, 1938.

Sub-section (2)

If a Cutchi Memon will contains a contingent bequest, the bequest will be void if the will is to be construed by the Mahomedan law, but valid if it is to be construed by the Hindu law. It has been held that trusts in a will are governed by Mahomedan Law, and therefore a contingent bequest is invalid.[30]

A Cutchi Memon is governed by the Mahomedan law so far as it relates to the execution and revocation of his will.[31](*see* 116)

28 *Advocate-General v. Jimbabai* (1915) 41 Bom. 181, 31 I.C. 106; *Advocate-General v. Karmali* (1903) 29 Bom. 133, 148-149; *Sattar Ismail v. Hamid Sait* (1944) 2 M.LJ. 92, ('44) AM. 504.

29 *Abdulsakur v. Abubakkar* (1930) 54 Bom. 358, 362, 127 I.C. 401, ('30) A.B. 191, dissenting from dicta to the contrary in *Advocate-General v. Jimbabai, supra* ; *Ashraf Alli v. Mahomed Alli* (1946) 48 Bom. L.R. 642; ('47) A.B. 122; *Adambhai v. Allarakhia* (1935) 37 Bom. L.R. 686, 159 I.C. 199, ('35) A.B. 417.

30 *Ashraf Alli v. Mahomed Alii* (1946) 48 Bom. L.R. 642; ('47) A.B. 122.

31 *Abdul Hameed v. Mahomed Yoonus* (1940) 1 M.LJ. 273, 187 I.C. 414, ('40) A.M. 153; *Sarabhai Amibai v. Mahomed Cassum* (1919) 6 A.B. 80, (1919) 43 Bom. 641, approved.

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CHAPTER II

CONVERSION TO MAHOMEDANISM

24

Testamentary power of Khojas

A Khoja may dispose of the whole of his property by will.[32]But the effect of the Shariat Act, 1937, is that a Khoja may restrict his testamentary power under the &uot;one-third rule&uot; of Mahomedan Law (s. 118, below) by making the statutory declaration provided for by 3 of the Shariat Act, 1937.

The making and revocation of Khoja wills and the validity of trusts and wakfs created thereby are all governed by the Mahomedan law, but apart from trusts and wakfs, the construction of a Khoja will is still governed by Hindu Law.[33]

32 *Fidahusein v. Monghibai* (1936) 38 Bom. L.R. 397, 164 I.C. 533, ('36) A.B. 257; *Allyarkhan v. Rambhau* (1947) 49 Bom. L.R. 793, ('48) A.B. 162.

33 *Ashraf Alli v. Mahomed Alli* (1946) 48 Bom. L.R. 642, ('47) A.B. 122.

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CHAPTER II

CONVERSION TO MAHOMEDANISM

25.

Halai Memons

Halai Memons domiciled in Bombay are governed in all respects by the Mahomedan law.[34]

Halai Memons of Porbandar in Kathiawar follow in matters of succession and inheritance, Hindu law and not Mahomedan law, differing in that respect from Halai Memons of Bombay. It was so held in the undermentioned case upon evidence of custom among Halai Memons in Porbandar.[35]

34 *Khojas and Memons' Case* (1847) Perry's O.C. 110, 115; *Khatubai v. Mahomed Haji Abu* (1923) 50 I.A. 108, 47 Bom. 72, I.C. 202, ('22) A.P.C. 414, affirming *Mahomed Haji v. Khatubai* (1918) 43 Bom. 647, 51 I.C. 513.

35 (1923) 50 I.A. 108, 47 Bom. 146, 72 I.C. 202, ('22) A.P.C. 414, *supra*.

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CHAPTER II

CONVERSION TO MAHOMEDANISM

25-A.

Daoodi and Sulaimani Bohras

Daoodi and Sulaimani Bohras are Shia Ismailis, being adherents of the Western Branch of the Ismailis.[36] They have always been governed by Mahomedan (Shia) law. (*see* note under 29)

36 See Introduction.

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CHAPTER II

CONVERSION TO MAHOMEDANISM

26.

Sunni Bohras of Gujarat: Molesalam Girasias of Broach

The Sunni Bohra Mahomedans of Gujarat,[37] and the Molesalam Girasias of Broach[38] are governed by custom in certain matters.

The Sunni Bohra Mahomedans of Gujarat and the Molesalam Girasias of Broach were originally Hindus, and became subsequently converts of Mahomedanism. They are governed by the Shariat Act, 1937 same as the Khojas. They are, however, governed by custom if no declaration has been made under s. 3 of the Shariat Act by an individual. They are not to be confused with the Bohras of Bombay who are Shias. (29).[39]

37 *Bai Baiji v. Bai Santok* (1894) 20 Bom. 53; *Nurbai v. Abhram Mahomed* (1939) 41 Bom. L.R. 825, ('39) AB. 449.

38 *Fatesangji v. Harisangji* (1894) 20 Bom. 181.

39 There has been some misunderstanding of the commentary in the 17th ed. The comment and the text of the section was changed from the 16th. ed. It was not noticed that the Shariat Act does not operate *proprio vigore* in those spheres where a declaration under s. 3 is necessary before custom can be changed to Shariat.

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CHAPTER III

MAHOMEDAN SECTS AND SUB-SECTS

27.

Sunnis and Shias

The Mahomedans are divided into two sects, namely, the Sunnis and the Shias.

There is another class of Mahomedans called Motazilas. It is not clear whether they form an independent sect, or are an offshoot of the Shia sect.

Qadianis also follow the Sunni law, and so do the Ahl-e-Hadith. The Cutchi Memons of Bombay and Halai Memons belong to the Sunni sect. (*see* 22, 23 and 25 above)

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CHAPTER III

MAHOMEDAN SECTS AND SUB-SECTS

28.

Sunni sub-sects

The Sunnis are divided into four sub-sects, namely, the Hanafis, the Malikis, the Shafeis and the Hanbalis.

The Sunni Mahomedans of India belong principally to the Hanafi School.

Presumption as to Sunnism

The great majority of the Mahomedans of this country being Sunnis, the presumption will be that the parties to a suit or proceeding are Sunnis, unless it is shown that the parties belong to the Shia sect.[1] But the Shia law is not foreign law. It is part of the law of the land, and so no expert evidence can be led to prove it as in the case of foreign law.[2]

As most Sunnis are Hanafis, the presumption is that a Sunni is governed by Hanafi law.[3]

The Wahhabis are an off-shoot of the Hanbalis. Considerable groups of Mahomedans in the South of

India, such as Kerala and Malabar, are Shafeis.

1 *Bafatum v. Bilaiti Khanum* (1903) 30 Cal. 683, 686; *Mt. Iqbal Begum v. Mt. Syed Begum* (1933) 140 I.C. 829, ('33) A.L. 80; *Akbarally v. Mahomedally* (1932) 34 Bom. L.R. 655, 138 I.C. 810, ('32) A.B. 356; *Moosa Seethi v. Mariakutty* (1954) Trav.-Co. 690, ('54) A.Trav.-Co. 432.

2 *Aziz Bano v. Muhammad* (1925) 47 All. 823, 89 I.C. 690, ('25) A.A. 720.

3 *Akbarally v. Mahomedally* (1932) 34 Bom. L.R. 655, 138 I.C. 810, ('32) A.B. 356; *Abdullah Beary v. Alikunhi Beary* (1957) Ker. L.J. 731, Presumption removed--Shafei law applied. *Sardar Bibi v. Muhammad Bakhsh P.L.D.* 1954 (W.P.) Lah 481. *Mst. Sahib Bibi v. Muhammad and ors.* P.L.D. 1961 (W.P.) Lah. 1036; *Khan Muhammad v. Gohar Banu* P.L.D. 1965 (W.P.) Lah. 46. *Kuttialikutty Marakkar v. Kandankutty* ('67) A Ker. 78.

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CHAPTER III

MAHOMEDAN SECTS AND SUB-SECTS

29.

Shia sub-sects

The Shias are divided into three main sub-sects, namely, the Athna-Asharias, the Ismailyas and the Zaidyas.

There are two divisions of Athna-Asharias, namely, (1) Akhbari, and (2) Usuli.

As most Shias are Athna-Asharias, the presumption is that a Shia is governed by the Athna-Asharia exposition of the law.[4]

The Khojas and the Bohras of Bombay belong to the Ismailya sub-sect. (*see* 22, 25-A and 26 above)

The Aga Khan, the spiritual head of the Ismaili Khojas, was once regarded as having the sole right of determining who shall or shall not remain a member of the community, but this right has been curtailed by the Bombay Prevention of Excommunication Act (XLII of 1949). All the offerings are the Aga Khan's absolute property and are not subject to any trust for the benefit of the community.[5]

The Mullaji is the spiritual head of the Daoodi Bohras,[6] and in regard to properties vested in him and to offerings received by him for the benefit of the community, it has been held in one case that he is a trustee.[7] In another case, the constitutional validity of the Bombay Prevention of Excommunication Act (XLII of 1949) has been upheld and an order of excommunication given by the Head Priest of the Daoodi Bohras was set aside.[8]

The Sulaimani Bohras follow their own religious leaders. Their secession from the Daoodis is mentioned in *Mansoorally v. Taiyabally* .[9]

4 34 Bom. L.R. 655, *Supra.*

5 *The Advocate-General ex relations Daya Muhammad v. Muhammad Husein* (1879) 12 Bom. H.C. 323; *Haji Bibi v. H.H. Sir Sultan Mahomed Shah, The Aga Khan* (1909) 11 Bom. L.R. 409, 2 I.C. 874.

6 *Hasanali v. Mansoorali* (1949) 76 I.A. 1, ('48) A.P.C. 66.

7 *Advocate-General of Bombay v. Yusufally Ebrahim* (1922) 24 Bom. L.R. 1060, 84 I.C. 759, ('21) A.B. 338.

8 *Sardar Syedna Saifuddin v. Tyebhai* (1953) 55 Bom. L.R. 1. But see *Saifuddin Sahib v. Govt of Bombay,* (1962) A.S.C. 854.

9 ('35) A.N. 156.

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CHAPTER III

MAHOMEDAN SECTS AND SUB-SECTS

30.

Each sect governed by its law

The Mahomedan law applicable to each sect or sub-sect is to prevail as to litigants of that sect or sub-sect.[10]

The Sunni law will therefore apply to Sunnis, and the Shia law to Shias, and the law peculiar to each sub-sect will apply to persons belonging to that sub-sect.

10 *Deedar Hossein v. Zuhoor-oon-Nissa* (1841) 2 M.I.A. 441, 477.

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CHAPTER III

MAHOMEDAN SECTS AND SUB-SECTS

31.

Change of sect

A Mahomedan male or female who has attained the age of puberty, may renounce the doctrines of the sect or sub-sect to which he or she belongs, and adopt the tenets of the other sect or any other sub-sect, and he or she will thenceforth be subject to the law of the new sect or sub-sect.[11]

11 *Hayat-un-Nissa v. Muhammad* (1890) 12 All. 290, 17 I.A. 73 (change of sect); *Muhammad v. Gulam* (1864) 1 B.H.C. 236 (change from Shafeiism to Hanafism).

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CHAPTER III

MAHOMEDAN SECTS AND SUB-SECTS

32.

Marriage between Shia male and Sunni female--wife's status not affected

A Sunni woman contracting marriage with a Shia does not thereby become subject to the Shia law.[12]

The same proposition, it would appear, holds good in the case of marriage of a Shia female with a Sunni male. (*see* 258)

12 *Nasrat v. Hamidan* (1882) 4 All. 205.

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CHAPTER IV

SOURCES AND INTERPRETATION OF MAHOMEDAN LAW

33.

Sources of Mahomedan Law

There are four sources of Mahomedan law, namely, (1) the Koran; (2) *Hadis*, that is, precepts, actions and sayings of the Prophet Mahomed, not written down during his lifetime, but preserved by tradition and handed down by authorized persons; (3) *Ijmaa*, that is, a concurrence of opinion of the companions of Mahomed and his disciples; and (4) *Qiyas*, being analogical deductions derived from a comparison of the first three sources when they did not apply to the particular case.[1]

Qiyas is reasoning by analogy. Abu Hanifa, the founder of the Hanafi sect of Sunnis, frequently preferred it to traditions of single authority. The founders of the other Sunni sects, however, seldom resorted to it.[2]

See: The Introduction.

1 Morley, *Digest of Indian Cases*, Introd. ccxxvii.

2 *Ibid*. at p. ccvii.

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CHAPTER IV

SOURCES AND INTERPRETATION OF MAHOMEDAN LAW

34.

Interpretation of the Koran

The Courts, in administering Mahomedan law, should not, as a rule, attempt to put their own

construction on the Koran in opposition to the express ruling of Mahomedan commentators of great antiquity and high authority.

Thus, where a passage of the Koran (Sura ii, w. 241-242) was interpreted in a particular way both in the *Hedaya* (a work on the Sunni law) and in the *Imamia* (a work on the Shia law), it was held by their Lordships of the Privy Council that it was not open to a Judge to construe it in a different manner.[3]

3 *Aga Mahomed Jaffer v. Koolsom Beebee* (1897) 25 Cal. 9, 18, 24 I.A. 196, 204.

CHAPTER IV

SOURCES AND INTERPRETATION OF MAHOMEDAN LAW

35.

Precepts of the Prophet

Neither the ancient texts nor the precepts of the Prophet Mahomed should be taken literally so as to deduce from them *new* rules of law, especially when such proposed rules do not conduce to substantial justice.

The words of the section are taken from the judgment of their Lordships of the Privy Council in *Baqar Ali v. Anjuman* .[4]

It is a rule of Mahomedan law that a gift in perpetuity is not valid unless it is a gift to *charity*. Is a gift by a Mahomedan to his own *children* and *their descendants* a gift to charity? No--was the answer given by a majority of the Full Bench of the Calcutta High Court in *Bikani Mia v. Shuk Lal.* [5] Yes--was the answer given by Ameer Ali, J., in a dissenting judgment, relying on the following precept of the Prophet Mahomed:

"A pious offering to one's *family* to provide against their getting into want is more pious than giving alms to the beggars. The most excellent form of *Sadakah* (*charity*) is that which a man bestows upon his own family."

Referring to the judgment of Ameer Ali, J., their Lordships of the Privy Council observed in a later case,[6]that it was not safe in determining what was the rule of Mahomedan law on a particular subject to rely upon abstract precepts taken from the mouth of the Prophet without knowing the context in which those precepts were uttered. Their Lordships further observed that the rule of Mahomedan law on the subject was that which was laid down by the majority of the Full Bench, and that the rew rule of law sought to be deduced from the precept of the Prophet by Ameer Ali, J., was not one that would conduce to justice. A wakf in favour of children and descendants is now declared to be legal by the Mussalman Wakf Validating Act (VI of 1913), provided there is an ultimate gift to charity. (*see* 196-198 below)

4 (1902) 25 All. 236, 254, 30 I.A. 94.

5 (1893) 20 Cal. 116.

6 *Abdul Fata v. Russomoy* (1894) 22 Cal. 619, 631, 632, 22 I.A. 76, 86, on appeal from *Russomoy v. Abdul Fata* (1891) 18 Cal. 399.

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CHAPTER IV

SOURCES AND INTERPRETATION OF MAHOMEDAN LAW

36. Ancient texts

New rules of law are not to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions.[7]

7 *Baqar Ali v. Anjuman* (1902) 25 All. 236, 254, 30 I.A. 111; dissenting from *Agha Ali Khan v. Altaf Hasan Khan* (1892) 14 All. 429, 448.

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CHAPTER IV

SOURCES AND INTERPRETATION OF MAHOMEDAN LAW

37.

General rules of interpretation of Hanafi law

The three great exponents of the Hanafi-Sunni law are Abu Hanifa, the founder of the Hanafi school, and his two disciples, Abu Yusuf and Imam Muhammad.

It is a general rule of interpretation of the Hanafi law that where there is a difference of opinion between Abu Hanifa and his two disciples, Abu Yusuf and Imam Muhammad, the opinion of the disciples prevails.[8] Where there is a difference of opinion between Abu Hanifa and Imam Muhammad, that opinion is to be accepted which coincides with the opinion of Abu Yusuf.[9] When the two disciples differ from their master and from each other, the authority of Abu Yusuf is generally preferred.[10] But these rules are not inflexible; they are to be regarded as rules of preference adopted by ancient jurists for their own guidance, but the subsequent history of opinion and practice will generally be of greater importance.[11]

Where there is a conflict of opinion, and no specific rule to guide the Court, the Court ought to follow that opinion which is most in accordance with justice, equity and good conscience.[12]

8 *Agha Ali Khan v. Altaf Hasan Khan* (1892) 14 All. 429, 448; *Abdul Kadir v. Salima* (1886) 8 All. 149, 166-167.

9 (1886) 8 All. 149, p. 162, *supra*; *Kutti Umma v. Negungadi Bank, Ltd* (1938) Mad. 148, 173 I.C. 699, ('37) A.M. 731.

10 *Kulsom Bibee v. Golam Hoosein* (1905) 10 C.W.N. 449, 488; *Khajah Hoosein v. Shahazadee* (1869) 12 W.R. 344, 346, *Affmd. in Shahazadee v. Khaja Hossein* (1869) 12 W.R. 498; *Kutti Umma v. Nedungadi Bank, Ltd.* (1938) Mad. 148,173 I.C. 699, ('37) A.M. 731. See also 151 below. In *Muhammad v. The Legal Remembrancer* (1893) 15 All. 321, 323, it was held that the opinion of Imam Muhammad should be preferred to that of Abu Yusuf, the Court thinking (though erroneously) that it was so laid down by the Full Bench in *Bikani Mia v. Shuk Lal* (1893) 20 Cal. 116.

11 *Anis Begum v. Muhammad Istafa* (1933) 55 All. 743, 148 I.C. 26, ('33) A. A. 634; *Siddiq Ahmed v. Syed Ahmed* (1945) 49 C.W.N. 311. ('45) AC. 418; *Mohamed Yasin v. Rahmat Ilahi* ('47) A.A. 201(F.B.)

12 *Aziz Bano v. Muhammad* (1925) 47 All. 823, 837. 89 I.C. 690, ('25) A.A. 720 (difference in Shia authorities); *Ebrahim Allibhai v. Bai Asi* (1933) 58 Bom. 254, 149 I.C. 225, (34) A.B. 21, (difference in Sunni authorities); *Haji Mohd v. Abdul Ghafoor* ('55) A.A. 688.

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CHAPTER IV

SOURCES AND INTERPRETATION OF MAHOMEDAN LAW

38.

Rules of equity

The rules of equity and equitable considerations commonly recognized in Courts of Equity in England are not foreign to the Mussulman system, but are in fact often referred to and invoked in the adjudication of cases under that system.[13]

The Kerala High Court has observed that the receipt of money by an heir apparent in lieu of his/her share in the property of his/her father during his lifetime would estop the heir-apparent from claiming share in the property of the father on his dying intestate. Respondent No. 1 was estopped by her conduct from claiming share in the suit properties as she had received money in lieu of her share in the suit properties during the lifetime of her father.[14]

Similarly, in *Shehammol v. Hassan Khani Rawther,* [15] the Apex Court observed that ordinarily there cannot be a transfer of *spes-successionis*, but in certain exceptions the same can be avoided either by the execution of a family settlement or by accepting consideration for a future share. It could then operate as estoppel against the expectant heir to claim any share in the estate of the deceased on account of the doctrine of *spessuccessionis*. Having accepted the consideration for having relinquished a future claim or share in the estate of deceased, it would be against public policy if such a claimant be allowed the benefit of the doctrine of *spes-successionis*. In such cases, the principle of estoppel would be attracted.

13 *Hamira Bibi v. Zubaida Bibi* (1915) 43 I.A 294, 301-302, 38 All. 581, 582, 36 I.C. 87, See *Hedayas,* Book XX, p. 334, &uot;Of the Duties of the Kazee.&uot;

14 *Hameed v Jameela* LNIND 2009 Ker. 796, A.I.R. 2010 Ker 44.

15 A.I.R. 2011 SC 3609.

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CHAPTER V

SUCCESSION AND ADMINISTRATION

[Before the Indian Succession Act, 1925, the two principal Acts in force in British India relating to the administration of the estate of deceased persons were the Indian Succession Act 1865 and the Probate and Administration Act, 1881. The Indian Succession Act, 1865, applied to Europeans,

Parsis, East Indians and to all Natives of India other than Hindus, Mahomedans and Buddhists. The probate and Administration Act applied to Hindus, Mahomedans and Buddhists. Both these Act s have been repealed by the Indian Succession Act, 1925, and their provisions re-enacted in the Act .]

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CHAPTER V

SUCCESSION AND ADMINISTRATION

39.

Administration of the estate of a deceased Mahomedan

The estate of a deceased Mahomedan is to be applied successively in payment of (1) his funeral expenses and death-bed charges; (2) expenses of obtaining probate, letters of administration, or succession certificate; (3) wages due for service rendered to the deceased within three months next preceding his death by any labourer, artisan or domestic servant; (4) other debts of the deceased according to their respective priorities (if any); and (5) legacies not exceeding one-third of what remains after all the above payments have been made. The residue is to be distributed among the heirs of the deceased according to the law of the sect to which he belonged at the time of his death,[1]and the heir has a right of contribution against his co-heirs, if by the action of the judgment creditor under a decree under s. 52 of the Civil Procedure Code against all the heirs, he was left with less than his proper share of the net estate of the deceased.[2] Under Mahomedan law, the payment of the debts of the deceased takes precedence over the legacies.[3]

The order set forth above is in accordance with the provisions of the Indian Succession Act, 1925, ss. 320-323 and s. 325. Item No. (1) funeral and death-bed charges do not include monies spent in ceremonies for securing the peace of the soul of the deceased.[4] As regards item No. (5), it is to be noted that a Mahomedan cannot by *will* dispose of more than one-third of what remains of his property after payment of his funeral expenses and debts, unless the heirs consent thereto (s.118). The residue available for distribution is the residue of the partible estate. If the inheritance includes both partible and impartible estate, and the debts of the deceased have been paid out of the partible estate, there is no right of contribution against the heir who has succeeded to the impartible estate.[5]

If the deceased was a Sunni at the time of his death, his property would be distributed among his heirs according to the Sunni law, and if he was a Shia, it would be distributed according to the Shia law. In other words, succession to the estate of a deceased Mahomedan is governed by the law of the sect to which he belonged at the time of his death, and not by the law of the sect to which the persons claiming the estate as his heirs belong.[6] A deceased Mahomedan is presumed to have been a Sunni and the onus is on the person alleging him to have been a Shia.[7]

The person primarily entitled to administer the estate of a deceased Mahomedan, that is, to apply it in the manner set forth in the section, is the *executor* appointed under his will. If the deceased left no will, the person entitled to administer his estate would be the person to whom letters of administration are granted. Such a person is called *administrator*. The persons primarily entitled to letters of administration are the *heirs*of the deceased: Indian Succession Act, 1925, s. 218. In the absence of an executor or administrator, the persons entitled to administer the estate are the heirs of the deceased.

1 *Hayat-un-Nissa v. Muhammad* (1890) 12 All. 290,17 I.A. 73.

2 *Mahomed Kazim Ali Khan v. Sadiq Ali Khan* (1938) (65) I.A. 218,13 Luck. 494, 174 I.C. 977 ('38) A.P.C. 169.

3 *Abdul Aziz v. Dharamsey Jetha & Co.* ('40) A.L. 348.

4 *Sajjad Hussain v. Muhammad Sayid Hasan* (1934) 154 I.C. 434, ('34) A.A. 71.

5 *Nawab Mirza Mahomed Sadiq Ali Khan v. Nawab Fakir Jahan Begum* (1934) 9 Luck. 701, 148 I.C. 1052, ('34) A.O. 307.

6 *Hayat-un-Nissa v. Mohammad* (1890) 12 All. 290, 17 I.A. 73.

7 *Mt. Iqbal Begum v. Mt. Syed Begum* (1933) 140 I.C. 829, ('33) A.L. 80.

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CHAPTER V

SUCCESSION AND ADMINISTRATION

40.

Vesting of estate in executor and administrator

The executor or administrator, as the case may be, of a deceased Mahomedan, is, under the provisions of the Indian Succession Act, 1925, s. 211, his legal representative for all purposes, and all the property of the deceased vests in him as such. The estate vests in the executor, though no probate has been obtained by him.[8]

But since a Mahomedan cannot dispose of by will more than one-third of what remains of his property after payment of his funeral expenses and debts, and since the remaining two-thirds must go to his heirs as on intestacy unless the heirs consent to the legacies exceeding the bequeathable third, the executor, when he has realized the estate, is a bare trustee for the heirs as to two-thirds, and an active trustee as to one-third for the purposes of the will; and of these trusts, one is created by the Act and the probate irrespective of the will, the other by the will established by the probate.[9]

The first paragraph is a reproduction of the provisions of s. 211 of the Indian Succession Act, 1925. An executor under the Mahomedan law is called*wasi*, derived from the same root as *wasiyyat* which means a will. But though the Mahomedan law recognised a *wasi*, it did not recognise an administrator, there being nothing analogous in that law to &uot;letters of administration&uot;. A *wasi* or *executor* under the Mahomedan law was merely a *manager* of the estate, and no part of the estate of the deceased *vested* in him as such. As a *manager,*all that he was entitled to do was to pay the debts and distribute the estate as directed by the will. He had no power to sell or mortgage the property of the deceased, not even for the payment of his debts. The first time this power was conferred upon him was by the Probate and Administration Act, 1881. Under s. 4 of that Act, the whole of the property of a Mahomedan testator vested in his executor, and it does so now under s. 211 of the Indian Succession Act, 1925. The property vests in the executor*even if no probate has been obtained*. As a result of the *vesting*of the estate in the executor, he has the power to dispose of the property vested in him in due course of administration, a power which he did not possess before the Probate and Administration Act, 1881; (*see*s. 90 of that Act, now s. 307 of the Indian Succession Act, 1925). The will may provide for the remuneration of the executor, but if the executor is an heir the provision is not valid unless the other heirs consent.[10]

8 *Venkata Subbamma v. Ramayya* (1932) 59 I.A. 112, 55 Mad. 443, 136 I.C. 1 1 1, ('32) A.P.C. 92 (a case of a Hindu will, which applies also to a Mahomedan will); *Shemail v. Ahmed Omer* (1931) 33 Bom. L.R. 1056, 135 I.C. 817, ('31) A.B. 533; *Mahomed Usuf v. Hargovandas* (1923) 47 Bom. 231, 70 I.C. 268. ('22) A.B. 392; *Sakina Bibee v. Mohomed Ishak* (1910) 37 Cal. 839, 8 I.C. 655, is no longer good law. *Mohammadi Begum v. Nawaz Jung* (1955) Hyd. 743; *Hakim Rehman v. Mohammad Mahmud Hasan* ('57) A.P. 559; *Hasan Bokhari v. Venkayya* ('55) A. Andh. 87, (1957)

Andh. W.R. 638.

9 *Kurrutulain v. Nuzhat-ud-dowla* (1905) 33 Cal. 116, 128, 32 I.A. 244, 257.

10 *Mahomed Hussain v. Aishabai* (1934) 36 Bom. L.R. 1155, 155 I.C. 334, ('35) A.B. 84 (a Sunni case).

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CHAPTER V

SUCCESSION AND ADMINISTRATION

41.

Devolution of inheritance

Subject to the provisions of 39 and 40, the whole estate of a deceased Mahomedan if he has died intestate, or so much of it as has not been disposed of by will, if he has left a will (s. 118), devolves on his heirs *at the moment of his death*, and the devolution is not suspended by reason merely of debts being due from the deceased.[11] The heirs succeed to the estate as tenants-in-common in specific shares.[12]

Unlike Hindu Law, estate of a deceased Mahomedan if he has died instestate, devolves on his heirs at the moment of his death. Under the Mahomedan Law, birth right is not recognised. The right of an heir apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor.[13]

There is no joint tenancy in Mahomedan law and the heirs are only tenants-in-common. Therefore heir can claim partition in respect of one of the properties held in common without seeking partition of all the properties.[14]

Possession of a co-sharer or co-heir is presumed to be that of other co-sharers or co-heirs. To start adverse possession there must be clear and complete evidence of an ouster.[15]

Representation of deceased's estate

The theory of representation is not known to the Mahomedan law. Under its provisions, the estate of a deceased person devolves upon his *heirs at the moment of his death*. The estate vests immediately in each heir in proportion to the share ordained by Mahomedan law. As the interest of each heir is separate and distinct, one of a number of heirs cannot be treated as representing the others.[16] But an heir in possession of assets of an estate can be sued by a creditor of the deceased upon principles discussed in 43 and 46 *infra.*There is no intermediate vesting in any one, such as an executor or administrator, as under the Indian Succession Act.[17]

A suit for partition of his share by one of the heirs is maintainable even if the heirs who are not in possession are not impleaded since the shares of Mahomedan heirs are definite and specific.[18]

A muslim woman acquired property at a time when her husband's estate was owned in common by her along with other heirs, her children. The properties were managed by her father. She was adult but the children were minors. Under Muslim Law she was not the guardian of the property of the

minors, nor was her father. *Held*:--There is no presumption that acquisitions are made for the benefit of the family jointly. On the death of a Muslim, his property devolves on the heirs in specific shares and they take the estate as tenants-in-common. There is no principle of representation and the interest of each heir is separate and distinct.[19]

11 *Jafri Begum v. Amir Muhammad* (1885) 7 All. 822; *Muhammad Awais v. Har Sahai* (1885) 7 All. 716; *Biland Khan v. Mt Begum Noor* ('43) A.Pesh. 62; *Faizulla Khan v. Abdul Jabbar* ('43) A.Pesh. 65; *Ebrahim Aboobaker v. Tek Chanf* ('53) A.S.C. 298.

12 *Abul Khader v. Chidambaram* (1909) 32 Mad. 276, 278, 3 I.C. 876; *Abdul Majeeth v. Krishnamchariar* (1917) 40 Mad. 243, 245, 40 I.C. 210; *Khatun Bai v. Abdul Wahab Sahib* (1939) M.W.N. 346, 184 I.C. 778, ('39) A.M 306; *Mt. Fardosiahan Begum v. Kazi Shafiuddin* (1942) N.LJ. 261, ('42) A.N. 75; *Mohammad Sohail v. Ghulam Rasul* (1941) Lah. 308, ('41) A.L. 152 (F.B); *Mahomedally Tyebally v. Safiabai* (1940) 67 I.A. 406, 191 I.C. 113, ('40) A.P.C. 215. See also cases cited in footnote (20) below.

13 *Imamul Hassan v. State of Bihar,* A.I.R. 1982 Patna 89.

14 *Mt. Haluman. v. Md Manir* (1971) A. Pat. 386(D.B.) .

15 *Sabura Ammal v. Ali Mohammad Nachiar* ('70) A.Mad. 411.

16 *Sakina Begum v. Shahar Banoo* (1935) 10 Luck. 433 at 458, 152 I.C. 42, ('35) A.O. 62, 67; *Manni Gir v. Amar Jati* (1936) 58 All. 594, 160 I.C. 1030, ('36) A.A. 94.

17 *AmirDulhin v. Bhaij Nath* (1894) 21 Cal. 311, 315.

18 *Mohd. Subhan v. Misbahuddin Ahmad* ('71) A. Raj 274.

19 *Maimun Bivi v. O. A. Khaja Mohideen* (1970) I.M.L.J. 266, ('70) A. Mad. 200.

Limitations for suit by an heir for recovery of his share

As stated above, the heirs succeed to the estate as tenants-in-common in specific shares. When the heirs continue to hold the estate as tenants-in-common without dividing it and one of them subsequently brings a suit for recovery of his share, the period of limitation for the suit does not run against him from the date of the death of the deceased, but from the date of express ouster or denial of title; in other words, it is Art. 144 of Sch. I to the Limitation Act, 1908 that applies, and not Art. 123.[20] In the undermentioned case, the Privy Council has held that a suit for administration of the estate of a Mahomedan is governed as regards immovable property by Art. 144 and as regards movables by Art. 120.[21]

One of several co-sharers can be in possession and enjoyment of the common property to the exclusion of the other co-sharers without affecting their interest in the property and unless the co-sharer in possession does something which operates as an ouster of the interests of the other co-sharers, the latter's right cannot be destroyed. An alienee from the co-sharer is in no better position. The cumulative effect of circumstances will show that there has been an ouster. There may not be demand by one co-owner and denial by the other, but any evidence of an unmistakable indication of intention to hold adversely to others may suffice.

The is of a very limited application. It is to be read as laid down in the statute.[22]

20 *Ghulam Mohammad v. Ghulam Hussain* (1932) 59 I.A., 74, 54 All. 98, 136 I.C. 454, ('32) A.P.C. 81; *Kallangowda v. Bibishaya* (1920) 44 Bom. 943, 58 I.C. 42; *Nurdin v. Bu Umrao* (1921) 45 Bom. 519, 59 I.C. 780, ('71) A.B. 56; *Bai Jivi v. Bai Bibanboo* (1929) 31 Bom. L.R. 199, 118 I.C. 785, ('29) A.B. 141; *Mussammat Jano v. Narasingh Das* (1930) 11 Lah. 29, 117 I.C. 803, ('29) A.L. 549; *Ma Bi v. Ma Khatoon* (1929) 7 Rang. 744, 121 I.C. 785, ('30) A.R. 72; *Rustam Khan v. Janki* (1929) 51 All. 101, 111 I.C. 809, ('28) A.A. 467; *Ahmad Dar v. Mt. Mukhti,* ('51) A.J. & K. 21. See also *Mohd Kaliba v. Md. Abdullah* ('63) A.M. 84.

21 *Mahomedally Tyebally v. Safibai* (1940) 67 I.A. 406. 191 I.C. 113, ('40) A.P.C. 215.

22 *T. Abdullah v. N. Abdul Samad Sahib* (1970) II M.L.J. 510.

Parties to the suit by an heir

In a suit by an heir for the recovery of his share the co-heirs are proper parties; but as the interests of the heirs are distinct, the omission to join a co-heir is not a good reason for dismissing the suit.[23] In other words the co-heir is not a necessary party, i.e a party in whose absence no decree can be passed. A co-owner suing a trespasser and not joining the other co-owners can get a decree only for his share in the property. The plea of *just tertii* is available to the defendant unless the suit is framed as a representative suit.[24]

23 *Zebaishi Begum v. Naziruddin Khan* (1935) 57 All. 445, 152 I.C. 1008, ('35) A.A. 110.

24 *Jamahiddin v. Mosque Mashakganj* ('73) A. All. 328.

Partial partition

The doctrine of partial partition is applicable only to a Hindu co-parcenary where the coparceners are joint in estate, and not to Muslims, who are only tenants-in-common; Under the Mahomedan law the heirs of a deceased Muslim succeed to a definite fraction of every part of his estate. Muslim sharers are not obliged to sue for partition of all the properties in which they are interested. There is nothing to preclude one of them from seeking a partition of some of the items of the properties.[25]

Renunciation or relinquishment need not be expressly stated in the document. It can be inferred from the conduct of the parties. If a suit for partition in a Mohammedan family is brought after 12 years and the plaintiff fails to explain his or her inaction, renunciation can be inferred. If renunciation is pleaded in the document and renunciation is accepted by the parties, in that case, he or she must be estopped from claiming partition, as it is a part of family arrangement. Strictly speaking, such renunciation will not forbid her from claiming partition, but in order to maintain harmony and peace in the family, renunciation should be treated as estoppel to the party concerned.[26]

The relinquishment of a contingent right of inheritance by a Muslim heir is generally void under the Mahomedan Law, but if it is supported by consideration and forms part of a valid family settlement it is valid.

Where the mother claimed a share during the partition among her sons and herself and was allotted certain properties, a condition that she has to relinquish her share beyond her life time becomes void, where she has not done so for consideration. She gets the properties absolutely and could alienate the properties.[27]

25 *Khazir Bhat v. Ahmad Dar* ('60) A.J. & K. 57; *Mohd. Abdullah v. Mohd Rahiman* ('64) A.M. 234 (See sec. 49.)

26 *Mt Hashihan v. Jalaluddin* (1982) B.L.J.R. 410: (1982) Pat. L.J.R. 463 : A.I.R.1982 Pat.226 [B.P. Jha, J.].

27 *Huchu Sab v. Sahajabi* (1983) 1 Karn. LJ. 170 [G.N. Sabhahit, J.].

Administration suit

Any heir or creditor of the deceased may bring a suit for the administration of the estate: he is not bound to bring a suit for partition.[28]In an ordinary partition suit, the Court may, in working out its

preliminary decree, instead of making an act ual division of all the property, give one heir a charge over the share of another for any difference in favour of the former and any such charge imposed will bind the alienee *pendente lite* from that heir.[29]

28 *Essafally v. Abdeali* (1921) 45 Bom. 75, 59 I.C. 396, ('21) A.B. 424; *Atorjan Bibi v. Sikandar Ali* ('60) A.Ass. 183. See also *Abdul Razack v. Mohd. Shah* ('62) A.M. 346.

29 *Khatun Bibi v. Abdul Wahib Sahib* (1939) M.W.N. 346, 184 I.C. 778, ('39) A.M. 306.

Interim maintenance

In a suit brought by a Mahomedan widow for the administration of her deceased husband's estate and the payment to her of her l/8th share the Court can order interim maintenance.[30]

30 *Bahadurkhanji v. Begum Mehrunnissa* ('55) A. Sau. 72.

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CHAPTER V

SUCCESSION AND ADMINISTRATION

42.

Alienation by heir of his share before payment of debts

(1) Any heir may even before distribution of the estate, transfer his own share (*see* 47), and pass a good title to a *bona fide* transferee for value, notwithstanding any debts that might be due from the deceased[31] [ills, (a) and (c)].

The transfer must be one for value, that is, for a consideration, e.g., a sale or a mortgage, as distinguished from a gift. If partition has not been effected the heir can only sell his undivided share and cannot sell a particular plot.[32]

The property of a common ancestor on his death devolves in well-defined shares upon his heirs. The presence of minor among the heirs does not bar the major heirs from transferring their share. *Imambandi v. Mutsaddi,* [33] applied. One Habibullah entered into an agreement to sell property to defendant No. 1, but before receipt of consideration and execution of the sale-deed he died. The heirs served notices on defendant No. 1 to complete the transaction.[34]

(2) A *sale* of the share of heir in execution of a decree passed against him at the suit of his creditor amounts to a &uot;transfer&uot; within the meaning of sub-sec. (1), and will pass a good title to the purchaser in execution [ill. (b)].

(3) If the share transferred by an heir is a share in *immovable property* forming part of the estate of the deceased, and the transfer is made *during the pendency of a suit* by the widow of the deceased for her dower, in which a decree is passed creating a *charge* on the estate for the dower debt, the transferee will take the share of the heir *subject to the charge*[35] but if the widow's decree is a simple money decree, the transferee will not be affected[36] [ill. (d)]. Where a charge is created in favour of an heir in an administration

suit on the share of another heir and the latter transfers his share *pendente lite*, the transferee will take the share subject to the charge.[37](*see*Transfer of Property Act, 1882, s. 52, and s. 295 below)

Illustrations

(a) A Mahomedan dies leaving several heirs. After his death *the whole body of heirs* sell the whole of his estate without paying his debts. *After the sale*, a creditor of the deceased obtains a decree against the heirs for his debt, and applies for execution of the decree by an attachment and sale of the property in the hands of the purchaser. He is not entitled to do so. The reason is that a creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bona fide* purchaser for value.[38]

(b) A Mahomedan dies leaving two sisters as his only heirs. After his death, *C*, a creditor of the deceased, obtains a decree against the sisters for his debt. Subsequently a creditor *of the sisters* obtains a decree against them for his debt, and the property of the deceased come to their hands is sold in execution of his decree to *P*. In this case, *C* is not entitled to attach the property in the hands of *P* in execution of his decree.[39]

***Note*.--**In the case in ill. (a), the sale was by private treaty. In the case in ill. (b), it was in execution of a decree. Both these sales stand on the same footing. In both the cases the purchaser was a *bona fide* purchaser for value.

(c) A Mahomedan dies leaving a widow and a son. A large sum of money is due to the widow for her dower. [Dower is a debt, and the widow is to that extent a creditor of the estate of her deceased husband. She is not, however, a secured creditor (295)]. The son mortgages his share in the estate to Af, without paying the dower debt. *After the mortgage*, the widow obtains a decree against the son, who is in possession of the whole estate for the dower debt, and attaches the son's share in execution of the decree. The mortgagee then obtains a decree against the son on the mortgage for sale of the son's share mortgaged to him. The share is sold in execution of the decree, and purchased by *P*. The mortgage having been made before the attachment, *P* is entitled to recover the son's share free from the attachment.[40]

Note.-- In the cases in ills, (a) and (b), the sale was by all the heirs of their shares. In the case in ill. (c), the sale is only by one of the heirs.

(d) A Mahomedan died leaving three widows and a son. He left considerable property both movable and immovable. After his death, the widows brought a suit against the son, who was in possession of the whole estate, for an administration of the estate of the deceased, and for payment of the dower debt out of the estate. A decree was passed in the suit directing the son to render an account of the properties of the deceased come to his hands, and providing for payment of the dower *out of the properties*. (This was not a *simple money decree*, but a decree creating a *charge* on the properties for the dower debt.) The widows then applied for execution of the decree. *Pending execution* (which is the same thing as *pending the suit*), the son mortgaged his share to *M. M* sued the son on the mortgage, and obtained a decree for sale of the share mortgaged to him. The share was sold in execution of the decree to *P*, who purchased with notice of the decree. Upon these facts the Privy Council held that *P* took the share *subject to the decree* in favour of the widows.[41]

Note.-- If the mortgage had been effected *before* the suit, it would not have been affected by the decree.[42]

31 *Bazayet Hossein v. Dooli Chund* (1878) 5 I.A. 211, 4 Cal. 402; *Wahidunnissa v. Shubrattun* (1870) 6. Beng. L.R. 54; *Land Mortgage Bank v. Bidyadhari* (1880) 7 Cal. L.R. 460; *Khatun Bibi v. Abdul Wahab Sahib* (1939) M.W.N. 346, 184 I.C. 778. ('39) A.M. 306; *Hasan Bokhari v. Venkayya* ('55) A Andh. 87.

32 *Mansab Ali v. Mt. Nabirunnissa* (1934) 150 I.C. 443, ('34) A.A. 702.

33 45 I.A. 73.

34 *Bhimadev Taria v. Radhakrishna Agarwalla* ('68) A. Ori. 230.

35 *Mahomed Wajid v. Bazayet Hossein* (1878) 5 I.A. 211, 223-224, 4 Cal. 402.

36 *Bhola Nath v. Maqbul-un-Nissa* (1903) 26 All. 28; *Abdul Rahman v. Inayati Bibi* ('31) A.O. 63, 130 I.C. 113; *Hasan Bokhari v. Venkayya* ('55) A Andh. 87, (1957) Andh. W.R. 638.

37 *Khatun Bibi v. Abdul Wahab Sahib* (1939) M.W.N. 346, 184 I.C. 778, ('39) A.M. 306.

38 *Land Mortgage Bank v. Bidyadhari* (1880) 7 Cal. L.R. 460 (with facts somewhat altered).

39 *Wahidunnissa v. Shubrattun* (1870) 6 Beng. L.R. 54 (with facts slightly altered).

40 *Bazayet Hossein v. Dooli Chund* (1878) 5 IA. 211, 4 Cal. 402.

41 *Mahomed Wajid v. Bazayet Hossein* (1878) 5 I.A. 211, 223-224, 4 Cal. 402.

42 *Bazayet Hossein v. Dooli Chund* (1878) 5I. A. 211, 4. Cal. 402.

CHAPTER V

SUCCESSION AND ADMINISTRATION

43.

Extent of liability of heirs for debts

Each heir is liable for the debts of the deceased to the extent only of a share of the debts proportionate to his share of the estate.[43]

[A Mahomedan, who is indebted to C in the sum of Rs. 3,200, dies leaving a widow, a son and two daughters. The heirs divide the estate without paying the debt, the widow taking 1/8, the son taking 7/16, and each daughter 7/32. C then sues the widow and the son for the *whole* of the debt due to him from the deceased. The widow is liable to pay only (1/8 3,200) = Rs. 400, and the son (7/16 3,200) = Rs. 1,400; they are not liable for the whole debt].[44]

A co-heir who is not a guardian of a minor; has no power to alienate the minor's share in the property even to pay the debts of the deceased from whom they inherit. This is so even if there be a decree against the minor and the alienation is done to discharge the decree. The transaction is void and not merely voidable.[45]

The Supreme Court in *P.N. Veetil Narayani v. Pathummo Beevi* ,[46] observed that the heirs of a Muslim dying intestate on whom falls the liability to discharge the debt, proportionate to their respective shares in the estate devolved, can hardly be classified as joint contractors, partners, executers or mortgages. They are by themselves independent debtors; the debt having been split by operation of law. They succeed to the estate as tenants in common in specific shares. Therefore, the acknowledgment of the debts only by one heir can be confined to himself and cannot be extended to the other heirs for their independent position. The payment made on account of debt by the only one

heir as an independent debtor, and not as an agent, express or implied, on behalf of other co-heirs could not be said to be a payment on behalf of all so as to extend the period of limitation as against all. The fact that the heir acknowledging the debt by making the payment was in possession of entire estate and had not parted with it by means of partition to the coheirs, would not make him liable for entire debt.

This section should be read subject to 46 *infra*.

43 *Pirthi Pal Singh v. Husaini Jan* (1882) 4 All. 361; *Ambashankar v. Sayad Ali* (1894) 19 Bom. 273; *Bassunteram v. Kamaluddin* (1885) 11 Cal. 421, 428;. *Abbas Naskar v. Chairman, District Board* , 24- Parganas (1932) 59 Cal. 691, 141. I.C. 871, ('33) AC. 81; *Ramcharan v. Hanifa Khatun* (1932) 54 All. 796, 138 I.C 746, ('32) AA. 591; *Hakim Rehman v. Mohammad Mahmud Hasan* ('57) A.P. 559; *Imperial Bank, Gaya v.Bibi Sayeedan* ('60) AP. 132.

44 *Pirthi Pal Singfi v. Husaini Jan* (1882) 4 All. 361; *Hamir Singh v. Zokia* (1875) 1 All. 57, 59(F.B.) .

45 *Patel Parshottamdas Narasihbhai v. Bai Dhabu* ('73) A. Guj. 88.

46 A.I.R. 1991 SC 720.

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CHAPTER V

SUCCESSION AND ADMINISTRATION

44.

Distribution of estate

Since the estate devolves on the heirs at the moment of the death of the deceased, they are at liberty to divide it at any time after the death of the deceased. The distribution is not liable to be suspended until payment of the debts.

Where some of the co-sharers have paid the debts of the deceased, allowance should be made in regard to these payments at the time of partition.[47]

It was stated in two Allahabad cases,[48] and also in a Calcutta case,[49] relying on some passages in the *Heddya* that the estate could not be distributed, if it was insolvent. In a later Allahabad case,[50] however, Mahmood, J., observed that the translation of the said passage was only a loose paraphrase of the original Arabic, and expressed the opinion that the estate may be distributed even if it is insolvent.

In *Amar Ahmad Khan v. Shamim Ahmad Khan* ,[51] the Jharkhand High Court held that on the death of a Mohammedan, his property immediately devolves on his heirs separately to the extent of share they are entitled under the personal law. Thus, immediately on death of the Mohammedan, his each heir becomes absolute owner of the property proportionate to his share. Thus, there is no concept of jointness of ownership of properties of deceased under Islamic law.

Mohammedan heirs are independent owners of their specific shares and their liability is also proportionate to the extent of their shares in estate. Under the said circumstances one shareholder has no right, title and interest to alienate property of another shareholder.

47 *Sk Aftab Husain v. Smt. Tayebba Begum* ('73) A. All. 54.

48 *Hamir Singh v. Zaha* (1875) 1 All. 57, 59(F.B.) ; *Pirthi Pal Singh v. Hussaini Jan* (1882) 4 All. 361, 366.

49 *Bassunteram v. Kamaluddim* (1885) 11 Cal. 421, 428.

50 *Jafri Begum v. Amir Muhammad* (1885) 7 All. 822, 838.

51 A.I.R. 2012 Jhar 39.

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CHAPTER V

SUCCESSION AND ADMINISTRATION

45.

Suit by creditor against executor or administrator

If the estate is represented by an executor or administrator, a suit by a creditor of the deceased should be instituted against the executor or administrator, as the case may be.

Mulla: Mahomedan law, Updated 20th edition/CHAPTER V SUCCESSION AND ADMINISTRATION/46. Suit by creditor against heirs

CHAPTER V

SUCCESSION AND ADMINISTRATION

46.

Suit by creditor against heirs

If there be no executor or administrator, the creditor may proceed against the *heirs* of the deceased, and where the estate of the deceased has not been distributed between the heirs, he is entitled to execute the decree against the property as a whole without regard to the extent of the liability of the heirs *inter se.*[52]

There is, however, a conflict of opinion as to whether a decree obtained by a creditor against some of the heirs of the deceased is binding on the other heirs.

According to the decisions of the High Court of Calcutta, any creditor of the deceased may sue any one of the heirs who is in possession of the *whole or any part* of the estate, without joining the other heirs as defendants, to recover the *entire* debt, and the Court may in such a suit pass a decree for the sale, not only of the share of that particular heir in the estate, but of all the assets of the deceased that are in his possession. Where such a decree is passed, and a sale is effected in execution of the decree, the sale will pass to the purchaser not only the interest of that particular heir in the property, but the interests of the other heirs also (including minors) thought they were not parties to the suit,[53] unless the decree was obtained by fraud, or was taken by consent[54] [ills. (a) and (b)]. These decisions proceed on the view that the proper principle was to treat the creditors' suit as an administration suit and as such heir in possession is bound to account for any assets that may have come into his hands and to that extent he is liable to pay the creditors before the residue, if any, is divided among the heirs. In a later case, however, the same High Court held that the above decisions could not apply if

the heir who was sued was in possession of the estate on behalf of the other heirs, i.e., was in possession of more than his share of the inheritance, but not if he only held his own share of the inheritance.[55]

The High Court of Bombay in some cases[56] took the same view as the Calcutta High Court did in its earlier decision, though on different grounds, but with this difference that a decree against heir in possession bound the other heirs only if he was in possession of the *whole* estate [ills, (c) and (d)]. But this view has been disapproved in later cases, and it has been held that a sale in execution of a decree passed against an heir in possession in a creditor's suit does not pass to the purchaser the interest of those heirs in the estate who were not parties to the suit even if the heir against whom the decree was passed was in possession of the *whole* estate[57] [ill. (c)]. This coincides with the view taken by the High Court of Allahabad.

In *Pathummabi v. Vittil* ,[58] the High Court of Madras followed the earlier rulings of the Bombay High Court, but this decision was subsequently dissented from if not expressly overruled by a Full Bench in *Abdul Majeeth v. Krishnamachariar* ,[59] adopting the view taken by the Allahabad High Court.

According to the rulings of the Allahabad High Court, a decree relative to his debts passed in a contentious or non-contentious suit against such heirs only of a deceased Mahomedan debtor as are in possession of the whole or part of his estate, binds each defendant to the extent of his share in the estate[60] but it does not bind the other heirs who, by reason of absence or any other cause, are out of possession, so as to convey to the purchaser, in execution of such a decree, the interests of such heirs as were not parties to the decree. This is because under Mahomedan law each heir inherits a separate and definite share and as he has no interest in the share inherited by another heir he cannot be said to represent the estate that has devolved upon the other heir.[61] But if they sue for a declaration that the sale is not binding on them, and it is proved that the debts have been paid out of the proceeds of the sale, they ought to be put on terms as a matter of equity, and required to pay their proportionate share of the debt before they are granted the declaration sued for[62] [ills. (f) and (g)].

The High Court of Nagpur[63] and the Chief Court of Oudh[64] took the same view as that taken by the Allahabad High Court. The Lahore decisions were not consistent; one Judge of that High Court agreed with the Calcutta view,[65] while another followed the later Bombay decisions.[66] The Hyderabad High Court in the case of *Mohd. Sulaiman v. Mohd. Ismail* [67] followed the Calcutta view.

However, the Supreme Court has attempted to resolve this conflict in the manner described below.

In the Allahabad case of *Jafri Begum v. Amir Mohammad Khan,* [68]Mahmood, J., had observed that &uot;upon the death of a Mahomedan owner, his property. immediately devolves upon his heirs in specific shares, and if there are any claims against the estate, and they are litigated, the matter passes into the region of procedure and must be regulated according to the law which governs the act ion of the Court&uot;. The learned Judge therefore went on to hold that though in certain circumstances under the rules of the Mahomedan law of procedure, a decree could be binding on an absent heir, such rules did not apply in India; and that in accordance with the principles which governed the procedure in Indian courts, a decree obtained by a creditor would be ineffective as regards the share of those who were not parties to the litigation.

The observation quoted above was cited with approval by the Privy Council in its judgment in the case of *Mohd. Kazim Ali Khan v. Sadiq Ali Khan* [69] and the principle embodied in it has also been approved by the Supreme Court in its recent judgment in the appeal from the Hyderabad case of *Mohd. Sulaiman v. Mohd. Ismail.* [70] However, the Supreme Court has now held that though ordinarily the court does not regard a decree binding on a person who is not impleaded *eo nomine* in an action, there are certain recognized exceptions to this rule: and one of these is that where certain persons are impleaded after diligent and *bona fide* enquiry in the genuine belief that they are the only persons interested in the estate, the whole estate of the deceased will be duly represented by the persons who are brought on the record or impleaded, and the decree will be binding on the entire estate. But this rule will not apply to cases where there has been fraud or collusion between the creditor and the heir

impleaded or where there are other circumstances which indicate that there has not been a fair or real trial, or that the absent heir had a special defence which was not and could not be tried in the earlier proceeding, [ill. (i)].

It may be noted here that with regard to the view taken in the earlier Calcutta cases, the Supreme Court also observed[71]that though a suit by a creditor may in appropriate cases, where the procedure prescribed in that behalf is followed, be treated as an administration act ion, every action instituted by a creditor of a deceased debtor to recover a debt due out of his estate in the hands of some or all the heirs cannot be regarded as an administration act ion.

(*N.B. See* the Preface to the 16th Edition).

Illustrations

(a) A Mahomedan dies leaving a widow, a daughter, and two sisters. After his death a suit is brought by a creditor of the deceased against the widow and the daughter who alone are in possession of the *whole* estate, and a decree is passed "against the assets of" the deceased. The decree and the sale in execution of the property left by the deceased are binding on the sisters though they were not parties to the suit.[72](*see* note to ill. (b) below)

(b) A Mahomedan dies leaving a widow and other heirs. A suit is brought by a creditor of the deceased against the widow alone who is in possession of *part* of the estate. The other heirs are not necessary parties, and the creditor is entitled to a decree not only against the share of the widow in the estate, but the entire assets which have come into her hands and which have not been applied in the discharge of the liabilities to which the estate may be subject at her husband's death.[73]

Note.--As to the cases cited in ills, (a) and (b), it was pointed out by the High Court of Calcutta that the defendants in those cases were in possession of the estate on behalf of all the heirs; otherwise the only decree that the creditor would be entitled to would be a decree for a *proportionate* share of the debt.[74]

(c) A Mahomedan woman, Khatiza, dies leaving a minor son and a daughter. After her death a suit is brought by a creditor of the deceased "against Khatiza, deceased, represented by her minor son represented by his guardian",[75] and a decree is passed in that form. The deceased was entitled to a share in a *Khoti Vatan* and "the right, title, and interest of Khatiza" in that share is sold in execution of the decree. The purchaser acquires a title unimpeachable by the daughter, though she was not a party to the suit or to the subsequent proceedings in execution.[76] [No reference was made in the judgment to the Calcutta cases cited above nor to the Allahabad cases cited in ill (f)].[77]

(d) A Mahomedan dies leaving a widow, a minor son, and two daughters. After his death a suit is brought by a mortgagee from the deceased against the son as represented by his guardian and mother, claiming possession of the land mortgaged to him as owner under *a gahan lahan* clause in the mortgage. The widow is in possession of the estate and a decree *ex-parte* is passed directing her to deliver possession of the land to the mortgagee, and he is accordingly put in possession. The decree binds the daughters though they were not parties to the suit, and they are not entitled to redeem the mortgage as against the mortgagee or a purchaser from him.[78]

(e) A Mahomedan dies leaving a widow and a daughter. After his death *C*, a creditor of the deceased, sues the widow for the recovery of a debt due to him and a decree is passed in his favour for Rs. 327 to be recovered out of the estate of the deceased. In execution of the decree, the right, title and interest of the deceased in a house is sold and it is

purchased by *P*. The daughter, who was not a party to the suit, subsequently sues *P* to recover by partition her share in the house. Held, disapproving the cases cited in ills, (c) and (d), that the daughter, *not being a party to C's suit*, was not bound by the decree passed in the suit, and that the sale did not pass her interest in the house to *P*, and that she was entitled to recover her share in the house.[79]

(f) A creditor of a deceased Mahomedan obtains a decree upon a hypothecation bond &uot;for recovery of his debt by enforcement of lien&uot; against one of the heirs of the deceased in possession of the estate. The whole estate is sold in execution of the decree, and it is purchased by the decree-holder. Subsequently another heir of the deceased, who was not a party to these proceedings, sues the decree-holder as purchaser for recovery of his share in the estate. According to the Allahabad High Court, he is entitled to possession of his share on payment of his proportionate share of the debts, if the sale proceeds were applied in payment of the debt.[80]

(g) A creditor of a deceased Mahomedan obtains a money decree against an heir of the deceased in possession of the estate, and attaches certain immovable property forming part of the estate in execution of the decree. The value of the immovable property exceeds the share of the defendant. According to the Allahabad High Court, the defendant is entitled to object to the attachment and sale of the right and interest of the other heirs who were not parties to the suit, upon the ground that as regards them he is in possession of the property as trustee.[81]

(h) A creditor of a deceased Mahomedan filed a suit against his widow, without making his daughters parties to the suit. He obtained a decree and attached an immovable property which was in the joint possession of the widow and the two daughters. The daughters filed a suit for a declaration that the decree was not binding on their shares. It was held that the decree was not binding on their shares, and as there was no sale of the property, they could not be called upon to pay the proportionate share of the debt of the deceased before the grant of the declaration.[82]

(i) *M, K* and *L* mortgaged certain immovable properties in favour of *R*. A few years later, after *M* had died, *R* commenced an action for enforcement of the mortgage against *K*, *L* and three widows and a daughter of *M*. In execution of the decree passed in the action the properties were sold at a Court auction and purchased by *R*, who then transferred them to others. Thereafter, the plaintiff, claiming that he was the son of *M*, sued for a decree for partition of the mortgaged properties &uot;by metes and bounds&uot; and in the alternative for a declaration that he was entitled to redeem the mortgage or a portion thereof equal to his share in the mortgaged properties. The plaintiffs suit was resisted by *R* and the other alienees of the properties mainly on the ground that the decree obtained by *R* was binding on the plaintiff as the estate of *M* was fully represented in the suit by those who were in possession at the time; and that *R* had made full and *bona fide* enquiry and had learnt that the three widows and the daughter of *M* were the only surviving members of the latter's family. It was held that the plaintiff was bound by the decree of 1940 as the estate of *M* was fully represented in the suit.[83]

52 *Mamraj Maniram v. Muhamad Hashim* (1941) 194 I.C. 727, ('41) A.C 245.

53 *Muttyjan v. Ahmad Ally* (1882) 8 Cal. 370; *Amir Dulhin v. Baij Nath* (1894) 21 Cal. 311.

54 *Assamathem v. Roy Lutchmeeput Singh* (1878) 4 Cal. 142, 155.

55 *Abbas Naskar v. Chairman District Board* , 24 Parganas (1932) 59 Cal. 691, 141 I.C. 871, (33) AC. 81,.

56 *Khurshetbibi v. Keso Vinayek* (1887) 12 Bom. 101; *Davalava v. Bhimaji* (1895) 20 Bom. 338, followed in *Virchand v. Kondu* (1915) 39 Bom. 729, 31 I.C. 180 [mortgage-decree].

57 *Bhagirthibai v. Roshanbi* (1919) 43 Bom. 412, 51 I.C. 18, dissenting from 12 Bom. 101 and 20 Bom. 338, *supra* *Shahasaheb v. Sadashiv* (1919) 43 Bom. 575, 581, 51 I.C. 223 [mortgage suit], dissenting from (1915) 39 Bom. 729, 31 I.C. I80 *supra*; *Lala Miya v. Manubibi* (l923) 47 Bom. 712, 73 I.C. 246, ('23) A.B. 411; *Vcerbhadrappa Shilwant v. Shekabai* (1939) Bom. 232, 41 Bom. L.R. 249, 182 I.C. 539, ('39) A.B. 188.

58 (1902) 26 Mad. 734, 738.

59 (1917) 40 Mad. 243, 255, 257, 40 I.C. 210.

60 *Dallu Mal v. Hari Das* (1901) 23 All. 263, 265.

61 *Manni Gir. Amar Jati*(1936) 58 All. 594, 160 I.C. 1030, ('36) A.A. 94.

62 *Jafri Begum v. Amir Muhammad Khan* (1885) 7 All. 822; *Muhammad Awais v. Har Sahai* (1885) 7 All. 716; *Hamir Singh v. Zakia* (1875) 1 All. 57. See also *Mahomad Alladad v. Muhammad Ismail* (1888) 10 All. 239; and *Chandu Lal v. Khaltemuneessa* (1942) 2 Cal. 299, 205 I.C. 344, ('43) A.C. 76.

63 *Suleman v. Abdul Shakoor* (1939) N.LJ. 577, 188 I.C. 292, ('40) A.N. 99; *Laxminarayan v. Sadatali* (1944) Nag. 97, 212 I.C. 161, ('44) A.N. 99.

64 *Amir Jahan v. Khadim Husain* ('31) A.O. 253, 132 I.C. 75. See also *Sakina Begum v. Shahar Banoo Begum* (1935) 10 Luck. 443, 152 I.C. 42, ('35) A.O. 62, 67; *Firm Bishambar Nath Gopi Nath v. Hashmi Begam* (1949) 23 Luck. 3, ('49) A.O. 56.

65 *Mt. Amir Begum v. Dr. Ahmad Jalal Din* ('35) A.L. 273.

66 *Balak Ram. v. Ineyat Begum* (1935) 160 I.C. 217, ('35) A.L. 940.

67 (1959) 1 AWR 220.

68 (1885) 7 All. 822.

69 A.I.R. 1938 PC 169.

70 *Mohd Sulaiman v. Mohd Ismail and Ors.* (1966) 1 S.C.R. 937. Following *Daya Ram v. Shyam Sundari* ('65) A.S.C. 1049.

71 At p. 944.

72 *Muttyjan v. Ahmed Ally* (1882) 8 Cal. 370.

73 *Amir Dulhin v. Baij Nath* (1894) 21 Cal. 311.

74 *Abbas Naskar v. Chairman, District Board, 24-Parganas* (1932) 59 Cal. 691, 141 IC. 871, ('33) A.C. 81.

75 This form of suit, which was at one time common in the Mofussil of Bombay, has been disapproved of by the Bombay High Court. See *Rampratab v. Gavrishankar* (1923) 25 Bom. L.R. 7, 85 I.C. 464. ('24) A.B. 109.

76 *Khurshet Bibi v. Keso Vinayak* (1887) 12 Bom. 101.

77 Note that in this case &uot;no part of the Khoti was in act ual possession of either of the heirs of the deceased.&uot;

78 *Davalava v. Bhimaji* (1895) 20 Bom. 238.

79 *Bhagirthibai v. Roshanbi* (1919) 43 Bom. 412, 51 I.C. 18. [In this case the widow against whom the decree was obtained was in possession of the whole house; see p. 427 of the report, lines 27-28].

80 *Muhammad Awais v. Har Sahai* (1885) 1 All. 716, following *Jafri Begam v. Amir Muhammad* (1885) 7 All. 822.

81 *Dallu Mal v. Hari Das* (1901) 23 All. 263.

82 *Firm Bishambhar Nath Gopi Nath v. Hashim Begam* (1947) 23 Luck. 3, ('49) AO. 56.

83 *Muhd. Sulaiman v. Mohd. Ismail* (1966) 1 S.C.R. 937. (See the Preface to the 16th Edition).

CHAPTER V

SUCCESSION AND ADMINISTRATION

47.

Alienation by one of several heirs for payment of debts

One of several heirs of the deceased Mahomedan, though he may be in possession of the whole estate of the deceased, has no power to alienate the shares of his co-heirs, not even for the purpose of discharging the debts of the deceased. If he sells or mortgages any property in his possession forming part of the estate of the deceased, though it may be for payment of the debts of the deceased, such sale or mortgage operates as a transfer only of his interest in the property. It is not binding on the other heirs or the other creditors of the deceased.[84] The transferor, of course, is, in his turn, entitled to obtain contribution from his co-heirs.

It has been so held by a Full Bench of the Madras High Court overruling *Pathummabi v. Vittil* ,[85] an earlier decision of the same High Court, and dissenting from the Allahabad decision in *Hasan Ali v. Mehdi Husain* .[86] The Madras Full Bench decision has been followed by the Bombay High Court[87] and approved by the Privy Council.[88] In the under mentioned case, a single Judge of the Lahore High Court has held that if an heir who is in possession of the property seeks a declaration that the alienation effected in respect of that property without joining him in the transaction is illegal, he cannot be called upon to pay a proportionate share of the debts of the deceased as a condition precedent to the suit being decreed.[89]

As to ostensible ownership, see *Mubarak-un-Nissa v. Muhammad* ,[90]a case under section 41 of the Transfer of Property Act, 1882.

84 *Abdul Majeeth v. Krishnamachariar* (1917) 40 Mad. 243, 40 I.C. 210(F.B.) *Sukur v. Asmat* (1923) 50 Cal. 978, 79 I.C. 491. ('24) AC. 384; *Phul Chand v. Mantia* (1938) All. 167, 174 I.C. 651, ('38) A.A. 182; *Mt. Zubida Bibi v. Mt. Zenab Bibi* (1942) 199 I.C. 604, ('42) A.L. 65; *Ramachandrayya v. Abdul Kadar* ('48) A.M. 37, dissenting from *V.M.RV. Chiettiar Firm v. Asha Bibi* (1929) 118 I.C. 407, ('29) A.R. 107. See *Gulam Gose v. Shriram* (1919) 43 Bom. 487, 51 I.C. 79 (sale of equity of redemption by one of the heirs--suit for redemption by other heirs--limitation); *Jan Mohammad v. Karm Chand* (1947) Lah. 399, 49 Bom. L.R. 577, ('47) A.P.C. 99.

85 (1902) 26 Mad. 734.

86 (1877) 1 All. 533.

87 *Alisaheb v. Sesho Govind* (1931) 33 Bom. L.R. 1238, 135 I.C. 489, ('31) A.B. 545.

88 *Jan Mahommad v. Karm Chand* (1947) Lah. 399, 49 Bom. L.R. 577, ('47) A.P.C. 99.

89 *Mt. Zubida Bibi v. Mt. Zenab Bibi* (1942) 199 I.C. 604. ('42) A.L. 65.

90 (1924) 46 All. 377, 79 I.C. 174, ('24) A.A. 384.

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CHAPTER V

SUCCESSION AND ADMINISTRATION

48.

Recovery through Court of debts due to the deceased

No Court shall pass a decree against a debtor of a deceased Mahomedan for payment of his debts to a person claiming on succession to be entitled to the effects of the deceased or to any part thereof, or proceed upon an application of a person claiming to be so entitled, to execute against such a debtor a

decree or order for the payment of his debt, except on the production, by the person so claiming, of a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or a certificate granted under s. 31 or s. 32 of the Administrator-General's Act, 1913, and having the debt mentioned therein, or a succession certificate granted under Part X of the Indian Succession Act, 1925, and having the debt specified therein, or a certificate granted under the Succession Certificate Act, 1889 or a certificate granted under Bombay Regulation VIII of 1827, and, if granted after the first day of May, 1889, having the debt specified therein.

Explanation.--The word "debt" in this section includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

The section reproduces the provisions of s. 214 of the Indian Succession Act, 1925.

Probate and letters of administration

It is not necessary in the case of a Mahomedan will that the executor should obtain probate of the will to establish his right as such in a Court of justice [Indian Succession Act, 1925, s. 213(2)].[91]Nor is it necessary, where a Mahomedan has died intestate that his heirs should obtain letters of administration to establish their right to any part of the property of the deceased in a Court of Justice [Indian Succession Act, 1925, s. 212(2)]. But where a suit is brought to recover a debt due to the deceased, the Court shall not pass a decree except on production of probate or of letters of administration or a certificate.

91 *Venkata Subamma v. Ramayya* (1932) 59 I.A. 112, 55 Mad. 443, 136 I.C. 111, ('32) A.P.C. 92; *Shaik Moosa v. Shaik Essa* (1884) 8 Bom. 241, 255.

Recovery of debts through Court

It must be observed that the rule laid down in the present section applies only where a debt due to the deceased is sought to be recovered *through a Court*. A debtor of a deceased person may pay his debt to the executor, though he may not have obtained probate, or, where he has died intestate, to his heirs even if they had not taken out letters of administration or a certificate and such payment will operate as a discharge to the debtor. But payment of a debt by a debtor to one of several heirs does not discharge the debt as to all.[92]

It may also be noted that where a debt is sought to be recovered by *legal proceedings*, it is not necessary that the plaintiff should have obtained either probate or letters of administration or a certificate *before the date of the institution of the suit*. It is enough if he produces the grant *before the passing of the decree*.[93]

92 *Pathummabi v. Vittil* (1902) 26 Mad. 734, 739. Cf. *Sitaram v. Shridhar* (1903) 27 Bom. 292. See also *Ahinsa Bibi v. Abdul Kader* (1901) 25 Mad. 26, 39.

93 *Chandra Kishore v. Prasanna Kumari* (1910) 38 Cal. 327, 38 I.A. 7, 9 I.C. 122; *Veerbhadrappa v. Shekabai* (1939) Bom. 232, 41 Bom. L.R. 249, 182 I.C. 539, ('39) A.B. 188.

Debt

A suit by one member of a family to recover his share of the family property from the other members is not a suit to recover a "debt".[94] A suit asking for a personal decree against the mortgagor in respect of a mortgage is a suit for a "debt." But there is a conflict of opinion as to whether a

suit for sale of the mortgaged property is a suit for a "debt." The High Court of Allahabad has held that it is.[95] The High Courts of Calcutta,[96] Bombay[97] and Madras[98] have held that it is not.

94 *Shaik Moosa v. Shaik Essa* (1884) 8 Bom. 241, 255.

95 *Fateh Chand v. Muhammad* (1894) 16 All. 259.

96 *Mahomed Yusuf v. Abdur Rahim* (1900) 26 Cal. 839.

97 *Nanchand v. Yenawa* (1904) 28 Bom. 630.

98 *Palaniyandi v. Veerammal* (1905) 29 Mad. 77.

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CHAPTER V

SUCCESSION AND ADMINISTRATION

49.

Alienation by co-sharer before partition

Where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly by them, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If the mortgage, therefore, is followed by a partition, and the mortgaged properties are allotted to the other co-sharers, they take those properties in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share.[1]

The Chief Court of Sind has held that a co-sharer may file a suit for partial partition. Where a co-sharer alienates a part only of the property without authority from the other co-sharers, the purchaser is not entitled to adjustment of equities in respect of other properties held in co-ownership, which have not been alienated to the purchaser. If, however, a co-sharer, who has alienated specific property without the consent of the other co-sharers, files a suit for general partition, the question of adjustment of equities between the purchaser and the co-sharers may arise, but a purchaser cannot compel the co-sharer, who had alienated specific property, to file a suit for general partition.[2] This may be explained as follows. *A*, *B* and *C* are co-sharers of properties *X*, *Y* and *Z*. *A* without the consent of *B* and *Q* alienates property *X*. *B* and C may ask for the partition of property X only. They are not bound to ask for partition of properties *X,Y* and *Z*. If only property X' is being partitioned, the purchaser will get only the share of A in the property. If, however, there is a suit for the partition of all the properties, the Court may allot property *X* to A's share, if this is equitable to the other co-sharers. The purchaser cannot compel A to file a suit for properties *X, Y* and *Z*, as the purchaser has no legal interest in properties *Y* and *Z*.

However, a Single Bench of the Madhya Pradesh High Court has held that when a co-owner has the right of claiming general partition of all the properties, the same right ought not to be denied to an alienee of the specific item of property from some of the co-owners. The alienee obtains a personal right which he is equitably entitled to enforce against the share of his vendors which can only be done by a general partition of the entire property.[3]

1 *Mohammad Afzal Khan v. Abdul Rahman* (1932) 59 I.A. 405, ('32) A.P.C. 235.

2 *Ghumanmal Lakumal v. Faiz Muhammad Haji Khan* ('48) A.S. 83.

3 *Abdul Rahaman v. HamidAli* ('59) A.M.P. 190, relying on *Pakkiri Kanni v. Manjoor Saheb* ('24) A.M. 124.

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CHAPTER V

SUCCESSION AND ADMINISTRATION

50.

Enactment relating to administration

In matters not herein before specifically mentioned, the administration of the estate of a deceased Mahomedan is governed by the provisions of the following Acts to the extent to which they are applicable to the case of Mahomedans, namely:--

(1) The Indian Succession Act, 1925;
(2) The Administrator-Generals Act, 1913; and
(3) Bombay Regulation VIII of 1827.

Such of the provisions of the Administrator-Generals Act as apply to Mahomedans come into operation when a Mahomedan dies leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court of Calcutta, Madras or Bombay. In such a case, the Court may, upon the application of any person interested in the assets, direct the Administrator-General to apply for letters of administration of the effects of the deceased, if the application satisfies the Court that such grant is necessary for the protection of the assets (*see* s. 10 of the Act, and also s. 13).

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CHAPTER VI

INHERITANCE--GENERAL RULES

51.

Heritable property

There is no distinction in the Mahomedan law of inheritance between movable and immovable property or between ancestral and self-acquired property.

There is no such thing as a joint Mahomedan family nor does the law recognize a tenancy in common in a Mahomedan family.[1] In a Mahomedan family there is a presumption that the cash and household furniture belong to the husband.[2]

In *Sahul Hamid v. Sulthan* it was held by Rajmannar J. (as he then was): &uot;The Mahomedan Law does not recognise a joint family as a legal entity. In fact according to the rules of Mahomedan Law of Succession, heirship does not necessarily go with membership of the family. There are several males and females who have no interest in the heritage but may be members of the family. On the other

hand there are several heirs like, for example, married daughters of a deceased male owner who take an interest in the estate but are no part of the family.&uot;[3]

However, if a custom of the family establishing joint holding as is common among Hindus is proved, it will be given effect. Additions to the joint estate by the managing member of a Mahomedan family will be presumed to have been made from the joint estate and will be for the benefit of all the members. But acquisition of property not attributable to the family assets will not be for the family.

However, if all the members of the family live in commensality and are in joint possession of family properties, it will be for the person claiming property as his own to show that the source of the property was his own.[4]

The personal law of Muslims does not recognise a system of joint holding as is common amongst Hindus. There may be cases, however, where a custom may be set up in the matter of the holding of such properties by some of the members of a Muslim family, whereby it could be established that such possession and title in some of the members is customarily to be interpreted and understood as possession on behalf of all the members.

Acquisition of property independently by a member cannot automatically be said to be for the benefit of the family. If there is conclusive evidence that a member of the Muslim family, who acquired such properties gained an advantage to himself and caused prejudice to others and if such acquisition is traceable to surplus family assets or funds from and out of which the property could have been purchased, then matters would be different. Again it is also necessary to prove that the members were living jointly and enjoying the property jointly and in common.[5]

In *Mohd. Ismail v. Khadirsa Rowther* ,[6] it was stated that where some of the members of the Muslim joint family who were in possession of certain property made subsequent acquisitions, additional acquisitions would belong to all the members of the joint family in view of section 90 unless and until it is proved that the subsequent acquisitions were made by members in possession out of their independent income. In this view there is no necessity for other co-owners whatever to show that the income from the family properties yielded a surplus so as to enable the co-owners in possession to purchase the subsequent additional property.

Renunciation or relinquishment need not be expressly stated in the document. It can be inferred from the conduct of the parties. If a suit for partition in a Mohamedan family is brought after 12 years and the plaintiff fails to explain his or her inaction, renunciation can be inferred. If renunciation is pleaded in the document and renunciation is accepted by the parties in that case, he or she must be estopped from claiming partition, as it is a part of family arrangement. Strictly speaking such renunciation will not forbid her from claiming partition, but in order to maintain harmony and peace in the family, renunciation should be treated as estoppel to the party concerned.

[*Mt. Hashihan v. Jalaluddin,* [7] is strictly not of inheritance but this seems the appropriate place to consider it. (Editor)].

1 See *Abdul Rashid v. Sirajuddin* (1933) 145 I.C. 461, ('33) A.A. 206, 209.

2 *Ma Khatun v. Ma Bibi* ('33) A.R. 393, 149 I.C. 654.

3 *Sahul Hamid v. Sulthan* ('47) A. Mad. 287. See also *Maimoona Bivi v. D.A. Khaja Mohinuddin* ('70) A. Mad. 200.

4 *Mohammed Ibrahim v. Syed Muhammad Abbubakkar* ('76) A Mad. 84, (1976) 2 MLJ 478.

5 *Mohammed Ibrahim v. Syed Muhammad Abbubakkar* ('76) A Mad. 84, (1976) 2 MLJ 478.

6 A.I.R. (1983) Mad. 123.

7 A.I.R. 1982 Patna 226.

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CHAPTER VI

INHERITANCE--GENERAL RULES

52.

Birth-right not recognised

The right of an heir-apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor.[8]

A, who has a son *B* makes a gift of his property to *C*. *B*, alleging that the gift was procured by undue influence, sues *C* in *A*'s *lifetime* on the strength of his right to succeed to *A*'s property on *A*'s death. The suit must be dismissed for *B* has no cause of action against *C*. *B* has no cause of action, for he is not entitled to any interest in *A*'s property during *A*'s lifetime.[9] But the gift would be liable to be set aside if the suit was brought after *A*'s death, provided it was brought within the period of limitation.[10]

Such a right as that claimed by *B* in the above illustration is a mere *spes successions*, that is, an expectation or hope of succeeding to *A*'s property if *B* survived *A*.[11] The Mahomedan law "does not recognize any. interest expectant on the death of another, and till that death occurs which by force of that law gives birth to the right as heir in the person entitled to it according to the rules of succession, he possesses no right at all".[12]

8 *Abdul Wahid v. Nuran Bibi* (1885) 11 Cal. 597, 12 I.A. 91; *Humeeda v. Budlum* (1872) 17 W.R. 525; *Hasan Ali v. Nazo* (1889) 11 All. 456; *Abdool v. Goolam* (1905) 30 Bom. 304.

9 *Hasan Ali v. Nazo* (1889) 11 All. 456, 458.

10 *Kurrutulain v. Nuzhat-ud-dowla* (1905) 33 Cal. 116, 32 I.A. 244.

11 *Abdool v. Goolam* (1905) 30 Bom. 304.

12 *Hasan Ali v. Nazo* (1889) 11 All. 456, 458.

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CHAPTER VI

INHERITANCE--GENERAL RULES

53

Principle of representation

According to the Sunni Law the expectant right of an heir-apparent cannot pass by succession to his heir, nor can it pass by bequest to a legatee under his will.[13] According to the Shia law, it does pass by succession in the cases specified in 93 below.

A, a Sunni Mahomedan, has two sons, *B* and *C*, *B* dies in the lifetime of *A*, leaving a son *D*. *A* then dies leaving *C*, his son, and *D*, his grandson. The whole of *A*'s property will pass to *C* to the entire

exclusion of *D*. It is not open to *D* to contend that he is entitled to B's share as representing *B*.[14]

In the case cited above, their Lordships of the Privy Council observed: "It is a well-known principle of Mahomedan law that if any of the children of a man die before the opening of the succession to his estate, leaving children behind, these grand-children are entirely excluded from the inheritance by their uncles and their aunts." The son of a predeceased son is therefore not an heir.[15]

If in the above case, *B* bequeathed any portion of his expectant share in *A*'s property to *X*, the latter would take nothing under the will. "*A* mere possibility such as the expectant right of an heir-apparent, is not regarded as present or vested interest, and cannot pass by succession, bequest or transfer so long as the right has not actually come into existence by the death of the present owner."[16]

13 *Abdul Wahid v. Nuran Bibi* (1885) 11 Cal. 597, 607, 12 I.A. 91. Macnaghten, p. 1, s. 9.

14 *Moola Cassim v. Moolla Abdul* (1905) 33 Cal. 173, 32 I.A. 177.

15 *Abdul Bari v. Nasir Ahmed* ('33) A.O.142, 150 I.C. 330.

16 *Abdul Wahid v. Nurun Bibi* (1885) 11 Cal. 597, 12 I.A.91.

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CHAPTER VI

INHERITANCE--GENERAL RULES

54.

Transfer of spes succession is: Renunciation of chance of succession

The chance of a Mahomedan heir-apparent succeeding to an estate cannot be the subject of a valid transfer or release.[17]

Illustrations

A has a son *B* and a daughter *C*. *A* pays Rs. 1,000 to *C*, and obtains from her a writing whereby in consideration of Rs.1,000 received by her from *A*, she renounces her right to inherit *A*'s property. *A* then dies, and *C* sues *B* for her share (one-third) of the property left by *A*. *B* sets up in defence the release passed by *C* to her father. The release is no defence to the suit, and *C* is entitled to her share of the inheritance, as the transfer by her was a transfer merely of a *spes successionis*, and as such, inoperative. But *C* is bound to bring into account the amount received by her from her father.[18]

The rule of Mahomedan law that an heir cannot renounce his right to inherit is not different from the law under the Transfer of Property Act, 1882, sec, 6(a). That section provides that "the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred."

It has been held by the Allahabad and Travancore-Cochin High Courts that a Mahomedan heir may by his conduct be estopped from claiming the inheritance he has agreed to relinquish if the release was part of a compromise or family settlement and if he has benefited by the transaction.[19]But this view

has been expressly dissented from by the Madras and Kerala High Courts on the ground that not only can such a view not be justified in Mahomedan Law, but is also contrary to 8.6(a) of the Transfer of Property Act and s. 23 of the Contract Act .[20]

The conflict between the Madras and Kerala view on the one hand and the Allahabad and Travancore view on the other was resolved by approving the Allahabad view. It was observed &uot;. a bare renunciation of an expectation to inherit cannot bind the expectant heir's conduct in the future. But if the expectant heir goes further and receives consideration and so conducts himself as to mislead an owner into not making dispositions of his property, inter vivos, the expectant heir should be debarred from setting up his right when it does unquestionably vest in him. In other words the principle of estoppel remains untouched by this statement.

The questions that arose were:

(1) A mere expectancy to succeed cannot be subject of transfer and such a transfer is void;
(2) Can such an expectancy be removed after receiving consideration?
(3) Will such a conduct create an estoppel in the future?
(4) Can a right be renounced even before it was vested?

These questions may now be taken to have been settled. *Gulam Abbas v. Haji Kayyam Ali* .[21]

A husband gives immovable property to his wife in lieu of her dower, and agrees not to claim any share of it as her heir on her death. Is the agreement valid and binding on the husband? The High Court of Allahabad has held that it is binding on the husband.[22]

17 *Khanum Jan v. Jan Beebee* (1827) 4. Beng. S.D.A.210; *Sumsuddin v. Abdul Husein* (1906) 31 Bom. 165; *Asa Beevi v. Karuppan* (1918) 41 Mad. 365, 46 I.C. 35, dissenting from *Kunhi v. Kunhi* (1896) 19 Mad. 176. See also *Hurmut-ool-Nissa Begum v. Allahdia Khan* (1871) 17 W.R. 108(P.C.) ; *Sulaiman Sahib v. Kader Ibrahim* (1952) 2 Mad. L.J. 104, ('53) A.M. 161.

18 *Sumsuddin v. Abdul Hussein* (1906) 31 Bom. 165; *Banoo Begum v. Mir Abed Ali* (1908) 32 Bom. 172, 174-175.

19 *Latafat Husain v. Hidayet Husain* (1936) All. L.J. 342, 161 I.C. 851, ('36) A.A. 573; *Kochunni Kochu v. Kunju Pillai* (1956) A. Trav.-C. 276.

20 *Abdul Kaffor v. Abdul Razak* ('59) A.M. 131; *Kunhi Avulla v. Kunhi Avulla* ('64) A. Ker. 201.

21 ('73) A.S.C. 554.

22 *Nasir-ul-Haq v. Faiyaz-ul-Rahman* (1911) 33 All. 457, 9 I.C. 530.

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CHAPTER VI

INHERITANCE--GENERAL RULES

55.

Life-estate and vested remainder

(1) *Sunni Law*.--The Judicial Committee in *Humeeda v. Budlun,* [23] observed that &uot;the creation of (such) a life estate does not seem to be consistent with Mahomedan usage and there ought to be very clear proof of so unusual a transaction&uot;; and in *Abdul Gafur v. Nizamuddin* [24] referred to &uot;life-rents&uot; as a kind of estate which does not appear to be known to Mahomedan law&uot;. The difficulty arises out of the Mahomedan law of gift and does not appear to extend beyond cases of pure *hiba* whether *inter vivos* or by will. As explained in Chapter XI (cf. s. 164 below), if a gift be made subject to a condition which derogates from the grant, the condition is void, e.g., a partial restraint on alienation; but a condition which does not affect the corpus of the thing given is not within the rule, e.g. when there is a reservation of income to the donor or a gift of usufruct to another donee. In the Hedaya (489) the principle is applied to *amrees* (gift for life). The Prophet approved or *amrees* but held the condition annexed to them by the grantor to be void. &uot;. the meaning of *amree* moreover 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&uot;. Accordingly it was held in certain cases that a gift for life operates as an absolute gift.[25]

The assumption underlying this doctrine however is that what is given is the corporeal thing itself; and as the refusal to permit gifts of life interests produces serious inconvenience and gives rise to some unprofitable distinctions, the assumption has not gone without challenge. Can it not be held that what is given is not (e.g.) the land but an interest therein; and that this is given unconditionally there being no intention to make a gift of the corpus? In *Nawazish Ali Khan v. Ali Raza Khan* [26] which was a Shia case the Privy Council stated that there was no difference between the several schools of Muslim law in their fundamental conception of property and ownership. A limited interest takes effect out of the usufruct under any of the schools. The duty of the Court is to construe the gift. If &uot;it is a gift of the corpus,&uot; their Lordships said, &uot;then any condition which derogates from absolute dominion over the subject of the gift will be rejected as repugnant; but if upon construction the gift is held to be one of a limited interest the gift can take effect out of the usufruct, leaving the ownership of the corpus unaffected except to the extent to which its enjoyment is postponed for the duration of the limited interest&uot;.

In *Amjad Khan v. Ashraf Khan* [27] this question was raised in an acute form. The deed described the transaction as a gift without consideration. It recited that the donee and the heirs of the donor had consented. By it the donor gave to his wife his entire property as to one-third with power to alienate and &uot;as to the rest she shall not possess any power of alienation but she shall remain in possession thereof for her lifetime. After the death of the donee the entire property gifted away by this document shall revert to the donor's collaterals.&uot; On the question whether the interest given in the one-third was an absolute interest or was only a life interest plus a power to alienate, the Judicial Committee took the latter view. Their Lordships decided the case by asking, as matter of construction of the deed, what was the subject matter of the gift? Was it merely a life interest in the property together with a power of alienation over one-third thereof? Or was it an absolute interest in the property coupled with an inconsistent condition? Holding on the construction of the deed that the subject-matter of the gift was a life interest only (together with the power of alienation as to one-third) they dismissed the appeal of the donee's heir; the gift of a life-estate was not given the effect of an absolute estate. On the argument that a life-estate could not be created by gift *inter vivos* their Lordships expressed no opinion, holding that, if right, it would only mean that the donee took nothing by the gift--a result which would carry no benefit to her heir.

It is not possible to read this decision as proceeding upon the ground that the case was not one of *hiba* pure and simple. It is direct authority against regarding a life interest as enlarged by the doctrine which invalidates a condition restrictive of a gift and the decision to that effect abovenoted[28] must be treated as overruled by it. Subsequent decisions have so interpreted the Board's judgment.[29]

Both as regards life-estates and remainders there is considerable uncertainty as to the consequences of this decision. It does not decide that in Sunni law a life interest can be validly created by way of gift, but the doubt hitherto cast upon the matter has had reference to the validity of the limit in cases of gift.

The validity of the grant was very old authority: the Hedaya discloses the tradition that the Prophet approved of *amrees* just as he disapproved of *rikba* (e.g., if I die before you then this house is yours). A life interest is not illegal: admittedly a Mahomedan can create such an interest by contract.

The Calcutta, Bombay, Nagpur and Travancore-Cochin High Courts have held that a gift of a life interest is valid.[30] The Chief Court of Oudh has held that the bequest of a life interest by will is valid.[31] In *Nawazish Ali Khan v. Ali Raza Khan* [32] although a Shia case, the Privy Council has made observations which are sufficiently ample to cover Sunni cases. The effect of the decision is that a life estate as known to English law cannot be created by *hiba* whether *inter vivos* or by will. The question is always one of construction. In a case of gift to *A* for life and thereafter to *B*, the courts will presumably construe the gift as a gift of the corpus to *B* absolutely and of the usufruct of *A* for life. The gift, however, to *A* for life would be constructed as a gift of a interest to *A*, and the corpus would vest in the heirs.

It remains to consider whether under Sunni law a gift of a life-estate to *A* with remainder to *B* is a good gift to *B* and whether it amounts to a vested remainder so as to take effect even if *B* dies before *A*. By English law in such a case *B* takes a vested interest and can dispose of his interest by transfer *inter vivos* or by will. On his death intestate his interest will pass to his heirs even if he predeceases *A*. In *Abdul Wahid Khan v. Mt. Nuran Bibi,* [33] [illustration (a)] the Judicial Committee held that such an interest as a vested remainder did not seem to be recognized by Mahomedan law, and this case has been accepted as an authority for the proposition that the remainder man cannot take unless he survives the tenant for life.[34] The case of *Umes Chunder Sircar v. Mt. Zahoor Fatima* [35] [illustration (b)] cannot be regarded as invalidating this conclusion since the point was not taken and the principles of Mahomedan law do not appear to have been discussed. The facts of the case sufficiently account for the omission, but they do not enable the case to be distinguished from *Abdul Wahid Khan v. Nuran Bidi* in point of law; neither was a case of *hiba* pure and simple.

In *Abdul Wahid Khan's* case the principle applied was as follows: &uot;The arrangement contained in the compromise would be called by the Mahomedan lawyers 'a tauris' or 'making some stranger and heir' and cannot be regarded as creating a present or vested interest&uot;.[36]

The above authorities must now be read subject to the Privy Council decision in *Nawazish Ali Khan v. Ali Raza Khan* .[37] Although this was, as stated above, a Shia case, the observations made apply to all schools of Muslim law. Referring to the expression &uot;life estate&uot; and &uot;vested remainder&uot; their Lordships stated as follows:--&uot;In their Lordships' opinion this view of the matter introduces into Muslim law legal terms and conceptions of ownership, familiar enough in English law, but wholly alien to Muslim law. In general, Muslim law draws no distinction between real and personal property, and their Lordships know of no authoritative work on Muslim law, whether the Hedaya, or Baillie or more modern works, and no decision of this Board which affirms that Muslim law recognises the splitting up of ownership of land into estates, distinguished in point of quality like legal and equitable estates, or in point of duration like estates in fee simple, in tail, for life, or in remainder. What Muslim law does recognise and insists 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 recognises 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.. This distinction runs through all the Muslim law of gifts--gifts of the corpus (*hiba*), gifts of the usufruct (*ariyat*) and usufructuary bequests. No doubt where the use of a house is given to a man for his life he may, not inaptly, be termed a tenant for life, and the owner of the house, waiting to enjoy it until the termination of the limited interest, may be said, not inaccurately, to possess a vested remainder. But though the same terms may be used in English and Muslim law, to describe much the same things, the two systems of law are based on quite different conceptions of ownership. English law recognises ownership of land limited in duration; Muslim law admits only ownership unlimited in duration, but recognises interests of limited duration in the use of property . Their Lordships think that there is no difference between the several schools of Muslim law in their fundamental conception of property and

ownership. A limited interest takes effect out of the usufruct under any of the schools. Their Lordships feel no doubt that in dealing with a gift under Muslim law, the first duty of the court is to construe the gift. If it is a gift of the corpus, then any condition which derogates from absolute dominion over the subject of the gift will be rejected as repugnant; but if upon construction the gift is held to be one of a limited interest the gift can take effect out of the usufruct, leaving the ownership of the corpus unaffected except to the extent to which its enjoyment is postponed for the duration of the limited interest.&uot;

(2) *Family settlement.*--A life-estate may be created by an agreement in the nature of a family settlement, whether such agreement is preceded by litigation or not, but &uot;the creation of such a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction&uot;.[38] Such an agreement is from its very nature a transaction for a consideration, and it must be distinguished from a pure *hiba* or gift mentioned in sub-sec. (1) above.[39]

(3) *Hiba-bil iwaz.*--The rule stated in sub-sec. (1) above does not apply to a *hiba-bil-iwaz*. As to *hiba-bil-iwaz*. (*see* 168 below)

(4) *Shia law.*--It was at one time thought that the Shia law allowed the creation of a life-estate and a vested remainder, as held by Jenkins, C.J., and Heaton, J., in *Banoo Begum's* case [illustration (f)]. In two other cases however Beaman, J., expressed the opinion that the Arabic texts there relied upon did not support the conclusion reached, and observed that an estate for life and a vested remainder were known to the Shia law as much as to the Sunni law.[40] In *Nawazish Ali Khan v. Ali Raza Khan* [41] the Privy Council took the view that a life-estate as known in English law is alien to Mahomedan law but if on the construction of a *hiba*, the gift is held to be one of a limited interest the gift can take effect out of the usufruct, leaving the ownership of the corpus unaffected except to the extent to which its enjoyment is postponed for the duration of the limited interest.

(5) *Wakf.*--Both under the Sunni and the Shia law life-estates may be created by wakf. (*see* 197)

Illustrations

(a) One of two persons claiming to be the sons of Mouzzam Khan, a Sunni, sued Gauhar Bibi, his widow, who was in possession of the suit lands in Oudh under a Kabulyat and in pursuance of a summary settlement made by Government in 1858. The plaintiff claimed that Mouzzam Khan had made the estate over to him and his brother. The suit was compromised in terms contained in two petitions to the Court, namely, that the widow should during her life time continue as before to possess and be mistress of the *Talooka,* but should not alienate so as to deprive the plaintiff of his right and that after her death the plaintiff and his brother should possess and enjoy it, &uot;should become successors to and proprietors of the said talooka&uot;. The widow survived both. *Held,* that neither of them acquired any such right as would under Mahomedan law to form the subject of inheritance. &uot;Their Lordships think this is the reasonable construction of the compromise in this case, and that it would be opposed to Mahomedan law to hold that it created a vested interest as in *Abdul Rahman* and *Abdul Subhan* which passed to their heirs on their death in the life time of Gauhar Bibi&uot;. Also &uot;to give the plaintiffs a title to the estate it must be a vested interest which, on the death of the sons, passed to their heirs and is similar to a vested remainder under the English law. Such an interest in an estate does not seem to be recognized by the Mahomedan law&uot;.[42]

(b) By a deed of settlement in 1871 a Sunni leased lands to his second wife, Amani Begum at a fixed rent of one rupee on condition that if she had a child by him the grant should

be taken as a perpetual mokurruri: if no such child was born then it was only to be a life mokurruri and after her death the property was to go to the two sons of the settlor, Farzund and Farhut. Appellant and respondent both claimed to have taken title to one half of the property as purchasers of Farzund's right, title and interest at execution sales. Appellant's sale was in 1879 and respondent's in 1881. At the time of appellants' attachment the settlor, his wife and sons were all alive but before the sale in 1897 the settlor had died. At all material times the widow and Farzund were alive (both were respondents to the Privy Council appeal; the latter died pending the hearing thereof in 1887). It could not have been contended at the trial in 1883 or in the High Court in 1885, and it was not contended in the Privy Council that the gift to Farzund had failed. Both auction purchasers had the same title save that (a) the appellant was first in time, (b) his attachment had been in the settlor's life-time. Respondent's argument concentrated on (b), during the settlor's life the birth of a child to him was a contingency: this contingency no longer remained in 1881. This is the only argument dealt with in the judgment on this part of the case; it was held on the construction of the deed of 1871 that the wife's estate was enlarged and the sons' interest defeated on The birth of a child: not that the son's interest failed to arise until either husband or wife had died. As presented to the Judicial Committee by the rival auction purchasers the case raised no point of Mahomedan law. The contention advanced in *Rasoolbibi v. Usuf Ajam* [43] for the appellant with reference to this case cannot be accepted. There were two elements of contingency (a) the birth of a child, and (b) the widow surviving Farzund. The former was relied on by the respondent: neither sought to profit by the latter.[44]

(c) A Sunni lady, Bai Aishabai, by her will left two properties to her daughter, Hafizabibi, for life without power of alienation and after her death to Ajam (testatrix's step-son) and his descendants as absolute owners. Aishabai died in 1897. Hafizabibi enjoyed the properties till her death in 1926. Ajam died in 1919. The plaintiff was a daughter of Ajam suing for administration of his estate. *Held*, that in the events which had happened Ajam took no interest under the will. *Held* further by Mirza, J., and Beaumont, C.J., (Rangnekar. J., dissenting) that Hafizabibi did not take an absolute estate.[45]

(d) One Nasiruddin, a Sunni, died having by his will left three villages to his wife, Mariambi, and declared that after the death of Mariambi, Abdul Kadar should become the owner thereof. Abdul Kadar died in 1899 and Mariambi in 1904. The plaintiff was a daughter of Abdul Kadar and the defendants were her mother and sister. If an absolute interest was created in favour of Mariambi the plaintiffs suit failed: if on her death the property went to Abdu| Kadar's heirs the plaintiff was entitled to a seven annas share thereof subject to a question whether Abdul Kadar had validly made a gift to his wife in lieu of dower. *Held* on reference to a Bench that Mariambi took a life-estate only. Thereafter the appeal was disposed of on the footing that Abdul Kadar's heirs took the reversionary interest.[46]

(e) By a deed of settlement the plaintiffs mother conveyed two properties to a trustee upon trust to pay taxes and repairs; and out of the net rents and profits to pay to the settlor during her life such moneys as she should require and the balance as therein directed: on the settlor's death the net rents of one property were to be paid to the plaintiff: on the death of the survivor of the settlor and the plaintiff the property was to be held in trust for the plaintiffs son or sons and in default of sons for her daughters, with a gift over in the event of the plaintiff dying without issue. *Held* that assuming that the gift to the plaintiff was of a life interest in the property it did not by Sunni law confer an absolute estate upon her.[47]

(f) It was provided by a consent decree in a suit to which the parties were Shia Mahomedans that a certain house should be held and enjoyed by *A* for her life, and that after her death it should be sold and the sale proceeds divided among her step-sons. It was held that, *A* took a life interest in the house, and the step-sons took a definite interest like what is called in English law a vested remainder.[48] The question whether a vested remainder is recognized by the Shia law was raised in *Muhammad Raza v. Abbas Bandi Bibi* ,[49] but it was not decided as the document to be construed in that case was a compromise of a suit, and therefore one for a consideration.

(g) A Shia Mahomedan by his will purported to give an estate for life to *A* and thereafter to *B* for life, with a power to nominate his successor. It was held that *A* and *B* took a *life interest and that* the power of appointment was invalid under Mahomedan law. *A* and *B* had a life-interest in the usufruct and the testator's heirs were the owners of the property. Their Lordslnips said: "No doubt where the use of a house is given in a man for his life he may, not inaptly, be termed a tenant for life and the owner of the house, waiting to enjoy it until the termination of the limited interest, may be said, not inaccurately to possess a vested remainder. But though the same terms may be used in English and Muslim law, to describe much the same things, the two systems of law are based on quite different conceptions of ownerships. English law recognises ownership of land limited in duration; Muslim law admits only ownership unlimited in duration but recognises interests of limited duration in the use of property".[50]

(h) A makes a bequest in favour of *B* of certain land and provides that *B* shall have no right to transfer the property, but his male issue shall have the right to transfer the property. It was held that the corpus and not merely the usufruct was bequeathed to *B* and the condition that he should not transfer the property was void. *B* therefore took an absolute estate.[51]

(i) A Sunni Mahomedan settled property in favour of certain persons reserving a usufruct for himself for life, it was held that the deed of settlement was valid and the question whether the settlor reserved to himself a life-interest did not arise.[52]

(j) A Sunni Mahomedan made a settlement in the following terms, "I have settled upon you (my wife) for your maintenance the undermentioned *Nanja* land worth Rs. 2,000. Therefore this is a settlement deed executed by me consenting that you should enjoy for your life time the income alone from the said *nanja* land, that you should not make any gift, sale or hypothecation etc. of the said land, that if you should hereafter have issue by me, the said issue should enjoy the said land hereditarily, and that if you should not have such issue the said property after your life time shall go to me and to my heirs". It was held that only the usufruct was given to the wife.[53]

23 (1872) 17 W.R. 525.

24 (1892) 19 I.A. 170.

25 *Nizamuddin v. Abdul Gufur* (1888) 13 Bom. 264; *Abdoola v. Mahomed* (1948) 75 I.A. 62, ('48) A.P.C. 134. (1905) 7 Bom. L.R. 306.

26 (1948) 75 I.A. 62, ('48) A.P.C. 134.

27 (1929) 56 I.A. 213, 4 Luck. 305, 116 I.C. 405, ('29) A.P.C. 149 affirming (1925) 87 I.C. 445, ('25) A.O. 568.

28 *Nizamudin v. Abdul Gufur* (1888) 13 Bom. 264; *Abdoola v. Mahomed* (1905) 7 Bom. L.R. 306.

29 *Abdul Khaleque v. Bepin Behari* ('36) A.C. 456; *Bai Saroobai v. Hussein Somji* (1936) 38 Bom. L.R. 903, 165 I.C. 34, ('36) A.B. 330; *Mt. Subhanbi v.Mt. Umraobi*(1936) 161 I.C. 719, ('36) A.N. 113, *dissenting from Abdul v. Abdul* (1929) 131 I.C. 35, ('29) A.N. 313; *Nawazish Ali Khan v. Ali Raza Khan* (1948) 75 I.A. 62, ('48) A.P.C. 134.

30 *Bai Saroobai v. Hissein Somji* (1936) 38 Bom. L.R. 903, 165 I.C. 34, ('36) A.B. 330; *Mt. Subhanbi v. Mt. Umraobi* (1936) 161 I.C. 719, ('36) A.N. 113; *Achiruddin Ahmad v. Sakina Bewa* (1946) 50 C.W.N. 59, 222 I.C. 585 ('46) A.C. 288; *Maitheen Bivi Umma v. Ithappiri Varkey* (1956) Trav-C. 292, ('56) A Trav.-C. 268; *Anjumanara Begum v. Nawab Asif Kadar* (1955) 2 Cal 109.

31 *Naziruddin v. Khariat Ali* (1938) 172 I.C. 384, ('38) A.O. 51.

32 *Nawazish Ali Khan v. Ali Raza Khan* (1948) 75 I.A. 62, ('48) A.P.C. 134.

33 (1885) 12 I.A. 91, 11 Cal. 597.

34 *Abdul Karim Khan v. Abdul Qayum Khan* (1906) 28 All. 342; *Harpal Singh v. Lekraj Kunwar* (1908) 30 All. 406, 420; *Abdool Husein v. Goolam Hoosein* (1905) 30 Bom. 304, 317; *Rasoolbibi v. Usuf Ajam* (1933) 57 Bom. 737, 148 I.C. 82, ('33) A.B. 324.

35 (1890) 17 I.A. 201 II Cal. 164.

36 (1885) 12 I.A. at p. 101.

37 (1948) 75 I.A. 62, ('48) A.P.C. 134.

38 *Humeeda v. Budlun* (1872) 17 W.R. 525.

39 *Umjad Alli Khan v. Mohumdee Begum* (1867) 11 M.I.A. 517 at 548; *Khwajeh Solehman v. Nawab Sir Salimullah* (1922) 49 I.A. 153. 49 Cal. 820, 69 I.C. 138, ('22) A.P.C. 107; *Jagdish Narain v. Bande Ali Mian* (1939) 20 P.L.T. 328, 183 I.C. 467, ('39) A.P. 406.

40 *Jainabai v. Sethna* (1901) 34 Bom. 604, 612-3, 6 I.C. 513; *Cassamally v. Currimbhoy* (1911) 36 Bom. 214, 253-4, 12 I.C. 225.

41 (1948) 75 I.A. 62, ('48) A.P.C. 134.

42 *Abdul Wahid Khan v. Mt Nuran Bibi* (1885) 12 I.A. 91, 102, 100, 11 Cal. 597.

43 (1933) 57 Bom. 737 at 766, 148 I.C. 82, ('33) A.B. 324.

44 *Umes Chunder Sircar v. Zahoor Fatima* (1890) 17 I.A. 201.

45 *Rasoolbibi v. Usuf Ajam* (1933) 57 Bom. 737, 148 I.C. 82, ('33) A.B. 324.

46 *Mt. Subhanbiv. Mt. Umraobi*(1936) 161 I.C. 719, ('36) A.N. 113.

47 *Bai Saroobai v. Hussein Somji* (1936) 38 Bom. L.R. 903, 165 I.C. 34, ('36) A.B. 330.

48 *Banoo Begum v. Mir Abed Ali* (1908) 32 Bom. 172: *Siraj Hussin v. Mushaf Hussin* (1921) 21 O.C. 321, 49 I.C. 58.

49 (1932) 59 IA. 236, 7 Luck 257, 137 I.C. 321 ('32) A.P.C. 158.

50 *Nawazish Ali Khan v. Ali Raza Khan* (1948) 75 I.A. 62. ('48) A.P.C. 134.).

51 *Siddiq Ahmed v. Wilayat Ahmed.* ('52) A.A. 1.

52 *Mahomed v. Kairum* ('54) A. Mad. 769. See also *Shaikh Khatun Bibi v. Mohd. Zahina Bi* (1956) An. W.R. 771; *Khadija Beevi v. Maria Ummal* ('58) A.Ker. 264; *Sk. Kabir v. Narayandas* (1954) Cut. 513; *Krishnamurthy Setty v. Adbul Khader* ('56) A.Mys. 14.

53 *Nagoor Ammal v. M.K. Meeran* . ('54) A.Mad. 770.

CHAPTER VI

INHERITANCE--GENERAL RULES

56.

Vested inheritance

A &uot;vested inheritance&uot; is the share which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to such persons as are his heirs at the time of his death. The shares therefore are to be determined at each death.[54](*see* 41 *above*)

[*A* dies leaving a son *B*, and a daughter *C*. *B* dies before the estate of *A* is distributed leaving a son *D*. In this case, on the death of *A*, two-thirds of the inheritance vests in *B*, and one-third vests in *C*. On distribution of *A*'s estate, after *B*'s death the two-thirds which vested in *B* must be allotted to his son *D*.][55]

54 *Mst. Jawai v. Hussain Baksh* (1922) 3 Lah. 80, 67 I.C. 154, ('22) A.L. 298.

55 See Macnaghten, &uot;Principles and Precedents&uot;, p. 27, s. 96; Rumsey's Mahomedan Law of Inheritance, ch. ix; Rumsey's *Al Sirajiyyah*, 43-44.

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CHAPTER VI

INHERITANCE--GENERAL RULES

57.

Joint family and joint family business

(1) When the members of a Mahomedan family live in commensality, they do not form a joint family in the sense in which that expression is used in the Hindu Law.[56] Further, in the Mahomedan law, there is not, as in the Hindu law, any presumption that the acquisitions of the several members of a family living and messing together are for the benefit of the family.[57] But if during the continuance of the family properties are acquired in the name of the managing member of the family, and it is proved that they are possessed by all the members jointly, the presumption is that they are the properties of the family, and not the separate properties of the member in whose name they stand.[58]

(2) If after the death of a Mahomedan his adult sons continue their father's business, and retain his assets in the business, they will be deemed to stand in a fiduciary relation to the other heirs of the deceased, and liable to account as such for the profit made by them in the business.[59] If after the death of the sons, the business is continued by their sons or by other heirs, they also will be liable to account on the same footing.[60]

(3) Members of a Mahomedan family carrying on business jointly do not constitute a joint family firm in the sense in which that expression is used in the Hindu law so as to attract the legal incidents of such a firm.[61] Sons assisting a father in business are presumably his agents and not his partners, unless an agreement of partnership is proved.[62] A minor may be entitled to a benefit in the business, but this will not make him liable on a mortgage executed by him along with his adult brothers in the course of the business carried on by the latter. The managers of such a business in a Mahomedan family have no right to impose-any liability on the minor members of the family.[63]

There is no provision of Mahomedan Law recognising a joint family. In Andhra Pradesh muslim families live together and do business together. Such business may be carried on for the benefit of the family including minors and females. Such arrangements have been upheld by Courts. In such a case the adult member or members stand in a fiduciary capacity and the Trust Act is applicable. When the co-owner dies his heirs take his place.[64]

The burden of establishing that a property held by a member in Mahomedan family is his self-acquired property would arise only if the property is held commonly by the other members of the family and the entire family lives in commensality possessing the family property in common.[65]

As the theory of representation is unknown to Mahomedan law, and as there is no presumption that acquisition of one or more of the properties of the family are to be presumed to be for the benefit of the family. Unless there is proof to the contrary and as children in a Mahomedan family are not co-owners in the sense that what is purchased by one person enures for the benefit of another.[66]

56 *Hakim Khan v. Gool Khan* (1882) 8 Cal. 826; *Suddurtonnessa v. Majada Khatoon* (1878) 3 Cal. 694, *Abdool Adood v. Mahomed Makmil* (1884) 10 Cal. 562; *Abdul Khader v. Chidambaram* (1908) 32 Mad. 276; *Abdul Samad v. Bibijan* (1925) 49 Mad. L.J. 675, 91 I.C. 618, ('25) A.M. 1149; *Abdul Rashid v. Sirajuddin* (1933) 145 I.C. 461, ('33) A.A. 206; *Sahul Hamid v.. Sulthan*(1947) 1 Mad. LJ. 20, ('47) A.M. 287.

57 *Abdul Kadar v. Bapubhai* (1898) 23 Bom. 188; *Mohamad Amin v. Hasan* (1906) 31 Bom. 143; *Mohideen Bee v. Syed Meer* (1915) 38 Mad. 1099, 1101, 32 I.C. 1102, See also *Isap Ahmed v. Abramji* (1917) 41 Bom. 588, 612-613, 41 I.C. 761; *Safir Mohd. v. Bashir Mohd* ('61) A. Or. 92. *Md. Zafir v. Amiruddin* ('63) A.P. 108.

58 *Aminaddin v. Tajjadin* (1932) 59 Cal. 541, 138 I.C. 761, ('32) A.C. 538; *Mst. Bibi Fatma v. Aftab Ahmed* ('63) A.P. 128.

59 *Soudagar v. Soudagar* (1931) 54 Mad. 543, 135 I.C. 357, ('31) A.M. 553; *Durga Abdul Rawoof Sahib v. Quresha Bi Saheba* (1959) 2 An.W.R. 557.

60 *Shukrull v. Mt. Zuhra* (1932) 54 All. 916, 143 I.C. 230, ('32) A.A. 512.

61 See *Solema Bibi v. Hafez Mohammad* (1927) 54 Cal. 687, 104 I.C. 833, ('27) A.C 836; *Durg Abdul Rawoof Sahib v. Quresha Bi Saheba* (1959) 2 An. W.R. 557.

62 *Tarachand v. Mohideen* (1935) 37 Bom. L.R. 654, 158 I.C. 701, ('35) A.B. 401.

63 *Ahmed Ibrahim Saheb v. Meyyappa Chettiar* (1939) M.W.N. 976, (1940) Mad. 285, ('40) A.M. 285, [*Abdul Rahim v. Abdul Hakim* ('32) A.M. 553; (1931) 54 Mad. 543, explained.]

64 *D. Raja Ahmed v. Pacha Bai* (1969) 1 An. W.R. 255.

65 *Mohammed Ibrahim v. Syed Muhammad Abbubakker* A.I.R. 1976 Mad. 84 43L.W. .

66 A.I.R. 1970 Mad. 200; *Mohammed Ibrahim v. Syed Muhammad Abbubakker* A.I.R. 1976 Mad. L.W. 43.

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CHAPTER VI

INHERITANCE--GENERAL RULES

58.

Homicide

(1) Under the Sunni law, a person who has caused the death of another, whether intentionally, or by mistake, negligence, or accident, is debarred from succeeding to the estate of that other.

(2) Homicide under the Shia law is not a bar to succession unless the death was caused intentionally.

Rumsey's *Al Sirajiyyah*, 14; Bailie, 266, 369.

Impediments to inheritance

The *Sirajiyyah*sets out four grounds of exclusion from inheritance, namely (1) Homicide, (2) slavery, (3) difference of religion, and (4) difference of allegiance. Homicide, as an impediment to succession, is dealt with in the present section. The second impediment was removed by the enactment of Act V of 1843 abolishing slavery,[67] and the third by the provisions of Act XXI of 1850 which abolished so

much of any law or usage as affected any right of inheritance of any person by reason of his renouncing his religion. The bar of difference of allegiance disappeared with the subversion of the Mahomedan supremacy.

A person incapable of inheriting by reason of any of the above disqualifications is considered as not existing, and the estate is divided accordingly. According to the *Sirajiyyah* he does not exclude others from inheritance (Sir 22-28). Thus if *A* dies leaving a son *B*, a grandson *C* by *B*, and a brother *D* and if *B* has caused the death of *A*, *B* is totally excluded from inheritance, but he does not exclude his son *C*. The inheritance will devolve as if *B* were dead, so that *C*, the grandson, will succeed to the whole estate, *D* being a remote heir. In the undermentioned case, a single Judge of the Lahore High Court, has expressed the view that the rule of public policy would exclude a murderer and his descendants from succession.[68]

67 *Ujmudin Khan v. Zia-ul-Nissa* (1879) 6 I.A. 137, 3 Bom. 422.

68 *Khan Gul Khan v. Karam Nishan* ('40) A.L. 172.

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CHAPTER VI

INHERITANCE--GENERAL RULES

59.

Exclusion of daughters from inheritance by custom or by statute

Where daughters are excluded from inheritance either by custom[69] or by statute,[70] they should be treated as non-existent, and the shares of the other heirs should be calculated as they would be in default of daughters.

There is no custom that daughter can inherit her father's property only as Khananishia daughter or not at all--Such custom has to be pleaded and proved by cogent evidence.[71]

Watan Act, 1886 (Bombay)

If a Mahomedan watandar dies leaving a widow, a daughter, and a paternal uncle, the daughter is not entitled under the Act to any interest in the *watan* lands, she being postponed in the order of succession. The lands are divisible between the widow and the paternal uncle as if the daughter were non-existent so that the widow will take 1/4, and the uncle the residue, 3/4. The widow will take only a life-interest in her share. If the daughter were not excluded, she would have taken 1/2, the widow 1/8, and the uncle the residue, 3/8. The rule of Mahomedan law stated in the ill. to 63 does not apply to such case.

69 *Muhammad Kamil v. Imtiaz Fatima* (1908) 36 I.A. 210, 31 All. 557, 4. I.C. 457.

70 *Aminabi v. Abasaheb* (1931) 55 Bom. 401, 132 I.C. 892, ('31) A.B. 266.

71 AIR 1963 J&K 4, Foll.) *Ghulam Hassan v. Mst. Saja,* A.I.R. 1984 J&K 26.

Custom in Kashmir

Among the Gujars and Bakkerwals of Nunar the custom is that daughters do not inherit even if they remain at home. In default of agnates only, they can succeed to the property. Agnates mean grandfather's descendants in the male line.[72]

72 *Aziz Dar v. Mst. Fazli* ('60) A.J. & K. 53.

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CHAPTER VI

INHERITANCE--GENERAL RULES

60.

Taluqdars of Oudh

A special rule of succession by primogeniture is enacted for the taluqdars of Oudh by the Oudh Estates Act I of 1869 and the Oudh Estates Amendment Act III of 1910. Succession is to the nearest male agnate according to the rules of lineal primogeniture. A daughter's son is not a male agnate and is therefore not entitled to succeed.[73]As the Oudh Estates Act has laid down specific rules for devolution of taluqdari property and has in this respect displaced the Mahomedan law, such property should not be taken into consideration in determining the bequeathable one-third share of the entire assests of a Mahomedan testator.[74]

73 *Adbul Latif Khan v. Mt. Abadi Begum* (1934) 61 I.A. 322, 9 Luck. 421, 150 I.C. 810, ('34) A.P.C. 188.

74 *Mohammad Zia-Ullah v. Rafiq Mohammad* (1939) O.W.N. 581. 182 I.C. 190, ('39) A O . 213.

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CHAPTER VII

HANAFI LAW OF INHERITANCE

Works of authority: Al Sirajiyyah and Al Sharifiyyah The principal works of authority on the Hanafi Law of inheritance are the *Sirajiyyah*, composed by Shaikh Sirajuddin, and the *Sharifiyyah*, which is a commentary of the *Sirajiyyah* written by Sayyad Shariff. The *Sairjiyyah* is referred to in this and subsequent chapters by the abbrevation *Sir*, and the references are to the pages of Mr. Rumsey's edition of the translation of that work by Sir William Jones, as that edition is easily procurable. *See also* Sale's Translation of the Koran, *Sura IV.*

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CHAPTER VII

HANAFI LAW OF INHERITANCE

A.--

THREE CLASSES OF HEIRS

61.

Classes of heirs

There are three classes of heirs, namely, (1) Sharers, (2) Residuaries, and (3) Distant Kindred:

(1) "Sharers" are those who are entitled to a prescribed share of the inheritance;
(2) "Residuaries" are those who take no prescribed share, but succeed to the "residue" after the claims of the sharers are satisfied;
(3) "Distant Kindred" are all those relations by blood who are neither Sharers nor Residuaries.[1]

Sir, *12-13*. The first step in the distribution of the estate of a deceased Mahomedan, after payment of his funeral expenses, debts, and legacies, is to allot their respective shares *to such of the relations as belong to the class of sharers and are entitled to a share*. The next step is to divide the residue (if any) among *such of the residuaries as are entitled to the residue*. If there are no sharers, the residuaries will succeed to the whole inheritance. If there be neither sharers nor residuaries, the inheritance will be divided among *such of the distant kindred as are entitled to succeed thereto*. The distant kindred are not entitled to succeed so long as there is any heir belonging to the class of sharers or residuaries. But there is one case in which the distant kindred will inherit with a sharer, and that is where the sharer is the wife or husband of the deceased. Thus, if a Mahomedan dies leaving a wife and distant kindred, the wife as sharer will take her share which is 1/4 and the remaining three-fourths will go to the distant kindred. And if a Mahomedan female dies leaving a husband *and* distant kindred, the husband as sharer will take his 1/2 share, and the other half will go to the distant kindred. To take a simple case: *A* dies leaving a mother, a son and a daughter's son. The mother as *sharer* will take her share 1/6 and the son as *residuary* will take the residue 5/6. The daughter's son, being one of the class of *distant kindred*, is not entitled to any share of the inheritance.

The question as to which of the relations belonging to the class of sharers, residuaries, or distant kindred, are entitled to succeed to the inheritance depends, on the circumstances of each case. Thus, if the surviving relations be a father and a father's father, the father alone will succeed to the whole inheritance to the entire exclusion of the grandfather, though both of them belong to the class of sharers. And if the surviving relations be a son and a son's son, the son alone will inherit the estate, and the son's son will not be entitled to any share of the inheritance, though both belong to the class of residuaries. Similarly, if the surviving relations belong to the class of distant kindred, *e.g.*, a daughter's son and a daughter's son's son, the former will succeed to the whole inheritance, it being one of the rules of succession that the nearer relation excludes the more remote.

1 *Abdul Sarang v. Putee Bibi* (1902) 29 Cal. 738: *Sk. Akbar Ali v. Sk. Lokman* ('73) A. Orissa 129.

CHAPTER VII

HANAFI LAW OF INHERITANCE

A.--

THREE CLASSES OF HEIRS

62.

Definitions

(a) &uot;True grandfather&uot; means a male ancestor between whom and the deceased no female intervenes.

Thus, the father's father, father's father's father and his father how highsoever are all true grandfathers.

(b) &uot;False grandfather&uot; means a male ancestor between whom and the deceased a female intervenes.

Thus, the mother's father, mother's mother's father, mother's father's father, father's mother's father, are all false grandfathers.

(c) &uot;True grandmother&uot; means a female ancestor between whom and the deceased no false grandfather intervenes.

Thus, the father's mother, mother's mother, father's mother's mother, father's father's mother, mother's mother's mother, are all true grandmothers.

(d) &uot;False grandmother&uot; means a female ancestor between whom and the deceased a false grandfather intervenes.

Thus, the mother's father's mother is a false grandmother. False grandfathers and false grandmothers belong to the class of distant kindred.

(e) &uot;Son's son how lowsoever&uot; includes son's son, son's son's son, and the son or a son how lowsoever.

(f) &uot;Son's daughter how lowsoever&uot; includes son's daughter, son's son's daughter and the daughter of a son how lowsoever.

In *S.M. Dawood Bibi v. A.B. Pulavar* ,[2] a rule of evidence was considered. Evidence was found of ancestry in the recital of names in funeral prayers.

2 ('72) A.Mad. 228.

CHAPTER VII

HANAFI LAW OF INHERITANCE

B.--

SHARERS

63.

Sharers

After payment of funeral expenses, debts, and legacies, the first step in the distribution of the estate, of a deceased Mahomedan is to ascertain which of the surviving relations belong to the class of sharers, and which again of these are entitled to a share of the inheritance, and, after this is done, to proceed to assign their respective shares to such of the sharers as are, under the circumstances of the case, entitled to succeed to a share. The first column in the accompanying table (p. 66A) contains a list of Sharers; the second column specifies the normal share of each sharer; the third column specifies the conditions which determine the right of each sharer to a share, and the fourth column sets out the shares as varied by special circumstances.

Illustrations

Note.--The italics in the following and other illustrations in this chapter indicate the surviving relations. It will be observed that the sum total of the shares in all the following illustrations equals unity i.e. exhausts the inheritance:--

FATHER, HUSBAND AND WIFE

(a)	*Father*	..	..	*1/6*	(as *sharer*, because there are daughters)
	Father's father	..	..	..	(excluded by father)
	Mother	..	..	1/6	(because there are daughters)
	Mother's mother	..	..	..	(excluded by mother)
	Two daughters	..	..	2/3	
	Son's daughter	..	..	..	(excluded by daughters)
(b)	*Husband*	..	..	1/2	
	Father	..	..	1/2	(as residuary)
(c)	*Four widows*	..	..	1/4	(each taking 1/16)
	Father	..	..	3/4	(as residuary)

MOTHER

(d)	*Mother*	..	..	1/3	
	Father	..	..	2/3	(as residuary)
(e)	*Mother*	..	..	1/6	(because there are two sisters)
	Two sisters	..	..	..	(excluded by father)
	Father	..	..	5/6	(as residuary)

Note.--It is important to note that though the sisters do not inherit at all, they affect the share of the mother and prevent her from taking 1/3. This proceeds upon the principle that a person, though excluded from inheritance, may exclude others wholly or partially (*Sir* 28). In the present case the exclusion is partial, that is, the share of the mother is reduced, she taking 1/6 instead of 1/3, which latter share she would have

taken if the deceased had not left sisters. In ill. (g) also, the exclusion of the mother is partial. Ill. (q) is a case of total exclusion.

It is stated in the *Sirajiyyah*(p. 28) that &uot;A person excluded may, as all the learned agree, exclude others, as, if there be two brothers or sisters or more, on whichever side they are, they do not inherit with the father of the deceased, yet they drive the mother from a third to a sixth&uot;. This instance is split into ills, (e) and (g). Ill. (q) is another instance of the same rule. It is taken from Baillie's Digest Part 1, p. 706. The above rule does not apply where a particular heir is excluded by custom or statute. Thus, if the daughter is excluded by the Watan Act the wife's share is not reduced from 1/4 to 1/8.[3]*See* 59 above.

(f)	*Mother*	..	..	1/3	
	Sister	..	..	..	(excluded by father)
	Father	..	..	2/3	(as residuary)
(g)	*Mother*	..	..	1/6	(because there is a brother and also a sister)
	Brother (f., c, or u.)	..	..	..	(excluded by father)
	Sister (f., c, or u.)	..	..	..	(excluded by father)
	Father	..	..	5/6	(as residuary)

Note.--The mother takes 1/6, and not 1/3, where there are two or more brothers or two or more sisters, or *one brother and one sister*, or two or more brothers and sisters. The brother and sister, though they are excluded from inheritance by the father, prevent the mother from taking the larger share 1/3. *See* note to ill. (3).

(h)	*Husband*	..	..	1/2	
	Mother	..	..	1/6	(= 1/3 of 1/2)
	Father	..	..	1/3	(as residuary)

Note.--But for the *husband and father*, the mother in this case would have taken 1/3, as there are neither children not brothers nor sisters. As the deceased has left a husband *and* father, the mother is entitled only to one-third of what remains after the husband's share is allotted to him. The husband's share is 1/2, and what remains is 1/2, and 1/3 of 1/2 is 1/6. The reason of the rule is clear, for if the mother took 1/3, the residue for the father would only be 1--(1/2+1/3) = 1/6, that is, half the share of the mother, while as a general rule, the share of a male is twice that of a female of parallel grade (*Sir*. 22). For the case where deceased leaves a *widow and father*, *see* ill. (*j*) below.

(i)	*Husband*	..	..	1/2	
	Mother	..	..	1/3	
	Father's father	..	..	1/6	(as residuary)

Note.--The mother takes 1/3, for the *father's father* does not reduce her share from one-third of the whole to one-third of the remainder after deducting the husband's share.

(j)	*Widow*	..	..	1/4	
	Mother	..	..	1/4	(= 1/3 of 3/4)
	Father	..	..	1/2	(as residuary)

Note.--In this case, the mother would have taken 1/3 but for the *widow and father*, for there are neither children nor brothers nor sisters. As the widow and father are among the surviving heirs, the mother is entitled to one-third of the remainder after deducting the widow's share. The widow's share is 1/4, the remainder is 3/4, and the mother's share is 1/3 of 3/4, that is, 1/4. *See* ill. (h) above and the note thereto.

(k)	*Widow*	..	..	1/4	
	Mother	..	..	1/3	
	Father's father	..	..	5/12	(as residuary)

Note.--The mother takes 1/3, for the *father's father* does not reduce her share from one-third of the whole to one-third of the remainder after deducting the widow's share.

3 *Aminabi v. Abasaheb* (1931) 55 Bom. 401, 131 I.C. 892, ('31) AB. 266.

TRUE GRANDFATHER AND TRUE GRANDMOTHER

(l)	*Father's mother*	..	..	..	(being a true *pat*, grandmother, is excluded by father)
	Mother's mother	..	..	1/6	(being a true *mat*, grandmother, is not excluded by father)
	Father	..	..	5/6	(as residuary)

(m)	*Father's mother*	..	)	1/6	(each taking 1/12)
	Mother's mother	..	)		
	Father's father	..	..	5/6	(as residuary)

Note.--The father's mother is not excluded by the father's father, for the latter is not an *intermediate*, but an *equal*, true grandfather.

(n)	*Father's father's mother*	..	..	..	(excluded by father's father)
	Father's father	..	..	..	(takes the whole as residuary)

Note.--The father's father's mother is excluded by the father's father for he is an intermediate, true grandfather, the father's father's mother being related to the deceased *through* him.

(o)	*Father's mother's mother*	..	..	1/6	
	Father's father	..	..	5/6	(as residuary)

Note.--The father's mother's mother (who is a true *pat*, grandmother) is not excluded by the father's father (who is a true grandfather), for though he is nearer in degree, he is *not* in relation to her an *intermediate* true grandfather, as the father's mother is *not related to the deceased through him,* but through the father.

(p)	*Father's mother*	..	..	1/6	
	Mother's mother's mother		..	..	(excluded by father's mother who is nearer true grandmother)
	Father's father	..	..	5/6	(as residuary)
(q)	*Father's mother*	..	..	..	(excluded by father)
	Mother's mother's mother		..	..	excluded by father's mother who is a nearer true grandmother)
	Father	..	..	..	takes the whole as residuary

Note.--This illustration is taken from Baillie, 706. The father's mother, though she is excluded by the father, excludes the mother's mother's mother. This proceeds upon the rule that one who is excluded may himself exclude others wholly or partially. *See* note to ill. (e): in that case the exclusion of the mother by the sister was partial, for she did take a share, namely, 1/6. In the present case, however, the exclusion of the mother's mother's mother is entire. It need hardly be stated that if the deceased had not left the father's mother, the mother's mother's mother would have taken 1/6, for being a true *maternal* grandmother, she is not excluded by the father.

DAUGHTERS AND SON'S DAUGHTERS his.

(r)	*Father*	..	..	1/6	(as sharer)
	Mother		..	1/6	
	3 son's daughters, of whom one is by one son and the other two by another son		..	2/3	(each taking 2/9)

Note.--The son's daughters take *per capita* and not *per stirpes*. The two-thirds is not therefore divided into parts, one for the son's daughter by one son, and the other for the other two by another son, but it is divided into as many parts as there are son's daughters irrespective of the number of sons through whom they are related to the deceased. The reason is that the Sunni Mahomedan law does not recognize any right of representation (*see* 53), and the son's daughters do not inherit as representing their respective fathers, but in their own right as grand-daughters of the deceased. The same principle applies to the case of son's sons, brother's sons, uncles' sons, etc. *See* Table of Residuaries.

(s)	*Father*	..	..	1/6	(as sharer)
	Mother	..	..	1/6	
	Daughter	..	..	1/2	
	4 son's daughters	..	..	1/6	(each taking 1/24)

Note.--There being only one daughter, the son's daughters are not entirely excluded from inheritance, but they take 1/6, which together with the daughter's 1/2, makes up 2/3, the full portion of daughters.

(t)	*Father*	..	..	1/6	(as sharer)
	Mother	..	..	1/6	
	2 sons' daughters	..	..	2/3	
	Son's son's daughter	..	..	..	(excluded by son's daughters)
(u)	*Father*	..	..	1/6	(as sharer)
	Mother	..	..	1/6	
	Son's daughter	..	..	1/2	
	Son's son's daughter	..	..	1/6	

Note.--The rule of succession as between daughters and son's daughters applies, in the absence of daughters, as between higher son's daughters and lower son's daughters (*Sir*. 18). There being only one son's daughter in the present illustration, the son's son's daughter is not entirely excluded from inheritance, but she inherits 1/6, which together with the son's daughter's 1/2, makes up 2/3, the full share of son's daughters in the absence of daughters.

SISTERS

(v)	*Mother*	..	..	1/6	
	2 Full sisters	..	..	2/3	(each taking 1/3)
	C. sister	..	..	..	(excluded by full sisters)
	U. sister (or u. brother*)*	..	..	1/6	
(w)	*2 full sisters (or* c. sisters*)*		..	2/3	(each taking 1/3)
	2 u. sisters (or u. brothers*)*		..	1/3	(each taking 1/6)
(x)	*Full sister*	..	..	1/2	
	2 c. sisters	..	..	1/6	(each taking 1/12)
	U. brother	..	)	1/3	(each taking 1/6)
	U. sister	..	)		

Note.--There being only one full sister, the consanguine sisters are not excluded from inheritance, but they inherit 1/6 which, together with the sister's 1/2, makes up 2/3, the collective share of full sisters in the inheritance (*Sir*. *21).*

Sir. 14-23.--The principal point involved in the Table of Sharers are explained in their proper places in the notes appended to the illustrations. The illustrations must be carefully studied, as it is very difficult to understand the rules of succession without them. The principles underlying the rules of succession are set out in the notes on 65 below. It will be observed that the illustrations are so framed that the sum total of the shares does not exceed unity. For cases in which the total of the shares exceeds unity, *see* the next section.

In *Ibrahim Ashraf Patel v. Jamrood Bee* ,[4] the question which arose before the Aurangabad Bench of the Bombay High Court was-what would be the share of two widows? Whether on marriage a widow would lose her 1/16 share in the property? The Court held that the estate of a deceased Muslim immediately devolves upon his heirs at the moment of his death and they get the property in proportion to the share ordained by Mahomedan Law. In the instant case, a person died leaving behind two widows and three daughters. The Court held that two widows would take 1/8 share collectively. Subsequent marriage of one of the widows does not at all abrogate the share which was already devolved on the widow immediately after the death of her husband.

The sharers are twelve in number. Of these there are six that inherit under certain circumstances as residuaries, namely, the father, the true grandfather, the daughter, the son's daughter, the full sister, and the consanguine sister. *See* the list of Residuaries given in 65 below, and the notes on that section.

The Karnataka High Court has held that in the light of the principles of Muslim law, the widow of the pre-deceased son cannot claim any share in the property left behind by her mother in-law. She is excluded from claiming any share in the light of her husband dying prior to the death of his mother.[5]

4 2002 (2) Bom CR 295.

5 *Ashabi v. Faziyabi* A.I.R. 2004 Kant 476.

CHAPTER VII

HANAFI LAW OF INHERITANCE

B.--

SHARERS

64.

Increase (Aul.)

If it be found on assigning their respective shares to the Sharers that the total of the shares exceeds unity the share of each Sharer is proportionately diminished by reducing the fractional share to a common denominator, and *increasing* the denominator so as to make it equal to the sum of the numerators.

Of course, an anomaly arises where the sum of fractions allotted to koranic heir exceeds unity. This

anomaly arises only where either daughter's class (D, SD) or sister's class (real sister or consanguine sister) is present. In their absence no such anomaly can ever arise.

Illustrations

(a)	*Husband*	1/2=3/6	reduced to	3/7
	2 full sisters	2/3=4/6	"	4/7
		7/6		1

Note.--The sum total of 1/2 and 2/3 exceeds unity. The fractions are therefore reduced to a common denominator, which, in this case, is 6. The sum of the numerators is 7, and the process consists in substituting 7 for 6 as the denominator of the fraction 3/6 and 4/6. By so doing the total of the shares equals unity. The doctrine of "Increase" is so called because it is by *increasing* the denominator from 6 to 7 that the sum total of the shares is made equal to unity.

(b)	*Husband*	1/2=3/6	reduced to	3/7
	Full sisters	1/2=3/6	"	3/7
	C. Sister	1/6=1/6	"	1/7
		7/6		1
(c)	*2 full sisters*	2/3=4/6	reduced to	4/7
	2 u. brothers (each taking 1/6)	1/2=2/6	"	2/7
	Mother	1/6=1/6	"	1/7
		7/6		1

(d)	*Husband*	1/2=3/6	reduced to	3/8
	2 full sisters	2/3=4/6	"	4/8
	Mother	1/6=1/6	"	1/8
		8/6		1
(e)	*Husband*	1/2=3/6	reduced to	3/8
	Full sister	1/2=3/6	"	3/8
	3 u. sisters (each taking 1/9)	1/3=2/6	"	2/8
		8/6		1
(f)	*Husband*	1/2=3/6	reduced to	3/9
	2 full sisters	2/3=4/6	"	4/9
	2 u. sisters and 1 u. brother (each taking 1/9)	1/3=2/6	"	2/9
		9/6		1
(g)	*Husband*	1/2=3/6	reduced to	3/9
	Full sister	1/2=3/6	"	3/9
	2 u. sisters and 2 u. brothers (each taking 1/12)	1/3=2/6	"	2/9
	Mother	1/6=1/6	"	1/9
		9/6		1
(h)	*Husband*	1/2=3/6	reduced to	3/10
	2 full sisters	1/3=4/6	"	4/10
	3 u. sisters and 5 u. brothers (each taking 1/24)	1/3=2/6	"	2/10
	Mother	1/6=1/6	"	1/10
		10/6		1
(i)	*Widow*	1/4=3/12	reduced to	3/13
	2 c. sisters	2/3=8/12	"	8/13
	Mother	1/6=2/12	"	2/13
		13/12		1
(j)	*Husband*	1/4=3/12	reduced to	3/13
	Mother	1/6=2/12	"	2/13
	2 daughters	2/3=8/12	"	8/13
		13/12		1
(k)	*Husband*	1/4=3/12	reduced to	3/13
	Mother	1/6=2/12	"	2/13
	Daughter	1/2=6/12	"	6/13
	Son's daughters	1/6=2/12	"	2/13
		13/12		1
(l)	*Widow*	1/4=3/12	reduced to	3/13
	Mother	1/3=5/12	"	4/13
	Full sister	1/2=6/12	"	6/13
		13/12		1
(m)	*Widow*	1/4=3/12	reduced to	5/15
	2 full sisters	2/3=8/12	"	8/15
	2 u. sisters	1/3=4/12	"	4/15
		15/12		1

(n)	*Widow*	1/4=3/12	reduced to	3/15
	2 full sisters	2/3=8/12	"	8/15
	U. sister	1/6=2/12	"	2/15
	Mother	1/6=2/12	"	2/15
		15/12		1
(o)	*Husband*	1/4=3/12	reduced to	3/15
	Father	1/6=2/12	"	2/15
	Mother	1/6=2/12	"	2/15
	3 daughters	2/3=8/12	"	8/15
		15/12		1
(p)	*Widow*	1/4=3/12	reduced to	3/17
	2 full sisters	2/3=8/12	"	8/17
	2 u. sisters	1/3=4/12	"	4/17
	Mother	1/6=2/12	"	2/17
		17/12		1
(q)	*Wife*	1/8=3/24	reduced to	3/27
	2 daughters	2/3=16/24	"	16/27
	Father	1/6=4/24	"	4/27
	Mother	1/6=4/24	"	4/27
		27/24		1

Sir. 29-30.--For cases in which the total of the shares is less than unity, *see* 66 below.

Doctrine of Pulpit (*Al-Mimbariya*).--The doctrine of pulpit is credited in the name of Hazrat Ali, the 4th Caliph of Islam, a great jurist of Islam. The name 'pulpit' of this doctrine is related to an incident which had happened with him. Once he was delivering a sermon from the pulpit (mimber) of a mosque, he was asked how much the widow whose husband had left behind his both parents and two daughters inherits? He promptly replied, "The wife's 1/8 becomes 1/9".[6] The complete solution of the problem posed is as under.

W	1/8=3/24	reduced to	3/27
M	1/6=4/24	"	4/27
F	1/6=4/24	"	4/27
D_1	1/3=8/24	"	8/27
D_2	1/3=8/24	"	8/27
	27/24		27/27

First Step -allot the shares to each sharer.

Second Step-make same denominator to find out whether the total sum exceeds unity.

Third Step-substitute the denominator by the total sum of the numerators.

6 Fatawa-e-Alamgiri Vol. 10, Urdu Translation by Amir Ali, p. 424.

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CHAPTER VII

HANAFI LAW OF INHERITANCE

C.--

RESIDUARIES

65.

Residuaries

If there are no Sharers, or if there are Sharers, but there is a residue left after satisfying their claims, the whole inheritance or the residue, as the case may be, devolves upon Residuaries in the order set forth in the annexed table (p. 74A).

The Residuaries or Agnatic heirs were the principal heirs before Islam; they continue to remain the principal heirs in Sunni law. Their premier position is, in Islam, always subject to the claims of near relations mentioned as the Koranic heirs. First they are satisfied by giving them their Koranic shares. Residuaries are the relations whose rights were also recognized by tribal laws in Saudi Arabia before Islam.

The rights of residuaries are recognised by the Holy Quran (by implication) and by the traditions of the prophet (PBUH) in very specific terms.

The Holy Quran declares:

"from what is left by parents and near kindred, there is a share for men and a share for woman, whether the property be small or large-a determinate share".[7]

"To (benefit) every one, we have appointed shares and heirs to property left by parents and near relatives.."[8]

"Allah directs you concerning your children (their inheritance), to the male a portion equal to that of two females.."[9]

"They ask thee for a legal decision. Say: Allah directs (thus) about those who leave no descendants or ascendants as heir. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance. If (such a deceased was) a woman who left no child, her brother takes her inheritance.. If they are brothers and sisters, (they share), the male having twice the share of the female.."[10]

The first two verses are clear proof that blood relations are entitled to inherit. Blood relations definitely include residuaries (the male agnates).[11]

Hadiths

The *Sahih-al-Bukhari* provides:--

1. Narrated Ibn Abbas, the Prophet (PBUH) said, "Give the faraid (the shares of the

inheritance that are prescribed in the Quran) to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased."[12]

Abu Daud mentions:

2. Imran b. Hussain said: A man came to the Prophet (PBUH) and said my son's son died: What do I receive from his estate? He replied: "you receive a sixth. When he turned away he called him and said, you receive another sixth when he turned away, he called him and said: the other sixth is an allowance (beyond what is due)[13]
3. Ibn Abbas reported the Apostle of Allah (PBUH) as saying: "Divide the property among those whose shares have been prescribed in the Book of Allah, and what remains from the prescribed shares goes to the nearest male heirs.[14]

It is submitted that in the light of above Quranic verses and Hadiths, the whole law of inheritance should be understood and interpreted.

Illustrations

[*Note.*--The residue remaining after satisfying the sharers' claims is indicated in the following illustrations thus.]

No.1.--Sons and Daughters

(a)	*Son*	..	2/3	) (as residuaries)
	Daughter	..	1/3	)

Note.--The daughter cannot inherit as a sharer when there is a son. But if the heirs be a daughter and a son's son, the daughter as a *sharer* will take 1/2, and the son's son as a residuary will take the remaining 1/2.

(b)	*2 sons*	..	..	4/7	(as residuaries, each son taking 2/7)
	3 daughters	..	..	3/7	(as residuaries, each daughter taking 1/7)
(c)	*Widow*	..	..	1/8	(as sharer)
	Son	2/3 of (7/8)=7/12	..	)	(as residuaries)
	Daughter	1/3 of (7/8)=7/24	..	)	

Note.--The residue after payment of the widow's share is 7/8.

(d)	*Husband*		..	1/4	(as sharer)
	Mother		..	1/6	(as sharer)
	Sons	2/3 of (7/12)=7/18	..	)	(as residuaries)
	Daughter	1/3 of (7/12)=7/36	..	)	

Note.-- The residue in the above case is 1--(1/4+1/6)=7/12. If there were two sons and three daughters, each son would take 2/7 of 7/12=1/6, and each daughter 1/7 of 7/12=1/12.

No.2--Son's Sons h.l.s and Son's Daughters h.l.s.

(e)	*Son's son*	..	2/3	(as residuaries)
	Son's daughter		1/3	

Note.--Where there is a son's son, the son's daughter cannot inherit as a sharer but she inherits as a residuary with him. Similarly, a son's son's daughter cannot inherit except as a residuary when there is a son's son's son.

(f)	*2 daughters*	.. ..	2/3	(as sharers)
	Son's son	.. ..	1/3	(as residuary)
	Son's son's son	.. ..		(excluded by son's son)
	Son's son's daughter	.. ..		(excluded both by daughters) and son's son. (*see* Tab. of Sh., No. 8)
(g)	*2 daughters*	.. ..	2/3	(as sharer)
	Son's son	2/3 of (1/3)=2/9		(as residuaries)
	Son's daughter	1/3 of (1/3)=1/9		
(h)	*Daughter*	.. ..	1/2	(as sharer)
	Son's son	2/3 of (1/2)=1/3		(as residuaries)
	Son's daughter	1/3 of (1/2)=1/6		

Note.--There being only one daughter, the son's daughter would have taken 1/6 as *sharer* (*see* Tab. of Sh., No. 8), if the deceased had not left a son's son. But as the son's son is one of the heirs, the son's daughter can inherit only as a *residuary* with the son's son.

(i)	*Son's daughter*	.. ..	1/2	(as sharer)
	Son's son's son	.. ..	1/2	(as residuaries)

Note.-- In this case the son's daughter is not precluded from inheriting as a *sharer* for there is no relation who would preclude her from succeeding as a sharer (*see* Tab. of Sh., No 8, 3rd column). And it will be seen on referring to the Table of Residuaries that the only case in which the son's daughter inherits as a residuary with the son's son's son (who is a *lower* son's son) is where she is precluded from succeeding as a sharer (*see* ill. (k) below).

(j)	*Daughter*	.. ..	1/2	(as sharer)
	Son's daughter	.. ..	1/6	(as sharer *see* Tab. of Sh., No. 8)
	Son's son's son	2/3 of (1/3)=2/9		(as residuaries)
	Son's son's daughter	1/3 of (1/3)=1/9		

Note --There being only one daughter, the son's daughter is entitled to 1/6 as a sharer. Since she is not precluded from inheriting as a sharer, she does not become a residuary with the son's son's son (who is a

lower son's son).

(k)	*2 daughter*	.. ..	2/3	(as sharers)
	Son's daughter	1/3 of (1/3)=1/9	)	(as residuaries)
	Son's son's son	2/3 of (1/3)=2/9	)	

Note.--There being two daughters, the son's daughter cannot inherit as a sharer. She, therefore, inherits as a residuary with the son's son's son (who is a *lower* son's son).

(l)	*2 son's daughter*	.. ..	2/3	(as sharers)
	Son's son's son	2/3 of (1/3)=2/9	)	(as residuaries)
	Son's son's daughter	1/3 of (1/3)=1/9	)	

Note.--The son's daughters in this case do not inherit as residuaries with the son's son's son, for they are not precluded from inheriting as sharers.

(m)	*2 daughter*	.. ..	2/3	(as sharers)
	Son's son's son	2/4 of (1/3)=1/6	)	
	Son's daughter	1/4 of (1/3)=1/12	)	(as residuaries)
	Son's son's daughter	1/4 of (1/3)=1/12	)	

Note.--There being two daughters, the son's daughter cannot inherit as a sharer. She, therefore, inherits as a residuary with the son's son's son (who is a lower son's son). The son's son's daughter is entitled to inherit as a residuary with the son's son's son who is an *equal* son's son in relation to her. Both these female relations inherit therefore as residuaries with the son's son's son, each taking 1/12. This illustration presents two peculiar features. The one is that the son's son's daughter, though remoter in degree, shares with the son's daughter. The other is that the son's daughter succeeds as a residuary with a *lower* son's son. If this were not so, the son's son's daughter would inherit to the exclusion of the son's daughter, as result directly opposed to the principle that the nearest of blood must take first (*Sir*. 18-19).

No 3--Father

(n)	*Father*	.. ..	1/6	(as sharer)
	Son (or son's son h.l.s.)	.. ..	5/6	(as residuary)

Note.--Here the father inherits as a sharer. (*see* Table of Sh., No. 1).

(o)	*Mother*	.. ..	1/3	(as sharer)
	Father	.. ..	2/3	(as residuary)

Note.--Here the father inherits as a residuary, as there is no child or child of a son h.l.s. (S*ee* Table of Sh.,

No. 1)

(p)	*Daughter*	..	..	1/2	(as sharer)
	Father	..	..	1/2	(1/6 as sharer + 1/3 as residuary)

Note.--Here the father inherits both as a sharer and residuary. He inherits as a sharer, for there is a daughter, and he inherits the residue 1/3 as a residuary, for there are neither sons nor son's sons h.l.s. The father may inherit *both* as a sharer and residuary. He inherits simply as a sharer when there is a son or son's son h.l.s (*see* ill. (n) above). He inherits simply as a residuary when there are neither children nor children of sons h.l.s (*see* ill. (o) above). He is both a sharer and a residuary when there are only daughters or son's daughters (h.l.s), but no sons or son's sons h.l.s. as in the present illustration. The same remarks apply to the true grandfather h.h.s. In fact the father and the true grandfather are the only relations who can inherit in *both* capacities *simultaneously*.

No.4--True Grandfather h.h.s.

Note.--Substitute &uot;true grandfather&uot; for &uot;father&uot; in ills, (n), (o) and (p). The true grandfather will succeed in the same capacity and will take the same share as the father in those illustrations.

Nos. 5&7--Brothers and Sisters

(q)	*Husband*		.. ..	1/2	(as sharers)
	Mother		.. ..	1/6	(as sharers)
	Brother	2/3 of (1/3)=2/9	)		(as residuaries)
	Sister	1/3 of (1/3)=1/9	)		

Note.--The sister cannot inherit as a sharer when there is a brother, but she takes the residue with him.

Full brother[15]	..	..	2/3	(as residuary)
Full sister	..	..	1/3	(as residuary)
Con. Sister	..	..	..	(excluded by full brother)

15. *Abdul Karim v. Mst. Amat--ul-Habib* (1922) 3 Lah. 397, 70 I.C. 205, ('23) A.L. 121.

The fact of the mutation of the name of the son cannot be conclusive on the point that his sister had lost her right and interest in the property coming down from their father. It is still possible for the sister to contend that the name of the brother had been mutated in a representative capacity, but this fact had to be established by her by cogent evidence; otherwise the fact of the plots having been exclusively mutated in the name of the brother would be strong evidence that the brother get exclusive possession of the property on the death of the father and that the sister did not get such possession and hence lost her rights.[16]

No.6--Full Sisters with Daughters and Son's Daughters

(r)	*Daughter (or* son's daughter h.l.s*)*	..	..	1/2	(as sharer)
	Full sister	..	..	1/2	(as residuary No. 6)
	Brother's son	..	..	..	(excluded by full sister who is a nearer residuary)

Note.--The full sister inherits in *three* different capacitites: (1) as a sharer under the circumstances set out in the Table of Shares; (2) as a residuary with full brother when there is a brother; and, failing to inherit in either of these two capacities (3) as a residuary with daughters, or son's daughters h.l.s. or one daughter and a son's daughter h.l.s. provided there is no nearer residuary. Thus, in the present illustration, the sister cannot inherit as a sharer, because there is a daughter (or son's daughter h.s.s). And as there is no brother, she cannot inherit in the second of the three capacities enumerated above. She therefore takes the residue 1/2 as a residuary with the

(s)	*2 daughter (or* son's daughter h.l.s*)*	..	..	2/3	(as sharers)
	Full sister	..	..	1/3	(as residuary No. 6)
(t)	*2 daughter*[17]	..	..	2/3	(as sharers)
	Husband	..	..	1/4	(as sharer)
	Full sister	..	..	1/12	(as residuary No. 6)
	Father's pat. uncle's son	..	..		(excluded by full sister who is a nearer residuary)

(u)	*Daughter*	..	1/2	(as sharer)		
	Son's daughter	..	1/6	(as sharer)		
	Full sister	..	1/3	(as residuary No. 6)		
(v)	*Daughter*	..	1/2	(as sharer)		
	Son's daughter	..	1/6	(as sharer)		
	Mother	..	1/6	(as sharer)		
	Full sister	..	1/6	(as residuary No. 6)		
(w)	*Daughter*	..	1/2	(as sharer)		
	Son's daughter	..	1/6	(as sharer)		
	Husband	..	1/4	(as sharer)		
	Full sister	..	1/12	(as residuary No. 6)		
(x)	*Daughter*	..	1/2	(as sharer)=6/12	reduced to	6/13
	Son's daughter	..	1/6	(as sharer)=2/12	"	2/13
	Husband	..	1/4	(as sharer)=3/12	"	3/13
	Mother	..	1/6	(as sharer)=2/12	"	2/13
	Full sister			(excluded)		
			13/12			1

17. *Meherjan v. Shajadi* (1899) 24 Bom. 112.

Note.--Here the only capacity in which the full sister could inherit is that of a residuary with the daughter and son's daughter. But the residuary succeeds to the residue, *if any*, after the claims of the sharers are satisfied, and in the present case there is no residue. The sum total of the sharers exceeds unity, and the case is one of &uot;Increase.&uot;

No.8--Consanguine Sisters with Daughters and Son's Daughters.h.l.s.

Note.--Consanguine sisters inherit as residuaries with daughters and son's daughters in the absence of full sisters. Substitute &uot;consanguine sister&uot; for &uot;full sister&uot; in ills, (r) to (x), and the shares of the several heirs will remain the same, the consanguine sister taking the place of the full sister. Substitute also in the note to ill. (r) &uot;consanguine brother&uot; for &uot;full brother.&uot;

Consanguine brothers and brothers' sons are both residuaries but a consanguine brother excludes a brother's son being a higher residuary. When this happens a consanguine sister gets a share with the consanguine brother as a residuary and the daughter gets 1/2 share as a sharer.[18]

7 IV : 7.

8 IV : 33.

9 IV : 11.

10 IV : 176.

11 *See*, Mohammad Mustafa Ali Khan, *Islamic Law of Inheritance*, Ist edition.

12 *Sahih-al-Bukhari*, vol. 8, Translated by M.M. Khan No. 724.

13 Sunan Abu Daud, vol. 2, Tr, No. 2890.

14 *Ibid*, Tr, No. 2890.

16 1978 A.W.C. 577, Referred to, *Hasan Imdad v. Additional Civil Judge, Azamgarh.* (1979) A.W.C. 201 [M.P. Mehrotra. J].

18 *Smt. Kulsumunnissa v. Smt. Ahmadi Begum* ('72) A. All. 219.

Other Residuaries

(y)	*Full sister*	..	1/2	(as sharer)
	C. sister	..	1/6	(as sharer)
	Mother	..	1/6	(as sharer)
	Brother's son	..	1/6	(as residuary)

(z)	*Widow*	..	1/4	(as sharer)
	Mother	..	1/3	(as sharer)
	Pat. uncle	..	5/12	(as residuary)
(aa)	*Full sister*[19]	..	1/2	(as sharer)
	Pat. uncle's sons	..	1/2	(as residuaries)

19. *Mst. Ghulam v. Nur Hasan* (1922) 3 Lah. 278, 69 I.C. 1000. ('22) A.L. 406.

Sir. 18-21 and 23-26. Some of the important point involved in the Table of Residuaries are explained in the notes appended to the illustrations.

Classification of Residuaries

All residuaries are related to the deceased *through a male*. The uterine brother and sister are related to the deceased through a female, that is, the mother, and they do not therefore find a place in the List of Residuaries. The *Sirajiyyah* divides residuaries into three classes, *viz*., (1) residuaries *in their own right*: these are all males comprised in the List of Residuaries; (2) residuaries *in the right of another*: these are the four female residuaries, namely, the daughter as a residuary in the right of the son, the son's daughter h.l.s. as a residuary in the right of the son's son h.l.s., the full sister in the right of the full brother, and the consanguine sister in the right of the consanguine brother; and (3) residuaries *with* others, namely, the full sister and consanguine sister, when they inherit as residuaries *with* daughters and sons' daughter h.l.s. But if regard is to be had to the *order* of succession, residuaries may be divided into four classes, the first class comprising descendants of the deceased, the second class his ascendants, third the descendants of the deceased's father, and the fourth class is the descendants of the deceased's true grandfather h.h.s. This classification has been adopted in the Table of Residuaries. The division of Distant Kindred into four classes proceeds upon the same basis.

Residuaries that are primarily Sharers

It will be noticed on referring to the Table of Sharers and Residuaries that there are six sharers who inherit under certain circumstances as residuaries. These are the father and true grandfather h.h.s., the daughter and son's daughter h.l.s., and the full sister and consanguine sister. Of these, only the father and true grandfather inherit in' certain events both as sharers and residuaries (*see* ill. (p) above, and the note thereto). In fact they are the only relations who can inherit at the same time in a double capacity. The other four, who are all females, inherit either as sharers or residuaries. The circumstances under which they inherit as sharers are set out in the Table of Sharers. They succeed as residuaries and can succeed in the capacity alone, when they are combined with male relations of a parallel grade. Thus the daughter inherits as a *sharer* when there is no son. But when there is a son, she inherits as a *residuary*, and can inherit in that capacity alone; not that when there is a son she is excluded from inheritance, but that in that event she succeeds as a residuary, the presence of the son merely altering the character of her heirship. Similarly, the son's daughter h.l.s. inherits as a residuary when there is an equal son's son. And in like manner, the full sister and consanguine sister succeed as residuaries when they co-exist with the full brother and consanguine brother respectively. The curious reader may ask why it is that the said four female relations are precluded from inheriting as *sharers* when they exist with males of parallel grade? The answer appears to be this, that if they were allowed to inherit as sharers under those circumstances, it might be that no residue would remain for the corresponding males (all of whom are residuaries only), that is to say, though the females would have a share of the inheritance, the corresponding males, though of an equal grade, might have no share of the inheritance at all. To take an example: *A* dies leaving a husband, a father, a mother, a daughter, and a son. The husband will take 1/4, the father 1/6 and the

mother 1/6. If the daughter were allowed to inherit as a sharer, her share would be 1/2, and the total of the shares would then be 13/12, so that no residue would remain for the son. It is, it seems, to maintain a residue for the males that the said females are precluded from inheriting as sharers when they co-exist with corresponding male relations.

The principle which regulates the successions of full and consanguine sisters as residuaries which daughters and son's daughter h.l.s. is explained in the notes appended to ill. (r).

Female residuaries

There are two more points to be noted in connection with female residuaries, which are stated below.

(1) The female residuaries are four in number of whom two are descendants of the deceased, namely, the daughter and son's daughter h.l.s., and the other two are descendants of the deceased's father, namely, the full sister and consanguine sister. *No other female can inherit as a residuary*.
(2) All the four females inherit as residuaries with corresponding males of a *parallel* grade. But none of these except the son's daughter h.l.s. can succeed as a residuary with the male *lower* in degree than herself. Thus the daughter cannot succeed as a residuary with the son's son, nor the sister with the brother's son; but the son's daughter may inherit as a residuary not only with the son's son but with the son's son's son or other lower son's son. (*see* ill. (m) and the note thereto).

Principles of succession among Sharers and Residuaries

It will be seen from the Table of Sharers and Residuaries that certain relations entirely exclude others from inheritance. This proceeds upon the following principles laid down in the *Sirajiyyah* in the part headed &uot;Of Exclusion&uot;:--

(1) &uot;*Whoever is related to the deceased through any person shall not inherit while that person is living*&uot; (*Sir*. 27). Thus the father excludes brothers and sisters. And since uterine brothers and sisters are related to the deceased through the mother, it must follow that they should be excluded by the mother. A reference, however, to the Table of Shares will show that these relations are not excluded by the mother. The reason is that the mother, when she stands alone, is not entitled to the whole inheritance in one and the *same capacity* as the father would be if he stood alone, but partly as a sharer and partly by &uot;Return&uot; (*Sir*. 27; *Sharifiyyah* 49). Thus if the father be the sole ' surviving heir he will succeed to the whole inheritance as a *residuary*. But if the mother be the sole heir she will take 1/3 as *sharer*, and the remaining 2/3 by *Return* (*see* 53 below). For this reason the mother does not exclude the uterine brother and sister from inheriting with her.
(2) &uot;*The nearest of blood must take*&uot; (Sir. 27), that is, the nearer in degree exclude the more remote. The exclusion of the true grandfather by the father, of the true grandmother by the mother, of the son's son by the son, etc., rests upon this principle. These cases may also be referred to the first principle set out above.

It will have been seen that the daughter, though she is nearer in degree, does not exclude the brother's son or his son. Thus if the surviving relations be a daughter and a brother's son, the daughter takes 1/2,

and the brother's son takes the residue. The reason is that the daughter in this case inherits as a *sharer*, and the brother's son as a *residuary*, and the principle laid down above applies only as *between relations belonging to the same class of heirs*. The above principle may, therefore, be read thus: &uot;*Within the limits of each class of heirs*, the nearer in degree excludes the more remote.&uot;

Again, it will have been seen that the father, though nearer in degree, does not exclude the mother's mother or her mother; nor does the mother exclude the father's father or his father. The reason is that the above principle is to be read with further limitations, which we shall proceed to enumerate. These limitations are nowhere stated in the *Sirajiyyah* or in any other work of authority, but they appear to have been tacitly recognized in the rules governing succession among Sharers and Residuaries.

(3) After stating the two principles mentioned above, the *Sirajiyyah* (p. 28) goes on to say that &uot;a person excluded may, as all the learned agree, exclude others.&uot; *See* ills, (e), (g) and (q) to 50 above, and the note to ill.(e).

There are five heirs that are always entitled to some share of the inheritance, and they are in no case liable to exclusion. These are (1) the child, i.e., son or daughter, (2) father, (3) mother, (4) husband, and (5) wife (*Sir*. 27). These are the most favoured heirs, and we shall call them, for brevity's sake, Primary Heirs. Next to these, there are three, namely, (1) child of a son, h.l.s., (2) true grandfather h.h.s. and (3) true grandmother h.h.s. These three are the *Substitutes* of the corresponding primary heirs. The husband or wife can have no substitute. The following two lines indicate at a glance the primary heirs and their substitutes:--

Primary heirs	*Child*	*Father*	*Mother*
Substitutes	*Child of a son h.l.s.*	*Tr. G.F.*	*Tr. G.M*

The right of succession of the substitutes is governed by the following rules:--

(1) No substitute is entitled to succeed so long as there is the corresponding primary heir. To this there is an exception, and that is when there is no son, but a daughter and a son's daughter in which case the daughter takes 1/2, and the son's daughter (though a substitute) takes 1/6. (*see* Tab. of Sh., No. 8)
(2) The child of a son h.l.s. is always entitled to succeed, when there is no child.
(3) The Tr. G.F. is always entitled to succeed, when there is no father.
(4) The mother's mother is always entitled to succeed, when there is no mother. The father's mother is always entitled to succeed, if there be no mother and no father.
(5) All relations who are excluded by primary heirs are also excluded by their substitutes. Thus, full and consanguine sisters and uterine brothers and sisters are excluded by the *child* and the father. They are also excluded therefore by the *child of son h.l.s .* and by the true grandfather.[20]

In *Newanness v. Shaikh Mohamad* ,[21] the shares and extent were in controversy before the Supreme Court. The geneology table which was before the Court was not disputed. It showed that Haji Ishan died in 1995 leaving behind his widow Samudanusa (Plaintiff No. 1), who also died pending suit in 1966, his two daughters, (plaintiff No. 2) Bibi Mewannesa and Bibi Mahujanunusa (Defendant No.5); and three sons Jabar Ali, Isabul Ali and Sabul Hasan. Jabar left behind a son and a daughter, (defendant No. 1) and (defendant No. 2) respectively. Isabul Ali left behind him a daughter (defendant No. 3) who was married to defendant No. 1. Sabul Hasan predeceased Isabul Ali, leaving behind him (defendant No. 4), a son and a Liquate also a son, who too died before the death of Isabul Ali. The trial court granted preliminary decree which was affirmed in appeal. The High Court found that the property purchased by Haji Ishan Ali in the name of his son Sabul Hasan belong to the latter alone. Since Sabul Hasan had predeceased Isabul Ali, the question arose whether Haji Ishan Ali was a sharer in the estate of Sabul Hasan.

With the help to this book, the Court observed that a father gets 1/6 share, where there is a child or children of a son, and where there is no child or children of a son, the father inherits as residuary. Since Sabul Hasan left behind a son, Haji Ishan got 1/6 share. Out of this 1/6 share got from the estate of Sabul Hasan his widow and the daughter would get equal respective share under law, which would be determined by the trial court.

The next question was whether plaintiff No. 2 (two daughters) is entitled to a share in the estate of Bibi Mahujanunusa, defendant No. 5 who died pending suit. The rule mentioned in this book states that if there are no sharers or if there are sharers but there is residue left after satisfying their claim, Residuary also inherit in the order set forth in the Table 5 of this book. Defendant No. 5 left behind two daughters and as per the shares two daughters are entitled to 2/3 share i.e. 1/3 share each. Thus, 1/3 remains a residue. Table dealing with Residuary given under 65 indicates that where descendants like son, son's son, and ascendants like father and grandfather are not available, the descendants of the father takes in the order mentioned therein. The first, if full brother, then sister; in default, a daughter or son's daughter or daughter's son. In this case, since only two daughters were left behind by defendant No. 5 the full sister namely plaintiff No. 2 takes the entire residue, which is 1/3 share.

The next issue was that since defendant No.1 died in March 1990, steps were not taken to bring the legal representatives on record until 27th Jan,1995 despite notice given to the appellant by the letter dated 15th Nov, 1990 and no proper explanation has been given for the inordinate delay. Therefore, appeal as a whole should be dismissed as having been abated. The Supreme Court held that there is no force in the contention. Since the third defendant is already on record representing all heirs of the first defendant widow, the question of abatement does not arise. Even otherwise, the Court finds that substitution should be allowed since no injustice would be done in bringing the legal representatives on record.

20 It may here be stated that though, according to the opinion of Abu Hanifa the true grandfather excludes brothers and sisters whether full or consanguine, he does not exclude them according to the view of Abu Yusuf and Muhammad, but is put to the election as between certain shares (Sir. 40-42). But the latter view is not generally adopted, and it is unnecessary to set it out here.

21 A.I.R. 1996 SC 702.

Residue

The son, being a residuary, is entitled to the *residue* left after satisfying the claims of sharers. At the same time it must have been seen that a son is *always* entitled to some share of the inheritance. To enable the son to participate in the inheritance *in every case*, it is necessary that some residue must always be left when the son is one of the surviving heirs, and this, in fact, is always so; for the shares are so arranged and the rules of succession are so framed that when the son is one of the heirs some residue invariably remains. And since in the absence of the father the true grandfather h.h.s. is entitled to some participation in the inheritance, it will be found that in every case where he is one of the surviving heirs some residue is always left. No case of &uot;increase&uot; can therefore take place when these residuaries are amongst the surviving heirs.

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CHAPTER VII

HANAFI LAW OF INHERITANCE

C.--

RESIDUARIES

66.

Return (Radd)

If there is a residue left after satisfying the claims of Sharers, but there is no Residuary, the residue reverts to the Sharers in proportion to their shares. This right of reverter is technically called &uot;Return&uot; or *Radd*.

Exception.--Neither the husband nor the wife is entitled to the *Return* so long as there is any other heir, whether he be a Sharer or a Distant Kinsman. But if there be no other heir, the residue will go to the husband or the wife, as the case may be, by *Return*.

Illustrations

(a) A Mahomedan dies leaving a widow as his sole heir. The widow will take 1/4 as sharer, and the remaining 3/4 by *Return*. *The surplus 3/4 does not escheat to the Crown: Mahomed Arshad v. Sajida Banoo* ;[22]*Bafatun v. Bjilaiti Khanum* ;[23]*Mir Ilsub v. Isab* .[24]

(b)	*Husband*	..	1/2	
	Mother	..	1/2	(1/3 as sharer and 1/6 by Return)

Note.--The husband is not entitled to the *Return*, as there is another sharer, the mother. The surplus 1/6 will therefore go to the mother by *Return*.

(c)	*Husband*	..	1/4	
	Daughter	..	3/4	(1/2 as sharer and 1/4 by Return)
(d)	*Wife*	..	1/4	
	Sister (f. or c.)	..	3/4	(1/2 as sharer and 1/4 by Return)
(e)	*Wife*	..	1/8	
	Son's daughter	..	7/8	(1/2 as sharer and 3/8 by Return)
(f)	*Mother*	..	1/6	Increased to 1/4
	Son's daughter	..	1/2	= 3/6 " 3/4
				4/6 1

Note.-- In this and in illustrations (g) to (k) it will be observed that neither the husband nor the wife is among the surviving heirs. The rule in such a case is to reduce the fractional shares to a common denominator, and to decrease the denominator of those shares so as to make it equal to the sum of the numerators. Thus in the present illustration, the original shares, when reduced to a common denominator, are 1/6 and 3/6. The total of the numerators is 1+3=4, and the ultimate shares will therefore be 1/4 and 3/4 respectively.

(g)	*Father's mother* *Mother's mother*	)	1/6	increased to	1/5	(each taking 1/10)
	2 daughters		2/3=4/6 5/6	"	4/5 1	
(h)	*Mother*	..	1/6	increased to	1/5	
	Daughter		1/2=3/6	"	3/5	
	Son's daughter		1/6 5/6	"	1/5 1	
(i)	*Father's mother* *Mother's mother*	)	1/6	increased to	1/5	
	Full sister		1/2=3/6	"	3/5	
	C. sister		1/6 5/6	"	1/5 1	
(j)	*Full sister*		1/2=3/6	increased to	3/5	
	C. sister		1/6	"	1/5	
	U. sister		1/6 5/6	"	1/5 1	
(k)	*Mother*		1/6	Increased to	1/5	
	Full sister		1/2=3/6	"	3/5	
	U. brother		1/6 5/6	"	1/5 1	
(l)	*Husband*		1/4			= 4/16
	Mother		1/6	Increased to	1/4	of (3/4)=3/16
	Daughter		1/2=3/6 11/12	"	3/4	of (3/4)=9/16 1

Note:--In this and in ills, (m) to (r), it will be observed that either the husband or the wife is one of the surviving heirs. Since neither the husband nor the wife is entitled to the Return when there are other sharers, his or her share will remain the same, and the shares of the others will be increased by reducing them to a common denominator, and then decreasing the denominator of the original fractional share so as to make it equal to the sum of the numerators, and multiplying the new fractional shares thus obtained by the residue after deducting the husband's or wife's share. Thus in the present illustration the shares of the mother and daughter, when reduced to a common denominator, are 1/6 and 3/6 respectively. The total of the numerators is 1+3=4, and the new fractional shares will thus be 1/4, and 3/4 respectively. The residue after deducting the husband's share is 3/4, and the ultimate shares of the mother and daughter will therefore be 1/4 of 3/4=3/16 and 3/4 of 3/4=9/16 respectively.

(m)	*Wife*	1/8			= 4/32
	Mother	1/6	increased to	1/4	of (7/8)=7/32
	Daughter	1/2=3/6	”	3/4	of (7/8)=21/32
		19/24			1
(n)	*Wife*	1/8			= 5/40
	Mother	1/6	increased to	1/5	of (7/8)=7/40
	2 sons's daughter	4/6	”	4/5	of (7/8)=28/40
		23/24			1
(o)	*Husband*	1/2			= 2/4
	U.brother	1/6	increased to	1/2	of (1/2)=1/4
	U.sister	1/6	”	1/2	of (1/2)=1/4
		5/6			1
(p)	*Wife*	1/4			= 2/8
	U.brother	1/6	increased to	1/2	of (3/4)=3/8
	U.sister	1/6	”	1/2	of (3/4)=3/8
		7/12			1
(q)	*Wife*	1/4			= 4/16
	Full sister	1/2=3/6	increased to	3/4	of (3/4)=9/16
	C.sister	1/6	”	1/4	of (3/4)=3/16
		11/12			1
(r)	*Wife*	1/4			= 1/4
	U. brother	1/6	increased to	1/3	of (3/4)=1/4
	U. sister	1/6	”	1/3	of (3/4)=1/4
	Mother	1/6	”	1/3	of (3/4)=1/4
		9/12			1
(s)	*Husband*	1/2			
	Daughter's son	1/2			

Note:-- The daughter's son belongs to the class of distant kindred. The husband is not therefore entitled to the surplus by Return and the same will go to the daughter's son as a distant kinsman.

(t)	*Wife*	1/4
	Brother's daughter	3/4

Note.--The brother's daughter belongs to the class of distant kindred. The surplus will therefore go to her, as the wife is not entitled to the Return.[25]

Sir. 37-40.

Similarly, a case came before the Gauhati High Court where on the death of the father, his heirs, two sisters partitioned the land. One of them 'A' sold away her share (1/2) in the land to her sister 'B'. Later 'A' died leaving behind her son's as her sole heir. Later 'B' also died without any issue leaving behind her husband and her sister's son.

The Court held that the husband will get only one half share of the land belonging to his wife 'B' and the other half will devolve on the plaintiff, sister's son of the deceased who was a distant kindred. Here, husband is the only 'sharer' and so he will get of the share in the property as a share. Since there is no residuary so the residue will not revert to the husband but it will go to the sister's son as a distant kindred.[26]

22 (1878) 3 Cal. 702.

23 (1903) 30 Cal. 683.

24 (1920) 44 Bom. 947, 58 I.C. 48.

25 *See Koonari v. Dalim* (1884) 1 Cal. 14.

26 *Abdul Matin v. Abdul Aziz* A.I.R. 1990 Gau. 70.

Residuaries for special cause

A residuary for special cause is a person who inherits from a freed man by reason of the manumission of the latter.[27] According to Mahomedan law proper, if a manumitted slave dies without leaving any residuary heir by religion, the manumitter is entitled to succeed to the residue in preference to the right of the sharers to take the residue by Return (*Sir*. 25-26). But residuaries for special cause have no place in Mahomedan law as administered by the Courts of India since the abolition of slavery in 1843.

27 Rumsey's Moohummudan Law of Inheritance.

Husband and wife

The rule of law as stated in the exception as regards the right of the husband and wife to Return is different from that set out in the *Sirajiyyah*. According to the latter authority, neither the husband nor the wife is entitled to the Return in *any case*, not even if there be no other heir, and the surplus goes to the Public Treasury (*Sir*. 37). &uot;But although that was the original rule, an equitable practice has prevailed in modern times of returning to the husband or to the wife in default of other sharers by blood and distant kindred&uot; and this practice has been adopted by our Courts. (*see* the cases cited in ill. (a) above)

Husband or wife can inherit as sharers and also as distant kindred. But 'return' is not possible as sharers in their case. They are, however, not excluded from the 'return' in their other capacity as distant kindred.

In this case the husband inherited his share as a sharer and the residue in his capacity as a distant kindred byway of 'return'. *Baillie's Digest of Mohammedan Law* p. 287, Babu Ram Verma's *Mahommedan Law,* Tyabji's *Muhammadan Law* p. 892 referred to.

A person capable of inheriting in two capacities is entitled to inherit in both capacities.[28]

When a Hanafi Mohammedan dies leaving a husband or wife and there are no residuaries the husband or the wife, as the case may be take their full share and the residue is divided among distant kindred. There is no 'return' for them. (Paragraph 66 of Mulla's *Mahomedan Law* approved).

If there are no other heirs (including distant kindred) the husband or the widow, as the case may be takes the whole estate and the residue does not go to the *bait-ul-mal* (state treasury).[29]

28 *Mazirannessa v. Khondkar Golam Kibria* ('70) A. Cal. 387.

29 *Mst. Soobhanee v. Bhetun* Sel. Rep. SDA 346 and *Mahomed Arsad Choudhury v. Sajida Banoo* I.L.R. (1878) 3 Cal. 702 referred to (*see* Para 67). *Ali Sahib v. Hajra Begum* ('68) A. Mys. 351.

&uot;Return&uot; distinguished from &uot;Increase&uot;

Return is the converse of Increase. The case of Return takes place when the total of the shares is less than unity; the case of Increase, when the total is greater than unity. In the former case the shares undergo a rateable increase; in the latter a rateable decrease.

Father and true grandfather

When there is only one sharer, he succeeds to the whole inheritance, to his legal share as sharer, and to the surplus by Return. When the father is the sole surviving heir, he succeeds to the whole inheritance as a *residuary*, for he cannot inherit as a sharer when there is no child or child of a son h.l.s. (*see* Table of Sh., No. I). The same remarks apply to the case of the true grandfather when he is the sole surviving heir.

Father and Daughter

If the father dies leaving behind only daughter and no other heirs, the daughter will take her Quranic share and the residue will also revert back to her. In the instant case, an appeal was filed before the Madhya Pradesh High Court under s. 384 of the Succession Act, 1925 against the order where certificate was issued to the respondent daughter for the debts and securities left by deceased. The Court held that the daughter was entitled to her share (1/2) as a sharer, but as there was no residuary so the residue would also revert back to her. Thus under the circumstances, the grant of succession certificate to the respondent was not illegal.[30]

30 *Rukmanibai* v. *Bismillabai*A.I.R. 1993 MP 45.

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CHAPTER VII

HANAFI LAW OF INHERITANCE

D.--

DISTANT KINDRED

67.

Distant Kindred

(1) If there be no shares or Residuaries, the inheritance is divided amongst Distant Kindred.
(2) If the only sharer be a husband or wife, and there be no relation belonging to the class of Residuaries, the husband or wife will take his or her full share, and the remainder of the estate will be divided among Distant Kindred.

Sir. 13. It will have been seen from the preceding section that a husband or wife, though a sharer, does not exclude distant kindred from inheritance when he or she is the sole surviving heir. (*see* 66 and ills, (s) and (t) to that section)

In proceedings for substitution of legal representatives, a residuary has preference over distant kindred.[31]

31 *St Akbar Ali v. Smt. Lokman* (1972) 2 C.W.R. 1969.

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CHAPTER VII

HANAFI LAW OF INHERITANCE

D.--

DISTANT KINDRED

68.

Four Classes

(1) Distant Kindred are divided into four classes, namely, (1) descendants of the deceased other than sharers and residuaries; (2) ascendants of the deceased other than sharers and residuaries; (3) descendants of parents other than sharers and residuaries; (4) descendants of ascendants how highsoever other than residuaries. The descendants of the deceased succeed in priority to the ascendants, the ascendants of the deceased in priority to the descendants of parents, and the descendants of parents in preference to the descendants of ascendants.
(2) The following is a list of Distant Kindred comprised in each of the four classes:--
I. Descendants of the deceased:--
1. Daughter's children and their descendants.
2. Children of son's daughters h.l.s. and their descendants.

II. Ascendants of the deceased:--
1. False grandfathers h.h.s.
2. False grandmothers h.h.s.

III. Descendants of parents:--
1. Full brothers' daughters and their descendants.
2. Con. brothers' daughters and their descendants.
3. Uterine brothers' children and their descendants.
4. Daughters of full brothers' sons h.l.s. and their descendants.
5. Daughters of con. brothers' sons h.l.s. and their descendants.
6. Sisters' (f., c, or ut.) children and their descendants.

IV. Descendants of *immediate* grandparents (true or false):--
1. Full pat. uncles' daughters and their descendants.
2. Con. pat. uncles' daughters and their descendants.
3. Uterine pat, uncles and their children and their descendants.
4. Daughters of full pat. uncles' son h.l.s and their descendants.
5. Daughters of con. pat. uncles' son h.l.s and their descendants.
6. Pat. aunts (f., c, or ut.) and their children and their descendants.
7. Mat. uncles and aunts and their children and their descendants.

and

descendants of *remoter ancestors* h.h.s. (true or false).

(3) The order of precedence among Distant Kindred in each class and the rules by which such order is determined are given in 69 to 79. They are not given here in order of succession.

Sir. 44-46. The *Sirajiyyah* does not enumerate all relations belonging to the class of Distant Kindred, but mentions only some of them. Hence, it was thought at one time that &uot;distant kindred&uot; were restricted to the specific relations mentioned in the *Sirajiyyah*. But this view has long since been rejected as erroneous, and it is now firmly established that all relations who are neither sharers nor residuaries are distant kindred.[32]

Class I of Distant Kindred Difference between doctrines of Imam Muhammad and Abu Yusuf

When we come to Distant Kindred, we find that there are two sets of rules for each class, one for determining the order of succession, and the other for determining the shares. In each class we have first to determine which of the relations are entitled to succeed; this is done by applying certain rules which are called Rules of Exclusion. After so doing, we have to assign shares to these relations; this is done with the help of certain other rules.

It is when we come to the class of Distant Kindred that we find a remarkable difference of opinion between Abu Yusuf and Imam Muhammad, the two great disciples of Abu Hanifa. The doctrine of Abu Yusuf is very simple, but unhappily it has not been accepted by the Hanafi Sunnis in India. It is the doctrine of Imam Muhammad that is followed in India and this doctrine is much too complicated.[33] Moreover, the doctrine of Imam Muhammad is followed by the author of the *Sirajiyyah*, and apparently by the author of the *Sharifiyyah*.[34]*The Fatawa Alamgiri* does not express any preference either way.[35] The High Court of Calcutta has also expressed its preference for the opinion of Imam Muhammad.[36] Since the opinion of Abu Yusuf is not followed in India, we have confined ourselves in the following sections to the doctrine of Imam Muhammad, and the difference between the two systems is pointed out in the notes. It must not, however, be supposed that the two systems differ in all respects and at all stages. So long as the intermediate ancestors do not differ in their sexes or blood, there is no difference at all between the two systems. The difference comes in only in those cases where the intermediate ancestors are--

(i) of *different sexes* as where some are males and others in the same generation are females; or where they are
(ii) of *different blood*, as where some are of whole blood and others in the same generation are of half blood.

Abu Yusuf declines to take any notice of the sex or blood of *intermediate ancestors* or, as they are called

&uot;roots.&uot; According to him, regard should be had to the sex and blood of the *actual claimants*, or, as they are called, &uot;branches.&uot; The result is that according to his doctrine, the property is to be divided in the same manner as is done among son's sons and son's daughter as residuaries, that is to say, *per capita*, each male claimant taking a share double that of each female claimant.

According to Imam Muhammad, regard should be had not only to the sex and blood of the act ual claimants, but also of the intermediate ancestors.

Where the intermediate ancestors differ in their *sexes*, the two systems differ as to the *shares* to be allotted to the claimants. This difference in true shares manifests itself when claimants are descendants where they be descendants of the deceased as in class I or of brothers and sisters as in class III, or of uncles and aunts as in class IV.

Where the intermediate ancestors differ in *blood*, the two systems differ as to the *order* of succession. This difference in the order of succession manifests itself in class III when the surviving relations happen to be the descendants some of full or consanguine brothers or sisters, and some of uterine brothers or sisters. It cannot manifest itself in class I and class II, for there can be no difference of blood among the intermediate ancestors in those classes. Nor can it manifest itself in class IV, where the claimants are the descendants of uncles and aunts.

Before we proceed further, we may observe that among *Residuaries* there cannot be any difference of blood or sex among intermediate ancestors as may happen among *Distant Kindred*.

32 *Abdul Serang v. Putee Bibi* (1902) 29 Cal. 738.

33 *Macnaghten*, p. 9 (*foot-note*); Baillie's Moohummudan Law of Inheritance, p. 92; Rumsey's Moohummadun Law of Inheritance, p. 65; Ameer ali, Vol. II, (5th Ed.), p. 59.

34 *Sir* 49-50; *Shar*. 95.

35 Baillie, 716, 717.

36 *Akbar Ali v. Adar Bibi* (1931) 58 Cal. 366, 130 I.C. 873, ('31) A.C. 155.

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CHAPTER VII

HANAFI LAW OF INHERITANCE

D.--

DISTANT KINDRED

69.

Rules of exclusion

The first class of Distant Kindred comprises such of the descendants of the deceased as are neither Sharers nor Residuaries. The order of succession in this class is to be determined by applying the following two rules in order [*Sir*. 47]:--

Rule (1).--The nearer in degree excludes the more remote.

The fundamental rule of Mohammadan Law regarding succession is that the nearer in degree excludes the more remote. The distribution between the paternal side and the maternal side in the ratio of 2/3 and 1/3 to each side comes into the picture only when the heirs are ascertained; and such heirs happen to fall on both the sides. But in the task of ascertaining the heirs the fundamental rule is that the nearer in degree excludes the more remote. This makes it clear that children of the uncles and aunts and their grand-children cannot succeed together.[37]

Sir. 7. Thus a daughter's son or a daughter's daughter is preferred to a son's daughter's daughter. The daughter's son and the daughter's daughter are the nearest distant kindred, and they exclude all other distant kindred.

Rule (2).--Among claimants in the same degree of relationship, the children of Sharers and Residuaries are preferred to those of Distant Kindred.

Sir. 47. Thus a son's daughter's son, being a child of a sharer (son's daughter) succeeds in preference to a daughter's daughter's son, who is the child of a distant kinswoman (daughter's daughter).

37 M.P. Mehrotra, J. *Mohd. Haseeb v. Smt Mehrunnissa,* (1978) All. UJ. 558.

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CHAPTER VII

HANAFI LAW OF INHERITANCE

D.--

DISTANT KINDRED

70.

Order of succession

The rules set forth in section 69 lead to the following order of succession among Distant Kindred of the first class:--

(1) Daughter's children.
(2) Son's daughters' children.
(3) Daughters' grandchildren.
(4) Sons' sons' daughters' children.
(5) Daughters' great-grandchildren and sons' daughters' grandchildren.
(6) *Other descendants of the deceased in like order.*

Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Note that No. (1) belongs to the second generation, Nos. (2) and (3) to the third generation, and Nos (4) and (5) to the fourth generation. No. (2) excludes No.3 by reason of sec. 69, rule (2). For the same reason No. (4) excludes No. (5).

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CHAPTER VII

HANAFI LAW OF INHERITANCE

D.--

DISTANT KINDRED

71.

Allotment of Shares

After ascertaining which of the descendants of the deceased are entitled to succeed, the next step is to distribute the estate among them. The distribution in this class is governed by the following rules:--

Rule (1).--If the intermediate ancestors *do not differ* in their sexes, the estate is to be divided among the claimants *per capita* according to the rule of double share to the male [*Sir*. 47].

Illustrations

(a)	Daughter's son	..	..	2/3
	Daughter's daughter	..	..	1/3
(b)	Daughter's son's son	..	..	2/3
	Daughter's son's daughter	..	..	1/3
(c)	2 sons of daughter *A*	..	..	4/5 (each taking 2/5)
	1 daughter of daughter *B*	..	..	1/5

Note.--To divide the estate *per stirpes* is to assign 1/2 to the two sons, and 1/2 to the daughter, that being the portion of their respective parents, *A* and *B*.

(d)	2 sons of daughter's daughter *A*	..	..	4/6	(each 2/6 or 1/3)
	2 Daughter of a daughter's daughter *B*	..	..	2/6	(each 1/6)

Note.--To divide the estate *per stirpes* is to assign 1/2 to the two sons and 1/2 to the two daughters.

Doctrine of Abu Yusuf

The distribution will be the same according to Abu Yusuf also. In each of the above cases it will be seen that the sexes of the intermediate ancestors are the same. But if the claimants be a daughter's *daughter's* son and a daughter's *son's* daughter, the case is one in which the intermediate ancestors difer in their sexes. In such a case also, according to Abu Yusuf, the rule to be followed is Rule (1), so that the former, being a male, will take 2/3 and the latter, being a female, will take 1/3; the reason being that according to

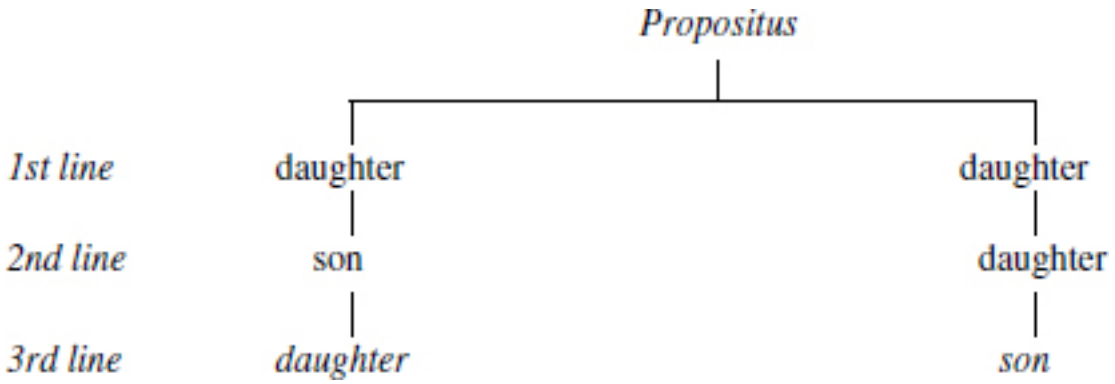
Abu Yusuf regard is to be had solely to the sexes of the *claimants* (*see* &uot;Difference between doctrines of Imam Muhammad and Abu Yusuf&uot;, p. 86). According to Imam Muhammad, regard should be had also to the sexes of the *intermediate ancestors*, and the distribution is to be made according to rule (2) below, which, it will be seen, is a distribution *per stirpes*, though not entirely such as in the Shia law.

Rule (2).--If the intermediate ancestors *differ* in their sexes, the estate is to be distributed according to the following rules [*Sir*. 48-50]:'

(a) The simplest case is where there are only two claimants, the one claiming through one line of ancestors, and the other claiming through another line. In such a case, the rule is to stop at the first line of descent in which the sexes of the intermediate ancestors differ, and to assign to the male ancestor a portion double that of the female ancestor. The share of a male ancestor will descend to the claimant who claims through him, and the share of the female ancestor will descend to the claimant who claims through her, irrespective of the sexes of the claimants.

Illustrations

A Mahomedan dies leaving a daughter's son's daughter and daughter's daughter's son, as shown in the following table:--



In this case, the ancestors first differ in their sexes in the second line of descent, and it is at this point that the rule of a double portion to the male is to be applied. This is done by assigning 2/3 to the daughter's son and 1/3 to the daughter's daughter. The 2/3 of the daughter's son will go to his daughter, and the 1/3 of the daughter's daughter will go to her son. Thus we have

daughter's son's daughter ..	..	2/3
daughter's daughter's son ..	..	1/3

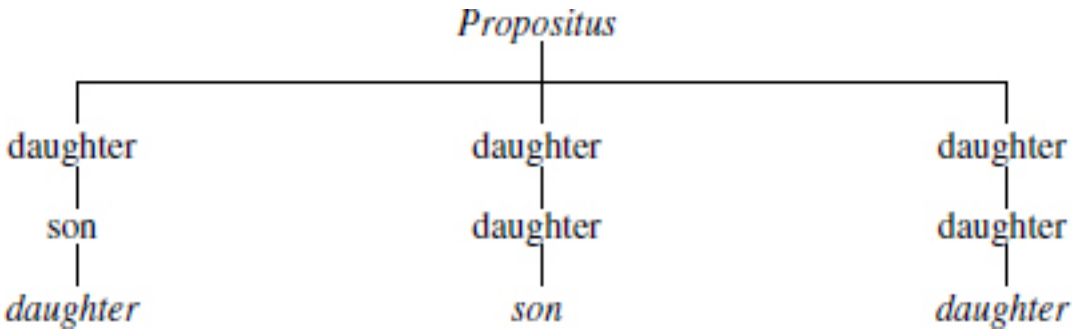
According to Abu Yusuf, the shares will be 1/3 and 2/3 respectively.

Note.--Where the deceased leaves descendants in the *fourth or remoter* generation the rule of the double share to the male is to be applied in *every successive line* in which the intermediate ancestors differ in their sexes. (*see* ill. (b) to sub-rule (c) below)

(b) The next case is where there are three or more claimants, each claiming through a different line of ancestors. Here again, the rule is to stop at the first line in which the sexes of the intermediate ancestors differ, and to assign to each male ancestor a portion double that of each female ancestor. But in this case the individual share of each ancestor does not descend to his or her descendants as in the preceding case, but the collective share of all the male ancestors is to be divided among all the descendants claiming through them, and the collective share of all the female ancestors is to be divided among their descendants, according to the rule, as between claimants in the same group, of a double portion to the male.

Illustrations

(a) A Mahomedan dies leaving a daughter's son's daughter, a daughter's daughter's son, and a daughter's daughter's daughter, as shown in the following table:--



In this case, the ancestors differ in their sex in the second line of descent. In that line we have one male and two females. The rule of the double share to the male is to be applied, first, in this line of descent, so that we have

daughter's son	..	1/2	
daughter's daughter	..	1/4	) 1/2 (collective share of female ancestors).
daughter's daughter	..	1/4	

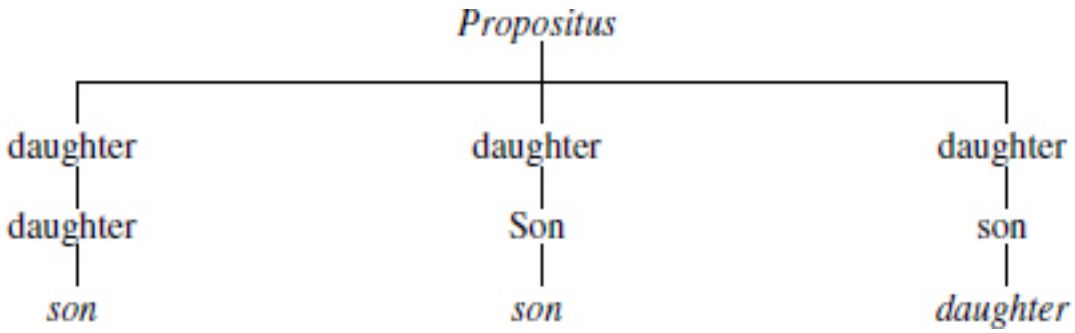
The daughter's son stands alone, and therefore his share descends to his daughter. The two female ancestors, namely the daughter's daughters, from a group, and their collective share is 1/2, which will be divided between their descendants, that is, the daughter's daughter's son and daughter's daughter's daughter in the proportion again of two to one, the former taking 2/3 1/2 = 1/3 and the latter 1/3 1/2 = 1/6.

Thus we have

daughter's son's daughter	.. ..	1/2=3/6
daughter's daughter's son	.. ..	1/3=2/6
daughter's daughter's daughter	.. ..	1/6=1/6

According to Abu Yusuf, the shares will be 1/4, 1/2 and 1/4 respectively.

(b) A Mahomedan dies leaving a daughter's daughter's son, a daughter's son's son and a daughter's son's daughter, as shown in the following table:--



[In the preceding illustration we had one male and two females in the first line in which the sexes differed. In the present case, we have one female and two males in that line.]

First ascertain what is the line of descent in which the sexes first differ. That line is the second line of descent.

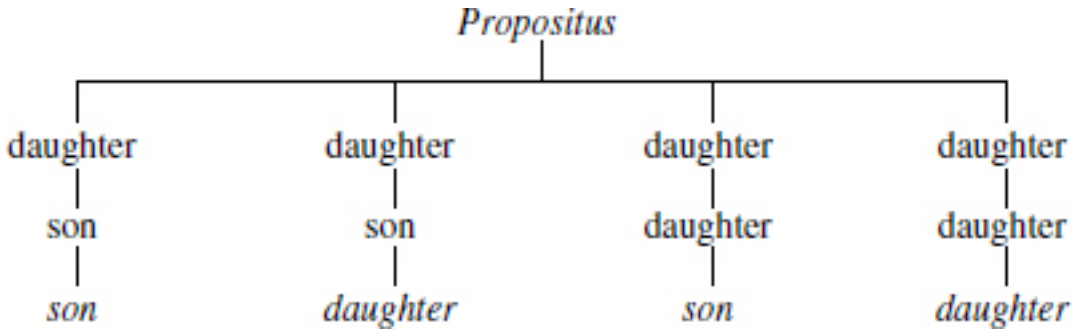
Next, assume the relations in that line to be so many children of the deceased and determine their shares upon that footing. The shares therefore will be, daughter's daughter 1/5, and each daughter's so n 2/5, the collective share of the two daughters' sons being 4/5. Assign the 1/5 of daughter's daughter to her son.

Lastly, divide the 4/5 of the two male ancestors between their descendants as if they were children of one ancestor, assigning a double portion to the male descendant. Thus, the daughter's son's son takes 2/3 4/5 = 8/15, and the daughter's son's daughter 1/3 4/5 = 4/15. Thus we have

daughter's daughter's son	.. ..	1/5=3/15
daughter's son's son	.. ..	8/15
daughter's son's daughter	.. ..	4/15

According to Abu Yusuf, the shares will be 2/5, 2/5 and 1/5 respectively.

(c) A Mahomedan dies leaving a daughter's son's son, a daughter's son's daughter, a daughter's daughter's son, and a daughter's daughter's daughter, as shown in the following table:--



Here the ancestors first differ in their sexes in the second line, and in that line we have two males and two females. The collective share of the two males is 4/6, and that of the two females is 2/6. The 4/6 of the daughters' sons will be divided between the daughter's son's son and the daughter's son's daughter, the former taking 2/3 4/6 = 8/18, and the latter 1/3 4/6 = 4/18. The 2/6 of the daughter's daughters will be divided between the daughter's daughter's son and the daughter's daughter's daughter, the former taking 2/3 2/6 = 4/18, and the latter 1/3 2/6 = 2/18. Thus we have

daughter's son's son	8/18
daughter's son's daughter	4/18
daughter's daughter's son	4/18
daughter's daughter's daughter	2/18

According to Abu Yusuf the shares will be 2/6, 1/6, 2/6 and 1/6 respectively.

Note.--When a person dies leaving descendants in the *fourth or remoter* generation, "the course indicated in the [above rule] as to the first line in which the sexes differ is to be followed equally in any lower line; but the descendants of any individual or group, once separated must be kept separate throughout, in other words they must not be united in a group with those of any other individual or group".[38](*see* ill. (b) to sub-rule (c))

(c) The last case is when there are two or more claimants claiming through the same intermediate ancestor. In such a case, there is this further rule to be applied, namely, to count for each such ancestor, if male, as many males as there are claimants claiming through him, and, if female, as many females as there are claimants claiming through her, irrespective of the sexes of the claimants.

38 Rumsey's Moohummudan Law of Inheritance, pp. 68-69.

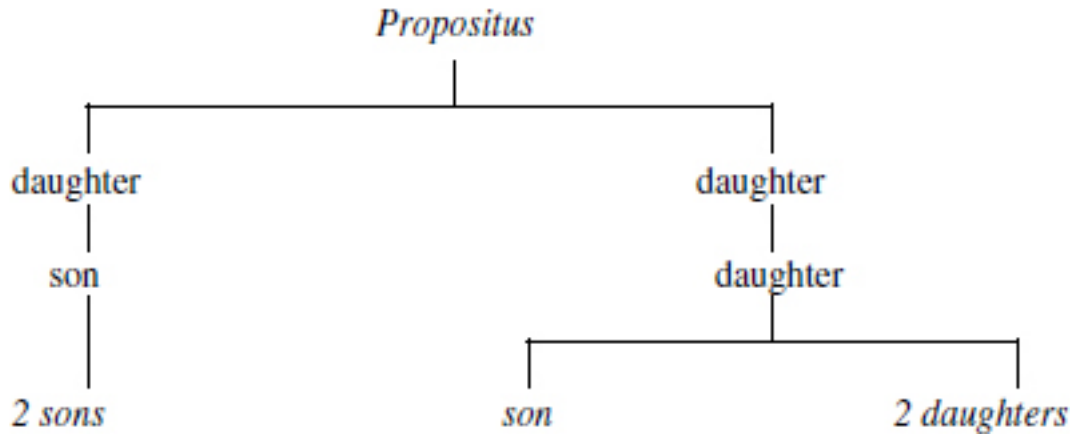
Illustrations

(a) A Mahomedan dies leaving 5 great-grandchildren as shown in the diagram on page 94.

Here the ancestors first differ in their sex in the second line, and in that line we have one male and one

female. The daughter's son will count as two *males* by reason of his having two descendants among the claimants, and the daughter's daughter will count as *three females* by reason of her having three descendants. Thus we have

daughter's son	4/7
daughter's daughter	3/7



The 4/7 of the daughter's son will go to his two sons. The 3/7 of the daughter's daughter will go to her descendants, the son taking 2/4 3/7 = 6/28 and each daughter taking 1/4 3/7 = 3/28. Thus we have

daughter's son's son	4/7=16/28	(each 8/28)
daughter's daughter's son	6/28	
daughter's daughter's daughter	6/28	(each 3/28)

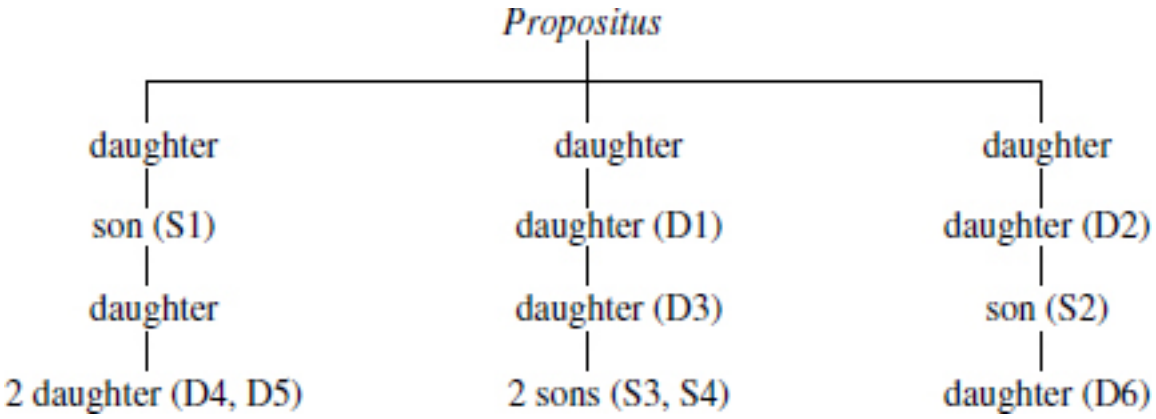
According to Abu Yusuf, the shares will be as follows:--

each daughter's son's *son*	2/8
daughter's daughter's *son*	2/8
each daughter's daughter's *daughter*	1/8

Note.--When the deceased leaves descendants in the *fourth* or *remoter* generation, the process indicated in the above rule is to be applied as often as there may be occasion to group the sexes. (*see* the next illustration)

(b) *Note*.--The following cases taken from the *Sirajiyyah* illustrate the combined operation of sub-rules (a), (b) and (c), when the claimants belong to the *fourth* generation. (*see* notes at the end of sub-rule (a) and sub-rule (b), and the note at the end of ill. (a) above)

A Mahomedan dies leaving 5 decendants in the fourth generation as shown in the following diagram [*Sir*. 49]:--



Here the sexes first differ in the second line. S1 having two descendants among the claimants will count as two males or four females. D1 having two such descendants will count as two females. D1 having one such descendant only will count as one female. The estate will therefore be divided into 7 parts as follows:--

S1 = 4/7;
D1=2/7
D2=l/7) 3/7 (collective share of female ancestors).

S1 being by himself, his share 4/7 will pass to his two descendants D4 and D5 in equal moieties, each taking 2/7.

The collective share 3/7 of D1 and D2 will descend to their *immediate* descendants D3 and S2; and here D3 having two descendants among the claimants will count as two females, and S2 having one such descendant only will count as one male, or two females. Hence the collective share 3/7 will be divided into 4 parts as follows:--

D3 = 2/4 3/7 = 3/14;

S2 = 2/4 3/7 = 3/14.

The share of D3 will pass to her two descendants S3 and S4, each taking 3/28. The share of S2 will pass to his descendant D6. The ultimate share will therefore be--

D4=8/28; D5=8/28; S3=3/28; S4=3/28; D6=6/28.

According to Abu Yusuf, the shares will be as follows:--

D4=l/7; D5=l/7; S3=2/7; S4=2/7; and D6=l/7.

Class II of Distant Kindred

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CHAPTER VII

HANAFI LAW OF INHERITANCE

D.--

DISTANT KINDRED

72.

Order of succession

(1) If there be no distant kindred of the first class, the whole estate will devolve upon the mother's father as being the nearest relation among Distant Kindred of the second class (*see* rule (1) below).

(2) If there be no mother's father the estate will devolve upon such of the false ancestors in the third degree as are connected with the deceased through sharers, namely, the father's mother's father and the mother's mother's father, and these two, the former, as belonging to the paternal side, will take 2/3, and the latter, as belonging to the maternal side, will take 1/3 (*see* rules (2) and (3) below).

Note that the father's mother and the mother's mother are sharers.

(3) If there be none of these, the estate will devolve upon the remaining false ancestors in the third degree, namely, the mother's father's father and the mother's father's mother. And as these two belong to the same (maternal) side, and as the sexes also of the intermediate ancestors are the same, the former, being a male, will take 2/3, and the latter, being a female, will take 1/3 according to sec. 71, rule (1) [*Sir*. 51-52].

Note that the two ancestors mentioned in sub-sec. (3), are both related to the deceased through a distant kinsman, namely, mother's father.

Rules of succession.--Succession among Distant Kindred of the second class is governed by the following rules:--

Rule (1).--The nearer in degree excludes the more remote.

Rule (2).--Among claimants in the same degree, those connected with the deceased through shares are preferred to those connected through distant kindred.

Rule (3).--If there are claimants on the paternal side as well as claimants on the maternal side, assign 2/3 to the paternal side, and 1/3 to the maternal side. Then divide the portion assigned to the paternal side among the ancestors of the father, and the portion assigned to the maternal side among the ancestors of the mother, in each case according to the rules contained in sec. 71.

Doctrine of Abu Yusuf

It is not clear whether when the sexes of the intermediate ancestors differ, there is the same difference of opinion between the two disciples as there is in class I. Anyhow, no such difference can arise until ancestors in the fourth degree are reached.

CHAPTER VII

HANAFI LAW OF INHERITANCE

CLASS III OF DISTANT KINDRED

73.

Rules of exclusion

If there be no Distant Kindred of the first or second class, the estate devolves upon Distant Kindred of the third class. This class comprises such of the descendants of brothers and sisters as are neither Sharers nor Residuaries. The order of succession in this class is to be determined by applying the following three rules in order [*Sir*. 52-54]:--

Rule (1).--The nearer in degree excludes the more remote.

Thus the children of brothers and sisters exclude the grandchildren of brothers and sisters. A sister's son excludes a brother's son's daughter.[39]

Rule (2).--Among claimants in the same degree of relationship, the children of Residuaries are preferred to those of Distant Kindred.

Thus a full brother's son's daughter, being the child of a Residuary (full brother's son), is preferred to a full sister's daughter's son who is the child of a distant kinswoman (full sister's daughter). For the same reason, a consanguine brother's son's daughter is preferred to a full sister's daughter's son, though the former is of half blood and the latter of whole blood.

Rule (3).--Among claimants in the same degree of relationship, and not excluded by reason of Rule (2) above, the descendants of full brothers exclude those of consanguine brothers and sisters.

But the descendants of full sisters do not exclude the descendants of consanguine brothers or sisters, and the latter take the residue, if there be any, after allotting shares to the descendants of full sisters and of uterine brothers and sisters.

The descendants of uterine brothers and sisters are not excluded by descendants either of full or consanguine brothers or sisters, but they inherit with them.

Note particularly that the test of blood laid down in Rule (3) is not to be applied until after you have applied the test laid down in Rule (2). Among descendants of uncles and aunts these tests are to be applied in the reverse order. *See* notes to 78 under the head &uot;Rules of succession among descendants&uot; [rules (3) and (4)].

39 *Agha Walayat v. Mt. Mahbub* ('42) A. Pesh. 83.

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CHAPTER VII

HANAFI LAW OF INHERITANCE

CLASS III OF DISTANT KINDRED

74.

Order of succession

The above rules lead to the following order of succession among Distant Kindred of the third class:--

(1) Full brother's daughters, full sisters' children and children of uterine brothers and sisters.
(2) Full sisters' children, children of uterine brothers and sisters, consanguine brother's daughters and consanguine sisters' children, the consanguine group taking the residue (if any).
(3) Consanguine brothers' daughter, consanguine sisters' children, and children of uterine brothers and sisters.
(4) Full brothers' sons' daughters (children of Residuaries).
(5) Consanguine brothers' sons' daughters (children of Residuaries).
(6) Full brothers' daughters' children, full sisters' grandchildren, and grandchildren of uterine brothers and sisters.
(7) Full sisters' grandchildren, grandchildren of uterine brothers and sisters, consanguine brothers' daughters' children and consanguine sisters' grandchildren, the consanguine group taking the residue (if any).
(8) Consanguine brothers' daughters' children, consanguine sisters' grandchildren, and grandchildren of uterine brothers and sisters.
(9) *Remoter descendants of brothers and sisters in like order*.

Of the above group each in turn must be exhausted before any member of the next group can succeed.

Among the descendants mentioned above, Nos. (1) to (3) are nephews and nieces, and Nos. (4) to (8) are grandnephews and grandnieces. Note particularly that a full brother's son and a consanguine brother's son are Residuaries; hence it is that they do not find any place in the above list.

Doctrine of Abu Yusuf

According to Abu Yusuf also, there are three rules of exclusion, of which the first two are the same as those laid down in the preceding section. The third rule of Abu Yusuf, which also is to be applied after applying the first two rules, is that descendants of full brothers and sisters exclude those of consanguine brothers and sisters, and the descendants of consanguine brothers and sisters exclude the descendants of uterine brothers and sisters. This difference arises from the fact that Abu Yusuf would have regard to the &uot;blood&uot; of the *claimants* while Imam Muhammad looks to the &uot;blood&uot; of the *Roots*. The result is that the order of succession according to Abu Yusuf is different from that according to Imam Muhammad.

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CHAPTER VII

HANAFI LAW OF INHERITANCE

CLASS III OF DISTANT KINDRED

75.

Allotment of shares

After ascertaining which of the descendants of brothers and sisters are entitled to succeed, the next step is to distribute the estate among them, and this is to be done by applying the following rules in order [*Sir.*

53-54]:--

Rule (1).--First, divide the estate among the *Roots*, that is to say, among the brothers and sisters (as if they were living) and in so doing treat each brother who has two or more claimants descended from him as so many brothers, and each sister who has two or more claimants descended from her as so many sisters. If there is a residue left after assigning their shares to the *Roots* but there are no Residuaries among the *Roots* [that is, neither a full nor consanguine brother], apply the doctrine of Return as described in section 66. The hypothetical claimants being brothers and sisters, no case of increase is possible at-all [s. 64].

The relations constituting Distant Kindred of the third class are descendants of brothers and sisters, full, consanguine and uterine. The brothers and sisters are therefore the *Roots*. Of these, uterine brothers and sisters always inherit as sharers, taking 1/6, and two or more 1/3. Full and consanguine brothers always inherit as residuaries. Full sisters inherit as sharers, if there are no full brothers, one taking 1/2, and two or more 2/3; but if there are full brothers, full sisters inherit as residuaries with them. The same remarks apply to consanguine sisters. (*see* Tab. of Sh., Nos. 9 to 12; Tab. of Res, Nos. 5-7)

If the claimants be a uterine brother and a full brother, the former takes 1/6, and the latter the residue 5/6. But if the claimants be two or more descendants of a uterine brother, and two or more descendants of a full brother, the hypothetical share of the uterine brother will be 1/3, that being the share of two or more uterine brothers, and the hypothetical share of the full brother will be the residue 2/3.

If the claimants be a uterine sister and a full sister, the former will take 1/6, and the latter 1/2, and the residue 1/3 will go to them by return, the former taking 1/4 and the latter 3/4. But if the claimants be 5 descendants of a uterine sister, and of descendants of a full sister, the hypothetical share of the uterine sister will be 1/3 that being the share of two or more uterine sisters, and that of the full sister will be 2/3, that being the share of two or more full sisters (*see* ill. (b) to Rule (3) below).

If the claimants be a full brother and a full sister, they will inherit as Residuaries, the former taking 2/3, and the latter 1/3. But if the claimants be 3 descendants of a full brother, and 4 descendants of a full sister, the full brother will count as three males, that is, 6 females and the full sister will count as 4 females. The property will then be divided into 10 parts, the hypothetical share of the full brother being 6/10, and that of the full sister 4/10 [compare ill. (a) to Rule (3) below]. The position of a consanguine brother and a consanguine sister is similar to that of a full brother and a full sister [compare ill. (e) to Rule (3) below].

As to the application of the doctrine of return to the *Roots*, (*see* ill. (d) to Rule (3) below).

Rule (2).--After determining the hypothetical shares of the *Roots*, the next step is to assign its shares to the uterine group. If there be only one claimant in that group, assign 1/6 to him, that being the hypothetical share of his parent. But if there be two or more claimants in that group, whether descended from a single uterine brother, or a single uterine sister, or two or more uterine brothers or sisters, assign 1/3 to them, that being the hypothetical share of their parent or parents, and divide it *equally* among them without distinction of sex.

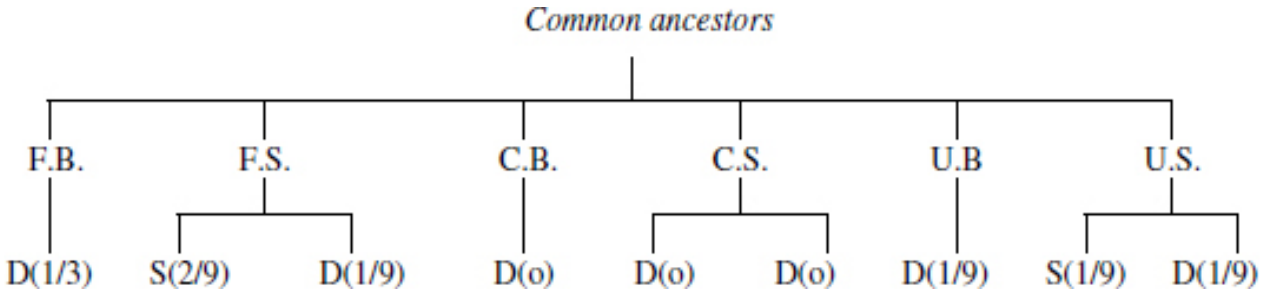
Rule (3).--Lastly, divide the hypothetical shares of the full and consanguine brothers and sisters among their respective descendants as among Distant Kindred of the first class (*see* 71).

Doctrine of Abu Yusuf

According to Abu Yusuf, the estate is to be divided among the claimants *per capita* according to the rule of the double share to the male.

Illustrations

(a) A Sunni Mahomedan dies leaving a daughter of a full brother, a son and a daughter of a full sister, a daughter of a consanguine brother, a son and a daughter of a consanguine sister, a daughter of a uterine brother, and a son and a daughter of a uterine sister, as shown in the following diagram:--



The children of the consanguine brother and sister are excluded from inheritance as there is a full brother's daughter (*see* 73, rule (3)). The estate has therefore to be divided among the children of the full and uterine brothers and sisters.

As there are three claimants in the uterine group, the collective share of the uterine brother and sister is 1/3, and this will be divided among their three descendants equally without distinction of sex, each taking 1/9.

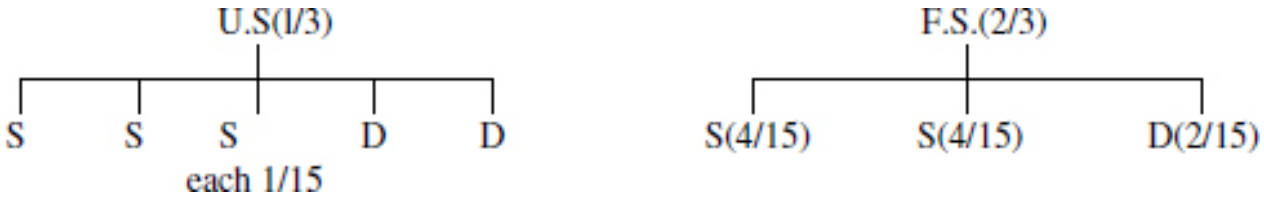
This leaves a residue of 2/3, and this is to be divided in the first instance between the full brother and the full sister as Residuaries, according to the number of claimants descended from each of them. The full brother, having only one descendant counts as one male or two females. The full sister, having two descendants, counts as two females. The residue will therefore be divided into four parts, the full brother taking 2/4 2/3 = 1/3, and the full sister also 2/4 1/3 = 1/9.

The full brother's share 1/3 will go to his descendant. The full sister's share 1/3 will be divided between her two children according to the rule of the double share to the male as in class I of Distant Kindred, the son taking 2/3 1/3 = 2/9, and the daughter taking 1/3 1/3 = 1/9.

Note.--On failure of children of full brother and sister, the residue will be divided in like manner among the children of consanguine brother and sister.

(According to Abu Yusuf, the whole estate will be divided among the children of the *full* brother and sister according to the rule of the double share to the male, so that the full brother's daughter will take 1/4, the full sister's son 1/2, and her daughter 1/4. On failure of children of the full brother and sister, the estate will be divided in like manner among the children of *consanguine* brother and sister. And on failure of them, it will be distributed in like manner among the children of the *uterine* brother and sister.)

(b) A Sunni Mahomedan dies leaving five children of a uterine sister, and three children of a full sister, as shown in the following diagram:--



As there are five claimants in the uterine group, the share of the uterine sister is 1/3, and this will be divided among her five children equally without distinction of sex, each taking 1/5 1/3 = 1/15.

The full sister, having three descendants, will count as three sisters, and she will take 2/3, that being the share of two or more full sisters (*see* Tab. of Sh., No. 11). This will then be divided among her three children according to the rule of the double share to the male as among Distant Kindred of the first class, so that each son will take 2/5 2/3 = 4/15, and the daughter will take 1/5 2/3 = 2/15.

[According to Abu Yusuf, the whole estate will be divided among the children of the full sister according to the rule of the double share to the male, so that each son will take 2/5, and the daughter will take 1/5].

(c) A Sunni Mahomedan dies leaving a uterine brother's daughter, a uterine sister's son, a full sister's son, and a consanguine brother's daughter, as shown in the following diagram:--



Here there is no descendant of a full brother; therefore the consanguine brother's daughter is not excluded from inheritance, and she will take what remains after the estate is divided among the other claimants.

As there are two descendants in the uterine group, the collective share of the uterine brother and sister is 1/3, and this will be divided equally between their children without distinction of sex, each taking 1/6.

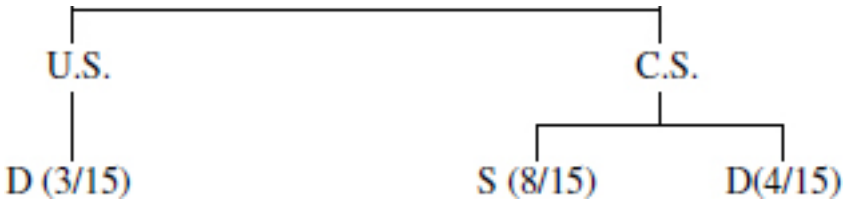
The full sister, having only one descendant, counts as one full sister, and her share therefore is 1/2. This will descend to her son.

This leaves a residue of 1/6 which will go to the consanguine brother as a Residuary. This will descend to his daughter.

[According to Abu Yusuf, the whole estate will go to the full sister's son.]

(d) A Sunni Mahomedan dies leaving 2 widows, 4 children of a full sister, and two daughters of a consanguine brother. The High Court of Calcutta held that the shares should be determined according to the system of Imam Muhammad. Following that system, they held that the widows were entitled to 1/4, the full sister's children were entitled to 2/3, and that the residue, that is 1/12, belonged to the consanguine brother's daughters.[40]

(e) A Sunni Mahomedan dies leaving a uterine sister's daughter, and a son and a daughter of a consanguine sister, as shown in the following diagram:--



The uterine sister has only one descendant: her share therefore is 1/6. The consanguine sister, having two descendants, counts as two consanguine sisters, and her share therefore is 2/3 [Tab. of Sh., No. 12]. This leaves the residue 1/6, and since there is no Residuary among the *Roots*, the residue will go to the uterine sister and consanguine sister by Return. The hypothetical shares will therefore be--

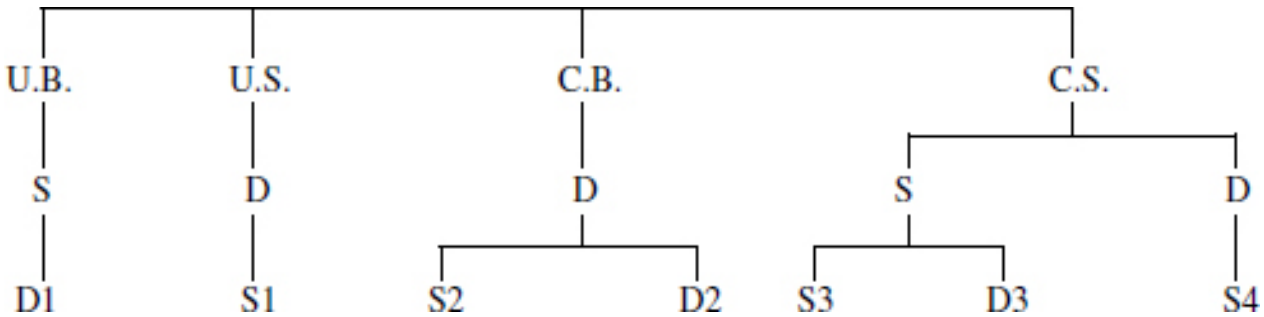
uterine sister	1/6=1/6	Increased to	1/5
consanguine sister	2/3=4/6	" "	4/5

The uterine sister's share 1/5 will pass to her daughter.

The consanguine sister's share 4/5 will be divided between her son and daughter, the son taking 2/3 x 4/5 = 8/15, and the daughter 1/3 x 4/5 = 4/15.

[According to Abu Yusuf, the whole estate will go to the children of the *consanguine* sister, the son taking 2/3, and the daughter 1/3].

(f) Sunni Mahomedan dies leaving four grandnephews, S1, S2, S3, and S4 and 3 grandnieces, D1, D2, and D3, as shown in the following diagram:--



As there are two claimants in the uterine group, the collective share of the uterine brother and sister is 1/3, and this will pass to D1 and S1, each taking 1/6.

This leaves a residue 2/3, and this is to be divided in the first instance between the consanguine brother and sister as Residuaries according to the number of claimants descended from each of them.

The consanguine brother, having two claimants descended from him, counts as two males or four females. The consanguine sister, having three claimants descended from her, counts as 3 females.

The residue will therefore be divided into seven parts, the consanguine brother taking 4/7 x 2/3 = 8/21, and the consanguine sister taking 3/7 x 2/3 = 6/21.

The consanguine brother's share 8/21 will be divided between his two descendants S2 and D2, S2 being a male taking 2/3 x 8/21 = 16/63, and D2 being a female taking 1/3 x 8/21 = 8/63.

The consanguine sister's share 6/21 is to be divided in the first instance between her son and her daughter. The son, having two claimants descended from him, counts as two males or four females. The daughter, having only one claimant descended from her, counts as one female. The son will therefore take 4/5 x 6/21 = 8/35, and the daughter will take 1/5 x 6/21 = 2/35.

The son's share 8/35 will be divided between his two children S3 and D3 according to the rule of the double share to the male, S3 taking 2/3 x 8/35 = 16/105, and D3 taking 1/3 x 8/35 = 8/105.

The daughter's share 2/35 will pass to her son S4.

The shares will therefore be--

Dl = l/6; Sl = l/6; S2=16/63; D2=8/63; S3=16/105; D3=8/105; and S4=2/35. The total of these shares is unity.

[According to Abu Yusuf, the whole property will be divided among the consanguine groups to the entire exclusion of the uterines so that S2, S3 and S4 will each take 2/8 or 1/4, and D2 and D3 will take 1/8.]

40 *Akbar Ali v. Adar Bibi* (1931) 58 Cal. 366, 130 I.C. 873, ('31) A.C. 155.

CHAPTER VII

HANAFI LAW OF INHERITANCE

CLASS IV OF DISTANT KINDRED

76.

Order of succession

(1) If there are no Distant Kindred of the first, second, or third class, the estate will devolve upon Distant Kindred of the fourth class in the order given below [*Sir*. 56-58].--
- (a) Paternal and maternal uncles and aunts *of the deceased*, other than his full and consanguine paternal uncles who are Residuaries.
- (b) The descendants h.l.s. of all the paternal and maternal uncles and aunts of the deceased, other than sons h.l.s. of his full and consanguine paternal uncles (they being Residuaries), the nearer excluding the more remote.
- (c) Paternal and maternal uncles and aunts *of the parents*, other than the full and consanguine paternal uncles of the father who are Residuaries.
- (d) The descendants h.l.s. of all the paternal and maternal uncles and aunts of the parents, other than sons h.l.s. of the full and consanguine paternal uncles of the father (they being Residuaries), the nearer excluding the more remote.
- (e) Paternal and maternal uncles and aunts *of the grand-parents*, other than the full and consanguine paternal uncles of the father's father who are Residuaries.
- (f) The descendants h.l.s. of all the paternal and maternal uncles and aunts of the grandparents, other than sons h.l.s. of the full and consanguine paternal uncles of the father's father (they being Residuaries), the nearer excluding the more remote.
- (g) *Remoter uncles and aunts* and their descendants in like manner and order.

(2) Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Doctrine of Abu Yusuf

The only difference between the two disciples as regards succession of the Distant Kindred of the fourth class is as to the allotment of *shares* among the descendants. (s*ee* 78 below)

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CHAPTER VII

HANAFI LAW OF INHERITANCE

CLASS IV OF DISTANT KINDRED

77.

Uncles and aunts

To distribute the estate among the uncles and aunts of the deceased, proceed as follows:--

(1) *First*, assign 2/3 to the paternal side, that is, to paternal uncles and aunts, even if there be only one such, and 1/3 to the maternal side, that is, to maternal uncles and aunts, even if there be only one such.

(2) *Next*, divide the portion assigned to the paternal side, that is 2/3 of the estate among
- (a) full paternal aunts in equal shares; failing them, among
- (b) consanguine paternal aunts in equal shares; and, failing them, among
- (c) uterine paternal uncles and aunts, according to the rule of the double share to the male.

(3) *Lastly*, divide the portion assigned to the maternal side, that is, 1/3 of the estate, among
- (a) full maternal uncles and aunts; failing them, among
- (b) consanguine maternal uncles and aunts; and failing them, among
- (c) uterine maternal uncles and aunts; according to the rule, in *each* case, of the double share to the male.

(4) If there be no uncle or aunt on the paternal side, the maternal side will take the whole. Similarly, if there be no uncle or aunt on the maternal side, the paternal side will take the whole.

Sir. 55-56.

Note that no claimant on the paternal side excludes any claimant on the maternal side, arid no claimant on the maternal side excludes any claimant on the paternal side.

Note particularly that full paternal uncles and consanguine paternal uncles are *Residuaries*.

Hence we are not concerned with them here.

Doctrine of Abu Yusuf

There is no difference between the two disciples as regards the *cession* of uncles and aunts.

Illustrations.

(a)	2/3	*full paternal aunt*	2/3=6/9	
		Cons. paternal aunt		(excluded by *full* paternal aunt)
	1/3	*Full maternal uncle*	2/3 × 1/3=2/9	
		Full maternal aunt	1/3 × 1/3=1/9	
		Cons. maternal uncle	.. .. ..	(excluded by *full* maternal uncle and aunt)
(b)	2/3	*Cons. paternal aunt*	2/3	
		Ut. paternal uncle	.. .. ..	(excluded by cons. paternal aunt)
	1/3	*Full maternal aunt*	1/3	
(c)	2/3	*Ut. paternal uncle*	2/3 × 2/3=4/9	
		Ut. paternal aunt	1/3 × 2/3=2/9	
	1/3	*Full maternal uncle*	2/3 × 1/3=2/9	
		Full maternal aunt	1/3 × 1/3=1/9	

Note.--The result would be the same if the deceased left a *uterine* maternal uncle and aunt instead of a *full* maternal uncle and aunt.

(d)	2/3	*Ut. paternal uncle*	2/3=6/9
	1/3	*Cons. maternal uncle*	2/3 × 1/3=2/9
		Cons. maternal aunt	1/3 × 1/3=1/9

Rules of succession

The present section is based upon the following rules:--

(1) If there are claimants on the paternal side, together with claimants on the maternal side, the former will take collectively 2/3, and the latter 1/3, and *each side* will then divide its own collective share according to the rule of the double share to the male.

(2) Among claimants on *the same side*, those of the full blood are preferred to those of the half blood, and the consanguine relations are preferred to uterine relations.

Order of priority

The uncles and aunts may belong to the paternal side or they may belong to the maternal side. The two sides *inherit together*, and no claimant on either side excludes any claimant on the other side. The order of succession among the uncles and aunts of the deceased is explained in the Table on p. 79.

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CHAPTER VII

HANAFI LAW OF INHERITANCE

CLASS IV OF DISTANT KINDRED

78.

Descendants of uncles and aunts

If there are no uncles or aunts of the deceased, the estate will devolve upon the descendants of uncles and aunts, other than sons how lowsoever of full paternal uncles and consanguine paternal uncles who are Residuaries. To distribute the estate among these relations, proceed as follows (*Sir*. 56-58):--

(1) *First*, assign 2/3 to the paternal side, that is, to descendants of paternal uncles and aunts, even if there be only one such, and 1/3 to the maternal side, that is, to descendants of maternal uncles and aunts, even if there be only one such.

(2) *Next*, divide the portion assigned to the paternal side, that is, 2/3 of the estate, among--
- (a) full paternal uncles' daughters; failing them, among
- (b) full paternal aunts' children; failing them among
- (c) consanguine paternal uncles' daughters; failing them, among
- (d) consanguine paternal aunt's children; and failing them, among
- (e) children of uterine paternal uncles and aunts, the division among the members of each of the five groups above to be made as among Distant Kindred of the first class (*see* 71)

Note that (a) excludes (b), the reason being that (a) are children of Residuaries (full paternal uncles), while (b) are children of Distant Kindred (full paternal aunts).

Note also that a full paternal uncle's son and a consanguine paternal uncle's son are Residuaries; hence they do not find any place in the above list.

(3) *Lastly*, divide the portion assigned to the maternal side, that is, 1/3 of the estate, among--
- (a) children of full maternal uncles and aunts; failing them, among
- (b) children of consanguine maternal uncles and aunts; failing them, among
- (c) children of uterine maternal uncles and aunts,

the division among the members of each of the three groups above to be made as among Distant Kindred of the first class (*see* 71).

(4) If there be no children of paternal uncles and aunts, the children of maternal uncles and aunts will take the whole. Similarly, if there be no children of maternal uncles and aunts, the children of paternal uncles and aunts will take the whole.

(5) If there be no children either of paternal uncles or aunts or of maternal uncles or aunts, the estate will be divided among their grandchildren on the same principle. Failing grandchildren, it will be divided among remoter descendants, the nearer in degree excluding the more remote.

The order of succession on each side is based on certain rules which are set forth below immediately after

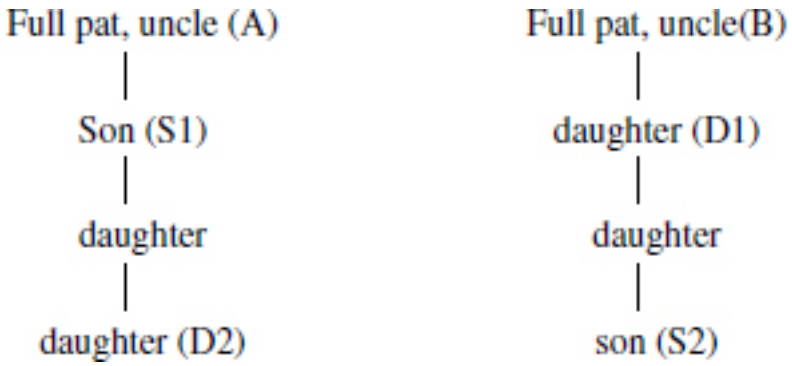
the illustrations.

Doctrine of Abu Yusuf

The only difference between the two disciples as to the succession of descendants of uncles and aunts is that, according to Abu Yusuf, the portion assigned to each side is to be divided among the claimants per capita according to the rule of the double share to the male.

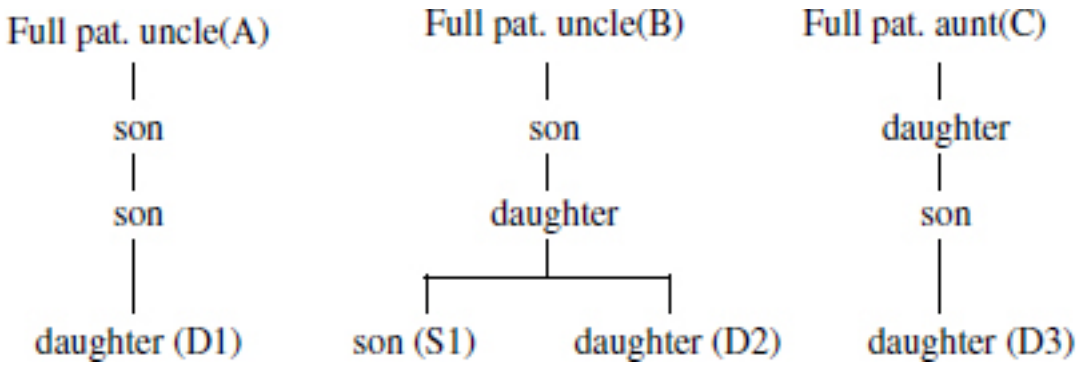
Illustrations

(a) The claimants are those indicated in the lowest line of the following diagram:--



Here the first difference in the sex of the ancestors occurs in the second line of descent. Therefore S1 takes 2/3, and D1 takes 1/3. Therefore, the share of D/2 is 2/3 and that of S2 is 1/3. According to Abu Yusuf, D2 being a female will take 1/3, and S2 being a male will take 2/3.

(b) Suppose the surviving relatives to be as shown in the last line of the following diagram:--



Here all the descendants are *equal in degree*; and they are also the same in blood, that is, they are all descendants of uncles and aunts of the full blood. But D1 is a child of a Residuary (full paternal uncle's son's son), while S1, D2, and D3 are children of Distant Kindred. Therefore D1 excludes S1, D2, and D3, and she will take the whole estate (*see* below &uot;Rules of Succession&uot;).

Suppose now that the surviving relations are S1, D2, and D3. In that case the distribution will be as follows. Here the sexes differ in the first line. As B has two claimants descended from him, he will count as two males or four females. C, having only one claimant descended from her, will count as one female. The estate will therefore be divided into five parts of which B will take 4/5 and C1/5.

B's share 4/5 will be divided among his two descendants S1 and D2 according to the rule of the double portion to the male, so that S1 will take 2/3 4/5 = 8/15, and D2 will take 1/3 4/5 = 4/15. C's share 1/5 will descend to D3. Hence S1 = 8/15; D2 = 4/15 and D3 = 1/5 =3/15.

[According to Abu Yusuf, the shares will be 1/2, 1/4 and 1/4 respectively.]

Rules of Succession Among Descendants.--To distribute the estate among descendants of uncles and aunts, apply the following rules *in the order in which they are given below*:--

Rule (1):-- The nearer degree excludes the more remote.

Rule (2).-- If both the paternal and maternal sides are represented, two-thirds are assigned to the paternal side and one-third to the maternal side.

Rule (3).--Among claimants on the same side, those of the whole blood are preferred to those of the half blood, and consanguine relations are preferred to uterine relations. (This rule applies both to the paternal and maternal sides, and it is to be applied separately to each side.)

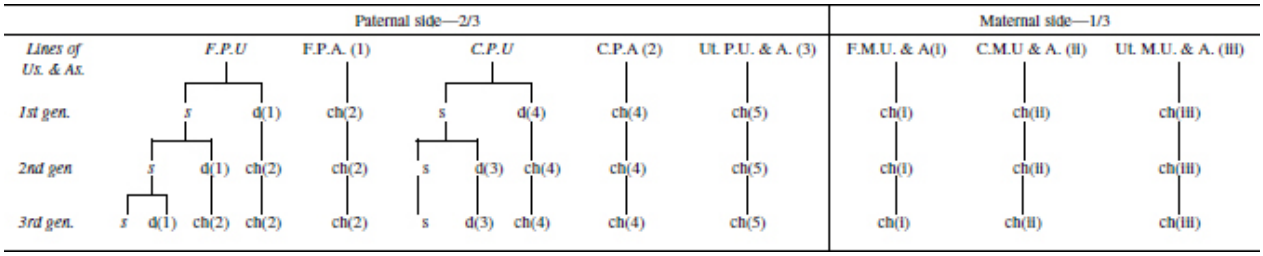
Rule (4).--Among claimants on the paternal side, the children of Residuaries are preferred to those of Distant Kindred. [Thus a full paternal uncle is a Residuary; his daughters, therefore, would be the children of a residuary, and they would be preferred to the daughters of a full paternal aunt who is a Distant Kinswoman. Similarly, a consanguine paternal uncle is a Residuary; his daughters therefore would be daughters of a Residuary, and they would be preferred to the daughters of a consanguine paternal aunt. Again, a full paternal uncle's son is a Residuary; his daughters therefore would be children of a Residuary, and they would be preferred to the daughters of a full paternal uncle's daughter. Upon the same principle the daughters of a consanguine paternal uncle's son would be preferred to the daughters of a consanguine paternal uncle's daughter. This rule cannot apply to relations on the maternal side, because none of the maternal uncles is a Residuary.]

Rule (5).--After ascertaining which of the relations are entitled to succeed, the portion assigned to the paternal side is to be distributed among the members of that side as among Distant Kindred of the first class (71). The portion assigned to the maternal side is also to be distributed according to the same principle (71).

The whole of 78 is based on the above rules.

Table of uncles and aunts of the deceased and their descendants up to the third generation

In the following Table, F stands for 'full,' C for 'consanguine/and Ut for 'uterine.' P stands for 'paternal' and M for 'maternal.' U stands for 'uncle' and A for 'aunt.' The small letter s stands for 'son,' d stands for 'daughter,' and ch. for 'children.' The italics indicate Residuaries; the rest are Distant Kindred. Note that the maternal side is not excluded by the paternal sides, but succeeds with members of that side:--



Line of uncles and aunts.-- In this line F.P.U. and C.P.U. are Residuaries. The rest are Distant Kindred, and the order of succession among them is shown in the case of paternal uncles and aunts, by the Arabic numerals (1), (2) and (3), and in the case of maternal uncles and aunts by the Roman figures (i), (ii), and (iii), (*see* 77).

1st generation.-- If there be no uncles or aunts, the estate devolves upon their children. Of these, F.P.U.s and C.P.U.s are Residuaries. The rest are Distant Kindred, and the order of succession among them is shown in the case of children of paternal uncles and aunts, by the Arabic numerals (1), (2), (3), (4) and (5), and in the case of maternal uncles and aunts by the Roman figures (i), (ii) and (iii). No. (1), being the child of a residuary, is preferred to No. 2, though they are both of full blood. For the same reason, No. (3) is preferred to No. (4), though they are both consanguine relations. (*see* 78)

2nd generation.--If there be no children of uncles and aunts, whether paternal or maternal, the estate devolves upon the grandchildren of uncles and aunts. Of these, F.P.U.s and C.P.Us are Residuaries. The rest are Distant Kindred, and the order of succession among them is shown in the same manner as in the first generation. No. (1), being the child of a residuary, is preferred to the group constituted by No. (2) and No. (2), they being children of Distant Kindred, though they are all of full blood. For the same reason No. (3) is preferred to the group constituted by No. (4) and No. (4), though they are all consanguine relations. Failing No. (1), No. (2) and No. (2) inherit together. Failing No. (3), No. 4 and No. (4) inherit together. Failing these No. (5) succeeds.

3rd generation.-- This does not require any further explanation. All that requires to be noted is that No. (1) excludes the group constituted by No. (2), No. (2), and No. (2), and No. (3) excludes the group constituted by No. (4), No. (4) and No. (5) of the half blood, and consanguine relations are preferred to uterine relations. [This rule applies both to the paternal and maternal sides, and it is to be applied separately to each side.].

Order of priority among descendants

The descendants of uncles and aunts may belong to the paternal side or they may belong to the maternal side. The two sides *inherit together*, and no claimant on either side excludes any claimant on the other side. The Table given on the previous page shows at a glance all uncles and aunts of the deceased and their descendants up to the third generation.

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CHAPTER VII

HANAFI LAW OF INHERITANCE

CLASS IV OF DISTANT KINDRED

79.

Other Distant Kindred of the fourth class

If there are no descendants of uncles and aunts, the estate will devolve upon other Distant Kindred of the fourth class in the order of succession given, in 76 above, the distribution among higher uncles and aunts being governed by the principles stated in 77, and that among their descendants by those stated in 78 [*Sir*. 58].

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INHERITANCE/SUCCESSORS UNRELATED IN BLOOD/80. 80.

CHAPTER VII

HANAFI LAW OF INHERITANCE

E.--

SUCCESSORS UNRELATED IN BLOOD

80.

Successor by contract

In default of Sharers, Residuaries, and Distant Kindred, the inheritance devolves upon the &uot;successor by contract,&uot; that is, a person who derives his right of succession under a contract with the deceased in consideration of an undertaking given by him to pay any fine or ransom to which the deceased may become liable.

Sir. 13; *Hedaya*, 517. The right of inheritance by reason of *Wala* dealt with in this section is taken away by the Slavery Act, 1843.

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CHAPTER VII

HANAFI LAW OF INHERITANCE

E.--

SUCCESSORS UNRELATED IN BLOOD

81.

Acknowledged kinsman

Next in succession is the &uot;Acknowledged Kinsman,&uot; that is, a person of unknown descent in whose favour the deceased has made an acknowledgement of kinship, not through himself, but through another.

Such an acknowledgement confers upon the &uot;Acknowledged Kinsman&uot; the right of succession to the property of the deceased, subject to bequests to the extent of the bequeathable third, but it does not invest the person acknowledged with all the rights of an act ual kinsman.

Sir. 13. The kinship acknowledged must be kinship *through another*, that is, through the deceased's father or his grandfather. Thus a person may acknowledge another to be his brother, for that is kinship through the *father*.[41] But he may not acknowledge another to be his son, for that is kinship through *himself*. The acknowledgement by the deceased of a person as his son or daughter stands upon a different footing altogether and it is dealt with in the chapter on &uot;Parentage&uot;.

41 Tagore Law Lectures, 1873, pp. 92-93.

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CHAPTER VII

HANAFI LAW OF INHERITANCE

E.--

SUCCESSORS UNRELATED IN BLOOD

82.

Universal legatee

The next successor is the &uot;Universal Legatee,&uot; that. is, a person to whom the deceased has left the whole of his property by will.

Sir. 13. It is to be noted that the prohibition against bequeathing more than one-third of the net assets exists only for the benefit of the heirs. Hence a bequest of the whole will take effect if the deceased has left no known heir.[42]

42 Baillie's Mahomedan Law of Inheritance, p. 19.

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CHAPTER VII

HANAFI LAW OF INHERITANCE

E.--

SUCCESSORS UNRELATED IN BLOOD

83

Escheat

On failure of all the heirs and successors above specified, the property of a deceased Sunni Mahomedan escheats to the Government.

Sir. 13. The rule of pure Mahomedan law in this respect is different, for according to that rule the property does not devolve upon Government by way of inheritance as *ultimus haeres*, but falls into the *baitul-mal* (public treasury) *for the benefit of Mussalmans.*

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CHAPTER VII

HANAFI LAW OF INHERITANCE

F.--

MISCELLANEOUS

84.

Step-children

Step-children do not inherit from step-parents, nor do step-parents inherit from step-children.

See Macnaghten, p. 99. Precedents of Inheritance No. XXI.

CHAPTER VII

HANAFI LAW OF INHERITANCE

F.--

MISCELLANEOUS

85.

Bastard

An illegitimate child is considered to be the child of its mother only, and as such it inherits from its mother and its relations, and they inherit from such child.[43] But it has been held that an illegitimate son cannot inherit from the legitimate son of the same mother.[44]

Illustrations

[A Mahomedan female of the Sunni sect dies leaving a husband and an illegitimate son of her sister. The husband will take 1/2 and the sister's son, though illegitimate, will take the other 1/2 as a distant kinsman, being related to the deceased through his mother.[45]

An illegitimate child does not inherit from its putative father or his relations, nor do they inherit from such child. In *Rahmat Ullah v. Maqsood Ahmad* [46] it was held that the &uot;mother's relations&uot; did not include her relations by a subsequent marriage&uot;.

43 Tagore Law Lectures, 1873, p. 123.

44 *Rehmat Ullah v. Maqsood Ahmad* ('52) A.A. 640.

45 *Bafatun v. Bilaiti Khanum* (1903) 30 Cal. 683.

46 ('52) A.A. 640.

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CHAPTER VII

HANAFI LAW OF INHERITANCE

F.--

MISCELLANEOUS

86.

Missing persons

When the question is whether a Mahomedan is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it.

Under the Hanafi law, a missing person is to be regarded as alive till the lapse of ninety years from the date of his birth. But it has been held by a Full Bench of the Allahabad High Court that this rule is only a rule of *evidence*, and not one of *succession*, and it must therefore be taken as superseded by the provisions of the Indian Evidence Act.[47]The present section reproduces, with some verbal alterations, the provisions of s. 108 of the Indian Evidence Act .

47 *Mazhar Ali v. Budh Singh* (1884) 7 All. 297; *Mairaj v Abdul Wahid* (1921) 43 All. 673, 63 I.C. 286, ('21) A.A. 175. See Also *Moola Cassim v. Moola Abdul* (1905) 33 Cal. 173, 178, 32 I.A. 177; *Azizul Hasan v. Mohammad Faruq* (1934) 9 Luck. 401, 147 I.C. 973, ('34) A.O. 41.

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CHAPTER VIII

SHIA LAW OF INHERITANCE

Work of highest authority: Sharaya-ul-Islam.--The most authoritative text book of the Shia law is *Sharaya-ul-Islam*,[1] the whole of which has been translated into French by M. Query under the title *Droit Musulman*.

1 *Agha Ali Khan v. Altaf Hasan Khan* (1892) 14 All. 429, 450; *Baker Ali Khan v. Anjuman Ara Begum* (1902) 30 I.A. 94, 112, 25 All. 236; *Aga Sheralli v. Bai Kulsum* (1908) 32 Bom. 540, 558; *Aziz Bano v. Muhammad Ibrahim* (1925) 47 All. 823, 828, 829, 836, 89 I.C. 690, ('25) A.A. 720.

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CHAPTER VIII

SHIA LAW OF INHERITANCE

87.

Division of heirs

The Shias divide heirs into two groups, namely, (1) heirs by consanguinity, that is, blood relations, and (2) heirs by marriage, that is, husband and wife.

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CHAPTER VIII

SHIA LAW OF INHERITANCE

88.

Three classes of heirs by consanguinity

(1) Heirs by consanguinity are divided into three classes, and each class is subdivided into two sections. These classes are respectively composed as follows:--

I.

(i) Parents;
(ii) children and other lineal descendants h.l.s.

II.

(i) Grandparents h.h.s. (true as well as false);
(ii) brothers and sisters and their descendants h.l.s.

III. (i) Paternal, and (ii) maternal, uncles and aunts, of the deceased, and of his parents and grandparents h.h.s., and their descendants h.l.s.

(2) Of these three classes of heirs, the first excludes the second from inheritance, and the second excludes the third. But the heirs of the two sections of each class succeed together, the nearer degree in each section excluding the more remote in that section (Baillie, II, 276, 280, 285).

As to the distribution of estate among the heirs, (*see* 96 et seq.)

Illustrations

(a) A Shia Mahomedan dies leaving a daughter's son, a father's mother, and a full brother.

[In Hanafi law the father's mother as a Sharer will take 1/6, and the full brother as a Residuary will take 5/6; the daughter's son, being a Distant Kinsman, will be entirely excluded from inheritance.]

By Shia law the daughter's son, being an heir of the first class, will succeed to the whole inheritance in preference to the father's mother and the full brother, both of whom belong to the second class of

heirs.

(b) A Shia Mahomedan dies leaving a brother's daughter and a full paternal uncle.

[In Hanafi law the full paternal uncle, being a Residuary, will take the whole property to the exclusion of the brother's daughter who is a Distant Kinswoman.]

By Shia law the brother's daughter, being an heir of the second class, will succeed in preference to the full paternal uncle who belongs to the third class of heirs.

(c) A Shia Mahomedan dies leaving a full paternal uncle's son and a mother's father.

[In Hanafi law the full paternal uncle's son, being a Residuary, will succeed to the whole estate to the entire exclusion of the mother's father who is a Distant Kinsman.]

By Shia law the mother's father, being an heir of the second class, will succeed in preference to the full paternal uncle's son, who belongs to the third class of heirs.

(d) A Shia Mahomedan dies leaving (1) a father, (2) a mother, (3) a daughter, (4) a son's son, (5) a brother, and (6) a paternal uncle. Which of these relations are entitled to succeed?

Here the first four relations, belong to the first class of heirs, the fifth belongs to the second class, and the sixth belongs to the third class. The fifth and sixth are therefore excluded from inheritance. The father and mother belong to the first section of Class 1, and they are both equal in degree. The daughter and son's son belong to the second section, and of these two, the daughter, being nearer in degree, excludes the son's son. The only persons therefore entitled to inherit are the father, the mother, and the daughter.

(e) The surviving relations are (1) a grandfather, (2) a grandmother, (3) a great-grandfather, (4) a brother, and (5) a brother's son. Here all the relations belong to the second class of heirs, the first three belonging to the first section of that class and the last two to the second section. The grandfather and grandmother exclude the great-grandfather by reason of the rule that the nearer in each section excludes the more remote. For the same reason, the brother excludes the brother's son. The only persons therefore entitled to inherit are the grandfather, the grandmother and the brother.

Note that parents do not exclude children, but inherit with them. If there be no children, parents inherit with grandchildren. Similarly, in the second class, brothers and sisters do not exclude grandparents, but inherit with them. If there be no brothers or sisters, the grandparents inherit with the children of brothers and sisters. In the same way, in the third class, paternal uncles and aunts do not exclude maternal uncles and aunts, but inherit with them.

The above illustrations exemplify the fundamental distinction between the Sunni and the Shia Law of Inheritance. Under the Sunni law, Distant Kindred are postponed to Sharers and Residuaries (s. 67); under the Shia law, they inherit with them. The Sunnis prefer agnates to cognates: the Shias prefer the nearest kinsman, whether they be agnates or cognates. In fact, the Shia law does not recognize any separate class of heirs corresponding to the &uot;Distant Kindred&uot; of Sunni law. All heirs under the Shia law are either Sharers or Residuaries (s. 90).

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CHAPTER VIII

SHIA LAW OF INHERITANCE

89.

Husband and wife

The husband or wife is never excluded from succession, but inherits together with the nearest heirs by consanguinity, the husband taking 1/4 or 1/2, and the wife taking 1/8 or 1/4 under the conditions mentioned in the Table of Sharers on page 112.

As to the disability of a childless widow to succeed to her husband's immovable property, (*see* 113 below).

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CHAPTER VIII

SHIA LAW OF INHERITANCE

90.

Table of Sharers--Shia Law

(1) For the purpose of determining the shares of heirs, the Shias divide heirs into two classes, namely, Sharers and Residuaries. There is no separate class of heirs corresponding to the &uot;Distant Kindred&uot; of Sunni law.
(2) The sharers are nine in number. The Table on page 112 gives a list of Sharers together with the shares assigned to them in Shia law.
(3) The descendants h.l.s. of Sharers are also Sharers.

Of the nine sharers mentioned in the Table, the first two are heirs by affinity. The next three belong to the first class of heirs by consanguinity [s.88], and the remaining four belong to the second class. There are no Sharers in the third class of heirs.

Note that the true grandfather h.h.s., the true grandmother h.h.s., and the son's daughter h.l.s., who are Sharers according to Sunni law, are not Sharers, but Residuaries, according to Shia law.

It is very important to note that the descendants of Sharers are also Sharers. This refers, of course, to the descendants of the (1) daughter, (2) uterine brother, (3) uterine sister, (4) full sister, and (5) consanguine sister. It does not refer to the descendants, if they can be called descendants at all, of the husband, wife, father or mother. The Shia jurists are not concerned with the descendants of these four relations.

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CHAPTER VIII

SHIA LAW OF INHERITANCE

91.

Residuaries

(1) All heirs other than Sharers are Residuaries.
(2) The descendants h.l.s. of Residuaries are also Residuaries.

Thus, sons, brothers, uncles and aunts are all Residuaries. Their descendants, therefore, are also Residuaries. For example, a son's daughter, being a descendant of a Residuary (son), is also a Residuary.

TABLE OF SHARERS--SHIA LAW [90]

(Baillie, II, 271-276, 381.)

Sharers	Normal share		Conditions under which the share is inherited	Share as varied by special circumstances
	of one	of two or more collectively		
1. Husband	1/4	..	When there is a lineal descendant.	1/2 when no such descendant.
2. Wife	1/8	1/8	When there is a lineal descendant.	1/4 when no such descendant
3. Father[2]	1/6	..	When there is a lineal descendant	[If there be no lineal descendant, the father inherits as a residuary.]
4. Mother	1/6	..	(a) When there is a lineal descendant; or (b) When there are two or more full or consanguine brothers, or one such brother and two such sisters, or four such sisters, with the father.	1/3 in other cases
5. Daughter	1/2	2/3	When no son	[With the son she takes as a residuary.]
6. Uterine brother 7. *or* sister	1/6	1/3	When no parent, or lineal descendant. (*see* §88)	
8. Full sister	1/2	2/3	When no parent, or lineal descendant, or full brother, or father's father. (*see* §88, 101)	[The full sister takes as a residuary, with the full brother and also with the father's father. (*see* §101)
9. Consanguine sister	1/2	2/3	When no parent, or lineal descendant, or full brother or sister, or consanguine brother or father's father. (*see* §88, 101)	[The consanguine sister takes as a residuary with the consanguine brother and also with the father's father. (*see* §101.]

2. As to the father's extra rights as Sharer, see §108 and 110.

Note.--**The descendantes h.l.s. of sharers are also sharers. (90)**

Of the nine Sharers mentioned in the Table of Sharers, there are four who inherit sometimes as Sharers, and sometimes as Residuaries. These are the (1) father, (2) daughter, (3) full sister, and (4)

consanguine sister. As to the last three, it is to be observed that where any one of them would have, if living, inherited as a Sharer, her descendants would inherit as Sharers, and if she would have inherited as a Residuary, her descendants would inherit as Residuaries (s.95).

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CHAPTER VIII

SHIA LAW OF INHERITANCE

92.

Distribution of property

(1) If the deceased left only one heir, the whole property would devolve upon that heir, except in the case of a wife. If the only heir be a wife, the older view is that she is entitled to no more than her Koranic share (one-fourth) and the residue (three-fourths) escheats to the Government.

Baillie, II, 262. The reason of the exception in the case of a wife is that she is not entitled to the surplus by *Return*, not even if there be no other heir. If she is the sole heir, she takes 1/4, and the surplus passes to the Imam, now to the Government of India. Ameer Ali is of opinion that there being no machinery now to take charge of the Imam's share, the surplus should pass to the wife.[3] This opinion has been followed by the Oudh Court.[4]

If the only heir be a sharer, e.g., a husband, he takes his Koranic share (one-half) as a Sharer, and the residue by Return. If the only heir be a Residuary, e.g., a brother, he takes the whole estate as a Residuary. As to Sunni law, (*see* 66).

(2) If the deceased left two or more heirs, the first step in the distribution of the estate is to assign his or her share to the husband or wife. The next step is to ascertain which of the surviving relations are entitled to succeed, and this is to be done with the help of the rules laid down in 88. The estate (*minus* the share of the husband or wife, if any) is then to be divided among those entitled to succeed according to the rules of distribution applicable to the class to which they belong (96-110).

Note that the husband or wife, as the case may be, is always entitled to succeed whatever be the class to which the other claimants belong. The husband and wife always inherit as Sharers, their shares being respectively 1/4 and 1/8 when there is a lineal descendant, and 1/2 and 1/4 when there is no lineal descendant. Since there are no lineal descendants either in the second or third class of heirs, it follows that when the husband or wife succeeds with the heirs of the second or third class, he or she takes his or her full share, that is, the husband takes 1/2, and the wife takes 1/4.

3 Ameer Ali, 5th ed., Vol. II, p. 123, f.n. (3).

4 *Abdul Hamid Khan v. Peare Mirza* (1935) 10 Luck. 550, 153 I.C. 379, ('35) A.O. 78.

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CHAPTER VIII

SHIA LAW OF INHERITANCE

93.

Representation

(1) The principle of representation has more than one meaning. It may be applied for the purpose of deciding
   (a) what persons are entitled to inherit, or
   (b) the quantum of the share of any given person on the footing that he is entitled to inherit.[5]

(2) Where for purpose (a) the rule of exclusion applies (i.e., the, nearer in degree excludes the more remote), it is true both of Sunnis and Shias that the principle of representation is not recognized as qualifying the rule of exclusion. Thus, if *A* dies leaving him surviving a son and grandsons by a predeceased son, the grandsons are excluded from inheritance by their uncle. They do not take in their father's stead though he would have been an heir had he survived his father.

(3) But if both sons predeceased the propositus who died leaving three grandsons by one son and two by the other, then all the grandsons are heirs. In that case, is the principle of representation to be applied for purpose (b), that is, for ascertaining the share or each grandson? This is a further and different question. If the principle is applied, the grandsons of one branch will have to divide into three what the grandsons of the other branch divide in half.

In the case supposed, Sunni law would not proceed upon any principle of representation in calculating the grandson's shares (*see* rule (1) in 71 *supra*). The grandsons would each take the same share, i.e., a share ascertained without recourse to the representation principle. The division among them would be *per capita and not per stirpes*. As explained in 71, however, recognition of the principle of representation for the purpose of calculating shares is not altogether absent from the Sunni law. Rules (2) and (3) therein formulated disclose the influence of the principle in ascertaining the share of each heir in cases to which these rules are applicable.

(4) For the limited purpose of calculating the share of each heir--as distinct from the purpose of ascertaining the heirs--the Shia law accepts the principle of representation as a cardinal principle throughout. According to that principle, the descendants of a deceased son, if they are heirs, take the portion which he, if living, would have taken, and in that sense, represent the son. In the same limited sense, the descendants of a deceased daughter represent the daughter: if they inherit, they take the portion which the daughter, if living, would have taken. The principle is applicable in the same way to the descendants of a deceased brother, sister or aunt.

(5) The principle of representation is not confined in its operation to descendants only. It applies in the ascending as well as in the descending line. Thus, great-grandparents take the portion which the grandparents, if living, would have taken: and the father's uncles and aunts take the portion which the deceased's uncles and aunts, if living, would have taken.

When the rule of exclusion applies

The rule that the nearer in degree excludes the more remote is a rule applied within the limits of each

class of heirs. In Sunni law (*see* 65 *supra*), it is not without other limitations (*see* note &uot;Principles of succession among sharers and residuaries&uot; at pp. 79-81 *supra*). But among Shias' it applies within each section in all cases without distinction of class or sex (*see* 88(2) *supra* and Baillie II, 270). As the classification of heirs is different in the two systems, the application of the doctrine has different results as regards the persons entitled to inherit. The extent of this divergence is not the subject matter of the present section which is concerned only with the ascertainment of shares under the Shia law, for which purposes the principle of representation is fundamental.

5 *Aga Sheralli v. Bai Kulsum* (1908) 32 Bom. 540, 547, 548, 558.

CHAPTER VIII

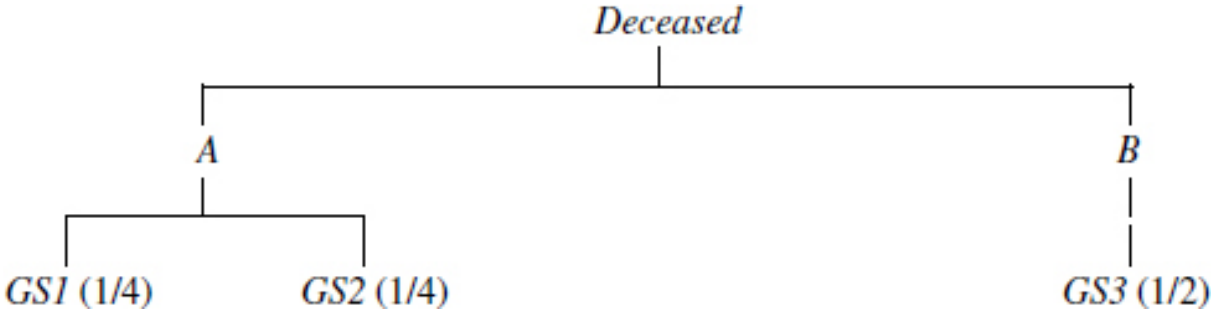
SHIA LAW OF INHERITANCE

94.

Stirpital succession

Succession among descendants in each of the three classes of heirs (88) is *per stirpes*, and not *per capita*.[6]

This is repeating in other words the principle of representation described in the last section. Thus, suppose a Shia dies leaving two grandsons *GS*1 and *GS*2 by a predeceased son *A* and a grandson *GS*3 by another predeceased son *B*, as shown in the following diagram:--



By Shia law, the estate is to be notionally divided first among the two sons *A* and *B*, so that each takes . *A*'s share 1/2 descends to his two sons *GS*1 and *GS*2, each taking 1/4, *B*'s share 1/2 passes to his son *GS*3. The division, in other words, is according to the stocks, and not according to the *claimants*. By Sunni law, *GS*1, *GS*2 and *GS*3 take *per capita*, that is, each takes 1/3 without reference to the shares which their respective fathers, if living, would have taken. Under the Shia law, *A*'s two sons represent *A* and stand in his place, and *B*'s son *represents B* and stands in his place. Under the Sunni law, there is no such representation (s. 53).

The above is an example of succession *per stirpes* among the descendants of sons. The descendants of daughters, brothers, sisters, uncles, aunts, granduncles and grandaunts also succeed *per stirpes* (*see* 96, 100, 104 and 105).

6 *Aga Sheralli v. Bai Kulsum* (1908) 32 Bom. 540.

Mulla: Mahomedan law, Updated 20th edition/CHAPTER VIII SHIA LAW OF INHERITANCE/95. Succession among descendants

CHAPTER VIII

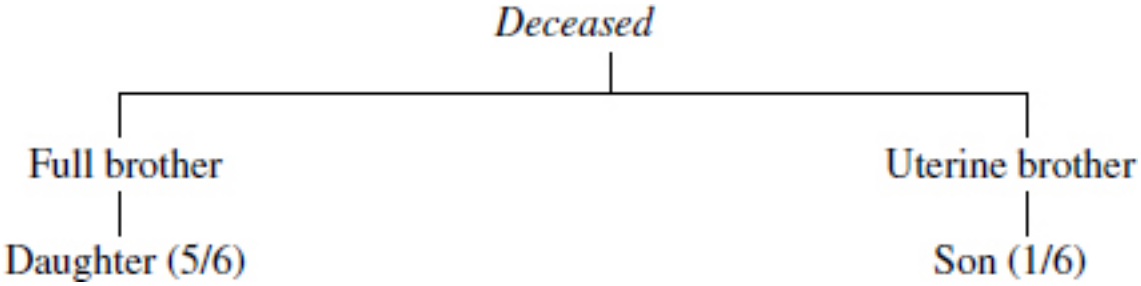
SHIA LAW OF INHERITANCE

95.

Succession among descendants

The descendants of a person who, if living, would have taken as a Sharer, succeed as Sharers. The descendants of a person who, if living, would have taken as a Residuary, succeed as Residuaries.

This follows necessarily from the principle of representation described in 93. Thus, suppose a Shia dies leaving a full brother's daughter and a uterine brother's son as shown in the following diagram:--



The uterine brother, had he survived, would have taken as a Sharer his Koranic share 1/6 (*see* Table of Sharers, No. 6). The full brother, had he survived, would have taken 5/6 as a residuary. The uterine brother's son, being the descendant of a Sharer, will succeed as a sharer, and representing as he does his father, take his father's share 1/6. The full brother's daughter, being the descendant of a Residuary, will succeed also as a Residuary, and *representing* as she does her father, takes her father's portion 5/6. Under the Sunni law, both a full brother's daughter and a uterine brother's son are Distant Kindred of the third class. According to Imam Muhammad, the former would take 5/6 and the latter 1/6 exactly as in Shia law (see 75). According to Abu Yusuf, the former entirely excludes the latter (*see* notes to 74), &uot;Doctrine of Abu Yusuf&uot;.

Having described the mode of distribution in 92, and having explained the principle of representation in sec. 93, and its two corollaries in 94 and 95, we proceed to enumerate the special rules by which succession in each of the three classes of heirs mentioned in 88 is governed.

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CHAPTER VIII

SHIA LAW OF INHERITANCE

DISTRIBUTION AMONG HEIRS OF THE FIRST CLASS

96.

Rules of succession among heirs of the first class

The persons who are first entitled to succeed to the estate of a deceased Shia Mahomedan are the heirs

of the first class *along* with the husband or wife, if any (92(2)). The first class of heirs comprises parents, children, grandchildren, and remoter lineal descendants of the deceased. The parents inherit together with children, and, failing children, with grandchildren, and failing grandchildren, with remoter lineal descendants of the deceased, the nearer excluding the more remote (88). Succession in this class is governed by the following rules:--

(1) *Father.*--The father takes 1/6 as a Sharer, if there is a lineal descendant; as a Residuary, if there be no lineal descendant (*see* Table of Sharers, No. 3).

(2) *Mother.*--The mother is always a Sharer, and her share is 1/6 or 1/3 (*see* Table of Sharers, No. 4).

(3) *Son.*-- The son always takes as a Residuary.

(4) *Daughter.*--The daughter inherits as a Sharer, unless there is a son in which case she takes as a Residuary with him according to the rule of the double share to the male (*see* Table of Sharers, No. 5).

(5) *Grandchildren.*--On failure of children, the grandchildren stand in the place of their respective parents, and they inherit according to the principle of representation described in 93, 94 and 95, that is to say --

  (i) the children of each son take the portion which their father, if living, would have taken as a Residuary and divide it among them according to the rule of the double share to the male;

  (ii) the children of each daughter take the portion which their mother, if living, would have taken either as a Sharer or as a Residuary and divide it among them also according to the rule of the double share to the male.

(6) *Remoter lineal descendants.*--Succession among remoter lineal descendants is governed by the same principle of representation, that is to say, great-grandchildren take the portion which their respective parents, if living, would have taken, and divide it among them according to the rule of the double share to the male, and great-great-grand children take the portion which their respective parents, if living, would have taken, and divide it among them also according to the same rule.

Baillie, 11,276-279.

Mode of distribution among husband or wife and heirs of the first class--

first, assign his or her share to the husband or wife (*see* Table of Sharers Nos. 1-2);

next, assign their shares to such of the claimants as can inherit as Sharers only;

next, divide the residue, if any, among the residuaries;

lastly, if there be no Residuary, and the sum total of the shares is less than unity, apply the 'Doctrine of Return' as stated in 106 to 109, and if the sum total exceeds unity, proceed as stated in 110.

Illustrations

(a)	*Husband*	..	..	1/2	(as sharer)
	Mother	..	..	1/3	(as sharer)
	Father	..	..	1/6	(as residuary)

Note.--Under the Sunni law, the mother takes 1/3x1/2= 1/6, and the father 1/3 as a residuary (*see* Table of Sharers, Sunni law, No. 5).

(b)	*Wife*	..	..	1/4	(as sharer)

	Mother	..	..	1/3	(as sharer)
	Father	..	..	5/12	(as residuary)

Note.--Under the Sunni law, the mother takes 1/3x 3/4 = 1/4, and the father 1/2 as a residuary (*see* Table of Sharers, Sunni law, No. 5).

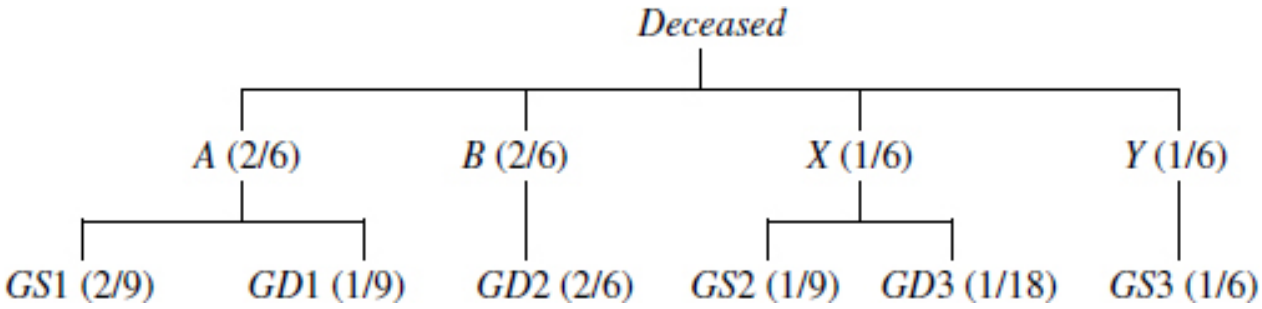
(c)	*Father*	..	..	1/6	(as sharer)
	Mother	..	..	1/6	(as sharer)
	Son	..	..	2/3	(as residuary)

Note.--If instead of a son, there was a son's daughter, she would have taken 2/3 as representing her father.

(d)	Father	..	..	1/6	(as sharer, because there are daughters)
	Mother	..	..	1/6	(as sharer)
	2 daughters	..	..	2/3	(as sharers)

Note.--The shares would be the same if we substitute daughters' sons or daughters' daughters for daughters.

(e) A Shia dies leaving a grandson *GS*1 and a granddaughter *GD*1 by a predeceased son *A*, a granddaughter *GD2* by another predeceased son *B*, a grandson *GS*2 and a granddaughter *GD*3 by a predeceased daughter *X*, and a grandson *GS*3 by another predeceased daughter *Y*, as shown in the following diagram:--



Here the two daughters *X* and *Y*, if living, would have taken as residuaries with the two sons *A* and *B* according to the rule of the double share to the male, so that *A* and *B* would each have taken 2/6, and *X* and *Y* would each have taken 1/6.

A's share 2/6 will pass to his son and daughter according to the rule of the double share to the male, so that *GS*1 will take 2/3 x 2/6 = 2/9 and *GD*1 will take 1/3 x 2/6 = 1/9.

B's share 2/6 will pass to his daughter *GD*2.

X's share 1/6 will be divided between her son and her daughter according to the rule of the double share to the male, so that *GS*2 will take 2/3 x 1/6 = 1/9, and *GD*3 will take 1/3 x 1/6 = 1/18.

Y's share 1/6 will pass to her son *GS*3.

The shares will thus be 2/9 + 1/9 + 2/6 + 1/9 + 1/18 + 1/6 = 1.

According to the Hanafi law, *GS*1 and *GD*1 and *GD*2 are Residuaries and they exclude *GS*2, *GD*3, and *GS*3 who are Distant Kindred. *GS*1 will take 1/2, and *GD*1 and *GS*2 will each take 1/4.

If in the above case, the deceased also left a wife, the wife will first take her share 1/8, and the remaining 7/8 will be divided among the six grandchildren in the same proportions.

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CHAPTER VIII

SHIA LAW OF INHERITANCE

DISTRIBUTION AMONG HEIRS OF THE SECOND CLASS

97.

Rules of succession among heirs of the second class

If there are no heirs of the first class, the estate (minus the share of the husband or wife, if any) devolves upon the heirs of the second class. The second class of heirs comprises grandparents h.h.s. and brothers and sisters and their descendants h.l.s. (88). The rules of succession among the heirs of this class are different according as the surviving relations are --

(1) grandparents h.h.s., without brothers or sisters or their descendants;
(2) brothers and sisters or their descendants, without grandparents or remoter ancestors;
(3) grandparents h.h.s., with brothers and sisters or their descendants.

The first case is dealt with in 98. The second case is dealt with in 99 and 100. The third case is dealt with in 101.

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CHAPTER VIII

SHIA LAW OF INHERITANCE

DISTRIBUTION AMONG HEIRS OF THE SECOND CLASS

98.

Grandparents h.h.s. without brothers or sisters or their descendants

If there are no brothers or sisters, or descendants of brothers or sisters, the estate (minus the share of the husband or wife, if any) is to be distributed among grandparents according to the following rules:--

(1) If the deceased left all his four grandparents surviving, the paternal grandparents take two-thirds, and divide it between them according to the rule of the double share to the male, and the maternal grandparents take 1/3, and divide it equally between them, as shown below:--

2/3	Father's father	.. .. ..	2/3 x 2/3 = 4/9 = 8/18
	Father's mother	.. .. ..	1/3 x 2/3 = 2/9 = 4/18
1/3	Mother's father	.. .. ..	1/2 x 1/3 = 1/6 = 3/18
	Mother's mother	.. .. ..	1/2 x 1/3 = 1/6 = 3/18

(2) If there is only one grandparent on the paternal side, he or she takes the entire 2/3. Similarly, if there is only one grandparent on the maternal side, he or she takes the entire 1/3, as shown below:--

(a)	Father's father	.. ..	2/3
	Mother's father	.. ..	1/3 (each taking 1/6)
	Mother's mother	.. ..	
(b)	Father's father	2/3	2/3 x 2/3 = 4/9
	Father's mother		1/3 x 2/3 = 2/9
	Mother's mother	1/3	=3/9
(c)	Father's father	.. .. ..	2/3
	Mother's mother	.. .. ..	1/3

(3) If there are no grandparents, the property will devolve according to the same rules upon remoter ancestors of the deceased, the nearer excluding the more remote.

Baillie, II, 281, 283.

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CHAPTER VIII

SHIA LAW OF INHERITANCE

DISTRIBUTION AMONG HEIRS OF THE SECOND CLASS

99.

Brothers and sisters, without any ancestor

If the deceased left no ancestors, but brothers and sisters of various kinds, the estate (*minus* the share of the husband or wife, if any) will be distributed among them according to the same rules as those in Hanafi law. The said rules are as follows:--

(i) Brothers and sisters of the full blood exclude consanguine brothers and sisters.

(ii) Uterine brothers and sisters are not excluded by brothers or sisters either full or consanguine, but they inherit with them, their share being 1/3 or 1/6 according to their number (*see* Table of Sharers, Nos. 6 and 7).

(iii) Full brothers take as Residuaries, so do consanguine brothers.

(iv) Full sisters take as Sharers (*see* Table of Sharers, No. 8), unless there be a full brother in which case they take as Residuaries with him according to the rule of the double share to the male. Consanguine sisters also take as Sharers (*see* Table of Sharers, No. 9) unless there be a consanguine brother with them in which case they take as Residuaries with him according to the same rule.

Baillie, II, 280.

Illustrations

Note.--The shares of the several heirs in the following illustrations are the same both in Sunni and Shia law. The illustrations are given to familiarize the reader with combinations of heirs that are common in Shia law:--

(a)	*Husband*	..	..	1/2	(as sharer)
	Full (or cons.) sister	..	..	1/2	(as sharer)
(b)	*Wife*	..	..	1/4	(as sharer)
	Full brother	..	..	3/4	(as residuary)
(c)	*Husband*	..	..	1/2	(as sharer)
	Full brother	..	..	2/3x(1/2)=1/3	(as residuaries)
	Full sister	..	..	1/3x(1/2)=1/6	
(d)	*Wife*	..	..	1/4	(as sharer)
	Ut. brother	..	..	1/6	(as sharer)
	Cons. brother	..	..	2/3 x (7/12) = 7/18	(as residuaries)
	Cons. sister	..	..	1/3 x(7/12) =7/36	

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CHAPTER VIII

SHIA LAW OF INHERITANCE

DISTRIBUTION AMONG HEIRS OF THE SECOND CLASS

100.

Descendants of brothers and sisters, without any ancestor

If there are no brothers or sisters of any kind, and no ancestors, but there are children of bothers and of sisters, the estate (*minus* the share of the husband or wife, if any) will devolve upon them according to the principle of representation described in 93, 94 and 95, that is to say--

(1) The children of each full or consanguine brother will take the portion which their father, if living, would have taken as a Residuary, and they will divide it among them according to the rule of the double share to the male; and the children of each full or consanguine sister will take the portion which their mother, if living, would have taken either as a Sharer or as a Residuary, and they will divide it among them according also to the rule of the double share to the male.

(2) The children of each uterine brother will take the portion which their father, if living, would have taken as a Sharer, and they will divide it *equally* among them; and so will the children of each uterine sister.

(3) If there are no children of brothers or sisters, the estate will devolve upon the grandchildren

of brothers and sisters according to the principle of representation, that is to say, the grandchildren of full or consanguine brothers and sisters take the portion which their *respective* parents, if living, would have taken and divide it among them according to the rule of the double share to the male, and the grandchildren of uterine brothers and sisters take the portion which their *respective* parents, if living, would have taken, and divide it equally among them without distinction of sex.

Baillie, II, 284.

Illustrations

(a)	*Husband*	..	..	1/2	(as sharer)
	Ut. Brother's daughter	..	..	1/3	(as sharer, being her father's portion)
	Full brother's daughter	..	..	1/6	(as residuary, being her father's portion)
	Cons. Brother's son	..	..		(excluded by full brother's daughter)

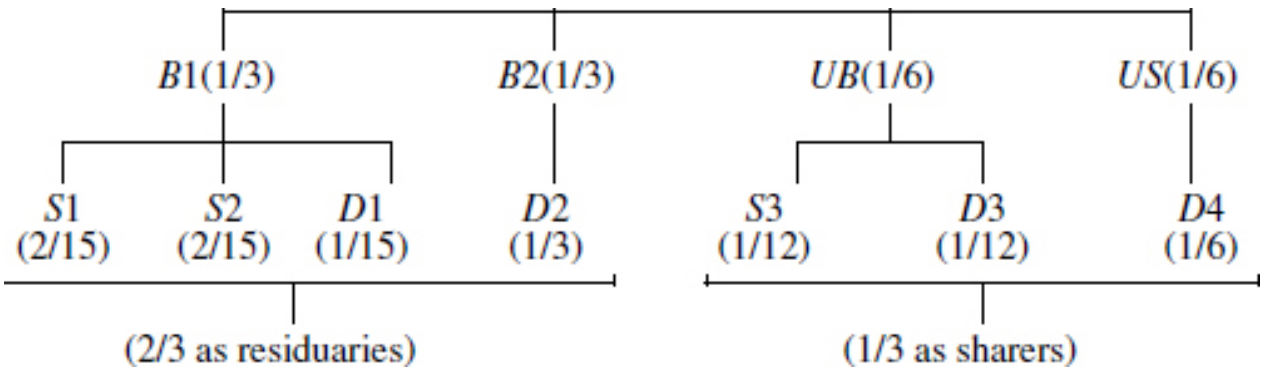
(b) Suppose the claimants to be as shown in the second line of the following diagram, that is to say,--

two sons and a daughter of a full brother, *B*1;

a daughter of another full brother, *B*2;

a son and a daughter of a uterine brother, *UB*;

a daughter of a uterine sister, *US*;



First, assign their respective shares to the brothers and sisters thus:--

UB and *US*	..	..	1/3	(as sharers), each taking 1/6;

*B*1 and *B*2	..	..	2/3	(as residuaries), each taking 1/3;

Next assign portions to their children thus:--

US's share 1/6 will go to her daughter *D*4;

UB's share 1/6 will be divided *equally* between *S*3 and *D*3, each taking 1/12;

*B*2's share 1/3 will go to his daughter *D*2;

*B*1's share 1/3 will be divided among his two sons and his daughter according to the rule of the double share to the male, so that *S1* will take 2/5x1/3 = 2/15, *S*2 will also take 2/15, and *D*1 will take 1/5 x 1/3 = 1/15.

The shares will thus be 2/15+2/15+1/15 +1/3+1/12+1/12+1/6 = 1.

Suppose that in the above case the children of the brothers and sisters had all predeceased the propositus, and that *S*1 had left a son and a daughter, that *S*3 also had left a son and a daughter, and the remaining five nephews and nieces had each left a son. In that case, the share of *S*1, that is, 2/15, would be divided between his son and his daughter according to the rule of the double share to the male, the son taking 2/3 x 2/15 = 4/45, and the daughter 1/3 x 2/15 = 2/45. The share of *S*3, that is, 1/12, would be divided *equally* between his son and daughter, they being descendants of a *uterine* brother, so that each would take 1/24. The sons of *S*2, *D*1, *D*2, *D*3, and *D*4, would take their respective parents' portion.

CHAPTER VIII

SHIA LAW OF INHERITANCE

DISTRIBUTION AMONG HEIRS OF THE SECOND CLASS

101.

Grandparents and remoter ancestors with brothers and sisters or their descendants

(1) If the deceased left grandparents and also brothers or sisters, the estate (minus the share of the husband or wife, if any) is to be distributed among grandparents and brothers and sisters, according to the following rules:--
   (a) A paternal grandfather counts as a full or consanguine brother, and a paternal grandmother counts as a full or consanguine sister.
   (b) A maternal grandfather counts as a uterine brother, and a maternal grandmother counts as a uterine sister.

(2) On failure of grandparents, the remoter ancestors of the deceased stand in the place of the grandparents through whom they are respectively connected with the deceased. On failure of brothers or sisters, their descendants stand in the place of their respective parents.

Baillie, II, 281,391-392; Wilson, Anglo-Muhammadan Law, s. 468.

The effect of the above rules is that when among heirs of the second class you find a single brother or sister, full, consanguine or uterine, what you have to do is to substitute for

grandparents so many brothers and sisters according to the above rules, and then assign shares to grandparents as if they were so many brothers and sisters, as is done in the following illustrations:--

(a)	*Paternal grandfather*	(= full brother)	2/3
	2 Full sisters		1/3

Note.--Here the full sister takes as a residuary with the paternal grandfather, the latter being counted as a full brother.

(b)	*Paternal grandfather*	(= consanguine brother)	2/3
	Consanguine sister		1/3

Note.--Here the consanguine sister takes as a residuary with the paternal grandfather, the latter being counted as a consanguine brother.

(c)	*Uterine brother*			
	Maternal grandmother	(= ut. sister)	1/3	(each taking 1/6)
	2 Full sisters		2/3	(as sharers)

Note.--Here the maternal grandmother counts as a uterine sister, so that the case is the same as if we had a uterine brother and a uterine sister; these take 1/3 between them as sharers.

(d)	*Full brother*		4/18	2/3 as residuaries
	Full sister		2/18	
	Father's father	(= full brother)	4/18	
	Father's mother	(= full sister)	2/18	
	Mother's father	(= ut. sister)	1/6	1/3 as sharers.
	Mother's mother	(= ut. sister)	1/6	

Note.--First substitute brothers and sisters for grandparents, so that we have 2 full brothers, 2 full sisters, one uterine brother and one uterine sister. The uterine brother and sister take 1/3 between them as sharers. The residue 2/3 is to be divided between full brothers and 2 full sisters as residuaries according to the rule of the double share to the male. Each brother therefore takes 2/6 x 2/3 = 4/18, and each sister 1/6 x 2/3 = 2/18. The result would be the same if instead of a full brother and a full sister in the above case, there were a consanguine brother and a consanguine sister.

(e)	*Uterine brother*		=	1/9	1/3 as sharers.
	Uterine sister		=	1/9	
	Mother's mother	(= uterine sister)	=	1/9	
	Father's father	(= con. brother)	=	1/3	2/3 as residuaries.
	Father's mother	(= con. sister)	=	1/6	
	Con. sister		=	1/6	

Note.--Substitute &uot;uterine sister&uot; for &uot;mother's mother,&uot; so that we have one uterine brother and two uterine sisters. Next as there is a *consanguine* sister, substitute &uot;consanguine brother&uot; for &uot;father's father&uot; and &uot;consanguine sister&uot; for &uot;father's mother.&uot; The uterine-brother and the two uterine sisters take collectively 1/3 as sharers. The residue 2/3 is to be divided between one consanguine brother and two consanguine sisters as residuaries according to the rule of the double share to the male. The brother therefore takes 2/4 x 2/3 = 1/3, and each sister takes 1/4x2/3=1/6.

(f)	*Husband*		1/2	
	Father's father (=full brother)	]	1/2	as residuaries, each taking 1/4
	Full brother	]		
(g)	*Wife*		1/4	
	Uterine sister	}	1/3	as sharers, each taking 1/9
	Uterine brother	}		
	Maternal grandfather	}		
	(= ut. brother)	}		
	Paternal grandfather		5/12	(as residuary)

Note.--In the above case, it is all the same whether you count the paternal grandfather as a full brother or as a consanguine brother; in either case he takes as a residuary.

(h)	*Full brother's son*		1/2	(being his father's share)
	Father's father (=full brother)		1/2	

Note.--The above, illustration is taken from Baillie, II, pp. 327-328, 392.

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CHAPTER VIII

SHIA LAW OF INHERITANCE

DISTRIBUTION AMONG HEIRS OF THE THIRD CLASS

102.

Order of succession among heirs of the third class

(1) If there are no heirs of the first or second class, the estate (*minus* the share of the husband or wife, if any) devolves upon the heirs of the third class in the order given below:--
- (1) Paternal, and maternal uncles and aunts of the deceased.
- (2) Their descendants h.l.s., the nearer in degree excluding the more remote.
- (3) Paternal and maternal uncles and aunts of the parents.
- (4) Their descendants h.l.s., the nearer in degree excluding the more remote.
- (5) Paternal and maternal uncles and aunts of the grandparents.
- (6) Their descendants h.l.s., the nearer in degree excluding the more remote.
- (7) Remoter uncles and aunts and their descendants in like order.

(2) Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Exception.--If the only claimants be the son of a full paternal uncle and a consanguine paternal uncle, the former though he belongs to group (2), excludes the latter who is nearer and belongs to group (1).

Exception to 102(2)

The Shias are the followers of Ali. Ali was a cousin of the Prophet. He was also the son-in-law of the Prophet having been married to his favourite daughter Fatima. The Shias maintain that on the death of the prophet the Caliphat (successorship to the Prophet) ought to have gone first to Ali, on the ground that he was the *nearest male heir* of the Prophet. But the Prophet had also left a consanguine paternal uncle (named Abbas), and Ali was but a cousin of the Prophet, being the son of a full paternal uncle (Abu Talib) of the Prophet. Ali therefore could not be the *nearest* male heir, unless the son of a full paternal uncle was entitled to succeed in preference to a consanguine uncle. To uphold, however, the claim of Ali and that of the lineal descendants of the Prophet through Fatima, the Shias had to hold that the son of a full paternal uncle was entitled to succeed in preference to a consanguine paternal uncle, and this accounts for the exception to 102(2) above.

No sharers in the third class of heirs

The heirs of the third class are all Residuaries. There is no sharer among them as will be seen on referring to the Table of Sharers given above.

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SHIA LAW OF INHERITANCE

DISTRIBUTION AMONG HEIRS OF THE THIRD CLASS

103.

Uncles and aunts

To distribute the estate among uncles and aunts proceed as follows:--

(1) *First*, assign 2/3 of the estate to the paternal side, that is, to paternal uncles and aunts, even if there be only one such, and 1/3 to the maternal side, that is, to maternal uncles and aunts, even if there be only one such.

(2) *Next*, divide the portion assigned to the paternal side (that is 2/3 of the estate) among the paternal uncles and aunts exactly as if they were brothers and sisters of the deceased, that is to say:--

  (i) assign to uterine paternal uncles and aunts--

    (a) if there be two or more of them, 1/3 to be *equally* divided among them;

    (b) if there be only one of them, 1/6;

  (ii) divide the remainder among full paternal uncles and aunts according to the rule of the double share to the male, and, *failing them*, among consanguine paternal uncles and aunts according to the same rule.

(3) *Lastly*, divide the portion assigned to the maternal side, among the maternal uncles and aunts as follows:--

(i) assign to uterine maternal uncles and aunts--
(a) if there be two or more of them, 1/3 to be equally divided among them;
(b) if there be only one of them, 1/6;

(ii) divide the remainder *equally* among full maternal uncles and aunts, and, *failing* them, among consanguine maternal uncles and aunts.

(4) If there be no uncle or aunt on the maternal side, the paternal side takes the whole. Similarly, if there be no uncle or aunt on the paternal side, the maternal side takes the whole.

Baillie, II, 285, 286, 329.

Note.--In working out examples, proceed in the order given in this section.

(a) 2/3 { *Full pat. uncle* .. 5/6 x 2/3 = 5/9; *Con. pat. uncle* .. =0 (excluded by *full* pat. uncle); *Ut. pat. uncle* .. 1/6 x 2/3 = 1/9 }
1/3 { *Full mat. uncle* .. 5/6 x 1/3 = 5/18; *Cons, matuncle* .. =0 (excluded by *full* pat. uncle); *Ut. mat. uncle* .. 1/6x1/3 = 1/18 }

(b) 2/3 [*Full pat. aunt* .. 2/3; *Cons. pat. uncle* .. (excluded by *full* pat. aunt)]
1/3 *Ut. mat. aunt* .. 1/3

(c) *Full pat. uncle* .. .. 2/3 (takes a double shares, being a male)
Full pat. aunt 1/3

(d) *Full mat. uncle* 5/6
Ut. mat. uncle .. .. 1/6 (being only one)

(e) 2/3 [*Cons. pat. uncle* .. 5/6 x 2/3 = 5/9; *Ut. pat uncle* .. 1/6 x 2/3 = 1/9]
1/3 *Ut. mat. aunt* 1/3

(f) 2/3 { *Full pat. uncle* ..] 2/3 x 2/3 = 4/9 [2/3 x 4/9 = 8/27; *Full pat. aunt* ..] [1/3 x 4/9 = 4/27; *4 Ut. pat. uncles* ..] 1/3 x 2/3 = 2/9 each taking [1/6 x 2/9 = 1/27; *2 Ut. pat. aunts* ..] }
1/3 [*1 Ut. mat. uncle* 1/2 x 1/3 = 1/6; *1 Ut. mat. aunt* 1/2 x 1/3 = 1/6]

8/27 + 4/27 + 2/9 + 1/6 + 1/6 = 1

(g) *Full mat. uncle* .. 1/2
Full mat. aunt .. 1/2

Note.--Maternal uncles and aunts take equally without distinction of sex.

(h) *Ut. mat. uncle*, *Ut. mat. aunt*] 1/3, each taking 1/6
Full mat. uncle, *Full mat. aunt*] 2/3, each taking 1/3

Note.--The above result is in accordance with rule (3) above, namely, that the full maternal uncles and

aunts take equally without distinction of sex. This proposition, however, is not free from doubt. There is another possible view, namely, that full maternal uncles and aunts take equally only if there are no uterine maternal uncles and aunts [as in ill. (g)], and that if there be any such uncles or aunts (as in the above illustration), they take according to the rule of the double share to the male. According to this view the full maternal uncle in the above illustration is entitled to 2/3 x 2/3 = 4/9, and the full maternal aunts to 1/3 x 2/3 = 2/9. The same remarks apply to consanguine maternal uncles and aunts.[7]

7 See Baillie, II, pp. 285, 286, and Querry's Translation of the *Sharaya-ul-Islam,* ss. 214-219; Ameer Ali, 5th ed., Vol. 11, pp. 119-120.

CHAPTER VIII

SHIA LAW OF INHERITANCE

DISTRIBUTION AMONG HEIRS OF THE THIRD CLASS

104.

Descendants of uncles and aunts

If there are no uncles or aunts of any kind, children of deceased uncles and aunts take the portion of their respective parents according to the principle of representation described in 80, 81, and 82 the children of each full or consanguine paternal uncle or aunt dividing their parents' share among them according to the rule of the double share to the male, and the children of each of the remaining uncles and aunts, that is, of uterine paternal uncles and aunts, and of maternal uncles and aunts, whether full, consanguine or uterine, dividing their parents' share *equally* among them.

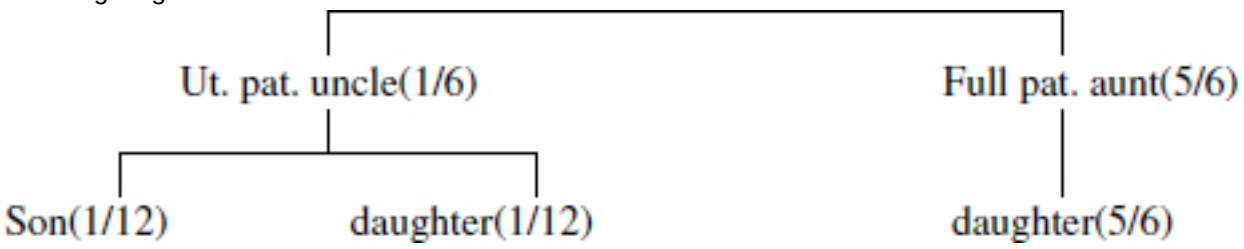
If there are no children of uncles or aunts, the grandchildren of uncles and aunts take the portion of their respective parents according to the same principles.

Baillie, II, 287

Note.--In working out examples, first ascertain the hypothetical shares of uncles and aunts,

(a) The surviving relations are--

a son and a daughter of a uterine paternal uncle, and a daughter of a full paternal aunt, as shown in the following diagram:--



The uterine uncle takes 1/6. The aunt of the full blood takes the residue 5/6. The uterine uncle's share 1/6 is to be divided *equally* between his son and daughter. The aunt's share 5/6 goes to her daughter.

(b) *Paternal uncle's son* .. 2/3 (the portion of the *paternal side*)

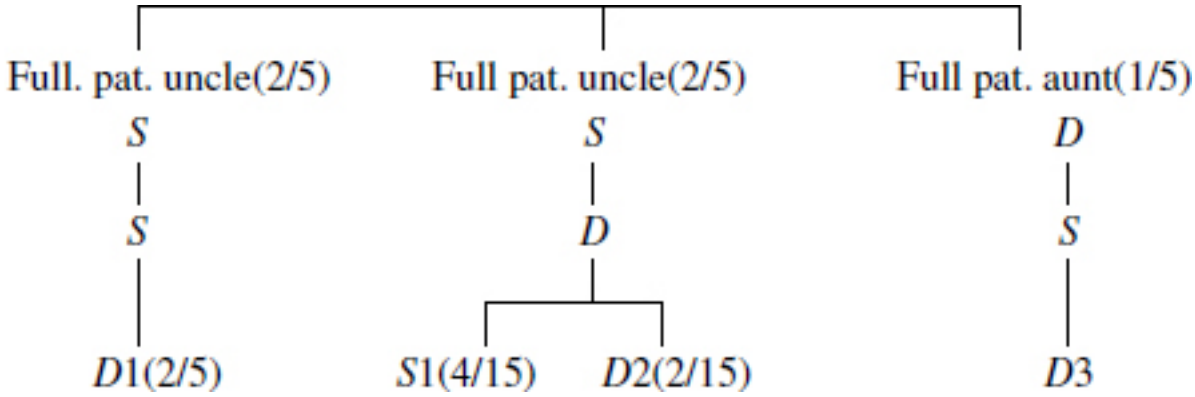
Maternal aunt's son .. 1/3 (the portion of the *maternal side*)

(c) The surviving relations are[8] --

a great-granddaughter of a full paternal uncle, *D*1;

a great-grandson and a great-granddaughter of another such uncle, *S*1 and *D*2;

a great-granddaughter of a full paternal aunt, *D*3;



The two uncles take each twice as much as the aunt, so that each uncle takes 2/5 and the aunt takes 1/5. The first uncle's share 2/5 goes to his descendant *D*l.

The second uncle's share 2/5 is to be divided between his two descendants *S*1 and *D*2 according to the rule of the double share to the male, so that *S*1 takes 2/3 x 2/5= 4/15 and *D*2 takes 1/3 x 2/5 = 2/15

The aunt's share 1/5 passes to her descendant *D*3.

According to Hanafi law, the shares will be as stated in ill. (b) to 65 above.

8 *Aga Sheralli v. Bai Kulsum* (1908) 32 Bom. 450.

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SHIA LAW OF INHERITANCE

DISTRIBUTION AMONG HEIRS OF THE THIRD CLASS

105.

Other heirs of the third class

If there are no descendants of uncles or aunts, the estate will devolve upon the other heirs of the third class in the order of succession given in 102, the distribution among higher uncles and aunts being governed by the principles stated in 103, and that among their descendants being governed by the principles states in 104.

Baillie, II, 287, 331, 332.

CHAPTER VIII

SHIA LAW OF INHERITANCE

THE &uot;RETURN&uot; AND THE &uot;INCREASE&uot;

106.

Doctrine of &uot;Return&uot;

If there is a residue left after satisfying the claims of Sharers, but there are no Residuaries *in the class to which the sharers* belong, the residue reverts, subject to the three exceptions noted in 107, 108 and 109, to the Sharers in the proportion of their respective shares.

Baillie, II, 262.

Note.--In working out examples, follow the rules given in the notes appended to ill. (f) and ill.

(l) to 66.

(a)	*Mother*	..	1/6	Increased to 1/4
	Daughter	..	1/2 =3/6	Increased to 3/4
	Brother	..	0	(excluded, as being an heir of the second class)

Note.--By Hanafi law, the brother would have taken the residue 1/3.

(b)	*Mother*	.. ..	1/6	Increased to 1/5
	Father	.. ..	1/6	Increased to 1/5
	Daughter	.. ..	1/2 = 3/6	Increased to 3/5

Note.--By Hanafi law, the father would have taken the residue 1/6 as a Residuary.

(c)	*Ut. sister*	.. ..	1/6	increased to 1/4
	Con. sister	.. ..	1/2 = 3/6	increased to 3/4

Baillie, II, 335-336.

Note.--If there was a full sister instead of a consanguine sister, the uterine sister would have been excluded from participating in the *Return*. (*see* 109 below)

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SHIA LAW OF INHERITANCE

THE &uot;RETURN&uot; AND THE &uot;INCREASE&uot;

107.

Husband and wife and &uot;Return&uot;

Neither the husband nor the wife is entitled to the *Return* if there is any other heir. If the deceased left a husband but no other heir, the surplus will pass to the husband by *Return*. If the deceased left a wife, but no other heir, the older view was that the wife will take her share 1/4, and the surplus will escheat to the Crown; in other words, that the surplus never reverts to a wife. But in *Abdul Hamid Khan v. Peare Mirza* [9] the Oudh Court followed the opinion of Ameer Ali (Mahomedan Law, Vol. II, 5th Ed., at p. 1254) and held that the rule now in force is that the widow is entitled to take by return.

Baillie, II, p. 262. *See* 92 and the notes thereto.

(a)	*Wife*	1/8		=5/40
	Father	1/8	increased to 1/5 x (7/8)	=7/40
	Mother	1/6	increased 1/5 x (7/8)	=7/40
	Daughter	1/2 =3/6	increased to 3/5 x (7/8)	= 21/40

Note.--By Hanafi law, the residue 1/24 would go to the father as a Residuary.

(b)	*Husband*	1/4		=4/16
	Father	1/6	increased to l/4 x (3/4)	=3/16
	Daughter ..	1/2 = 3/6	increased to 3/4 x (3/4)	=9/16

Note.--By Hanafi law, the residue 1/12 would go to the father as a Residuary.

9 (1935) 10 Luck. 550, (1531) I.C. 379, ('35) AO. 78.

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SHIA LAW OF INHERITANCE

THE &uot;RETURN&uot; AND THE &uot;INCREASE&uot;

108.

Mother when excluded from &uot;Return&uot;

If the deceased left a mother, a father, and one daughter, and also --

(a) two or more full or consanguine brothers, *or*
(b) one such brother and two such sisters, *or*
(c) four such sisters,

the brothers and sisters, though themselves excluded from inheritance as being heirs of the second class, prevent the mother from participating in the *Return*, and the surplus reverts to the father and the daughter in the proportion of their respective shares. This is the only case in which the mother is excluded from the *Return*.

Baillie, II, 272, 317-318, 365, 386.

Mother	1/6		=4/24
Father	1/6	increased to 1/4 x (5/6)	=5/24
Daughter ..	1/2 =3/6	increased to 3/4 x (5/6)	= 15/24
2 full brothers	0	(excluded)	

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THE &uot;RETURN&uot; AND THE &uot;INCREASE&uot;

109.

Uterine brothers and sisters when excluded from &uot;Return&uot;

If there are uterine brothers or sisters, and also full sisters, the uterine brothers and sisters are not entitled to participate in the *Return*, and the residue goes entirely to the full sisters. This rule does not apply to consanguine sisters. Consanguine sisters and uterine brothers and sisters divide the *Return* in proportion to their shares.

Baillie, II, 335-336.

(a)	*Uterine brother*				= 16
	Full sister		1/2	(as sharer) + 1/3 (by Return)	=5/6
(b)	*Uterine brother* ..	)			
	Uterine sister ..	)	1/3	each taking 1/6	
	Full sister ..		1/2	(as sharer) + 1/6 (by Return)	= 2/3
(c)	*Wife*		1/4 = 3/12		
	Uterine sister ..		1/6 = 2/12		
	Full sister		1/2	(as sharer) + 1/12 (by Return)	= 7/12

Note.--The wife in case (c) is not entitled to the &uot;Return&uot; as there are other heirs of the deceased (s.107). The uterine sister is excluded from the &uot;Return&uot; by the full sister, and the latter takes the whole &uot;Return.&uot;

Consanguine sister

There is a conflict of opinion whether a consanguine sister is entitled to the whole &uot;Return&uot; in the absence of a full sister. The author of the *Sharaya-ul-Islam* is of opinion that she is not. The author of the *Kafi* is of opinion that she is. (*see* 106, ill.(c))

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THE &uot;RETURN&uot; AND THE &uot;INCREASE&uot;

110.

Doctrine of &uot;Increase&uot;

The Sunni doctrine of *Increase* is not recognized in the Shia law. According to the Shia law, if the sum total of the shares exceeds unity, the fraction in excess of the unity is deducted invariably from the share of:--

(a) the daughter or daughters; or
(b) full or consanguine sister or sisters.

Baillie, II, 263,396.

(a)	*Husband*	..	1/4 = 3/12		= 3/12
	Daughter	..	1/2 = 6/12	reduced to (6/12-1/2)	= 5/12
	Father	..	1/6 = 2/12		= 2/12
	Mother	..	1/6 = 2/12		= 2/12
			13/12		1

Note.--Here the excess over unity is 1/12, and this is to be deducted from the daughter's share

(b)	*Husband*	1/4 = 3/12		= 3/12
	2 daughters	2/3 = 8/12	reduced to (8/12 -3/12)	= 5/12 (each 5/24)
	Father	1/6 = 2/12		=2/12
	Mother	1/6 = 2/12		= 2/12
		15/12		1
(c)	*Husband*	1/2 = 3/6		=3/6= 1/2
	2 full (or cons.) sister	2/3 = 4/6	reduced to (4/6-1/6)	=3/6 = 1/2 (each 1/4)
		7/6		1
(d)	*Husband*	1/2		
	Uterine sister or brother	1/6		
	Full (or cons.) sister	1/2	reduced to (1/2-1/6) = 1/3	
		7/6		

Reason of the rule

The reason of the rule laid down in this section is stated to be that since a full sister, whether coexisting with uterines, gets the full benefit of the &uot;Return&uot; (s. 106), it is but fair that when the sum total of the shares exceeds unity, she should bear the deficit. But what then of the *consanguine sister*? According to the *Sharaya-ul-Islam,* a *consanguine* sister is not entitled to the whole &uot;Return&uot; when she co-exists with uterines. Why then should *she* bear the deficit?

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CHAPTER VIII

SHIA LAW OF INHERITANCE

THE "RETURN" AND THE "INCREASE"

111.

Escheat

On failure of all natural heirs, the estate of a deceased Shia Mahomedan escheats to the Government.[10]

Baillie, II, 301,362-363. (*see* 92)

10 *Mussammat Khursaidi v. Secretary of State* (1926) 5 Pat. 539, 94 I.C. 433, ('26) A.P. 321.

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CHAPTER VIII

SHIA LAW OF INHERITANCE

MISCELLANEOUS

112.

Eldest son

The eldest son, if of sound mind, is exclusively entitled to the wearing apparel of the father, and to his Koran, sword and ring, provided the deceased has left property besides those articles.

Baillie, II, 279.

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CHAPTER VIII

SHIA LAW OF INHERITANCE

MISCELLANEOUS

113.

Childless widow

A childless widow takes no share in her husband's lands, but she is entitled to her one-fourth share in the

value of trees and buildings standing thereon, as well as in his movable property including debts due to him though they may be secured by a usufructuary mortgage or otherwise.

Baillie, II, 295; *Mir Alii v. Sajuda Begum;* [11]*Umardaraz Ali Khan v. Wilayat Ali Khan;* [12]*Muzaffar Ali v. Parbati;* [13]*Aga Mahomed Jaffer v. Koolsom Beebee;* [14]*Durga Das v. Nawab Ali Khan,* [15]*Syed Ali v. Syed Muhammad.* [16]

The expression &uot;lands&uot; in this section is not confined to *agricultural* land only, it includes lands forming the site of a building.[17] But a childless widow, in the absence of other heirs, was held entitled to inherit in addition to her one-fourth all the remainder of her husband's property, including a house by virtue of the doctrine of &uot;return&uot;.[18]

11 (1897) 21 Mad. 27.

12 (1896) 19 All. 169.

13 (1907) 29 All. 640.

14 (1897) 25 Cal. 9P.C.

15 (1926) 48 All. 557, 95 I.C. 19, ('26) A.A. 522.

16 (1928) 7 Pat. 426, 116 I.C. 525, ('28) A.P. 441.

17 (1897) 25 Cal. 9P.C. *supra*.

18 *Abdul Hamid Khan v. Peare Mirza* (1925) 10 W.R. 125. Luck. 550, 153 I.C. 379, ('35) A.O. 78.

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CHAPTER VIII

SHIA LAW OF INHERITANCE

MISCELLANEOUS

114.

Illegitimate child An illegitimate child does not inherit at all, not even from his mother or her relations, nor do they inherit from him.

Baillie, II, 305; *Sahebzadee Begum v. Himmut Bahadur* .[19]

19 (1869) 12 W.R. 512, S.C. on review (1870) 14.

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CHAPTER IX

WILLS

Works of authority: Hedaya, Fatawa Alamgiri and Baillie

The leading authority on the subject of wills is the *Hedaya* (Guide), which was translated from the original Arabic by four Maulvis or Mahomedan lawyers; and from Persian into English by Charles Hamilton by order of Warren Hastings when he was Governor-General of India. The *Hedaya* was composed by Shaikh Burhan-ud-Din Ali who flourished in the twelfth century. The author of the *Hedaya* belonged to the Hanafi School, and it is the doctrines of that school that he has principally recorded in that work. The *Fatwa Alamgiri* is another work of authority, and it has been accepted by the Courts in India as well as by the Privy Council as of greater authority than the *Hedaya*. It was compiled in the seventeenth century by command of the emperor Aurangzeb Alamgir. It is "a collection of the most authoritative *futwas* or expositions of law on all points that had been decided up to the time of its preparation." The law there expounded is again the law of the Hanafi sect, as the Mahomedan sovereigns of India all belonged to that sect. The first volume of Baillie's Digest of Mahomedan law is founded chiefly on that work. Both the *Hedaya* and *Fatawa Alamgiri* deal with almost all topics of Mahomedan law, except that the law of Inheritance is not dealt with in the *Hedaya*. The references to the *Hedaya* in this and subsequent chapters are given to the pages of Mr. Grady's Edition of Hamilton's *Hedaya*. The first volume of Baillie's Digest is referred to as "Baillie." The leading work on Shia law is *Sharaya-ul-Islam*, for which see the preliminary note to 87 above.

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CHAPTER IX

WILLS

115.

Persons capable of making wills

Subject to the limitations hereinafter set forth, every Mahomedan of sound mind and not a minor may dispose of his property by will.

Hedaya, 673; Baillie, 627.

Hadith as regards to the importance of will

It is narrated from *Abdulla Ibn Umar* that the Prophet is reported to have said: "A Muslim who has some thing has no right even to pass two nights without making a will unless he has already written one."[1]

1 *Sahih-al-Bukhari*, Karachi vol. 1, pp. 383-84.

Majority under Mahomedan Law

The age majority as regards matters other than marriage, dower, divorce and adoption, is now regulated by the Indian Majority Act IX of 1875. Section 3 of the Act declares that a person shall be deemed to have attained majority when he shall have completed the age of eighteen years. In the case, however, of a minor of whose person or property a guardian has been appointed, or of whose property the superintendence has been assumed by a Court of Wards, the Act provides that the age of majority shall be deemed to have been attained on the minor completing the age of twenty-one years.

Minority under the Mahomedan law terminates on completion of the fifteenth year; therefore, before the passing of Act IX of 1875, a Mahomedan who had attained the age of fifteen years was competent to make a valid disposition of his property.[2]But this rule of Mahomedan law, so far as regards matters other than marriage, dower, and divorce (adoption not being recognized by that law), must be taken to be superseded by the provisions of the Majority Act, for the Act extends to the whole of India (s.l), and applies to every person,*domiciled* in India (s. 3). Hence minority in the case of Mahomedans, for purposes of wills, gifts, wakfs, etc., terminates not on the completion of the fifteenth year, but on completion of the eighteenth year.[3]

2 Ameer Ali, 4th ed., Vol. I, pp. 42-43.

3 Compare *Bai Gulab v. Thakorelal* (1912) 36 Bom. 622, 17 I.C. 86.

Shia law: Suicide

A will made by a person after he has taken poison, or done any other act towards the commission of suicide, is not valid under the Shia law: Baillie, II, 232. In *Mazhar Husen v. Bodha Bibi* ,[4] the deceased first made his will, and afterwards took poison. It was held that the will was valid, though he had contemplated suicide at the time of making the will.

4 (1898) 21 All. 91.

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CHAPTER IX

WILLS

116.

Form of will immaterial

A will (*Vasiyyat*) may be made either verbally or in writing.

Writing not necessary

&uot;By the Mahomedan law no writing is required to make a will valid, and no particular form, even of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained&uot;.[5] In a case before the Privy Council a letter written by a testator shortly before his death and containing directions as to the disposition of his property, was held to constitute a valid will.[6] The mere fact that a document is called *tamlik-nama* (assignment) will not prevent it from operating as a will, if it possesses the substantial characteristics of a will.[7] But where a Mahomedan executed a document which started, &uot;I have no son, and I have adopted my nephew to succeed to my property and title,&uot; it was held by the Privy Council that the document did not operate as a will. Nor did it operate as a gift, for there was no delivery of possession to the nephew by the deceased.[8] An immediate and irrevocable disposition, subject to the reservation of the usufruct for life operates as a gift and not as a will.[9]

Under the Mahomedan Law no writing is required to make a valid will and no particular form is necessary. Even a verbal declaration is a will. The intention of the testator to make a will must be

clear and explicit and form is immaterial. Revocation also is an inferential fact from proved facts and circumstances in a given case. No express mention of revocation of the will is mandatory. The bequest must be of one third of the testator's estate after meeting the funeral expenses and debts; and a bequest to heir is invalid unless the other heirs consent to it after the demise of the testator. A writing by a Mahomedan by way of a testamentary disposition is valid and binding on the persons claiming through his estate. Where under the document styled as a will the testator declared his daughter and nephew to be his heirs and mentioned their shares in the property bequeathed and divided the properties during his lifetime and gave them in species and put the heirs in possession for enjoyment and stated that the will would come into effect after his lifetime and there was no mention that the bequest was of one third of his estate after deducting the funeral expenses and debts, the recitals in the document and their cumulative effect would show that the testator devised his properties by means of a conveyance and expressed the same by the words &uot;by means of this bond.&uot; Therefore, the document was a conveyance and not a will and since it was not registered it was invalid, though styled as a will and was not binding on the legal heirs.[10]

A Mahomedan will, though in writing, does not require to be signed;[11] nor, even if signed, does it require attestation.[12] The reason is that a Mahomedan will does not require to be in writing at all.

But if there is a question--Whether the will has been executed or not? The Andhra Pradesh High Court has held that under Mohammedan law, written will requires standard of proof as contemplated under ss. 67 and 68 of the Indian Evidence Act. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, the Court should inevitably refer to the statutory provisions under the Indian Evidence Act (ss. 67 & 68) and ss. 59 and 63 of the Indian Succession Act, 1925.[13]

5 *Mahomed Altaf v. Ahmed Buksh* (1876) 25 W.R. 121PC.

6 *Mazar Husen v. Bodha Bibi* (1898) 21 All. 91; *Abdul Hameed v. Mahomed Yoonus* (1940) 1 M.L.J. 273, 187 I.C. 414, ('40) A.M. 153.

7 *Saiad Kasum v. Shaista Bibi* (1875) 7 N.W.P. 313; *Ishri Singh v. Baldeo* (1884) 11 I.A. 135, 141-143, 10 Cal. 792, 800-802.

8 *Jeswant Singjee v. Jet Singjee* (1844) 3 M.I.A. 245, 258; Macnaghten, p. 124, case 54.

9 *Mohammad v. Fakhr Jahan* (1922) 49 I.A. 195, 44 All. 301, 68 I.C. 254, ('22) A.P.C. 281.

10 AIR 1940 Mad. 153 Rel. on; *Vazeer Bee. v. Putti Begum* A.I.R. 1986 -- A.P. -- 159.

11 *Aulia Bibi v. Alauddin* (1906) 28 All. 715.

12 *In re Aba Satar*(1905) 7 Bom. L.R. 558 [Cutchi Memon will]; *Sarabai v. Mahomed* (1919) 43 Bom. 641, 49 I.C. 637 [Cutchi Memon will]; *Ramjilal v. Ahmed Ali* ('52) A. Madhya Bharat 56. *See* Section 138 and the following case: *Ibadat Ali v. Baldia Co-operative Bank* (1968) 11 A.L.T 124.

13 *Mohd. Ghousuddin v. Khoja Moinuddin,* LNIND 2009 A.P. 479. *See* also, *H. Venkatachala Iyengar v. B.N. Thimmajamma,* A.I.R. 1959 SC 443.

Proof of oral will

The burden of establishing an oral will is always a very heavy one; it must be proved with utmost precision, and with every circumstance of time and place.[14] The Court must be made certain that it knows what the speaker said and must from the circumstances and from the statement be able to infer for itself that testamentary effect was intended, in addition to being satisfied of the contents of the direction given.[15]

14 *Venkat Rao v. Namdeo* (1931) 58 I.A. 362, 133 I.C. 711, ('31) A.P.C. 285.

15 *Mahabir Prasad v. Mustafa* (1937) 41 Cal. W.N. 933, 168 I.C. 418, ('37) A.P.C. 174; *Mt. Izhar Fatma Bibi v. Mt. Ansar Bibi* (1939) A.L.J. 642, 182 I.C. 801, ('39) A.A. 348.

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CHAPTER IX

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117.

Bequests to heirs

A bequest to an heir is not valid unless the other heirs also consent to the bequest after the death of the testator.[16] Any single heir may consent so as to bind his own share.[17]

A bequest to an heir, either in whole or in part, is invalid, unless consented to by other heir or heirs and whosoever consents, the bequest is valid to that extent only and binds his or her share. Neither inaction nor silence can be the basis of implied consent.[18]

Explanation.--In determining whether a person is or is not an heir, regard is to be had, not to the time of the execution of the will, but to the time of the testator's death.

Illustrations

(a) A Mahomedan dies leaving him surviving a son, a father, and a paternal grandfather. Here the grandfather is not an &uot;heir,&uot; and a bequest to him will be valid without the assent of the son and the father.

(aa) A Mahomedan dies leaving a son, a widow and a grandson by a predeceased son. The grandson is not an heir and a bequest to him is valid to the extent of one-third without the consent of the son and widow.[19]

(b) *A*, by his will, bequeaths certain property to his father's father. Besides the father's father, the testator has a son and a father living at the time of the will. The father dies in the lifetime of *A*. The bequest to the grandfather cannot lake effect, unless the son assents to it, for the father being dead, the grandfather is at &uot;heir&uot; at the time of *A*'s death.

(c) *A*, by his will bequeaths certain property to his brother. The only relatives of the testator living at the time of the will are a daughter and the brother. After the date of the will, a son is born to *A*. The son, the daughter and the brother all survive the testator. The bequest to the brother is valid, for though the brother was an expectant heir *at the date of the will*, he is not an &uot;heir&uot; *at the death of the testator*, for he is excluded from inheritance by the son. If the daughter and the brother has been the sole surviving relatives, the brother would have been one of the heirs, in which case the bequest to him could not have taken effect, unless the daughter assented to it: Baillie, 625; *Hedaya*, 672.

(d) A bequeaths property to one of his sons as his executor upon trust to expend such portion thereof as he may think proper &uot;for the testator's welfare hereafter by charity and pilgrimage,&uot; and to retain the surplus for his sole and absolute use. *The* other sons do not consent to the legacy. The bequest is void, for it is &uot;in reality an attempt to give, under colour of a religious bequest,&uot; a legacy to one of the heirs.[20] If the

bequest had been exclusively for religious purposes, and if those purposes had been sufficiently defined, it would have been valid to the extent of the bequeathable third.

(e) A Mahomedan leaves him surviving a son and a daughter. To the son he bequeaths three-fourths of his property, and to the daughter one-fourth. If the daughter does not consent to the disposition, she is entitled to claim a third of the property as her share of the inheritance.[21]

(f) A document named as a partition deed is executed to which the father and his sons are parties. It embodies a condition that two of the sons will not, after the father's death, claim any share in any property not covered by the deed and that such property will go to the other three sons. Such a disposition in favour of the three sons is testamentary and this bequest not having been consented to by the two sons after the father's death, it is invalid under Mahomedan law.[22]

It is for person who claims under a will to establish that other heirs had consented to bequest. Bequest in excess of 1/3 of estate cannot take effect unless such bequest consented to by heirs after death of testator.[23]

Hedaya, 621; *Baillie*, 625, as to Explanation. Under the Mahomedan law a bequest to an heir is not valid without the consent of the other heirs; and such consent may be inferred from their conduct.[24] The policy of that law is to prevent a testator from interfering by will with the course of devolution of property according to law among his heirs, although he may give a specified portion, as a third to a stranger.[25] The reason is that a bequest in favour of an heir would be an injury to the other heirs, as it would reduce their share, and &uot;would consequently induce a breach of the ties of kindred&uot; *Hedaya*, 671. But it cannot be so if the other heirs, &uot;having arrived at the age of majority,&uot; consent to the bequest. The consent necessary to give effect to the bequest must be given *after* the death of the testator, for no heir is entitled to any interest in the property of the deceased *in his lifetime*. The fact that an heir consenting to a bequest to a co-heir is an insolvent at the time when the consent given is immaterial; the consent is effective all the same.[26]

The Patna High Court has observed that any Mohammaden having a sound mind and not a minor may make a valid will to dispose of the property. So far as the deed of will is concerned, no formality or a particular form is required in law for creating a valid will. An unequivocal expression by the testator serves the purpose. Whereas a bequest in favour of an heir is invalid unless the other heirs consent to it after the testator's death. Moreover, if a testator makes a will of more than 1/3 in favour of an outsider, the consent of the heirs after the death of the testator is essential. Such consent can be inferred from conduct. Act s of attestation of will by legatees and taking of possession by them of property bequeathed would signify such consent.[27]

The Madras High Court also held the same view. It held that a Mohammedan cannot bequeath more than one third of his property and even with regard to that one third he cannot bequeath it to his heirs. If the bequest is to an heir it can be validated by the consent of all the heirs after the death of the testator. Thus, it is clear that bequest in excess of one third of estate cannot take effect unless such bequest is consented by other heirs after the death of the testator.[28]

The Kerala High Court is also of the view that a will in favour of an heir is not valid unless other heirs consent to it after the death of the testator. Any single heir may consent so as the bind his own share. Neither inaction nor silence can be the basis of implied consent.[29] Recently, the Kerala High Court further reiterated that a bequest to an heir is not valid, unless the other heirs consent to the bequest after the death of the testator, even if such bequest is in respect of the one third of the surplus left by the testator. The bequest will not be valid unless all the heirs had given consent to the bequest subsequent to the death of the testator, though any single heir may consent so as to bind his own share. But, such consent will not operate as against the other heirs who did not give consent.[30]

In one of its judgment, the Allahabad High Court held that a will by father in favour of one of his son disinheriting two other sons without any explanation thereof will be a suspicious will. A person who puts his signature on the document for some other purpose, e.g. to certify that he is a scribe or an

identifier or a registering officer, he cannot be treated to be an attesting witness unless attesting witnesses were dead or were not in a position to be examined.[31]

16 *Ghulam Mohammad v. Ghulam Husain* (1932) 59 I.A. 74, 54 All. 93, 136 I.C. 454; ('32) A.P.C. 81; *Shek Muhammad v. Shek Imamuddin* (1865) 2 B.H.C. 50; *Ahmad v. Bai Bibi* (1916) 41 Bom. 377, 39 I.C. 83 [Bhagdari property]; *Muharram Ali v. Barkat Ali* (1931) 12 Lah. 286, 125 I.C.886, ('30) A.L. 695; *Ghulam Mohammad v. Ghulam Husain* (1932) 59 I.A. 74, 54 All. 93, 34 Bom. L.R. 510, 136 I.C. 454, ('32) A.P.C. 81; *Bafatun v. Bilaiti Khanum* (1903) 30 Cal. 683.

17 *Salayjee v. Fatima* (1923) 1 Rang. 60, 63, 71 I.C. 753, ('22) A.P.C. 391; *Mohammad Ata Husain v. Husain Ali* (1944) 216 I.C. 276, ('44) A.O. 139.

18 *Narunissa v. Sheikh Abdul Hamid* , A.I.R. 1987 Karnataka, 222.

19 *Abdul Bari v. Nasir Ahmad* ('33) A.O.142, 150 I.C. 330.

20 *Khajooroonissa v. Rowshan Jehan* (1876) 2 Cal. 184, 196, 3 I.A. 291, 307.

21 *Fatima Bibee v. Ariff Ismailjee* (1881) 9 C.L.R. 66.

22 *Kunhi Avulla v. Kunhi Avulla* ('64) A.Ker. 201; See also *Abdul Kafoor v. Abdul Razack* ('59) A.M. 131.

23 *Yasin Imambhai Shaikh v. Hajarabi* 1986 -- Bom --357.

24 *Mahomed Husain v. Aishabai* (1934) 36 Bom. L.R. 1155, 155 I.C. 334, ('35) A.B. 84.

25 *Khajooroonissa v. Rowshan Jehan* (1876) 2 Cal. 184, 196, 3 I.A. 291, 307.

26 *Aziz-un-Nissa v. Chiene* (1920) 42 All. 593, 59 I.C. 296; *Imadadul Rahaman v. Purbi Din* (1938) 13 Luck. 174, 166 I.C. 980, ('37) AO. 239, disapproving *Kali Charan v. M0ohammad Jamil* (1930) All. L.J. 588, 122 I.C. 762, ('30) A.A. 498.

27 *Abdul Manan Khan v. Mirtuza Khan* A.I.R. 1991 Pat. 154.

28 *Noorunissa v. Rahaman Bi* (2001) 3 MLJ 141.

29 *Naziruddin v. Hajirambee* LNIND 2003 Ker 331, *See* also *Sajathi Bi v. Fathima Bi* (2002) MLJ 698. *See*, LNIND 2004 AP 1110, LNIND 2007 Kant 419.

30 *Mohammed Hanifa v. Salim* LNIND 2011 Ker 131.

31 *Mohd. Yusuf v. Board of Revenue* Allahabad A.I.R. 2005 All. 199.

Silence not consent

Where a will contained a bequest excluding the female heirs and mutation of names took place, it was held that consent of the heirs could not be implied from mere silence on their part at the mutation proceedings.[32]

32 *Izzul Jabbar Khan v. Chairman, District Kutchery* (1956) Nag. 501.

Custom

If the succession is governed by custom which does not destroy the testamentary capacity of the owner, the rule still applies. The bequest to an heir is invalid without the consent of those who are the other heirs according to the custom.[33]

In the famous case of *Illyas v. Badshah* ,[34] the Madhya Pradesh High Court observed that though the Muslim Law does not debar a muslim from executing a will of his property in favour of any one including the persons outside the community, a custom of Guru-chela system prevalent among the

eunuch community, limiting the choice of a person in whose favour the will is to be executed would not be contrary to this law. The said custom does not violate the *aforesaid* law. It only limits the choice of legatee without affecting the right to execute the will. Such a custom cannot be held to be either against public policy or the Mohammaden Law. The custom would, therefore, not be rendered invalid for this reason.

33 *Irshad Ullah Khan v. Mt. Fakira Khan* (1937) 12 Luck. 592, 165 I.C. 322, ('37) A.O. 4.

34 AIR 1990 M.P. 335.

Bequest subject to condition

Where a bequest is made to an heir, subject to a condition which is void as being repugnant to the Mahomedan law, e.g., that the legatee shall not alienate the property bequeathed, and the other heirs consent to the bequest, the legatee will take the property absolutely as he would have done if he were a stranger.[35] Similarly where a bequest is made to an heir subject to the condition that in the event of his death the property shall go to *X*, and the other heirs assent to the legacy, the condition attached to the legacy being void, he will take the property absolutely.[36](*see* 164 below)

35 *Abdul Karim v. Abdul Qayum* (1906) 28 All. 324.

36 *Nasir Ali v. Sughra Bibi* (1920) 1 Lah. 302, 54 I.C. 853.

Bequests to heirs and non-heirs

See notes to 118 under the same head.

Bequest of remainder

A bequeaths the rents of a house to one of his sons for life, and after his death to a charitable society for the benefit of the poor. The other sons do not consent to the legacy.

The bequest to the son being void for want of assent of the other sons, the subsequent bequest to charity also fails.[37] A bequeaths the whole of his property to his widow for life and thereafter to all his children. The bequest to the widow is invalid, unless the other heirs have consented to it.[38]

37 *Fatima Bibee v. Ariff Ismailjee* (1881) 9 C.L.R. 66, with facts slightly altered.

38 *Anarali v. Omar Ali* (1951) 55 C.W.N. 33, ('51) A.C. 7.

Shia law

According to the Shia law, a testator may leave a legacy to an heir so long as it does not exceed one-third of his estate. Such a legacy is valid without the consent of the other heirs. But if the legacy exceeds one-third, it is not valid unless the other heirs consent thereto; such consent may be given *either before or after the death of the* testator[39]: Baillie, II, 244. But such consent cannot be given after previous repudiation.[40] The consent of the heirs will not, however, validate the illegal conferment of a power of appointment or a transgression of the rule against perpetuities.[41] In *Fahmida v. Jafri* ,[42] the High Court of Allahabad laid it down as a broad proposition of law that where a bequest to an heir

exceeds one-third, and the other heirs do not consent to the bequest, the bequest is void in its entirety. *Fahmida's* case was followed by the same High Court in *Amrit Bibi v. Mustafa* .[43] But in the first case the bequest was of the entire property to one heir (daughter) to the exclusion of the other heir (another daughter). In the second case also the bequest was *substantially* of the whole of the testator's property to one heir (testator's widow) to the exclusion of the other heir (daughter's daughter), and the Court treated it as a case of entire exclusion of the daughter's daughter. In the latest Allahabad case on the subject,[44] the testatrix had two daughters, and it was not clear whether the bequest to one of them exceeded one-third. In any event the finding of the Court was that each of the two daughters had a portion of the estate bequeathed to her. On these facts the Court refused to apply the rulings in the two earlier cases, and upheld the bequest. As to the decision in the earlier cases it was said that it should be confined to cases where the whole estate was bequeathed to one heir and the other heirs were excluded entirely from inheritance. This, it is submitted, is the correct view. The only authoritative text on the subject is to be found in *Sharaya-ul-Islam*, where it is said: &uot;If a person should make a will *excluding* some of his children from their shares in his succession, the exclusion is not valid.&uot; The text further goes on to say that the better view is that the words of exclusion &uot;are quite futile and of no efficacy whatever&uot; Baillie, II, 238. The meaning of this text would appear to be that where a bequest is made of the *entire* property to one heir to the exclusion of the other heirs, the will is to be read as if it did not contain any disposition of the property. But it does not follow that where a bequest to an heir is not of the *entire* estate, but merely exceeds the legal third, such bequest also is void in its entirety.

39 *Husaini Begam v. Muhammad Mehdi* (1927) 49 All. 547, 100 I.C. 673, ('27) A.A. 340, dissenting from *Fahmida v. Jafri* (1908) 30 All. 153 where it was held that the consent must be given *after* the death of the testator.

40 *Mahabir Prasad v. Mustafa* (1937) 41 Cal. W.N. 933, 168 I.C. 418, ('37) A.P.C. 174.

41 *Nawazish Ali Khan v. Ali Raza Khan* (1948) 75 I.A. 62, (1948) A.P.C. 134.

42 (1908) 30 All. 153.

43 (1924) 46 All. 28, 77 I.C. 66, ('24) A.A. 20.

44 *Hussaini Begum v. Muhammad Mehdi* (1927) 49 All. 547, 100 I.C. 673, ('27) A.A. 340.

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CHAPTER IX

WILLS

118.

Limit of testamentary power

A Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator.[45]

Hedaya, 671; *Baillie*, 625.

Origin of the rule

*&uot;*Wills are declared to be lawful in the Koran and the traditions; and all our doctors, moreover, have concurred in this opinion&uot;: *Hedaya*, 671. But the limit of one-third is not laid down in the

Koran. This limit derives sanction from a tradition reported by Sad Ibn Abi Waggas. It is said that the Prophet paid a visit to Sad Ibn Abi Waggas while the latter was ill and his life was despaired of. Sad Ibn Abi Waggas had no heirs except a daughter, and he asked the Prophet whether he could dispose of the whole of his property by will to which the Prophet replied saying that he could not dispose of the whole, nor even two-thirds, nor one-half, but only one-third: *Hedaya*, 671. But though the limit of one-third is not prescribed by the Koran, there are indications in the Koran that a Mahomedan may not so dispose of his property by will as to leave his heirs destitute. See Sale's Koran, Sura IV, and the Preliminary Discourse--section VI.

Another verse of Holy Quran that talks about will is --&uot;It is prescribed for you, when death approacheth one of you if he leaves wealth that he bequeath unto parents and near relatives in kindness. (This is) a duty for all those who ward off (exit). (II: 180)

45 *Khajooroonissa v. Rowshan Jehan* (1876) 2 Cal. 184, 3 I.A. 291; *Cherachom v. Valia* (1865) 2 M.H.C. 350.

Consent of heirs

It will be seen from this and the preceding section that the power of a Mahomedan to dispose of his property by will is limited in two ways, first, as regards *the persons* to whom the property may be bequeathed, and, secondly, as regards the *extent to which* the property may be bequeathed. The only case in which a testamentary disposition is binding upon the heirs is where the bequest does not exceed the legal third and it is made to a person who is not an heir. But a bequest in excess of the legal third may be validated by the consent of the heirs; similarly, a bequest to an heir may be rendered valid by the consent of the other heirs. The reason is that the limits of testamentary power exist solely for the benefit of the heirs, and the heirs may, if they like to forgo the benefit by giving their consent. For the same reason, if the testator has no heirs, he may bequeath the whole of his property to a stranger: (*see* Baillie, 625).

If the heirs do not consent, the remaining two-thirds must go to the heirs in the shares prescribed by the law. The testator cannot reduce or enlarge their shares, nor can he restrict the enjoyment of their shares.[46]

46 *Jeewa v. Yacoob Ally* (1928) 6 Rang. 542, 114 I.C. 303, ('28) A.R. 307.

Consent cannot be rescinded

As to the consent of heirs to a legacy exceeding the legal third, it is to be remembered that the consent once given cannot be rescinded: *Hedaya*, 671.

Consent maybe expressed or implied

The consent need not be express: it may be signified by conduct showing a fixed and unequivocal intention. *A* bequeaths the whole of his property, which consists of three houses, to a stranger. The will is attested by his two sons who are his only heirs. After *A*'s death the legatee enters into possession and recovers the rents with the knowledge of the sons and without any objection from them. These facts are sufficient to constitute consent on the part of the sons, and the bequest will take effect as against the sons and persons claiming through them.[47]

47 *Daulatram v. Abdul Kayum* (1902) 26 Bom. 497. See also *Sharifa Bibi v. Gulam Mahomed* (1892) 16 Mad. 43;

Mahomed Hussain v. Aishabai (1934) 36 Bom. L.R. 1155, 155 I.C. 334, ('35) A.B. 84; *Ma Khatoon v. Ma Mya* (1936) 165 I.C. 232, ('36) A.R. 448; *Faqir Mahomed Khan v. Hasan Khan* (1941) 16 Luck. 93, 190 I.C. 132,('41) A.O. 25.

Bequests to heirs and non-heirs

Where by the same will a legacy is given to an heir and a legacy also to a non-heir, the legacy to the heir is invalid unless assented to by the other heirs, but the legacy to the non-heir is valid to the extent of one-third of the property. *A* bequeaths 1/3 of his property to *S*, a non-heir, and 2/3 to *H*, one of his heirs. The other heirs do not assent to the bequest to *H*. The result is that *S* will take 1/3 under the will, and the remaining 2/3 will be divided among all the heirs of *A*.[48] Similarly if *A* bequeaths the whole of his property to his wife and a non-heir, and the bequest to the wife is not assented to by the other heirs of *A*, the non-heir will take 1/3 under the will (that being the maximum disposable under the will), and the remaining 2/3 will be divided among the heirs of *A*.[49]

S, a Muslim, purchased certain properties and became the absolute owner thereof. *S* left a will by which he gave a life interest in favour of his wife, namely, the first defendant and gave the remainder to his sister's son, the second defendant. The validity of this will was challenged by the brother of *S* who contended that the will was not in accordance with their personal law. The trial Court found that the will was true but was not valid. On appeal by the defendants:

The terms of the will provided that the first defendant should enjoy the properties for her life, and thereafter, the second defendant was to take the properties as his absolute properties. In this respect, no contingency was involved. The period during which the right to enjoy the usufructs of the properties was postponed was again the creature of the intention of the testator. So long as such a situation was not repugnant either to the personal law or even to the common law full force had to be given to such a recital. It has to be reconciled and not understood as a contingent bequest to the remainderman. The possible reconciliation which could be effected was by treating the words as postponing the right of the remainderman to enjoy the properties till after the intervening life estate holder.

The bequest to an heir coupled with a bequest to a non-heir had to be reconciled as far as possible and the totality of the instrument could not be rejected *in toto*. If this was the method by which such an instrument has to be understood and interpreted, then it should be held that the bequest to the first defendant who was an heir in this case was not valid, because it was against the personal law but, in so far as the bequest to a non-heir, namely the second defendant was concerned it would be operative to the extent of a third of the estate of *S*.

(On facts): the first plaintiff and P.W. 2 together would be entitled to 3/4 2 of the totality of the estate; the first defendant would be entitled to 1/4 7/3 and the balance of 1/12 would be the share of the totality of the estate which would be the property of the second defendant.[50]

The Madras High Court has held that a Mohammedan cannot by will dispose of more than 1/3 of surplus of his estate after payment of funeral expenses and debts, unless the consent is obtained from legal heirs after the death of testator.[51]

48 *Muhammad v. Aulia Bibi* (1920) 42 All. 497, 61 I.C. 947; *Ghulam Jannat v. Ramat Din* (1934) 15 Lah. 889, 153 I.C. 33, ('34) A.L. 427.

49 (1920) 42 All. 497, at p. 502, 61 I.C. 947, *supra*; *Abdul Bari v. Nasir Ahmed* ('33) A.O. 142, 150 I.C. 330; *Mohammad Ata Husain v. Husain Ali* (1944) 216 I.C. 276, ('44) A.O. 139.

50 T. Ramaprasada Rao and N. Ratnavel Pandian, JJ. *Rahumath Ammal v. Mohammed Mydeen Rowther* (1978) 2 M.LJ. 499 : 91 L.W. 369.

51 *Asma Beevi v. M. Ameer Ali* LNIND 2008, MAD 1417.

Bequest for pious purposes

A bequest, though it be for pious purposes, can only be made to the extent of the bequeathable third.[52]

52 *Badrul Islam Ali Khan v. Ali Begum* (1935) 16 Lah. 782, 158 I.C. 465, ('35) A.L. 251.

Commission to executor

A commission to an executor by way of remuneration is &uot;a gratuitous bequest, and . . . certainly *not* in any sense a *debt*&uot; It is therefore subject to the rules contained in this and the preceding section.[53]

53 *Aga Mahomed Jaffer v. Koolsom Beebee* (1897) 25 Cal. 9, 18 P.C.; *Salayjee v. Fatima* (1923) 1 Rang. 60, 71 I.C. 753, ('22) A.P.C. 391.

Cutchi Memons and Khojas

As to Cutchi Memons and Khojas see 23 and 24 *supra*.

Shia law

Under the Shia law, the consent necessary to validate a bequest exceeding the legal third may be given either before or after the death of the testator: Baillie, II, 233.

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119.

Abatement of legacies

If the bequests exceed the legal third, and the heirs refuse their consent, the bequests abate rateably.

Hedaya, 766; Baillie, 636-637.

Bequests for pious purposes

Bequests for pious purposes fall under three classes according to the purpose for which they are made, namely:--

(1) *Bequests for faraiz*, that is, purposes expressly ordained in the Koran, namely, (i) *haj* (pilgrimage), (ii) *zakat* (tithe or poor's rate), and (iii) expiation, e.g., for prayers missed by a Mahomedan.
(2) Bequests for *wajibat*, that is, purposes not expressly ordained, but which are in themselves necessary and proper, namely *sadaka fitrat* (charity given on the day of breaking fast), and sacrifices.
(3) Bequests for *nawafil* that is, bequest of a purely voluntary nature e.g, bequests to the poor, or for building a mosque, or a bridge, or an inn for travellers.

Of these three classes bequests of the first class take precedence over bequests of the second and the third class, and bequests of the second class take precedence over bequests of the third class. In class (1) again, a bequest for *haj* must be paid before a bequest for *zakat* or tithe, and a bequest for *zakat* must be paid before a bequest by way of expiation.

Hedaya, 688; Baillie, 653-654.

Shia law

The Shia law is different for that law does not recognize the principle of rateable distribution. Under that law if a testator bequeaths 1/3 of his estate to *A*, 1/4 to *B*, and 1/6 to *C*, and the heirs refuse to confirm the bequests, *A*, the legatee first named, takes 1/3, and *B* and *C* take nothing: Baillie, II, 235. But it, instead of 1/3, 1/12 was given to *A*, then *A* would take 1/12, and *B* would take 1/4, but *C*, who is last in order would not be entitled to anything as 1/12 + 1/4 exhausts the legal *third*. To the above rules there is an exception--where there are successive bequests of the exact third to two different persons, as where a testator bequeaths 1/3 of his property to *A*, and 1/3 again to *B*, in such a case the later bequest would be a revocation of the earlier bequest, so that *B* would take the whole of the one-third, and *A* would take nothing: Baillie, II, 235. If a will is made of the whole property in favour of a single legatee, then no doubt that legatee may claim that he should take one-third of the property. But where there are different objects provided for in the document, there is no rule by which each object should be reduced to one-third of the amount and therefore the document does not appear to be valid as a will.[54]

54 *Kaniz Kubra Bibi v. Muzaffaruddin Haider* (1940) A.L.J. 504, 192 I.C. 410, ('40) A.A. 462.

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CHAPTER IX

WILLS

120.

Bequest to unborn person

A bequest to a person not yet in existence at the testator's death is void; but a bequest may be made to a child in the womb, provided it is born within six months from the date of the will.

The legatee, according to Mahomedan law, must be a person *competent* to receive the legacy: Baillie, 624; he must therefore be a person in existence at the death of the testator.[55] As to bequests to a child in the womb, *see Hedaya*, 674.

55 *Abdul Cadur v. Turner* (1884) 9 Bom. 158.

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WILLS

121.

Lapse of legacy

If the legatee does not survive the testator, the legacy will lapse, and form part of the estate of the testator.

Compare the Indian Succession Act, 1925, s. 105, which, however, does not apply to Mahomedans.

Shia law

Under the Shia law the legacy would, in such a case, pass to the heirs of the legatee, unless it is revoked by the testator; but if the legatee should die without leaving any heir, the legacy would pass to the heirs of the testator.[56] Baillie, II, 247.

56 *Husaini Begum v. Muhammad Mehdi* (1927) 49 All. 547, 100 I.C. 673. ('27) A.A. 340.

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122.

Subject of legacy

It is not requisite to the validity of a bequest that the thing bequeathed should be in existence at the time of making the will; it is sufficient if it exists at the time of the testator's death.

Baillie, 624. The reason is that a will takes effect from the moment of the testator's death, and not earlier. The subject of a gift, however, must be in existence *at the time of the gift*: *see* 162:

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123.

Subject of Bequest

A bequest may be made of any property which capable of being transferred, and which exists at the testator's death. It need not be in existence at the date of the will.

Baillie, 624, 655-666.

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WILLS

124.

Bequest in futuro

A bequest in futuro is void: as to gift, (*see* 162).

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125.

Contingent bequest

A contingent bequest is void: as to gift, (*see* 163

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WILLS

126.

Conditional bequest

A bequest with a condition which derogates from the completeness of the grant takes effect as if no condition was attached to it, for the condition is void.[57] But *Amjad Khan's* case[58] must be taken into account before applying the doctrine to destroy a life estate. (*see* 55. As to gifts, *see* 164)

57 *Ma Hmyin v. P.L.S.A.R.S. Chettyar* (1935) 158 I.C. 848, ('35) A.R. 318.

58 (1929) 56 I.A. 213, 4 Luck. 305, 116 I.C. 405, ('29) A.P.C. 149.

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WILLS

127.

Alternative bequest

An alternative bequest has been held to be valid.

A Cutchi Memon, who had no son at the date of his will, bequeathed the residue of his property in effect as follows: &uot;Should I have a son, and if such son be alive at my death, my executors shall hand over the residue of my property to him; but if such a son dies in my lifetime leaving a son, and the latter is alive at my death, then my executors shall hand over the residue to him. But if there be no son or grandson alive at my death, my executor shall apply the residue to charity.&uot; The testator died without having ever had a son. It was held that the gift was not conditioned in *futuro*, but it was an absolute gift in the alternative and that the charity was entitled to the residue.[59]

59 *Advocate-General v. Jimbabai* (1917) 41 Bom. 181, 284-286 31 I.C. 106 [Cutchi Memon will].

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CHAPTER IX

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128.

Revocation of bequest

A bequest may be revoked either expressly or by implication.

Hedaya; 674; Baillie, 624. Revocation is express, when the testator revokes the bequest in express terms either oral or written. It is implied, when he does an act from which revocation may be inferred.

It is doubtful whether, if a testator denies that he ever made a bequest, the denial operates as a revocation; but the better opinion seem to be that it does not: *Hedaya*, 675; Baillie, 630.

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CHAPTER IX

WILLS

129.

Implied revocation

A bequest may be revoked by an act which occasions an addition to the subject of the bequest, or an

extinction of the proprietary right of the testator.

(a) A bequest of a piece of land is revoked, if the testator subsequently builds a house upon it.
(b) A bequest of a piece of copper is revoked, if the testator subsequently converts it into a vessel.
(c) A bequest of a house is revoked, if the testator sells it, or makes a gift of it to another.

Hedaya, 674, 675; Baillie, 628-629. This was criticised by Chagla J. in *Ashrafalli v. Mahomedalli* .[60] The original texts are, however, against the view of the learned Judge. The illustrations are taken from the *Hedaya*.

60 48 Bom. L.R. 642 at 651-653.

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WILLS

130.

Revocation by subsequent will

A bequest to a person is revoked by a bequest in a *subsequent will* of the same property to another. But a subsequent bequest, though it be of the same property, to another person in the *same will*, does not operate as a revocation of the prior bequest, and the property will be divided between the two legatees in equal shares.

Hedaya, 675; Baillie, 630.

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CHAPTER IX

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131.

Probate of a Mahomedan will

(1) A Mahomedan will may, after due proof, be admitted in evidence even though no probate had been obtained.[61]
(2) In the case of a Mahomedan will, the estate of the testator vests in the executor, if be accepts office, front the date of the testator's death, and he has the power to alienate the estate for the purpose of administering it, and has all other powers of an executor under the Probate and Administration Act, 1881, and the corresponding provisions of the Indian Succession Act, 1925.[62](*see* 40 and notes)

The same rule applies to wills of Cutchi Memons[63] and Khojas.[64]

As to suits for recovery of debts. (*see* 48).

61 *Shaik Moosa v. Shaik Essa* (1884) 8 Bom. 241, 255; *Abdul Karim v. Karmali* (1920) 22 Bom. L.R. 708, 58 I.C. 270; *Mahomed Yusuf v. Hargovandas* (1923) 47 Bom. 231, 70 I.C. 268, ('22) A.B. 392; *Mahomed Hussein v. Ashabai* (1934) 36 Bom. L.R. 1155, 155 I.C. 334, ('35) A.B. 84.

62 *Venkata Subamma v. Ramayya* (1932) 59 I.A. 112, 55 Mad. 443, 136 I.C. 111, ('32) A.P.C. 92 [a case of a Hindu will, but applies also to a Mahomedan will]; *Shemail v. Ahmed Omer* (1931) 33 Bom. L.R. 1056, 135 I.C. 817, ('31) A.B. 533; *Shaik Moosa v. Shaik Essa* (1884) 8 Bom. 241, 255; *Mahomed Yusuf v. Hargovandas* (1923) 47 Bom. 231, 70 I.C. 268, ('22) A.B. 392.

63 *Haji Ismail, in the matter of the will of*(1880) 6 Bom. 452.

64 *Abdul Karim v. Karmali* (1920) 22 Bom. L.R. 708, 58 I.C. 270.

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CHAPTER IX

WILLS

132.

Letters of administration

Except as regards debts due to the estate of the deceased (48), no letters of administration are necessary to establish any right to the property of a Mahomedan who has died intestate [Indian Succession Act, 1925, (s. 212(2)).

Accordingly, we hold that the trial court was quite justified in considering the application for grant of letters of administration on merit and not throwing the same simply on the view that the will in question was opposed to Mahomedan law.[65]

65 P.K. Banerjee and G.N. Roy, JJ. *Dhane Ali Mia and Ors. v. Sobhan Ali And Ors.* (1982) C.W.N. 431.

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CHAPTER IX

WILLS

133.

Executor need not be a Mahomedan

It is not necessary that the executor of the will of a Mahomedan should be a Mahomedan.

A Mahomedan may appoint a Christian, a Hindu, or any non-Mahomedan to be his executor.[66]

66 *Moohummud Ameemoodeen v. Moohummud Kubeeroodeen* (1825) 4 S.D.A. [Beng.] 49, 55; *Henry Imlach v. Zuhooroonisa* (1828) 4 S.D.A. [Beng.] 301, 303.

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CHAPTER IX

WILLS

134.

Powers and duties of executors

The powers and duties of executors of a Mahomedan will are determined by the provisions of the Indian Succession Act, 1925, in so far as they are applicable to Mahomedans. (*see* 40 and notes)

Per Sargent, C.J., in *Shaikh Moosa v. Shaik Essa* .[67]The Probate and Administration Act, 1881, applied amongst others to Mahomedan. Before the passing of that Act the posers and duties of Mahomedan executors were regulated by the Mahomedan law. After the passing of the Act, they were determined by the provisions of that Act . The Probate and Administration Act has been replaced by the Indian Succession Act, 1925.

When there are several executors, the powers of all may, in the absence of any direction to the contrary in the will, be exercised by any one of them who has proved the will: Indian Succession Act, 1925, s. 311. But if no probate has been obtained they must all act jointly; none of them is entitled to represent the estate alone or to exercise any of the powers of an executor alone.[68]

67 (1884) 8 Bom. 241, 256.

68 (1884) 8 Bom. 241, 255-256, *supra*.

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CHAPTER X

DEATH-BED GIFTS AND ACKNOWLEDGMENTS

135.

Gift made during marz-ul-maut

A gift made by a Mahomedan during *marz-ul-maut* or death-illness cannot take effect beyond a third of his estate after payment of funeral expenses and debts, unless the heirs give their consent, after the death of the donor, to the excess taking effect; nor can such a gift take effect if made in favour of an heir unless the other heirs consent thereto after the donor's death.[1]

Explanation.--A *marz-ul-maut* is a malady which induces an apprehension of death in the person suffering from it and which eventually results in his death.

Hedaya, 684, 685; Baillie, 551-552.

Marz-ul-maut[2]

It is an essential condition of *marz-ul-maut*, that is, death-illness, that the person suffering from the *marz* (malady) must be under an apprehension of *maut* (death). "The most valid definition of death-illness is, that it is one which it is *highly probable* will issue fatally": Baillie, 552. Where the malady is of long continuance, as, for instance, consumption or albuminuria, and there is no immediate apprehension of death, the malady is not *marz-ul-maut*; but it may become *marz-ul-maut* if it subsequently reaches such a stage as to render death highly probable, and does in fact result in death.[3] According to the *Hedaya*, a malady is said to be of "long continuance," if it has lasted a year; a disease that has lasted a year does not constitute *marz-ul-maut*, for "the patient has become familiarized to his disease, which is not then accounted as sickness": *Hedaya*, 685 but "this limit of one year does not constitute a hard-and-fast rule, and it may mean a period of about one year".[4] In short, a gift must be deemed to be made during *marz-ulmaut*, if, as observed by the Privy Council, it was made "under pressure of the sense of the imminence of death".[5]

To constitute a malady, *marz-ul-maut*, there must be (1) proximate danger of death, so that there is a preponderance of apprehension of death, (2) some degree of subjective apprehension of death in the mind of the sick person, and (3) some external indicia, chief among which would be inability to attend to ordinary avocations,[6] although his attending his ordinary avocations does not conclusively prove that he was not suffering from *marzul-maut*.[7] It is not necessary, however, to come to a definite finding that the disease which caused the apprehension of death was the immediate cause of death.[8]

It has been pointed out by the same author that it is an essential condition of *marz-ulmaut*, that is, death-illness that the person suffering from the *marz* (malady) must be made under an apprehension of *maut* (death) and that the most valid definition of death-illness, is, that it is one which it is *highly probable* will issue fatally. Where the malady is of long continuance and there is no immediate apprehension of death, the malady is not *marz-ulmaut*. To constitute a malady, *marz-ul-maut*, there must be: (1) proximate danger of death, so that there is a preponderance of apprehension of death; (2) some degree of subjective apprehension of death in the mind of the sick person, and (3) some external indicia, chief among which would be inability to attend to ordinary avocations. It is not necessary, however, to come to a definite finding that the disease which caused the apprehension of death was the immediate cause of death. The statement of the legal position of the above lines is not and cannot be in dispute.

A Bench of the Calcutta High Court in *Fatima Bibee v. Ahmed Baksh,* [9] observed:

> "According to the Mahomedan Law, three things are necessary to constitute *marz-ulmaut* or death-illness *viz*., (i) illness, (ii) expectation of fatal issue, and (iii) certain physical incapacities, which indicate the degree of the illness. The second condition cannot be presumed to exist from the existence of the first and the third as the incapacities indicate, with perhaps the single exception of the case in which a man cannot stand up and say his prayers, are not in fact the signs of death-illness.
>
> When a malady is of long continuance and there is no immediate apprehension of death, it is not a death-illness; so that a gift made by a sick person in such circumstances, if he is in the full possession of his senses, will not be invalid."

The decision was affirmed on appeal and it was held that whether the donor was or was not under the apprehension of death at the time the *deed was executed or was on the death bed,* was a question essentially of fact.[10]

Order 6, Rule 4, Civil Procedure Code, provides that in all cases in which the party pleading relies on, among others, undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms provided in the Code, particulars (with dates and items, if necessary) shall be stated in the pleadings. Thus, in the case of undue influence, there is a mandatory requirement of particulars having to be set out in the pleadings.

The law as regards onus is clear. The person who propounds a will is under a greater obligation to prove by clear evidence that the will was executed by the testator and at the time of the execution, he was a free agent and possessed of a sound disposing of state of mind. However, in the case of a settlement, as well as a will, so long as the execution of the document is provided, the onus is on the person who inserts that the documents procured by undue influence. In cases other than a will, at any rate, the person who alleges has to prove that the executant did not have the mental capacity to comprehend the nature of the transaction.[11]

Total evidence and all circumstances should be examined (principles restated). A finding of gift being made in *marz-ul-maut* cannot be given when it is not alleged in the plaint or raised at the trial. It is not for the court to raise the point *suo motu.*[12]

1 *Wazir Jan v. Saiyyid Altaf Ali* (1887) 9 All. 357; *Fazal Ahmad v. Rahim Bibi* (1918) 40 All. 238, 244, 51 I.C. 638; *Mt. Sakina Begum v. Khalifa Hafiz-ud-din* (1914) 194 I.C. 77, ('41) A.L. 58.

2 *Fatima Bibee v. Ahmad Baksh* (1903) 31 Cal. 319, Affm. by P.C. (1908) 35 Cal. 271, 35 I.A. 67 [Albuminuria for upwards of a year --not *marz-ul-maut*]; *Ibrahim Goolam Ariff v. Saiboo* (1908) 35 Cal. 1, 22, 34 I.A. 167, 177. [Sudden bursting of a blood vessel in the stomach--not a case of *marzul-maut*]; *Labbi Beebee v. Bibbun Beebee* (1874) 6 N.W.P.H.C. 159; *Hassarat Bibi v. Golam Jaffar* (1898) 3 C.W.N. 57 and *Mt. Zanrao v. Sher Mohamed* (1934) 151 I.C. 671, ('34) A. Pesh. 91 [both cases of asthma -- not *marz-ul-maut*]; *Mahammad Gulshere Khan v. Mariam Begum* (1881) 3 All. 731 [lingering illness --no *marz-ul-maut*]; *Sarabai v. Rabiabai* (1906) 30 Bom. 537 [paralysis--not a case of *marz-ul-maut*], *Rashid Karmalli v. Sherbanoo* (1907) 31 Bom. 264 [rapid consumption -- held *marz-ul-maut*]: *Janjira v. Mohammad* (1922) 49 Cal. 477, 489-494, 67 I.C. 77, ('22) A.C. 429, [not a case of *marz-ul-maut*]; *Fazl Ahmad v. Rahim Bibi* (1918) 40 All. 238, 51 I.C. 638 and *Musi Imran v. Ibn Hussan* (1933) All. L.J. 53, 147 I.C. 835, ('33) A.A. 341 [both cases of galloping consumption--held *marz-ul-maut*]; *Jahar Ali Khan v. Nasimanissa Bibi* (1937) 65 Cal. L.J. 34, ('37) A.C. 500 [lingering consumption -- held not *marz-ul-maut*]; *Fazlur v. Mahommed* (1917) 3 Pat. L.W. 232, 43 I.C. 196; *Massood Ali v. Mohammad Khan* ('57) A.A. 395 [pneumonia not a lingering disease].

3 (1918) 40 All. 238, 243-244, 51 I.C. 638, *supra*.

4 *Fatima Bibee v. Ahmad Baksh* (1903) 31 Cal. 319, at p. 326.

5 *Ibrahim Goolam Ariff v. Saiboo* (1908) 35 Cal. 1, 22, 34 I.A. 167, 177.

6 *Sarabai v. Rabiabai* (1906) 30 Bom. 537, 551; *Rashid Karmalli v. Sherbanoo* (1907) 31 Bom. 264; *Jinjira v. Mohammad* (1922) 49 Cal. 477, 490, 67 I.C. 77, ('22) A.C. 429; *Abdul Ahmad v. Ahmad Nawaz* (1931) 12 Lah. 683, 132 I.C. 391, ('32) A.L. 229; *Mohammad Ayub Khan v. Mt. Gauhar Begum* (1932) 7 Luck. 705, 137 I.C. 804, ('32) A.O. 233; *Tufail Ahmed v. Umme Khatoon,* (1938) A.L.J. 16, 174 I.C. 465, ('38) A.A. 145; *Mumtaz Ahmad v. Wasiulnesa* ('48) A.C. 301.

7 *Safia Begum v. Abdul Razak* (1945) 47 Bom. L.R. 381, ('45) A.B. 438.

8 *Mt. Sakina Begum v. Khalifa Hafiz-ud-din* (1941) 194 I.C. 77, ('41) A.L. 58.

9 1904 I.L.R. 31 Cal. 319.

10 *See* also *Asmat Begum v. Hussain Jan* ('56) P. Pesh. 5; *Jahan Khan v. Feroze* ('51) P. Lah. 433.

11 *Goodu Saheb v. Rakiabi* alias *Nunni Bi*(1978) 2 M.L.J. 426 [V. Sethuraman, J.].

12 *Abdul Hafiz Beg v. Sahebbi* ('73) A.B. 165; *Bhoona Bi v. Gujar Bi* ('73) A. Mad. 154.

Shia law

The Shia law as to what constitutes *marz-ul-maut* is the same. In *Khurshed v. Faiyaz,* [13] a gift to one heir was held to be valid to the extent of one-third without the consent of the other heirs. This was

considered in a *Madras* case[14] to be tenable only if the donor was a Shia of the Ithna Ashari school, and it was held that a death-bed gift by an Ismailya Shia to an heir without the consent of the co-heirs was altogether invalid.

13 *Khurshed Husain v. Faiyaz Husain* (1914) 36 All. 289, 23 I.C. 253; cf. *Musi Imran v. Ibn. Hasan* (1933) All. L.J. 53, 147 I.C. 835, ('33) A.A. 341; *Sajjad Hussain v. Mahomed Sayid Hasan* (1934) All. L.J. 71, 154 I.C. 434, ('34) A.A. 71 [presumably a Shia case as the last case is cited].

14 *Sharif Ali v. Abdul Ali Safiaboo* (1936) 71 Mad. L.J. 247, 163 I.C. 626, ('36) A.M. 432.

Sale

The provisions of this section do not apply to a transfer for consideration, e.g., a sale.[15] A transfer of property made by a husband to his wife in lieu of dower is in effect a *sale*, though the transaction may be described as a gift.[16] On the other hand, a transaction, though in reality a gift, may be described as a sale to evade the provisions of the law relating to gifts made during *marz-ul-maut*. Such a transaction will be governed by the law relating to gifts made during *marz-ul-maut*.[17]

15 *Fazal Ahmad v. Rahim Bibi* (1918) 40 All. 238, 244-245, 51 I.C. 638.

16 *Eshaq v. Abedunnessa* (1914) 42 Cal. 361, 28 I.C. 692; *Sadiq Ali v. Mt. Amiran* ('29) A.O. 439, 121 I.C. 87: cf. *Mahabir Prasad v. Mustafa* (1937) 41 Cal. W.N. 933, 168 I.C 418, ('37) A.P.C. 174.

17 *Fazl Ahmad v. Rahim Bibi* (1918) 40 All. 238, 244-245, 51 I.C. 638.

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CHAPTER X

DEATH-BED GIFTS AND ACKNOWLEDGMENTS

136.

Conditions necessary for its validity

A gift made during *marz-ul-maut* is subject to all the conditions necessary for the validity of a *hiba* or gift, including delivery of possession by the donor to the donee.

Baillie, 551. As to the conditions requisite to the validity of a *hiba* or gift, see the Chapter on Gifts below. See also the cases cited in the preceding section. A death-bed gift is essentially a *hiba* or gift, though the limits of the donor's power to dispose of his property by such a gift are the same as the limits of his *testamentary* power. It is therefore subject to all the conditions of a gift, including delivery of possession by the donor to the donee before the death of the donor:

In *A.R. Abdul Lathif v. A.R. Mohammed Iliyas* [18], the Madras High Court categorically declared that under Muslim Law, a gift made during death-bed-illness (*Marz-ul maut*) is not valid, when it is made to one of several heirs to the exclusion of other heirs. Even if the gift is given by way of a registered document, under Muslim Law, for a valid gift, delivery of possession is mandatory, which cannot be dispensed with. The Court further held that the settlement deed executed 2 years and 10 months prior to death of the deceased cannot be called a death-bed gift.

18 (2008) 5 M.L.J. 1368.

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CHAPTER X

DEATH-BED GIFTS AND ACKNOWLEDGMENTS

137.

Death-bed acknowledgment of debt

An acknowledgment of a debt may be made as well during death-illness as &uot;in health.&uot;

When the *only proof* of a debt is an acknowledgment made during *marz-ul-maut* or death-illness, the debt must not be paid until after payment of debts acknowledged by the deceased while he was &uot;in health&uot; and of debts proved by other evidence. An acknowledgment of a debt made during death-illness in favour of an *heir* is no proof at all of the debt, and no effect can be given to it.

Hedaya, 436, 437, 438, 684, 685; Baillie 693-694. This section is to be read with that part of 39 which refers to priority of debts.

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CHAPTER XI

GIFTS

138.

Hiba or gift

A hiba or gift is &uot;a transfer of property, made immediately, and without any exchange,&uot; by one person to another, and accepted by or on behalf of the latter.

'Gift' or 'Hiba' literally means the giving away of such a thing from which the person in whose favour the gift is made may draw benefit. The definition of *Hiba* or Gift has been given in *Kanz al Daquiq* in the following words: &uot;*Hiba* is the making of another person owner of the corpus of property without taking its consideration from him.&uot;[1]

Thus, gift is the transfer of movable or immovable property with immediate effect and without consideration by one person called the donor to another person called the donee and the acceptance of the same by one himself or by some one authorised on his behalf, provided that making the gift must totally renounce all his title and rights in the property gifted away of his independent free will.[2]

The basis of the principle of gift is the Prophet's saying, &uot;Exchange gifts among yourselves so that love may increase.&uot;[3]

Whether a document is a gift deed or a will, can be gathered from the recitals in the document. Even the title given to it is not conclusive of its true nature. Therefore, the terms, conditions and recitals alone determine the nature of the disposition. They are to be taken as a whole. Where the disposition

of the right, title and interest accrues in *praesenti* it cannot be treated as will because in a will the disposition is carried into effect after the death of the maker. When once it is clear from the recitals that the ownership has been transferred *in praesenti* absolute it is a gift and any condition imposed on the enjoyment of the property is invalid. The gift must be accepted and completed by such delivery of possession as the nature of the property admits.[4]

Hedaya, 482; Baillie, 515. (*see*Transfer of Property Act, 1882, s. 122, and also s. 129)

1 *Al-Nasafi, Abdullah B Mahmud; Kanz al-Daqaiq*, Cairo p. 352.

2 See, Dr Tanzil-ur-Rahman, A Code of Muslim Personal Law Vol. II p 1.

3 Al-Marghinani, Burhan al-Din; Al-Hiadaya, Quran Mahal, Karachi Vol. III, p. 283.

4 *Ibadat Ali v. Baldia Co-operative Bank* (1968) II A.L.T. 124.

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139.

Persons capable of making gifts

Every Mahomedan of sound mind and not a minor may dispose of his property by gift.

Hedaya, p. 524. As to minority, (*see* notes to 115).

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CHAPTER XI

GIFTS

140.

Gift with intent to defraud creditors

There must be in every gift a bona fide intention on the part of the donor to transfer the property from the donor to the donee.[5] A gift made with intent to defraud the creditors of the donor is voidable at the option of the creditors. Such intention however cannot be inferred from the mere fact that the donor owed some debts at the time of the gift.[6]

(*See*Transfer of Property Act, 1882, s. 53.)

5 *Sultan Miya v. Ajibakhatoon Bibi* (1932) 59 Cal. 557, 138 I.C. 733, ('32) A.C. 497.

6 *Azim-un-nissa v. Dale* (1871) 6 Mad. H.C. 455, 468-469; *Abdul Hye v. Mir Mohamed* (1868) 11 I.A. 10 Cal. 616; Macnaghten p. 217 (case 15), p. 510 (case 44), Ameer Ali, 4th ed. I., pp. 51-54.

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CHAPTER XI

GIFTS

141.

Gift to unborn person

A gift to a person not yet in existence is void.[7]

Provision for maintenance of donee and his male heirs

It has been held by the Chief Court of Oudh that a gift by one person to another of a guzara (maintenance allowance) for the lifetime of the donee and after his death to his male heirs, is a valid gift under the Mahomedan law.[8] It would, however, not be valid, if none of the male heirs of the donee was in existence at the date of the gift.

A gift does not fail in its entirety if it is made in favour of living persons and also in favour of unborn persons. It is void only to the extent to which interest is created in favour of unborn persons. If the gift is made through the medium of a trust, the same conditions must be satisfied as for an ordinary gift.[9]

7 *Abdul Cadur v. Turner* (1884) 9 Bom. 158; *Mahomed Shah v. Official Trustee of Bengal* (1909) 36 Cal. 431, 2 I.C. 291; *Imam Sahib v. Ameer Sahib,* 68 Mad. L.W. 219; (1955) 1 M.L.J. 449, ('55) A. Mad. 621.

8 *Mt. Sartaj v. Muhammad* (1931) 6 Luck. 423, 129 I.C. 322, ('31) A.O. 6.

9 *Mrs. Khalida Adib Begum v. S.A. Bashirunnissa Begum* (1970) II, M.L.J. 98; *Hafiz Abdul Basit v. Hafiz Ahmad Mian* ('73) A. Delhi 280(D.B.) ; *Sujaythi Nuluku v. Nandini* (1975) 1 A.P.L.J 211.

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CHAPTER XI

GIFTS

142.

Extent of donor's power

A gift as distinguished from a will, may be made of the whole of the donor's property, and it may be made even to an heir.

"The policy of a Mahomedan law appears to be to prevent a *testator* interfering by *will* with the course of the devolution of property according to law among his heirs,[10] although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law *by giving in his lifetime the whole or any part of his property* to one of his sons, provided he complies with certain forms".[11]

A gift in favour of minor children and unborn children is void only to the extent of the interest created in favour of the unborn children and not as to the rest. Mahomedan law permits a man to gift away his

entire property during his lifetime so as to even disinherit his heirs.[12] The observations of the Privy Council in *Khajooroonisa v. Rowshan Jehan* may be seen.

A Mahomedan may dispose of the whole of his property by *gift* in favour of a stranger, to the entire exclusion of his heirs. The only restraint is the rule which invalidates deathbed gifts.[13]

10 *Sardar Ahmad Khan v. Zamroot Jan* ('50) P. Pesh. 45.

11 *Khajooroonissa v. Rowshan Jehan* (1876) 2 Cal. 184, 197. 3 I.A. 291, 307; *Chaudhri Mehdi Hasan v. Muhammad Hasan* (1905) 28 All. 439, 449, 33 I.A. 68, 75; *Sadik Husain v. Hashim Ali* (1916) 43 I.A. 212, 221, 38 All. 627, 645-646, 36 I.C. 104; *Lala v. Rasula* ('57) A. J.&K. 3.

12 *Hafiz Abdul Basit v. Hafiz Ahmad Mian* ('73) A. Delhi 280.

13 *Safi Ullah v. Ghulam Jabbar* (1995) Lah. 57, ('55) P. Lah. 191; *Lala v. Rasula* ('57) A. J.&K. 3.

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CHAPTER XI

GIFTS

143.

Power of appointment

A power given to a legatee to appoint a successor is invalid under Mahomedan law.[14]

In *Nawazish Ali Khan v. Ali Raza Khan* [15] the testator, who was a Shia Mahomedan, bequeathed his property to three persons successively for life and then provided as follows. &uot;The last devisee shall have power to nominate as-his successor any one whom he might consider fit from amongst the descendants of each of the three successors.&uot; It was held by the Privy Council that the power of appointment was invalid. Their Lordships said: &uot;If the successor is to take absolutely, the power operates upon the corpus, and in their Lordships' view is clearly inconsistent with principles of Muslim law. It would interfere with the Muslim law of succession, and would involve that the heirs took the corpus of the property for a term, not merely of limited, but of uncertain, duration.&uot; Although this was a Shia case, it would apply equally to Sunnis.

14 *Nawazish Ali Khan v. Ali Raza Khan* (1948) 75 I.A. 62, ('48) A.P.C. 134.

15 (1948) 75 I.A. 62 ('48) A.P.C. 134.

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CHAPTER XI

GIFTS

144.

Gift of actionable claims and incorporeal property

Actionable claims and incorporeal property may form the subject of gift equally with corporeal property.

A gift may be made of debts, negotiable instruments, or of Government promissory notes[16]; of *malikana*[17] or of zemindari[18] rights; also of property let on lease,[19] and property under attachment.[20] Similarly; a gift may be made of a right to receive a specified share in the offerings that may be made by pilgrims at a shrine.[21] So also an insurance policy may be assigned and the mere fact that the money was to be realized in future is not enough to make it a gift in futuro.[22] In short, a gift may be made of anything which comes within the definition of the word &uot;*mal*&uot; that is, property, including actionable claims.[23]

&uot;*Hiba* in its literal sense signifies the donation of a *thing from which the donee may derive a benefit&uot;; Hedaya*, 482. &uot;Gift, as it is defined in law, is the conferring of a *right of property* in something specific, without an exchange&uot;: Baillie, 515.

The case cited above would not have arisen at all, had it not been for the wrong notion which prevailed at one time that *khas* or physical possession was necessary in *all cases* to constitute a valid gift. Following that notion, it was contended in those cases that corporeal property alone could form the subject of gifts, as that was the only kind of property that was capable of *khas*or physical possession. But that notion has long since been rejected as erroneous, and it has been held that when the subject of gift is not capable of physical possession as in the case of choses in action or incorporeal rights, the gift may be completed by any act on the part of the donor showing a clear intention to divest himself of ownership in the property. Note that debts, negotiable instruments and Government promissory notes are all choses in action, or, to use the language of the Transfer of Property Act, actionable claims. (*see* 150 below)

It has been held in a case from Gujarat that the provisions of s. 130 of the Transfer of Property Act, 1882, over-ride the Mahomedan law in the case of a gift of an actionable claim and once it is established that the gift has been created by an instrument in writing, the necessity of establishing acceptance by the donee as required by the Mahomedan law would not arise.[24]

Assignment of Insurance Policy.--Under s. 38(7) of the Insurance Act, 1938, notwithstanding any law or custom having the force of law to the contrary, an assignment in favour of a person made with the condition that it shall be inoperative or that the interest shall pass to some other person on the happening of a specified event during the life of the policy-holder and an assignment in favour of the survivor or survivors of a number of persons shall be valid. It has been held that the words &uot;any law or custom&uot; are wide enough to cover Mahomedan Law. The gift, therefore, is not invalid because of any of the above conditions in the deed of Assignment.[25]

16 *Mullick Abdool Gaffoor v. Muleka* (1884) 10 Cal. 1112, 1125.

17 *Ibid*, p. 1125.

18 *Ibid*, p. 1126.

19 *Ibid*, p. 1125.

20 *Anwari Begum v. Nizam-ud-din Shah* (1898) 21 All. 165, 167.

21 *Ahmad-ud-din v. Illahi Bakhsh* (1912) 34 All. 465, 14 I.C. 587.

22 *Sadiq Ali v. Zahida Begum* (1939) All. 957, (1939) A.L.J. 1103, ('39) A.A. 744.

23 *Mirza Abid Husain v. Munnoo Bibi* (1927) 2 Luck. 496, 102 I.C. 72, ('27) A.O. 261.

24 *H.H. Iqbal Mohd. Khan v. Controller of Estate Duty, Ahmedabad.* 1964 Guj. 452 Foll. *Yocoob Sahib v. Pacha Bibi* (1932) 34 Bom. L.R. 837.

25 *Sudiq Ali v. Zahida Begum* (1939) All. 957, ('39) A.L.J. 1103, ('39) A.A. 744.

CHAPTER XI

GIFTS

145.

Gift of equity or redemption

(1) A gift may be made by a mortgagor of his equity of redemption.

When the property is subject to an usufructuary mortgage, the gift is completed by authorising the donee to redeem the mortgage, thus making a gift of the equality of redemption. In such a case there is no question of physical delivery of property.[26]

(2) There is a conflict of opinion whether a gift of an equity of redemption, where the mortgagee is in possession of the mortgaged property at the date of the gift, is valid. The High Court of Bombay has held that it is not.[27] On the other hand, it has been held by the High Court of Calcutta, that it is valid.[28] The latter, it is submitted, is the correct view. It has been so held by the High Courts of Patna and Allahabad.[29]

Thus, in the case of a gift by the grandfather to his minor grandsons, represented by the father, of property uncier mortgage, directing the father to pay off the mortgage from the income of the property the condition derogating from the gift, was held to be void.[30]

The Bombay High Court does not hold that an equity of redemption cannot form the subject of a gift in any case. What it does hold is that a gift of an equity of redemption is not valid if the mortgaged property at the time of a gift is *in possession of the mortgagee*. The ground of the Bombay decisions is that delivery of possession by the donor to the donee is a condition essential to the validity of a gift, and the mortgagor cannot deliver possession if the mortgagee is in possession. It is true that delivery of possession, by the donor to the donee is necessary to validate a gift. But it is equally well established that when the subject of a gift is not capable of actual possession, the gift may be perfected by appropriate act s on the part of the donor which may have the effect of transferring the ownership to the donee (s. 150). When the mortgagor himself is in possession of the mortgaged property, a gift of the equity of redemption is not valid unless he delivers possession of the property to the donee. But where the mortgagee is in possession, the mortgagor cannot deliver possession to the donee, and the gift, it is submitted, may in that event be completed by some other appropriate method. The Bombay decisions, it is submitted, are not sound. The correctness of these decisions was questioned by the High Court of Allahabad,[31] and they have been dissented from by the High Courts of Calcutta, Madhya Pradesh and Saurashtra.[32]

Though ordinarily and in accordance with the literal understanding of the condition of *hiba* under the personal law of Muslims the delivery of possession which ordinarily would mean physical possession of the subject-matter of the gift is a condition precedent, yet it has been consistently held that such possession which the subject-matter is susceptible of and capable of at the time when the *hiba* is made, if given, would be a valid substitute and education for corporeal delivery or physical delivery of the corporeal subject-matter and even in such circumstances, the *hiba* would be a valid gift.

Delivery of possession if understood as the *sine quo non* under all circumstances of the subject-matter of the gift, then, on such a wordy understanding of one of the terms the principles underlying it. The Judicial Committee has observed that taking possession of the subject-matter of the gift by the donee either actually or constructively was sufficient to complete the gift. Sufficient inroads were made in very early times into the necessity to deliver physical possession of the subject-matter of the gift in order to make it a valid gift. Equity made a sufficient dent upon the necessity to deliver

physical possession of properties in order to make a complete and valid gift. Therefore, it follows, that constructive possession of the subject-matter of the gift provided, it could be made out in a given case would be sufficient to make a *hiba* valid notwithstanding the fact that physical delivery of the same has not been given. It is only such possession as the subject matter is capable of or susceptible of that could be thought of and once if such available possession is given by the donor to the donee and as a follow-up, the donee exercises rights of ownership over the property taken over by him, though constructively, that would be sufficient evidence to establish that there was a valid *hiba* as is known to Mahomedan Law.[33]

A owns six immovable properties. He mortgages three with possession to M. He then makes a gift of all the six properties to *D* and puts him in possession of the three properties not mortgaged to *M*. The High Court of Bombay has held that in such a case the gift of all the six properties is valid.[34] So has the High Court of Madras[35] although the properties were situated in different talukas.

26 *Shahalam Khatoon v. Amir Ali* ('72) A.A.P. 241. *See* also *Amir Ali Khan v. Shah Alam* (1973) 1 All. W.R. 337.

27 *Ismail v. Ramji* (1899) 23 Bom. 682; *Mohinuddin v. Manchershah* (1882) 6 Bom. 650.

28 *Tara Prasana v. Shandi Bibi* (1922) 49 Cal. 68, 75 I.C. 319, ('22) A.C. 422; *Muhar Bibi v. Maharulla Mondal* (1933) 57 Cal. LJ. 375, 146 I.C. 803, ('33) A.C. 785.

29 *Abdul Kabir v. Jamila Khatoon* ('51) A.P. 315; *Mirza Mahdi Husain v. Sikandar Nawab* ('55) A.A. 255.

30 *Md. Naziruddin v. Govindrajulu Appah* ('71) A. Mad. 44.

31 *Rahim Baksh v. Muhammad Hasan* (1888) 11 All. 1, 10; *Anwari Begam v. Nizam-ud-din Shah* (1898) 21 All. 165, 170, 171,.

32 *Tara Prasanna v. Shandi Bibi* (1922) 49 Cal. 68; 75 I.C. 319, ('22) A.C. 422; *Munni Bai v. Abdul Gani* ('59) A.M.P. 225; *Kasam Umar v. Sipoy Gulab* ('56) A. Sau. 20.

33 *Fathima Bibi v. Bhavasa Maracair* (1979) 1 M.L.J. 409 [T. Ramaprasada Rao and M.A. Sathar Sayeed, JJ.].

34 *Chandsaheb v. Gangabai* (1921) 45 Bom. 1296, 64 I.C. 21, ('21) A.B. 248.

35 *Mohammad Ayisha Beevi v. Samankatha* (1944) 2 Mad. L.J. 267, 220 I.C. 103, ('45) A.M. 94.

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CHAPTER XI

GIFTS

146.

Gift of property held adversely to donor

A gift of property in the possession of a person who claims it adversely to the donor is not valid, unless the donor obtains and delivers possession thereof to the donee [ill. (z)], or does all that he can to complete the gift so as to put it within the power of the donee *to obtain possession* [ill. (a)].

(a) *A* executes a deed of gift in favour of *B*, conferring upon him the proprietary right to certain lands then in the possession of *Z*, and claimed by *Z* adversely to *A*. *A* dies without acquiring possession of the lands. After *A's* death, *B* sues *Z* to recover possession from him. The suit must fail, for the gift was not completed by delivery of possession to *B*.[36]

(b) *A* executes a deed to gift of immovable property in favour of *B*. At the date of the gift, the

property is in possession of *C* who claims to hold it adversely to *A*. *B* sues *C* to recover possession of the property from him, joining *A* in the suit as a party defendant. *A* by his written statement admits *B*'s claim. *C* contends that the gift is void, inasmuch as *A* was out of possession at the date of the gift, and no possession was ever given to *B*. The gift is valid though no possession was delivered by the donor to the donee. Their Lordships of the Privy Council said: &uot;But it must be observed that in this case the dispute as to the validity of the gift is not between the donee and the donor.. The person who disputes it claims adversely to both. *The donor has done all that she can to complete the gift and is a party to the suit, and admits the gift to be complete&uot;: Kalidas v. Kanhaya Lal* [37] a case under the Hindu law, but followed in *Mahomed Buksh v. Hosseini Bibi,* [38] which was a Mahomedan case. In the last-mentioned case their Lordships of the Privy Council (at p. 93) said--

&uot;In this case it appears to their Lordships that the lady [donor] did all she could to perfect the contemplated gift, and that nothing more was required from her. The gift was attended with the utmost publicity, the hibanamah itself authorizes the donees to take possession and it appears that in fact they did take possession. Their Lordships hold, under these circumstances, that there can be no objection to the gift on the ground that Shahzadi [donor] had not possession, and that she herself did not give possession at the time&uot;.[39]

Following the above observations, it has been held that a *gift* of immovable property by a purchaser at a sale in execution of a decree, though made before confirmation of the sale and before acquisition of possession by him, is valid, if the donee is authorized by the donor to obtain possession.[40](*see*Code of Civil Procedure, 1908, s. 65)

There can be a valid gift of property in possession of a lessee or a mortgagee and a gift may be sufficiently made by delivering constructive possession of the property to the donee. The view that a property in the possession of a usurper cannot be given away, is too rigid. The donor may make a valid gift of a property in the possession of a trespasser provided he either obtains and gives possession of the property to the donee or does all that he can to put it within the power of the donee to obtain possession.

A gift of property in the possession of a trespasser is not established by mere declaration by the donor and acceptance by the donee; there must also be either delivery of possession or some overt act by the donor to put it within the power of the donee to obtain possession.[41]

36 *Meherali v. Tajudin* (1888) 13 Bom. 156; *Rahim Baksh v. Muhammad Hasan* (1888) 11 All. 1; Macnaghten, p. 201, case 6; *Fakir Nynar v. Kandaswamy* (1912) 35 Mad. 120, 128-131, 14 I.C. 993.

37 (1884) 11 Cal. 121, 11 I.A. 218, 229.

38 (1888) 15 Cal. 684, 701-702, 15 I.A. 81.

39 Followed in *Maqbal Hussain v. Zaintul Nisa Bibi* (1939) A. L.J. 235, 182, I.C. 742, ('39) A.A. 435.

40 *Mirza Abid v. Munno Bibi* (1927) 2 Luck. 496, 100 I.C. 72, ('27) A.O. 61.

41 *Maqbool Alam v. Khodaija* ('66) A.S.C. 1194.

CHAPTER XI

GIFTS

147.

Writing not necessary

Writing is not essential to the validity of a gift either of movable or of immovable property. In *Kamar-un-nissa Bibi v. Hussaini Bibi* ,[42] the Privy Council upheld a verbal gift.[43]

Under Mohammadan Law writing is not essential for the validity of a gift either of movable or immovable property. There are three essentials of a gift under Mohammadan Law, namely, (1) a declaration of gift by the donor; (2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee. If these conditions are fulfilled, the gift is complete.[44]

Sections 122-129 (Chapter VII) of the Transfer of Property Act, 1882, deal with gifts. By s. 123 of the Act it is provided that a gift of immovable property must be effected by a registered instrument signed by the donor and attested by at least two witnesses, and that a gift of movable property may be effected either by a registered instrument signed as aforesaid or by delivery. But the provisions of s. 123 do not apply to Mahomedan gifts (*see*s. 129 of the Act). It has been held by the Patna High Court that the rules of Mahomedan law regarding gifts are based on reasonable classification and s. 129 exempting Mahomedans from certain provisions of the Transfer of Property Act is not hit by Art. 14 of the Constitution.[45]The Transfer of Property Act does not apply to gifts made by Muslims. In their case all that is necessary is: declaration, acceptance and delivery of possession.[46]

A gift under the Mahomedan law is to be effected in the manner prescribed by the Mahomedan law. If the formalities prescribed by that law (150 below) are complied with, the gift is valid even though it is not effected by a registered instrument and though, where effected by an instrument, the instrument is not attested.[47]But if the formalities are not complied with, the gift is not valid even though it may have been effected in the manner prescribed by s. 123 of the Transfer of Property Act . (*See* notes to 150 below)

The rule that a Mahomedan can make an oral gift is a general rule applicable to property of any kind; it must therefore give way to any special rules relating to a gift of any particular kind of property. Thus it was held by the Patna High Court that a Mahomedan could not transfer his occupancy holding by oral gift in contravention of the provisions of s. 26A read with s. 12 of the Bihar Tenancy Act, 1985, requiring transfers to be effected by a registered instrument, as that Act embodied special rules dealing with gifts of occupancy holdings.[48]

According to the Mahomedan Law, there can be a valid gift, if three essentials of the gift are satisfied: (1) a declaration of the gift by the donor; (2) the acceptance of the gift express or implied by or on behalf of the donee; and (3) delivery of possession of the subject of gift by the donor to the donee. It is not necessary that there should be deed of gift to make it a valid gift.

The present possession of the donee or the fact that the person who disputed the oral gift kept silent for one year and allowed the donee to enjoy the property or the fact that the donee had discharged the debts of the donor and was managing the properties of the donor or that he had spent moneys for the ceremonies after the death of the donor and the fact that the Panchayat Board had issued notices to him to pay house tax are not decisive of the question of validity and binding nature of the oral gift.[49]

In order that a declaration of gift is established it must be shown that the donor either in the presence of witnesses or otherwise made a public statement that he gifted the property in favour of the donee and that he divested himself of the ownership of the property by delivering such possession as the property is capable of to the donee who accepted the gift. It is inconceivable that a declaration of gift can be made unilaterally by a Mohammadan without making a public statement of the gift. Declaration of a gift for the purpose of law has a definite connotation in the sense that a person making a gift, must declare by some means to give public notice that he gifted the property to the donee and divested himself of the ownership or the property. It is unknown to law that a Mohammadan can make

an oral gift within the confines of his houses and without the presence of anybody else and canvass the plea that making such a declaration allegedly by the gift, the valid requirements of a gift are satisfied. If evidence is lacking on any of the requirements of a valid gift, law cannot presume that a valid gift has been orally made by a Mohammadan in favour of the donee.[50]

The Supreme Court in *Mohboob Sahab v. Syed Ismail* [51]has held that gift under Muslim Law is not required to be in writing and consequently need not be registered under the Registration Act. A gift to be complete, there should be a declaration of the gift by the donor, acceptances of the gift, express or implied, by or on behalf the donee, and delivery of possession of the property the subject matter of the gift by the donor to the donee. The donee should take the delivery of possession of the property either act ually or constructively. Only on the proof of these essential conditions, the gift becomes complete and valid. In case of possession of immovable property, the donor should completely divest himself physically of the subject of gift.

Similarly, the Andhra Pradesh High Court in the instant case has observed that oral gift is a typical facility which is available exclusively to Muslims. In the ordinary course, a gift is required to be made through a registered document as provided for under s. 123 of the Transfer of Property Act. When such a vital requirement as to registration is relaxed, the proof in the form of oral evidence must be unequivocal and clinching. The benefit of any doubt or contradiction has to be given in favour of the person, who is adversely affected in the event of the plea of oral gift being accepted. Any relapse in this regard is likely to provide an individual to trample the rights of other persons to succeed in accordance with law.[52]

Similarly in another case, Bombay High Court has observed that an oral gift to be valid must contain, declaration, acceptance and delivery of possession. In this case, the plaintiff's evidence has been accepted since there was no evidence led by the defendant in rebuttal. It was obvious from this evidence that the gift was declared by the plaintiff's father. The plaintiff had accepted the same and he had also taken the possession of the suit property. But here there is a contemporaneous execution of a document which is a gift deed. It is now well settled that any gift deed executed by a Muslim which is not registered affects the validity of the gift. Thus, if there is a document by which a property is gifted and it has been executed simultaneously with an oral gift, the document must be registered. If making of gift was an antecedent act and deed was executed as evidencing transaction, it does not require registration. In this case, the document was not registered, although executed contemporaneously with the oral gift. Therefore, the gift of the suit property in favour of the plaintiff is not valid.[53]

But now the issue has been finally settled by the Apex Court in *Hafiza Bibi v Shaikh Farid* ,[54] where the Court has observed that the three essentials of a gift under Mohammadan Law are (1) declaration of gift by the donor; (2) acceptance of the gift by the donee and (3) delivery of possession, the rules of Mohammedan Law do not make writing essential to the validity of gift; an oral gift fulfilling all the three essentials make the gift complete and irrevocable. However the donor may record the transaction of gift in writing. Merely because the gift is reduced to writing by a Mohammadan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammadan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammadan Law is that the compliance of three essential requisites. The form is immaterial. If all the three essential requisites are satisfied constituting a valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of gift, it must be registered, is in appropriate and not in conformity with the rule of gift in Mohammadan Law.

In the instant case, the gift was made by donor through a written deed in favour of his son in respect of his properties. The gift, as was recited in the deed, was based on love and affection for the son as after the death of donor's wife, he has been looking after and helping him. The acceptance of the gift by son was evidenced as he signed the deed. The son was in physical possession of residential house with the donor. All the three essentials of a valid gift under Mohammadan Law were satisfied.

The gift deed was a form of declaration by the donor and not an instrument of gift as contemplated under s. 17 of the Registration Act, and therefore, it was complete and irrevocable.

42 (1880) 3 All. 266.

43 See also Baillie, 509; and *Kulsum Bibi v. Shiam Sunder Lal* (1936) All. L.J. 1027, 164 I.C. 515, ('36) A.A. 600.

44 *Abdul Sattar v. The Fifth Additional District Judge* (1978) All. L.J. 543 [T.S. Misra, J.].

45 *Bibi Maniran v. Mohd. Ishaque* ('63) A. A.P. 229.

46 *Azaz Ahmed v. Krishnpaid* (1971) An. W.R. 542; *Ghulam Ahmed Sufi v. Mohd. Sidiq* ('74) A. J.&K. 59; *R.K. Rao v. M.S. Meyappan* ('74) A. Mad. 57.

47 *Karam Ilahi v. Sharf-ud-Din* (1916) 38 All. 212, 35 I.C. 14; *Abdul Hamid v. M. Abdul Ghani* (1934) 148 I.C. 801, ('34) A.O. 163.

48 *Bibi Sharifan v. Sheikh Salahuddin* ('60) A.P. 297. *Chotauddan Saheb v. Masthan Bi* ('75) A. A.P. 27.

49 *Chota Uddandu Sahib v. Masthan Bi.* A.I.R. 1975 A.P. 271 [Venkatrama Sastry, J.].

50 *Ratanlal Bora v. Mohd. Nabluddin* (1984) 2 An W.R. 201 [Anjanayulu, 1].

51 A.I.R. 1995 SC 1205, *See* also LNIND 2000 Kant 169.

52 *Katwal Abdul Hakeem Sab v. Nasyam, Sufiya,* LNIND 2009 A.P. 993.

53 LNIND 2010 Bom. 319, A.I.R. 2010 Bom. 100, *see* also *Shaik Khadaru Masthan v. Sayyad Fathimun,* LNIND 2007 A.P. 840.

54 A.I.R. 2011 SC 1695.

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CHAPTER XI

GIFTS

148.

Relinquishment by donor of ownership and dominion

It is essential to the validity of a gift that the donor should divest himself completely of all ownership and dominion over the subject of the gift.[55]

Relinquishment of control over the subject is necessary to complete the gift,[56] and book entries in themselves do not amount to delivery of possession.[57] A gift with a reservation of possession of property by the donor during his life is void.[58]

The Mahomedan Law requires the gift of corpus itself and if there is anything repugnant to such a gift such a repugnant condition would be invalid. But it is necessary that the gift should be of the corpus. If the donor reserves to himself the right to be in possession of the corpus and the right to enjoy the same, there cannot be a valid gift under the law.[59]

Certain documents of settlement, made by a Mohammedan provided that till the death of the executant he would have no right of alienation of the property or properties mentioned in each of the documents, but he will have the right to possess the said property or properties and enjoy the same by taking usufructs and that after his death the respective property or properties may be possessed

and enjoyed by the executee as he likes with right of alienation etc. and in that manner the property is settled upon the executee: It was held that the gifts were bad under the Mahomedan Law and that the same could not confer on the respective executee any right in respect of the property stated to have been gifted thereunder.[60]

"A gift cannot be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing_given, and the gift is null and void when he continues to exercise any act of ownership over it": Macnaghten, p. 51, s. 8.

The mere fact that a deposit was in the joint names of father and daughter cannot raise a presumption of advancement without proof of intention to make a gift.[61]

55 *Musammat Bibi v. Sheik Wahid* (1928) 7 Pat. 118, 114 I.C. 204, ('28) A.P. 183.

56 *Musa Miya v. Kadar Bux* (1928) 55 I.A. 171, 52 Bom. 316, 149 I.C. 31, ('28) A.P.C. 108.

57 *Mahomed Husain v. Aishabai* (1934) 36 Bom. L.R. 1155, 155 I.C. 334, ('35) A.B. 84.

58 *Mahomed Aslam Khan v. Khalilul Rehman* (1947) 51 C.W.N. 832, 231 I.C. 55, ('47) A.P.C. 97; *Kunju Mamathu v. Asikutty* (1959) Ker. L.T. 624; *Pichakannu v. Aliyar Kunju* (1963) Ker. L.T. 226.

59 A.I.R. 1948 PC. 134, A.I.R. 1947 P.C. 97, 1959 Ker. L.T. 624 and 1963 Ker. L.T. 226, Ref.

60 *Beepathumma v. Mohamed Nakoor Meera Rowther* A.I.R. 1977 Ker. 54 [Bhaskaran and George Vedakkal, JJ.].

61 *Mujtabai Begum v. Mehboob Rehman* ('59) A.M.P. 359.

CHAPTER XI

GIFTS

149.

The three essentials of a gift

It is essential to the validity of a gift that there should be (1) a declaration of gift by the donor, (2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee as mentioned in 150. If these conditions are complied with, the gift is complete.[62]

The three essential requisites for a valid gift are, (1) the offer of the gift (2) acceptance there of (3) delivery of possession in pursuanse there under. In this case, it is established as a fact that the appellant made an offer of gift over the plaint schedule property to the respondent as guardian, accepted the offer on behalf of the respondent. She has been in possession and enjoyment ever since the delivery of the plot. Therefore, the gift is complete on talking possession of the plaint schedule property. Therefore, the revocation deed is invalid and not binding on the respondent.[63]

See:--The reservation of the usufructs in favour of the donor during his life with authority to collect rents and profits as the agent of the donees did not make the gifts void under Mohammedan Law.[64] It must be established that it was accepted by the donee.[65]

Baillie, 515; *Hedaya*, 482. This section should be read subject to what is stated in 140.

Different High Courts like Chhattisgarh, Kerala, Patna, Madras, Allahabad are of the view that for the

validity of gift under Muslim Law following three elements are necessary; (i) declaration of gift by the donor (2) acceptance of the gift by the donee, and (3) delivery of possession of the property by donor. The relinquishment of control and ownership by the donor is necessary to complete the gift.

In the instant case, Chhattisgarh High Court held that where the deceased has made oral declaration in front of witnesses in mosque on the eve of Id and subsequently he had executed a memorandum of gift. In pursuance of this oral gift, the donee obtained the possession of the gifted property. All ingredients of a valid gift under Muslim Law had been established. Moreover, the donor was in fit physical and mental condition at the time of the gift. The gift was made perfectly in accordance with Muslim Law.[66]

In another case, the Gujrat High Court has held that where there is a gift by the husband to the wife in the presence of two witnesses and the mutation has also been completed at the instance of husband. Here, if the donor admitted that donee had accepted the gift, keeping in view the relationship between the donor and donee, no further evidence was required to prove acceptance of gift by the donee.[67]

The Karnataka High Court has made a distinction between 'gift deed' and a 'settlement deed'. Under gift three essentials, i.e. declaration, acceptance and delivery of possession of the gifted property, are necessary but where the deed stated that in pursuance of desire of executant to settle the suit schedule property, she had transferred the property by way of settlement deed upon the beneficiary to have and to hold the same absolutely for ever subject to the condition that during the lifetime of the said settler, she shall be entitled to for the usufruct from the property and shall also have the right to reside if she so chooses. But by the said recital, the settler did not make over the possession of the subject property thereunder at all nor symbolic possession was made over to her nor document of title was given, such deed was not a valid gift deed.[68]

62 *Mohamad Abdul Ghani v. Fakhr Jahan Begum* (1922) 49 I.A. 195, 44 All. 301, 68 I.C. 254, ('22) A.P.C. 281; *Amjad Khan v. Ashraf Khan* (1929) 56 I.A. 213, 4 Luck. 305, 116 I.C. 405, ('29) A.P.C. 149; *Sultan Begum v. Ara Begum* (1933) 57 Cal. L.J. 459, 143 I.C. 309, ('33) A.P.C. 164; *Munni Bai v. Abdul Gani* ('59) A.M.P. 225; Pakistan: - *Agha Mir Ahmad Shah v. Aga Mir Yaqub Shah* ('57) P. Kar. 238; *Iman Ali v. Furkun Ali* P.L.D. 1960 Dacca 3. *Mohd. Mustafa Ghazipur v. C.I.T.* 1970, I.T.J. 449; See also *Sitesh Chandra Choudhury v. Paziruddin Ahmed* ('73) A. Gau. 96.; Mian Jalal-Ud-Din. C.J., Dr. A.S. Anand and G.M. Mir. JJ.] *Wali Mohammad v. Faqir Mohamad.* A.I.R. 1978 J&K 92F.B. . *Md. Hesabuddin v. Md. Hesaruddin* A.I.R. 1984 Gauhati 4.

63 *Tateef Khan v. Abdul Basifh Khan* (1984) An. W.R. 72 [Ramaswamy, J.].

64 *M.T. Khalid v. P. M. Sainabi* A.I.R. 1981 Ker. 230.

65 *Wali Mohd. v. Faqir Mohd..* A.I.R. 1978 Jammu & Kashmir 92. *see*: *Md. Hesabuddin v. Md. Hesaruddin* A.I.R. 1984 Gauhati 41.

66 *Sher Ali v. Saiyad Isar Ali* A.I.R. 2006 Chhat 146. *See* also *Hasan Khani Rawther v. Muhammed Rawther* LNIND 2007 Ker 717; *Bibi Riajan Khatoon v. Sadrul Alam* A.I.R. 1996 Pat 156; *Pocker v. Kathia* LNIND 1999 Ker 514; *N.A. Abdul Rahim v. A.M. Mariam* (2002) 1 M.L.J. 836; *Ghulam Mohammad v. Taj Mohammad Khan* A.I.R. 1995 All. 333; *Aliman Nessa v. Sudhir Shandra Dey,* A.I.R. 1991 Gau 13; *A. Abdul Rahim v. Julaiga Beeri* (2001) 2 M.L.J. 822; *Musst Kulson Mallick v. Manowara Mallick* (2009) 2 WBLR 147, (2009) Cal LJ 509, LNIND 2009 Cal 28.

67 *Fatma Bibi v. Abdul Rehman Abdul Karim* A.I.R. 2001 Guj 75.

68 *Abdur Rahman v. Athifa Begum* A.I.R. 1998 Kant 39.

CHAPTER XI

GIFTS

150.

Delivery of possession

(1) It is essential to the validity of a gift that there should be a delivery of such possession as the subject of the gift is susceptible of *Sadik Husain v. Hashim Ali.* [69] As observed by the Judicial Committee, &uot;the taking of possession of the subject-matter of the gift by the donee, either actually or constructively,&uot; is necessary to complete a gift.[70](*see* 145, 146, 152, 154)

In the 'Muwatta' of Imam Malik a report from Aishah states that the Caliph Abu Bakr made a gift in favour of his daughter Aiysha of 20 wasaq (a weight) of dates that had not been plucked from the trees and at the time of death Abu Bakr approached her. Abu Bakr said to Aishah, &uot;If you had taken possession of the dates they would have been yours. Now you shall distribute them in accordance with the law of inheritance among all the heirs.&uot;

Delivery of possession of a gift may be act ual or constructive. When physical delivery of possession is not possible such possession as the property admits may be delivered. The donor must of course divest himself of his possession, to complete the gift.[71]

A document, embodying a declaration that the property gifted has been delivered, if given and accepted by the donee is tantamount to accepting delivery of the gifted property.[72] Mere admission of delivery of possession in the deed cannot be taken as evidence of delivery. To do so would nullify the principles of Mahomedan Law.[73]

But see Also:--When the document embodying the declaration of the gift is delivered by the donor to the donee and accepted by him, it would amount to acceptance of the gift.[74] It is a fundamental rule of Mohammedan Law as regards gifts that there must be a declaration of gift by the donor, an acceptance of the gift, express or implied, by or on behalf of the donee and delivery of such possession of the subject of the gift to the donee as it is susceptible of. The ownership of the property is transferred to the donee only on completion of these three essential requirements. [S.K. Ray] *Abu Khan v. Moriam Bibi* .

According to Mohammedan Law, once a valid gift is brought into existence, the gift becomes irrevocable and nothing short of a decree of Court would revoke the gift. Therefore, mere cancellation of the deed of gift by the donor would not onerate as a revocation of the gift.[75] A declaration made by the donor in the deed followed by handing over of that deed to the donee and acceptance of the donee would be amply sufficient to establish transfer of possession, without any physical departure or formal entry. Delivery of possession may be either actual or constructive. Possession can be shown not only by act s of enjoyment of the land itself, but also by ascertaining as to in whom the actual control or the thing is to be attributed or the advantages of possession is to be credited even though some other person is in apparent occupation of the land. In one case, it would be act ual possession and in the other case it would be constructive possession.[76]

As the intention of the donor to divest himself of his interest was manifest, the gift of his share is valid and operative in view of the fact that there can be a gift of an undivided share.[77]

The Patna High Court has held that under Muslim law, oral *Hiba* or gift is permissible. However, in order to constitute a valid gift, the donor should divest himself completely of all ownership and dominion over the subject of the gift.[78]

(2) *Registration.*--Registration of a deed of gift does not cure the want of delivery of possession.

A executes a deed of gift of a dwelling house belonging to him in favour of *B*. The deed is duly registered, but possession is not delivered to *B* The gift is incomplete, and therefore void.[79]

(3) If it is proved by oral evidence that a gift was completed as required by law (149 and

150), it is immaterial that the donor had also executed a deed of gift, but the deed has not been registered as required by the Registration Act, s. 17(a).[80]

(4) A declaration in a deed of gift that possession has been given binds the heirs of the donor.[81] But such a declaration is not conclusive and a recital in a deed of gift that possession has been given to a minor nephew (without the intervention of a father or guardian--(156) was on the facts held to be insufficient to support a gift as against the heirs of the donor.[82]

The requirements of a gift of immovable property under the Mahomedan Law are: (1) declaration by the donor; (2) acceptance by the donee and (3) delivery of possession by the donor to the donee. Where the execution of the gift deed by the donor was followed by delivery of possession to the donee the gift would be valid. The categorical statement in the gift deed that possession had passed to the donee and the donor had not retained any right whatever in the property coupled with the tax receipts in the name of the donee soon after the date of execution of the gift deed and before the death of the donor would show that possession of the property was act ually given to the donee.[83]

Hedaya, 482; *Baillie*, 520-522.

Constructive possession

Where the donor makes a gift of the corpus of a property, but reserves the usufruct to himself and continues in physical possession of the property, the payment by the donee of Government revenue after the date of the gift in respect of the property amounts to constructive possession of the property on the part of the donee and the gift is completed by such possession.[84]

69 (1916) 43 I.A. 212, 221-222, 38 All. 627, 645-646, 36 I.C. 104; *Khajooroonisa v. Rowshan Jehan* (1876) 2 Cal. 184, 197, 3 I.A. 291, 307; *Chaudhri Mehdi Hasan v. Muhammad Hasan* (1906) 28 All. 439, 449, 33 I.A. 68, 75; *Tara Prasanna v. Shandi Bibi* (1922) 49 Cal. 68, 75 I.C. 319, ('22) A.C. 422, *Jamil-un-nissa v. Mohammad Zia* (1937) All. 609, (1937) All. L.J. 486, 170 I.C. 824, ('37) A.A. 547; *V.N. Annamalal Reddiar v. Gulsun Bibi* ('55) A.M. 600, 68 M.L.W. 397.

70 *Mohammad v. Fakhr Jahan* (1922) 49 I.A. 195, 209, 44 All. 301, 315, 681 I.C. 254, ('22) A.P.C. 281; *Nazir Din v. Mahomed Shah* (1936) 161 I.C. 365, ('36) A.L. 92; *Halimbi v. Rahmatali* (1941) Nag. 669, 188 I.C. 181, ('40) A.N. 70. Pakistan: - *Safi Ullah v. Ghulam Jabbar* (1955) Lah. 57, ('55) P. Lah 191.

71 *Hafiz Abdul Basit v. Hafiz Ahmad Mian* ('73) A. Delhi 280.

72 *Abu Khan v. Moriam Bibi* (1974) 40 C.L.T. 1306.

73 *Atmaram v. Dr. Girdharilal* (1972) An. W.R. 125.

74 *Abu Khan v. Moriam Bibi* . [S. K. Ray, J.]

75 *Abu Khan v. Moriam Bibi* . [S.K. Ray, J.]

76 *Abu Khan v. Moriam Bibi* [S.K. Ray J.]. But see Also:--*Hayatuddin Haji Shujauddin v. Abdul Gani Abdul Hafiz* (1975) Mah. L.J. 345 [M.N. Chandurkar, J.].

77 *Hayatuddin Haji Shujauddin v. Abdul Gani Abdul Hafiz* (1975) Mah. L.J. 345 [M.N. Chandurkar, J.].

78 *Maimuna Bibi v. Rasool Mian* A.I.R. 1991 Pat 203.

79 *Mogulsha v. Mahamad Saheb* (1887) 11 Bom. 517; *Ismail v. Ramji* (1899) 23 Bom. 682; *Vahazullah v. Boyapati* (1907) 30 Mad. 519; *Saira Bai v. S.S. Joshi* ('60) AM.P. 260.

80 *Nasib Ali v. Wajed Ali* (1926) 44 Cal. L.J. 490, 100 I.C. 296, ('77) A.C. 197; *Abdul Rahman v. Gaya Prasad* (1930) 5 Luck. 384, 124 I.C. 354, ('29) A.O. 435; *A. Rowther v. Manahapra* ('72) A. Ker. 27.

81 *Muhammad Mumtaz v. Zubaida Jan* (1889) 16 I.A. 205; *Jamil-un-nissa v. Mohammad Zia* (1937) All. 609, (1937) All. L.J. 486, 170 I.C. 824, ('37) A.A. 547; *Mst. Azizi v. Sona Mir* ('62) A. J.&K 4; *See Nurbai v. Abraham Mahomed* (1939)

41 Bom. L.R. 825, ('39) A.B. 449 which seems to have been decided on its facts.

82 *Jhumman v. Husain* (1931) 129 I.C. 161, ('31) A.O. 7; *Johara Bibi v. Subera Bibi* ('64) A.M. 373.

83 A.I.R. 1933 Mad. 86 and A.I.R. 1964 S.C. 275. Expl. *P. Kunheema Umma v. P. Ayissa Umma* A.I.R. 1981 Ker. 176 [K. Bhaskaran. J.].

84 *Mohammad v. Fakhr Jahan* (1922) 49 I.A. 195, 210, 44 All. 301, 313, 68 I.C. 254, ('22) A.P.C. 281.

Mutation of names

No mutation of names is necessary to complete the transfer of possession in the case of the gift.[85] Nor is mutation of names a valid substitute for delivery of possession.[86]

Under the Mahomedan law the three essential requisites to make a gift valid are: (1) declaration of the gift by the donor: (2) acceptance of the gift by the donee expressly or impliedly and (3) delivery of possession to and taking possession thereof by the donee actually or constructively. No written document is required in such a case. Section 129 of the Transfer of Property Act, excludes the rule of Mahomedan law from the purview of s. 123 which mandates that the gift of immovable property must be effected by a registered instrument as stated therein. But it cannot be taken as a sine qua non in all cases that whenever there is a writing about a Mahomedan gift of immovable property there must be registration thereof. Whether the writing requires registration or not depends on the facts and circumstances of each case.

Where in the case of gift of land by the Mahomedan mother in favour of her son gift deed written on ordinary unstamped paper recited that by the deed the executant was making a gift of her land to her son who was maintaining and looking after her and that her other children were neglecting her, it cannot be said that because a declaration is contained in the document it must have been registered in order to make the gift valid. Since the gift deed was written on ordinary unstamped paper has to be taken as a form of declaration by the donor and cannot be said to be a formal instrument of gift so as to require registration under s. 17. When the donee had been possessing the land and got his name mutated in the revenue records with respect to the land, it is implied that there was acceptance on behalf of the donee and also that the possession of the property was delivered to the donee by the donor. Therefore, the gift would be valid without registration of the gift deed.[87]

One Rafiullah gifted property to Noor Jehan Begum (wife of his son) by a gift deed in 1916. There was no mutation of names till 1942. After application for mutation was made Rafiullah died during the pendency of the proceedings.

It was held that the gift was made and was also accepted. On the question of delivery of possession it was held that it was not proved. The recitals in the deed only raised a rebuttable presumption. Subsequent conduct was held material. Rafiullah continued to manage the property and appropriate profits. Parties lived far apart and therefore, there was no possibility of physical delivery. The gift was held to be invalid.[88]

In the gift by a sister in favour of her brother when the brother was already in possession and there was no subsequent conduct inconsistent with delivery of possession it was held that where the donee is already in possession of the undivided share in immovable property gifted to him there is no further act or retaking of possession necessary. From the moment the deed is executed, the donee is deemed to be in possession to the exclusion of the donor.[89]

The Apex Court in *Abdul Rahim v. Abdul Zabar* ,[90] has again reiterated that the gift under Mohammadan Law is a contract which takes effect through offer and acceptance. If by reason of a valid gift, the thing gifted has gone out of the donee's ownership, the same cannot be revoked.

Transfer of possession under Muslim Law is most essential for transferring complete ownership. For effecting a valid gift, the delivery of constructive possession of the property to the donee would serve the purpose.

85 *Muhammad Mumtaz v. Zubaida Jan* (1889) 16 I.A. 205, 217; *Mohammad Sadiq v. Fakhr Jahan* (1932) 59 I.A. 1, 13, 6 Luck. 556, 136 I.C. 385, ('32) A.P.C. 13.

86 *Mohammad Azim v. Saadat Ali* ('31) A.O. 177, 136 I.C. 642.

87 A.I.R. 1973 Gauhati 105, Referred to. *Md. Hesabuddin v. Mohammed Hesaruddin* A.I.R. 1984 Gasu. 41 [S. M. Ali, J.].

88 *Mst. Noor Jehan Begum v. Muftkhar Dad Khan* ('70) A. All. 170.

89 *Takkadi Syed Mohamed v. Ahmed Fathummal* ('73) A. Mad. 302.

90 (2009) 4 M.L.J. 1075, See also *Moosa Sulaiman v. Abdul Khader Yunus* LNIND 2002 MAD 207.

Burden of proof

&uot;By the Muhammadan law a holder of property may in his lifetime give away the whole or part of his property if he complies with certain forms; but it is incumbent upon those who seek to set up such a transaction show very clearly that those forms have been complied with. It may be by deed of gift simply. [That is, *hiba*], or by deed of gift coupled with consideration. [That is *hiba-bil-iwaz*, as to which see 168.] If the former, unless accompanied by delivery, of the thing given, so far as it is capable of delivery, it is invalid. If the latter (in which case delivery of possession is not necessary), act ual payment of the consideration must be proved, and the *bona fide* intention of the donor to divest himself in *praesenti* of the property, and to confer it upon the donee, must also be proved&uot;.[91]

Where in a suit for declaration that the plaintiff, a Muslim was entitled to a certain share in the suit property, based upon a settlement deed made by the ancestor of both the parties, it was held that the plaintiff was entitled to a decree prayed for, when the settlement deed relied upon by the plaintiff was proved to be true and valid and was acted upon and accepted by the donees and possession of the properties was also transferred to the donees. It was more so when, it was proved that the earlier settlement deed relied upon by the opposite parties was not act ed upon.[1]

91 *Chaudhri Mehdi Hasan v. Muhammad Hasan* (1906) 28 All. 439, 448-449, 33 I.A. 68, 75-76; *Khajooroonissa v. Rowshan Jehan* (1876) 3 I.A. 291, 307, 2 Cal. 184, 197; *Sadik Husain v. Hashim Ali* (1916) 43 I.A. 212, 221, 38 All. 627, 645-646, 36 I.C. 104; *Gulam Jafar v. Masludin* (1881) 5 Bom. 238, 242.

1 *S.A. Hamila Bivi v. Fatima Bivi,* A.I.R. (1987) Mad. 129.

Subsequent delivery of possession

A gift is not complete unless possession is taken at the time of gift, that is at the time of declaration and acceptance.[2] Possession taken at a subsequent date is sufficient if it was taken with the donor's consent.[3]

2 See (1916) 43 I.A. 212, 222-223, 38 All. 627, 646-647, 36 I.C. 104, *infra; Mulani v. Maula Bakhsh* (1924) 46 All. 260, 262-263, 78 I.C. 222, ('24) A.A. 307.

3 *Macnaghten*, p. 50, s. 4, and case 14, p. 215; *Jhumman v. Husain* ('31) A.O. 7, 129 I.C. 161.

Who can challenge the validity of the gift?

The question whether possession has been delivered is relevant only when an issue is raised between the donor or those claiming under him on one side, and the donee or those claiming under him on the other. A stranger cannot invoke the rule that the gift is bad because there has been no delivery of possession.[4] Once the donee accepts the gift and stood by it, a stranger cannot question its validity on the ground of want of delivery of possession.[5]

4 *Kairun Bai v. Mariam Bi* ('60) A.M. 447, A.I.R. October 1960.

5 *Sayed Eqbal v. Rabia Bee* (1984) 1 An. W.R. 300 [Kodancaramayya, J.].

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CHAPTER XI

GIFTS

151.

Gift through the medium of trust

(1) A gift may be made through the medium of a trust. The same conditions are necessary for the validity of such a gift as those for a gift to the donee direct with this difference that the gift should be accepted by the trustees (149), and possession also should be delivered to the trustees.[6](150).

(2) A Mahomedan cannot through the medium of a trust settle property for the benefit of persons who are incapable of taking under a gift, nor can he through the medium of a trust create an estate nor recognized by the law of gifts governing the sect to which he belongs. Thus neither a Sunni nor a Shia can make a gift in favour of an unborn person; so he cannot through the medium of a trust settle property in favour of an unborn person. Life estates and vested remainders are unknown to Muslim Law, but life estates may be construed as an interest in the usufruct (*see* 55). Successive life-interests, however, may be created both under the Sunni and the Shia law in favour even of unborn persons by means of a wakf.

[*A*, a Shia Mahomedan, executes a deed purporting to transfer certain immovable properties to *B*, *C* and *D* as trustees for the benefit of his wife and children. The deed is executed by *A* and it is registered. It is not executed by *B*, *C* and *D* or any of them. None of the properties is transferred to the names of the trustees, and *A* continues to be in receipt and enjoyment of the rents as before, here there is no acceptance of the trust by the trustees, nor is there any delivery of possession to the trustees. The gift is therefore void.[7]

The introduction of trustees is merely the employment of machinery whereby the gift is carried into effect.[8] Acceptance of a trust by trustees is indicated by their executing the deed of trust. In the case put above, the deed was not executed by the trustees, and hence there was no acceptance.

As in the case of a gift to the donee direct, so in the case of a gift through the medium of a trustee, the donor should divest himself of all control over the corpus of the property. If he does not do so, the gift is invalid.[9]

In a Bombay case[10] a single Judge took the view that according to Shia law a gift could be made

through the medium of a trust to an unborn person provided a life-estate in favour of a person existing at the date of the trust intervened. It is submitted that the test relied on related to settlements by way of wakf, and the basis of the decision, namely, that life-estates and vested remainders are recognised by Shia law, is after the decision in *Nawazish Ali Khan v. Ali Raza Khan* [11] no longer good law.

6 *Sadik Husain v. Hashim Ali* (1916) 43 I.A. 212, 218-224, 38 All. 627, 642-648, 36 I.C. 104; *Mossabhai v. Yacoobbhai* (1904) 29 Bom. 267, 274-276, [a Khoja case]; *Jainabai v. Sethna* (1910) 34 Bom. 604, 6 I.C. 513; *Cassamally v. Currimbhoy* (1911) 36 Bom. 214. 259-260, 12 I.C. 225 [A Khoja case]; *Ram Charan v. Fatima Begam* (1915) 42 Cal. 933, 938, 30 I.C. 686 (a case of wakf); *Mirza Haashim v. Bindaneem* (1928) 6 Rang. 343, 113 I.C. 255 ('28) A.R. 323; *Sugrabai v. Mahomedali* (1934) 36 Bom. L.R. 1151, 154 I.C. 984, ('35) A.B. 34.

7 *Sadik Husain v. Hashim Ali* (1916) 43 I.A. 212, 218-224, 38 All. 627, 642-648, 36 I.C. 104.

8 *Ram Charan v. Fatima Begam* (1915) 42 Cal. 933, 938, 30 I.C. 686.

9 *Mirza Hashim v. Bindaneem* (1928) 6 Rang. 343, 113 I.C. 255, ('28) A.R 323 [where the condition that the trustees should not sell the property without the consent of the donor was held to render the gift invalid].

10 *Gulamhusein v. Fakir Mahomed* (1946) 48 Bom. L.R 733, ('47) A.B. 185, dissenting from *Mirza Hashim v. Aga Abdul* (1927) 5 Rang. 252, 103 I.C. 189, ('27) A.R 242. Baillie II, p. 214.

11 (1948) 75 I.A. 62, ('48) A.P.C. 134 [In this case a passage from Ameer Ali was cited in arguendo at p. 711.]

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CHAPTER XI

GIFTS

152.

Delivery of possession of immovable property

(1) *Where donor is in possession.*--A gift of immovable property of which the donor is in actual possession is not complete, unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession.[12]

A recital in the deed of gift that the donor has divested himself and put the donees in possession binds the donor's heirs even if one of the heirs is later found in possession. Such a gift is valid.[13]

If the donor has done all in his power to divest himself and put the donee in possession, that is enough.[14]

(2) *Where property is in the occupation of tenants.*--A gift of immovable property which is in the occupation of tenants may be completed by a request by the donor to the tenants to attorn to the donee,[15] or by delivery of the title deed or by mutation in the Revenue Register or the landlord's *sherista*.[16] But if the husband reserves to himself the right to receive rents during his lifetime and also undertakes to pay Municipal dues, a mere recital in the deed that delivery of possession has been given to the donee will not make the gift complete.[17]

Since for a valid gift under the Mohammedan Law delivery of such possession as the nature of the property gifted was susceptible was enough and constructive possession was also permissible, gift of tenanted property would not be invalid as violating the rule that the subject matter of the gift should be

unencumbered.[18]

Where immovable property is in possession of tenants, the gift is completed by asking tenants to attorn to the donee. Where, however, both the donor and donee reside in the property some overt act is necessary.[19]

Delivery of a house in possession of tenants is completed by delivery of title deeds and asking the tenants to attorn to the donee.[20]

(3) *Where donor and donee both reside in the property.*--No physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift.[21] The principle for the determination of questions of this nature was thus stated by West, J., in a Bombay case.[22]&uot;When a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession without any physical departure or formal entry.&uot;

When a father makes a gift of the dwelling house to his sons, and both the father and the donees (sons) are residing in the house, there is no need for delivery of possession.[23]

It is no doubt correct that it is essential for the validity of a gift under the Mahomedan Law that the donor should divest himself completely of all ownership and dominion over the subject of the gift. The gift with reservation of possession of property by the donor during his lifetime is void. In the instant case, there is no evidence that there was any reservation of the possession of the property by the donor during his lifetime the statement made by the daughter that her father can stay in the property till his lifetime does not amount to reservation of possession.

Further, when both the donor and the donee reside in the property at the relevant time when the gift was declared, it was not necessary for the purposes of effecting delivery of possession that the donor must physically depart from the premises with all his goods, and chattels and a formal entry be effected by the donee on the premises. In such circumstances, mere declaration of the person previously in possession puts the donee into possession without any physical act or departure or formal entry.

When it has been established beyond doubt that after the declaration of the gift, and handing over of the possession by the donor to the donee, an application was made on the same day to the Land Records Authority, for mutation of the property from the name of the donor to the name of the donee and that the statements of both the parties were recorded in which the factum of delivery of possession was admitted and in consequence, the Land Records Authority actually mutated the property from the name of the donor to the donee, this overt act by the donor and the donee establishes compliance with the requisite condition of the delivery of possession of the property.[24]

Where the donor and donee reside together in a house, it is not necessary to depart from the house but some overt act showing that the donor has divested himself of the property is sufficient. In the cited case papers were handed over and the donor consented to record the name of the donee in the Municipal records, it was held that the condition about delivery of possession was satisfied.[25]

Illustrations to Sub-section (3)

(1) A Mahomedan lady, who had brought up her nephew as her son, executed a deed of gift in favour of the nephew of a house in which they were both residing at the time of the

gift. The donor did not physically depart from the house either at the time of the gift or at any subsequent period, but continued to live in the house with her nephew. The property was transferred to the name of the nephew, and the rents were recovered in his name. Held that the gift was complete, though there was no formal delivery of possession.[26]

(2) A Mahomedan lady executed a deed of gift in favour of her son of a house in which she and her son were both living. The son continued to live with her in the house after the execution of the deed. The deed recited that possession was given to the son and the son paid Municipal taxes after the execution of the deed. Held that the gift was complete although there was no physical departure or formal entry.[27]

(3) A Mahomedan lady executed a deed of gift in favour of her nephew of a house in which they both resided, the nephew continued to live with her in the house after the execution of the deed. The deed contained no recital that possession was given. The deed was not delivered to the nephew and the lady paid Municipal, taxes after execution of the deed. *Held* that the gift was invalid and ineffective.[28] Where there was no attornment by tenants, nor even delivery of deed of gift, the gift was held invalid.[29]

(4) A Mahomedan whose daughter-in-law is living in his house declares in unequivocal language that he has divested himself of the ownership of half the house and authorizes the daughter-in-law to take possession of that half. The daughter-in-law continues to reside in that half as before. Held that the gift was complete although there was no mutation of names in the Municipal Register.[30]

(5) A Mahomedan lived in the house of his sister and made a gift of his estate to the sister's son. There was no delivery of possession of the estate and it was *held* that the gift was invalid.[31]

(6) A paternal grand-mother gifted property to the defendant by the deed of settlement, but property was not delivered to the donee. The settlor and settlee lived together in the house. There was a clear intention to gift the property and hold it on behalf of the settlee. As the minor could get possession for himself and he lived in the house, a reservation by the donor of the right of residence did not detract from the gift. The boy was aged 15 years and could accept the gift. It was, therefore not necessary that the property should be handed over to the natural guardian. A donor can constitute himself as the guardian or indicate some other person and hand over possession to him. There should be a clear intention to make a gift and to deliver possession. Where the donor and the donee reside together an overt act only is necessary.[32]

(7) A Muslim gifted certain funds to his minor daughter and grand-daughter. He made appropriate entries in his books of account. This was held to be delivery of the funds to the donees. When it is the father or legal guardian a *bonafide* intention to gift is enough and no change of possession is necessary. If the donor is not the father nor the legal guardian (e.g. the grandfather when the father is alive), acceptance can be constructive. If the father withdrew interest on the funds, there is constructive acceptance. Although the donor must divest himself of possession in *praesanti*, acceptance may be express or implied.[33]

12 Macnaghten, p. 231, Prec. XXII.

13 *Ismail v. Idrish* A.I.R. 1974 Pat. 54D.B.

14 *Ismail v. Idrish* ('74) A. Pat. 54(D.B.) *Basirul Hua v. Mohammad Alimuddin* ('81) A. Pat. 291.

15 *Shaik Ibrahim v. Shaik Suleman,* (1884) 9 Bom. 146, 150; *Bibi Khaver v. Bibi Rukhia* (1905) 29 Bom. 468, 477; *Khajooroonissa v. Rowshan Jehan* (1876) 2 Cal. 184, 197, 3 I.A. 291. 308; *Allah Rakha v. Ali Mahommad* (1925) 9 Lah. 567.108 I.C. 741. ('29) A.L. 45; *Khair Mahomed Urs v. Bachi* (1940) Kar. 319 (attornment not proved). But see *Anjuman Islamia v. Ashiq Hussain,* P.L.D. 1967 Lah. 336; (Where although the gift deed contained a recital that possession had been delivered, the gift was held incomplete as there was no express request or permission of the donor for the tenants to attorn to the donees.)

16 *Gani Mia v. Wajid Ali* (1935) 39 Cal. W.N. 882, 61 Cal. L.J. 328, 156 I.C. 563, ('35) A.C. 393. (A full treatment of the subject by Mitter. J.) *Shaik Khatum Bibi v. Mohd Zahina Bi* (1956) Andh. W.R. 771.

17 *Jayanabibi v. Jayarabi* (1950) 1 M.L.J. 209, ('50) A.M. 761.

18 *Ibrahim Shah Mohamad v. Noor Ahmad Noor Mohamed* A.I.R. 1984 Gujarat 126.

19 *Hayatuddin Haji Shujauddin v. Abdul Gani Abdul Hafiz* ('76) A. Bom. 23.

20 *Sujaythi Nuluku v. Nandini* (1976) 1 A.P.L.J. 211; *K. Adib Begum v. S.A.B.B.* (1970) 2 M.L.J. 98.

21 *Shaik Ibrahim v. Shaik Suleman* (1884) 9 Bom. 146; *Abdul Majidkhan v. Husseinbu* (1920) 22 Bom. L.R. 229, 55 I.C. 952; *Humera Bibi v. Najm-un-nissa* (1905) 28 All. 147 (aunt to nephew); *Bibi Khaver v. Bibi Rukhia* (1905) 29 Bom. 468 (gift to daughter-in-law and her children); *Kandath v. Musalium* (1907) 30 Mad. 305 (mother do daughter); *Jamil-un-nissa v. Mohammad Zia* (1937) All. L.J. 486, 170 I.C. 824, ('37) A.A. 547; *Mt. Kanizan v. Mt. Lalifan* (1939) 183 I.C. 71, ('39) A.P. 316; *Mt. Naurozi v. Najat Ali Shah* (1939) 184 I.C. 508, ('39) A.P. 321; *Mst. Azizi v. Sona Mir.* ('62) A J.&K. 4; *Ayeeshee Bivi v. Mohd. Alim* ('64) A.M. 309; (donor-donee living together -- donor's physically parting with property not necessary). *See* also *C.T.D.A Pathumma v. Pokku* A.I.R. 1998 Ker 134.

22 (1884) 9 Bom. 146, 150, *supra*.

23 *Abdul Sattar Ostagar v. Abu Bakkar Ostagar* A.I.R. 1977 Cal. 132 [Nirmal Chandra Mukherji and Bankim Chandra Ray, JJ.].

24 *Ibrahim Haji Musa Haji Rasul Samol v. Sugrabibi* (1978) 19 G.L.R. 1136 [B. K. Metha, J.].

25 *S.M.S. Saleem Hashmi v. Syed Abdul Fateh* ('72) Pat. 279.

26 *Humera Bibi v. Najm-un- nissa* (1905) 28 All. 17.

27 *Abdul Razak v. Zainab Bi* (1933) 63 Mad. L.J. 887,141 I.C. 843, ('33) A.M. 86.

28 *Qamar-ud-din v. Mt. Hassan Jan* (1935) 16 Lah. 629,159 I.C. 968, ('35) AL. 795.

29 *Hussaina Bai v. Zohra Bai* ('60) A.M.P. 60; see also *Maitheen Bivi Umma v. Ithappiri Varkey* ('56) A. Trav.-C. 292.

30 *Baldeo Prasad Balgovind v. Shubratan* (1936) All. L.J. 590, 164 I.C. 720.

31 *Mt. Hajra v. Dost Mohammad* (1946) All. L.J. 410, 228 I.C. 72, ('47) A A. 180.

32 *Ibrahim Bibi v. K.M.M. Pakkir Rowther* ('70) A. Mad. 17.

33 *Qhamrunnissa Begum v. Fathima Begum* ('68) A. Mad. 367.

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CHAPTER XI

GIFTS

153.

Gift of immovable property by husband to wife

The rule laid down in 152(3) applies to gifts of immovable property by a wife to the husband,[34] and by a husband to the wife, whether the property is used by them for their joint residence,[35] or is let out to tenants.[36] The fact that the husband continues to live in the house or to receive the rents after the date of the gift will not invalidate the gift, the presumption in such a case being that the rents are collected by the husband on behalf of the wife and not on his own account.[37]

Gift from husband to wife

In *Amina Bibi v. Khatiji Bibi* [38] the gift was from a husband to the wife, and the gift consisted of a

house in which the husband and wife lived together, and of a chawl (adjoining the house) which was let out to tenants. Sir M. Sausse, CJ., said: &uot;In my opinion, the relation of husband and wife and his legal right to reside with her and to manage her property rebut the inference which in the case of parties standing in a different relation would arise from a continued residence in the house after the making of the *hiba* (gift), and in the husband generally receiving the rents of the chawl annexed to that house.&uot; In *Ma Mi v. Kallander Ammal* ,[39] the gift was by a husband to the wife, and mutation of names was duly effected in public records and the wife's name was entered as proprietress. Dealing with this case their Lordships of the Privy Council said: &uot;It must therefore be taken that mutation was effected by Moideen [husband] himself, and in the case of a gift of immovable property by a Mahomedan husband to his wife, once mutation of names has been proved, the natural presumption arising from the relation of husband and wife existing between them is that the husband's subsequent acts with reference to the property were done on his wife's behalf and not on his own.&uot; But no mutation of names is necessary if the deed of gift declares that the husband delivered possession to the wife, and the deed is handed over to her and retained by her.[40]

When a husband following the Hanafi School makes a gift of immovable properties to his minor wife by a registered deed and the wife has attained puberty and discretion, and the gift is accepted on her behalf by her mother in whose house both the spouses are living at the time and the father of and father's father of the wife are not alive and there is no executor of one or the other, such a gift is valid and complete. In the case there was no doubt that ownership was divested on the part of the husband and the gift deed was handed over to the mother of the wife, in whose care and charge both the donor and the donee were at the time.[41] Gift of Immovable property by father to minor son -- Minor's grandfather, guardian under law, alive -- Possession given to the mother will not invalidate the gift.[42]

In the case of gift of immovable property no physical departure or formal entry is required, 'where the property is used by the husband and wife for their joint residence, or is let out to tenants. The fact that the husband continued to live in the house or to receive the rents after the date of the gift will not invalidate the gift, the presumption in such a case being that the residence was on account of matrimonial obligation and that the rents are collected by the husband on behalf of the wife and not on his own account. It has also been held that no mutation of names is necessary if the deed of gift declares that the husband delivered possession to the wife and the deed is handed over to her and retained by her.[43]

See also 156.

The Gujarat High Court in *Noorbibi v. Ayeshabibi* .[44] has also held that a gift by husband to his wife who has been living in the house jointly, there is no necessity for formal departure of donor and formal entry of the donee in the property. Implied consent of the donee regarding acceptance of gift can be presumed in such cases and the gift will be perfectly valid. Some superfluous and redundant recitals in deed such as that wife would be owner if there is quarrel between husband and wife would not render gift deed to be in future or conditional gift and therefore invalid.

34 Macnaghten, p. 51, s. 9.

35 *Amina Bibi v. Katija Bibi,* (1864) 1 Bom. H.C. 157; *Azim-un-nissa v. Dale* (1868) 6 Mad. H.C. 455

36 *Emnabai v. Hajirabai* (1888) 13 Bom. 352.

37 *Ma Mi v. Kallander Ammal* (1927) 51 I.A. 23, 5 Rang. 7, 100 I.C. 32 ('27) A.P.C. 22, approving (1864) 1 Bom. H.C. 157, 162, *supra*; *Mohammad Sadiq v. Fakhr Jahan* (1932) 59 I.A. 1, 6 Luck. 556, 136 I.C. 385, ('32) A.P.C. 13; (1888) 13 Bom. 352, 354-355, *supra*; *Bibi Maniran v. Mohd Ishaque.* ('63) A.P. 229.

38 (1864) 1 Bom H.C. 157, 162, *supra*.

39 (1927) 54 I.A. 23, 30, 5 Rang. 7, 100 I.C. 32, ('77) A.P.C. 22.

40 *Mohammad Sadiq v. Fakhr Jahan* (1932) 59 I.A. 1 13, 6 Luck. 556, 136 I.C. 385, ('32) A.P.C. 13.

41 *Katheessa Umma v. N. Kunhamu* ('64) A.S.C. 275.

42 *Ibrahim Shah Mohamad v. Noor Ahmed Noor Mohamed,* A.I.R. 1984 Gujarat 126.

43 *Noohu Pathuammal v. Ummathu Ameena,* A.I.R. 1980 Mad 66.

44 A.I.R. 1999 Guj. 27.

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CHAPTER XI

GIFTS

154.

Delivery of possession in case of incorporeal property and actionable claims

When the subject of the gift is incorporeal property or an act ionable claim, the gift may be completed by any act on the part of the donor showing a clear intention on his part to divest himself in *praesenti* of the property, and to confer it upon the donee.

(a) A gift of Government promissory notes may be completed by endorsement and delivery to the donee.[45]
(b) A gift of zamindari rights, held under Government, may be completed by mutation of names in the books of the Collector.[46]
(c) *A* hands over to his wife a receipt passed to him by a bank in respect of money deposited by him with the bank, and says &uot;after taking a bath I will go to the bank and transfer the papers to your name.&uot; The receipt contains in the margin the words &uot;not transferable.&uot; *A* dies before the transfer is effected. The gift is not complete.[47] The receipt being &uot;not transferable,&uot; the donor's right to receive the money from the bank cannot be transferred by a mere delivery of the receipt.

As regards delivery of possession, a distinction ought to be made between cases where, from the nature of the subject of the gift, act ual possession cannot be given to the donee and cases where such possession can be given to the donee. Thus where lands are let on leases, no *khas* or actual possession can be delivered. In such a case a gift of the lands is valid though possession is not delivered.[48] There is no doubt that the principle of Mahomedan law is that possession is necessary to make a good gift, but the question is, possession of what? If the donor does not transfer to the donee, *so far as he can*, all the possession which he can transfer, the gift is not a good one. As we have said above, there is, in our judgment, nothing in the Mahomedan law to prevent the gift of a *right* to property. The donor must, *so far as it is possible for him*, transfer to the donee that which he gives, namely, such right as he himself has; but this does not imply that where a *right to property* forms the subject of a gift, the gift will be invalid unless the donor transfers what he himself does not possess, namely, the *corpus* of the property. He must evidence the reality of the gift by divesting himself *so far as he can*, of the whole of what he gives&uot;.[49]

45 *Nawab Umjad Ally Khan v. Mohumdee Bagum* (1867) 11 M.I.A. 517, 554.

46 *Sajjad Ahmad Khan v. Kadri Begum* (1895) 18 All. 1.

47 *Aga Mahomed Jaffer v. Koolsom Beebee* (1897) 25 Cal. 9, 17.

48 *Mullick Abdool Guffoor v. Muleka* (1884) 10 Cal. 1112.

49 *Anwari Begam v. Nizam-ud-din Shah* (1898) 21 All. 165, 170-171.

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CHAPTER XI

GIFTS

155.

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 *bonafide* intention to give.[50]

Hedaya, 484; Baillie, 538; Macnaghten, p. 51, s. 9. &uot;Where there is on the part of a father or other guardian a real and bona fide intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor&uot;.[51] When a father gifts property to his child, the position is peculiar. While it is true that law does not find anything wrong for the father to gift his property to his child, the difficulty arises from a twofold position. Firstly, a minor may not be physically able to be in possession of the property except through his guardian and, secondly the father is himself the guardian of the property of his minor child. Delivery of possession by a Mahomedan father to his minor child is, for all practical purposes, delivery by right hand to the left hand.[52]

See also:-- *Abdul Sattar v. Abu Bakkar,* A.I.R. 1977 Cal. 132.

This section will not apply, and it is necessary to transfer possession, if there are other donees besides the minor child, e.g., a trust for the benefit of a minor daughter and her adult husband.[53]

The guardian referred to in this section is the guardian of the property of the minor. The following persons are entitled, in order, to the guardianship of the property of a minor, namely, (1) the father, (2) his executor, (3) the father's father and (4) his executor. No change of possession is necessary in the case of a gift by a father to his minor son for the father himself is the person to receive possession as the guardian of his son. Similarly, no change of possession is necessary in the case of a gift by a grandfather to his minor grandson *if the father is dead*, for the grandfather is then the person to take delivery on behalf of his grandson as his guardian. *But if the father is alive and has not been deprived of his rights and powers as guardian*, there must be a delivery of possession by the grandfather to the father as guardian of his minor sons, otherwise the gift is not complete. The mere fact that the minors have always lived with their grandfather and have been brought up and maintained by him will not constitute him guardian of their property so as to dispense with delivery of possession.[54]

The mother is not in law the guardian of the property of her infant child; therefore, a gift by a *mother* to her infant child *does* require transfer of possession from her to the child's father, and, if the father be dead, to his executor, and if there be no executor, to the child's father's father, and if he be dead, to his executor. But if there be none of these, no change of possession is necessary in the case of a gift by a mother to her infant child, or in the case of a gift by any other person to a minor under his care (156).

Where delivery and possession of a gift to a minor is effected to a person specified by the donor as guardian (other than the father) and the father accepts, or acquiesces in, such an arrangement, the gift is valid.[55]

The Karnataka High Court has observed that delivery of possession by a Muslim father to his minor child is, for all practical purposes, delivery by right hand to the left hand. This is evidently the reason why the strict requirement of delivery of possession is not strictly insisted upon in the case of bona fide gift by the father to his minor child. In a sense the requirement continues, but it is fulfilled in a somewhat different manner. Till the date of gift, the father is in possession of the relevant property on his behalf. From the date of the gift he is in possession of the same, but only on behalf of the minor.

The Court further held that the law intends to make a gift valid and legal so far as possible so as to give full justice to the desire of the donor. Where there was no other guardian of the property or person of the minor and the mother was the only person who could look after the interest of the minor, acceptance of the gift by the mother was not illegal or invalid. In such cases, the benefit to the minor and the completion of the gift for his benefit was the sole consideration.[56]

The Madras High Court held that when a father or mother themselves as the natural guardian bequeathed the property on his or her minor child at the time of the marriage, no other guardian need be appointed and the gift will be perfectly valid.[57]

50 *Ameeroonissa v. Abadonissa* (1875) 15 Beng. L.R. 67, 78, 2 I.A. 87, 04; *Mohammad Sadiq v. Fakhr Jahan* (1932) 59 I.A. 1, 6 Luck. 556, 136 I.C. 385, ('32) A.P.C. 13 (bona fide intention proved); *Sultan Miya v. Ajibakhaton Bibi* (1932) 59 Cal. 557, 138 I.C. 733, ('32) A.C. 497 (bona fide intention not proved); *Fatima Bibi v. Ahmed Baksh* (1904) 31 Cal. 319, 330; *Khaliq Bux v. Mahabir Prasad* (1931) 6 Luck. 403, 129 I.C. 335, ('31) A.O. 19; *Mohammad Hassan v. Safdar Mirza* (1933) 14 Lah. 473, 144 I.C. 45, ('33) A.L. 601; *K. Veerankutty v. Pathumakutty* (1956) Mad. 1004. *Munni Bai v. Abdul Gani* ('59) A.M.P. 225 (gift to a minor 'practically adopted as a son').

51 *Ameeroonnissa v. Abadoonnissa* (1875) 15 Beng. L.R. 67, 78, L.R. 2 I.A. 87, 104.

52 *Kadderanbi v. Fatimabi,* A.I.R. 1981 Bombay 406.

53 *Sugrabai v. Mahomedali* (1934) 36 Bom. L.R. 1151,154 I.C. 984, ('35) AB. 34.

54 *Musa Miya v. Kadar Bux* (1928) 55 I.A. 171, 52 Bom. 316, 109 I.C. 31, ('28) A PC. 108.

55 *Azeshabai v. Kathoonbi* ('66) AM. 462.

56 *K. Abdul Hamid v. Sabira Begum* A.I.R. 2006 Kant 289. See also *Zulaiga v. Mohd. Mahamood Khan* LNIND 1991 AP 169.

57 *Aiyeshagani v. Abu Hanifa* (2002) 2 M.L.J. 199.

Mulla: Mahomedan law, Updated 20th edition/CHAPTER XI GIFTS/156. Gift to a minor by a person other than his father or guardian

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156.

Gift to a minor by a person other than his father or guardian

A gift to a minor or to a lunatic by a person other than his father or guardian may be completed by delivery of possession to the father or guardian.[58] A gift will also be complete when a minor, who has attained discretion, himself takes possession.[59]

Mohamedan Law does not dispense with the necessity for acceptance of the gift even in cases where the donees are minors. In the case cited there was not even a recital in the deed that possession was handed over and no evidence to show that to whom the deed was handed over.[60]

&uot;When the donee is a minor, or insane, the right to take possession for him belongs to his guardian, who is, first his father, then his father's executor, then his grandfather, then his executor.&uot; If there be none of these, possession may be taken for the minor by any person under whose power he may happen to be (s. 361): Baillie, 539; *Hedaya*, 484; Macnaghten, p. 15, s. 10. Of course, no change of possession is necessary where the guardian himself is the donor. (*see* notes to 155.)

For instances of cases where the strict rule requiring the giving of possession to one of the stated guardians of-the minor was not regarded as a condition of the validity of a gift; See the judgment of the Supreme Court in *Katheessa Umma v. Narayanath Kunhamu,* [61] where it was held that there was no legal impediment preventing a person other than a legal guardian, *e.g.* a trustee or a person acting as such trustee, from accepting a gift on behalf of a minor and taking possession.

The mother is not the legal guardian and therefore possession given to her when one of the stated guardians is alive is ineffectual.[62] But where a husband made a gift of properties, including immovable property, by a registered deed, to his minor wife who had attained puberty and discretion, and the gift was accepted on her behalf by her mother in whose house the husband and wife were residing, when the minor's father and the father's father were not alive and there was no executor of the one or the other, the gift was held by the Supreme Court to be valid and complete.[63]

In *Gulam Hussain v. Abdul Rashid,* [64] the Supreme Court of India has concurred with its earlier judgment and the decision of the Privy Council,[65]that where the father of a minor is alive the mother of the minor cannot act as a guardian of her minor son to accept the gift on his behalf.

58 *Musa Miya v. Kadar Bux, supra, Jhumman v. Hussain* ('31) A.O. 7, 129 I.C. 161 (gift by maternal uncle --no possession delivered gift held invalid).

59 *Mt. Fatma v. Mt. Autun* (1944) Kar. 151 ('44) A.S. 195. *Muni Bai v. Abdul Gani* ('59) A.M.P. 225, 226; *Assankutty v. Mohd. Kurikkal* (1961) Ker. L.T. 959; *Katheessa Umma v. Narayanath Kuhamu* ('64) A.S.C. 275.

60 *S.N. Usman Ali v. O.B.V. Kubendra Bai* (1973) Mad. 280.

61 ('64) A.S.C. 275. See also *Abdul Rahim v. Zeenath Bi* ('63) A.M. 186.

62 *Suna Meah v. S. A. S. Pillai* (1933) 11 Rang. 109, 143 I.C. 823, ('33) A.R. 155; *Abdul Raheman v. Mishrimal* (1959) 61 Bom. L.R. 761; but see; *Katheessa Umma v. Narayanath Kunhamu, supra* .

63 *Katheessa Umma v. Narayanath Kunhamu (supra)* .

64 2000 (8) S.C.C. 508, See also *Muas Miya v. Kadar Bux* A.I.R. 1928 PC 108; *Valia Peedikakkandi Kutheessa Umma v. Pathakkalan Naravanath Kuhmamu* 1964 (4) S.C.R. 549.

65 2000 (8) S.C.C. 508, See also *Muas Miya v. Kadar Bux* A.I.R. 1928 PC 108; *Valia Peedikakkandi Kutheessa Umma v. Pathakkalan Naravanath Kuhmamu* 1964 (4) S.C.R. 549.

CHAPTER XI

GIFTS

157.

Gift to a bailee

Where the subject of the gift is already in the possession of the donee as bailee, the gift may be completed by declaration and acceptance, without formal delivery of possession.

[(a) A gift of property in the possession of a bailee, lessee, pledgee or mortgagee may be completed without formal transfer of possession: *Hedaya*, 464: Baillie, 552.
(b) *A* makes a gift of a house to a servant in his employ for the collection of *rents*. There is no evidence of any &uot;overt act showing transfer of possession of the property.&uot; The gift is void, for a servant or an agent for the collection of rents cannot be said to be in &uot;possession&uot; of the *house* of which he collects the rents.[66]

66 *Valayet Hossein v. Maniran* (1879) 5 C.L.R. 91.

Mulla: Mahomedan law, Updated 20th edition/CHAPTER XI GIFTS/158. Mushaa defined

CHAPTER XI

GIFTS

158.

Mushaa defined

Mushaa is an *undivided* share in property either movable or immovable.

Mushaa means undistributed or common; in legal language it refers to undivided portions of property and in particular to such property which forms the subject matter of a gift. 'Mushaa' is derived from 'shuyuni' which mean: The confusion contemplated appears to the probable confusion regarding the enjoyment of the property by other cosharers as a result of the gift of a share by one or more cosharers. If, by the very nature of the property or by the relationship of the contracting parties; the gift of a definite share cannot lead to a confusion of enjoyment in future, the 'mushaa' rule shall not be applied with all its rigidity. The exceptions laid down by judicial precedents indicate that if the gift of the undivided share cannot affect the normal enjoyment of the property or if a physical partition may determentally affect the enjoyment of the property, a gift shall not fall because it is the transfer of an undivided share in the property. Apart from pressing into service the 'mushaa' rule, the defendants have not specifically pleaded that by the transaction confusion will be caused in the matter of undivided property. In the absence of the necessary facts constituting the basis upon which the 'mushaa' rule can be applied to the suit property, it cannot be held that the gifts should be avoided by the application of the 'mushaa' rule. The appellants have no case that the gift of 'mushaa' property is void *ab initio* because it is well-settled that the gift can be perfected by a subsequent partition and delivery of possession of the share dealt with by the gift deed. There are exceptions to the above principle of subsequent division. Where the donor has made a gift of his entire interest to the donee which was a share in a property, it is not possible for the donor to voluntarily effect a division and then deliver his share to the donee. In such cases the donee has a right to sue for partition. In this case, the 4th defendant has conveyed his entire share to the plaintiff by the gift deeds and so the suit for partition by the plaintiff donee is perfectly competent.[67]

67 *Kunhimoideekutty v. Abdulkhader* (1977) K.L.T. 193 [N.D.P. Namboodiripad, J.].

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159.

Gift of mushaa where property indivisible

A valid gift may be made of an undivided share (*mushaa*) in property which is *not capable* of partition.

[*A*, who owns a house, makes a gift to *B* of the house and of the right to use a stair-case used by him jointly with the owner of an adjoining house. The gift of *A*'s undivided share in the stair-case, though it is a gift of a mushaa, is valid, for a stair-case is not capable of division.[68] A gift of a share in the business of a Turkish bath is valid, for the Hammam is not capable of division and would be ruined if it were divided by metes and bounds.[69] A gift of an undivided share of the banks of a tank is valid if the banks are regarded as indivisible.[70]

Gift to joint donees is valid notwithstanding the doctrine of *Mushaa.*[71]

Relying on a Judgment of the Privy Council,[72] the Madras High Court held the doctrine of 'mushaa' inapplicable to the facts of the case.[73]

68 *Kasim Husain v. Sharif-un-Nissa* (1883) 5 All. 285.

69 *Fayyaz-ud-din v. Kutab-ud-din* (1929) 10 Lah. 761, 116 I.C. 899, ('29) A.L. 309.

70 *Ala Baksa v. Mahabat Ali* (1935) 61 Cal. L.J. 209,159 I.C. 678, ('35) A.C. 739.]

71 *Kollanchil P. Abdul Rahim v. Kunhimohammad:* ('75) A. Ker. 150.

72 *Sheikh Muhummad Mumtaz Ahmad v. Zubaida Jan,* (1889) L.R. 16 I.A. 205.

73 *Inum Beevi v. K.S.Syed Ahmed Kabir* (2001) 1 M.L.J. 307. See also, *Amina Bibi v Ummu Salma Bibi* 2004 (4) L.W. 383. *See* also *Karium Bi v. Mariam Bi* A.I.R. 1960 Mad. 447.

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CHAPTER XI

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160.

Gift of mushaa where property divisible

A gift of an undivided share (*mushaa*) in property which is *capable of division* is irregular (*fasid*), but not void (*batil*). The gift being irregular, and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him. If possession is once taken the gift is validated (ill. (a)).

Exceptions.--A gift of an undivided share (*mushaa*), though it be a share in property *capable of division*, is valid from the moment of the gift, even if the share is not divided off and delivered to the donee, in the following cases:--

(1) where the gift is made by one co-heir to another [ill. (b)];

Kanij Fatima v. Jai Narain, [74] a case of gift by mother to daughter of two anna share in lands, the

daughter having taken joint possession.

(2) where the gift is of a share in a zemindari or taluka [ill. (c)];
(3) where the gift is of a share in freehold property in a large commercial town [ill. (d)];
(4) where the gift is of shares in a land company,[75]

(a) *A* makes a gift of her undivided share in certain lands to *B*. The share is not divided off at the time of gift, but it is *subsequently* separated and possession thereof is delivered to *B*. The gift, though irregular in its inception, is validated by subsequent delivery of possession.[76]

A gift of Mushaa is not invalid if the donor divests himself of all his interest in the property and puts the donee in such possession as the property admits.[77]

A gift of a Kaimi raiyati land (undivided share) is valid and the doctrine of Mushaa is not applicable.[78]

A gift of an undivided share of the banks of a tank if regarded as property capable of division is validated by admission of the donee to possession.[79]

A makes a gift of an undivided share of land to B, who is not a cosharer, and there is no subsequent partition. The gift is not validated.[80]

When at the time of the execution of the gift deed, co-sharers are in joint possession of a house, the physical possession of some co-sharers will be deemed to be on behalf of the others who will be regarded as in constructive possession. If there has been a gift of an undivided share in a house, so held to be in constructive possession, and the donor divests himself or herself of possession at the time of making the gift and delivers constructive possession to the donee, then the gift is not hit by the doctrine of *Mushaa*. There must be evidence of constructive possession Each case will be decided on its own facts.[81]

(b) A Mahomedan female dies leaving a mother, a son and a daughter as her only heirs. The mother may make a valid gift of her undivided share in the inheritance to the son, or to the daughter, or jointly to the son and daughter.[82]
(c) *A, B* and *C* are co-sharers in a certain zemindari. Each share is separately assessed by the Government, and has a separate number in the Collector's books, and the proprietor of each share is entitled to collect a definite share of rents from the tenants. *A* makes a gift of his share to *Z* without a partition of the zemindari. The gift is valid, for it is not a gift strictly of a mushaa, the share being definite and marked off from the rest of the property.[83]
(d) *A*, who owns a house in Rangoon, makes a gift of a third of the house to B. The gift is valid, the property being situated in a large commercial town.[84]
(e) *A*, a partner in a firm, makes a gift of his share of the partnership assets to *B*. The gift is not valid unless the share is divided off and handed over to A-*Hedaya* 483; Baillie, 529-530.

Where the share of the donor in the assets of the partnership on the date of the gift was not insufficient to support the gift of the donated amount, the debit entry in the account of the donor partner and the credit entries in the accounts of the donee partners were a sufficient declaration of the gift by the donor, a sufficient acceptance of the gift by the donees and a delivery of such possession as the subject of the gift was susceptible of *Md. Kassim v. Controller of Estate duty* .[85]

Hedaya, 483,484; Baillie, 523-530. &uot;A gift of part of a thing which is capable of division is not valid unless the said part is divided off and separated from the property of the donor; but a gift of part of an indivisible thing is valid,&uot; the reason being that the thing being divisible, &uot;a complete seisin is altogether impracticable, and hence an incomplete seisin must necessarily suffice, since this is all that the article admits of.&uot;

The term &uot;*mushaa*&uot; is derived from *shuyuu*, which signifies confusion. An undivided share is called mushaa, because of the confusion that is likely to arise in the enjoyment of the property if a gift were made of an undivided share in the property by one co-sharer to a *stranger*. No such confusion can arise, if the gift is by one co-sharer to another co-sharer. The result is that a gift by one of several heirs of his undivided share in property which is capable of division to a stranger is irregular, but a gift of such a share in favour of a co-heir is valid.

Doctrine of mushaa unadopted to a progressive state of society

In *Muhammad Mumtuz v. Zubaida Jan* ,[86] upon which illustration (a) is based, their Lordships of the Privy Council said: &uot;the doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules.&uot; This principle was applied by their Lordships of the Privy Council in the case cited in ill. (d). It was also applied by the Allahabad High Court in a case where a sister made a gift to her husband of her share in six houses and three fields by a registered deed of gift. The property was divisible, but the gift was held to be valid as the donor who had only constructive possession had done all she could to put the donee in possession.[87] In *Ala Baksh v. Mahabat Ali* [88] the same principle was applied. It was considered that the gift of an undivided share is valid in anything which can be used to better advantage in an undivided condition.

74 (1944) 23 Pat. 216, ('44) AP. 334.

75 *Ibrahim Goolam Arif v. Saiboo* (1907) 35 Cal. 1, 34 I.A. 167.

76 *Muhammad Mumtaz v. Zubaida Jan* (1889) 11 All. 460, 16 I.A. 205; *Mohomed v. Cooverbai* (1904) 6 Bom. L.R. 1043; *Mohib Ullah v. Abdul Khalik* (1908) 30 All. 250; *Abdul Aziz v. Fateh Mahomed* (1911) 38 Cal. 518, 9 I.C. 635; *Mofezzudin Talukdar v. Abed Ali Sheikh* (1935) 62 Cal. L.J. 424.

77 *Masoom Sab v. Madan Sab* ; (1973) 1 A.P.L.J. 97.

78 *Ismail v. Idris* ('74) A. Patna, 54D.B .

79 *Ala Baksa v. Mahabat Ali* (1935) 61 Cal. L.J. 209,159 I.C. 678, ('35) A.C. 739.

80 *Said Hussan v. Shah Hussain* ('47) A.L. 272.

81 *SK. Aftab Husain v. Smt. Tayebba Begum* ('73) All. 54. *Said Hassan v. Shah Hussain* ('47) A. Lah. 272 not followed.

82 *Mahomed Buksh v. Hoosseini Bibi* (1888) 15 Cal. 684, 701, 15 I.A. 81.

83 *Ameerroonnissa v. Abadoonnissa* (1875) 15 B.L.R. 67, 2 I.A. 87; *Abdul Aziz v. Fateh Mahomed* (1911) 38 Cal. 518,9 I.C. 635; *Jiwan v. Imtiaz* (1878) 2 All. 93; *Kasim v. Sharif-un-Nissa* (1883) 5 All. 285; *Zahuran v. Abdus Salam* (1930) 5 Luck. 597, 123 I.C. 857, ('30) A.O. 71, ('37) A.C. 500; *Jahar Ali Khan v. Nasimannessa Bibi* (1937) 65 Cal. L.J; 34; *Kairom Bi v. Mariam Bi* ('60) A.M. 447; *Mst. Azizi v. Sona Mir* ('62) A. J.&K. 4.

84 *Ibrahim Goolam Ariff v. Saidoo* (1907) 35 Cal. 1, 34 I.A. 167; *Mt. Natho v. Hadayat Begum* ('49) A.I. 238.

85 ('67) A Ker. 130

86 (1889) 11 All. 460, 16 I.A. 205, 215.

87 *Hamid Ullah v. Ahmed Ullah* (1936) All. L.J. 292, 163 I.C. 558, ('36) A.A. 473.

88 (1935) 61 Cal. L.J. 209, 159 I.C. 678, ('35) A.C. 739; *Jahar Ali Khan v. Nasimanessa* (1937) 65 Cal. L.J. 34 ('37) A.C. 500, citing *Fayyazuddin Kutab-ud-din*(1929) 10 Lah. 761, 116 I.C. 899, ('29) A.L. 309; *Kalu Beg v. Gulzarbeg* (1946) Nag. 510; 224 I.C. 583, ('46) A.N. 347.

Doctrine of Mushaa in Madras

In a Madras case,[89] Benson, J., observed that the doctrine of *mushaa* did not apply in the Madras

Presidency, but it was held in a later case that that view was erroneous.[90]

89 *Alabi Koya v. Mussa Koya* (1901) 24 Mad. 513.

90 *Vahazullah v. Bayapati* (1907) 30 Mad. 519.

Doctrine of mushaa does not apply to transfers for consideration.

The rule laid down in this section applies only to gifts; it does not apply to transfers for consideration.[91]

91 *Ashidbai v. Abdullah* (1906) 31 Bom. 271.

Device to get over doctrine of mushaa

It has been held by the High Court of Allahabad that though a valid gift cannot be made to an undivided share (*mushaa*) in property which is capable of division, the difficulty may be overcome by the donor selling the undivided share at a fixed price to the person to whom the gift is intended to be made, and then releasing that person from payment of the debt representing the price.[92] If this decision were correct, delivery of possession in the case of a gift could be dispensed with in every case by the donor making a pretence of a sale to the donee and afterwards releasing the donee from the obligation to pay the price.

92 *Ahmadi Begam v. Abdul Aziz* (1927) 49 All. 503, 100 I.C. 644, ('77) A.A. 345.

Shia law

A gift of an undivided share is valid, though it be a share in property capable of partition[93]: Baillie, II, 204.

93 *Sadik Husain v. Hashim Ali* (1916) 43 I.A. 212, 221-222, 38 All. 627, 646, 36 I.C. 104.

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161.

Gift to two or more donees

A gift of property which is capable of division to two or more persons without specifying their shares or without dividing it is invalid, but if may be rendered valid if separate possession is taken by each donee of the portion of the property given to him or if there is a subsequent arrangement between all the donees with regard to the possession of the property gifted. This rule does not apply to the case

mentioned in the third Exception to 160,[94] nor, it is conceived, to the cases mentioned in the other Exceptions.

A makes a gift of a house to *B* and *C* without making any division of the property at the time of gift. Subsequently *B* and *C* divide the property and each takes possession of the portion allotted to him with the consent of the donor. Is the gift valid? According to Macnaghten (p. 50. s. 7, p. 201, case 5), it is not, the reason given being that the division should have taken place simultaneously with the transfer. According to Baillie (p. 524), the gift is not void in its inception and it may be rendered valid by subsequent division between the donees. The latter seems to be the better opinion. See also *Hedaya*, p. 485. The Bombay High Court has held that the rule is obsolete and that a gift can be made to two donees, although they are to hold the property as tenants in common.[95] The Patna[96] and Nagpur[97] High Courts have taken the view that a subsequent arrangement between the donees with regard to the property gifted would validate the gift.

[The Jammu and Kashmir High Court has held in a recent case that a gift to the donor's wife and child of the whole of certain property where the share of each of the donees is specified, is valid; and that it could not be considered invalid merely because an act ual partition of the gift had not been made.[98]

In view of the way in which this rule has been interpreted, the scope for its operation is very narrow. However the reason for the rule against a gift of a *mushaa* is based on the intention to avoid difficulty and confusion in ascertaining what precise property has been given in gift to a donee; and even where it is clear what the property gifted is, difficulty may still arise where there are two or more donees and their shares are not specified. In such a case the gift would be irregular (*fasid*) unless it is validated in one of the ways referred to above.] (*see* also 159 above)

94 *Ibrahim Goolam Ariff v. Saiboo* (1908) 35 Cal. 1, 34 I.A. 167.

95 *Ebrahim Alibhai v. Bai Asi* (1933) 58 Bom. 254, 35 Bom. L.R. 1148, 149 I.C. 225, 034) A.B. 21; *Mohammad Yusuf v. Hasina Yusuf* ('48) A.B. 61. *Musa Baba v. Badesahab* ('38) A.B. 84; *Assan Kutty v. Mohd. Kurikkal* (1961) Ker. L.T. 959. See *Kasim Ali v. Ratna Manikka Mudaliar* (1938) M.W.N. 403, ('38) A.M. 677.

96 *Kaniz Fatima v. Jai Narain* (1944) 23 Pat. 216, 218 I.C. 443, ('44) A.P. 334.

97 *Kalu Beg v. Gulzarbeg* (1946) Nag. 510, 224 I.C. 583 ('46) A.N. 357.

98 *Mst. Azizi v. Sona Mir* 1962 A. J. & K. 4.

Shia law

Under the Shia law a gift of property to two or more donees is valid, though no division is made either at the time of gift or subsequently: Baillie, II, 205.

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CHAPTER XI

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162.

Gift in futuro

A gift cannot be made of anything to be performed *in futuro* [ills, (a) and (b)], nor can it be made to

take effect at any future period whether definite [ill. (c)] or indefinite.[1]

[(a) *A* makes a gift to *B* of &uot;the fruit that may be produced by his palm tree this year.&uot; The gift is void as being a gift of future property: Baillie, 516.

(b) A Mahomedan executes a deed in favour of his wife purporting to give to the wife and her heirs in perpetuity Rs. 4,000 every year out of his share of the income of certain Jaghir villages. The gift is void, as being a gift of a portion of the future revenue of the villages.[2] But the Madras High Court has held that now a gift of future revenue, being in the nature of usufruct, is valid.[3](*see* also, illustration (c) under 165 below)

(c) *A* executes a deed of gift in favour of *B*, containing the words &uot;so long as I live, I shall enjoy and possess the properties, and I shall not sell or make gift to anyone, but after my death, you will be the owner.&uot; The gift is void, for it is not accompanied by delivery of possession and it is *not to operate until after the death of A*.[4](*see* also *Chekkonekutti v. Ahmed* [5])

(d) A is entitled to receive a specified share in the offerings made by pilgrims at a certain shrine. A may make a valid gift of the right to receive such share. Here the thing gifted is &uot;the right of the donor to receive a fixed share in the offerings after they have been made&uot; (*see* 144).[6]

Macnaghten, p. 50, s s. 3 and 5; Baillie, 516. The rule set forth in this section is based on the principle that the object of the gift must be in existence at the time of the gift: Baillie, 516.

1 *Chekkonekutti v. Ahmed* (1887) 10 Mad. 196, 199, *Phul Bee Bee v. R.M.P. Chettyar Finn* (1935) 13 Rang. 679, 156 I.C. 1038.

2 *Amtul Nissa v. Mir Nurudin* (1896) 22 Bom. 489; *Anwar Reza v. Hachinur Reza* (1944) 1 Cal. 680, 221, I.C. 262, ('45) A.C. 189.

3 *Duriesh Mohideen v. State of Madras* ('57) AM. 577.

4 *Yusuf Ali v. Collector of Tipperah* (1882) 9 Cal. 138.

5 (1886) 10 Mad. 196, at p. 199.

6 *Ahmad-ud-din v. Ilahi Bakhsh* (1912) 34 All. 465, 14 I.C. 587; *Anwari Begam v. Nizam-ud-din Shah* (1898) 21 All. 165, at pp. 170-171.]

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CHAPTER XI

GIFTS

163.

Contingent gift

A gift cannot be made to take effect on the happening of a contingency.[7]

&uot;A gift must not be dependent on anything contingent, as the entrance of Zeyd, or the arrival of Khalid&uot;: Baillie, 515- 516, 549-550. A gift by a Shia Mahomedan to *A* for life, and *in the event of the death of A* without leaving male issue to *B*, is as regards *B,* a contingent gift, and therefore void.[8] In a Privy Council case a gift was made by a Shia Mahomedan to his wife for life, and after her death to *such of his children as may be living at his death*. Their Lordships observed that the gift to the children was contingent, but they refrained from expressing any opinion as to its validity.[9] In a similar case it was held by the Bombay High Court that the gift was contingent and therefore invalid.[10] In

Nawazish Ali Khan v. Ali Raza Khan ,[11] a Shia testator bequeathed his estate to *A* for life, if he was living, then to *B* for life, if he was living, on *A*'s death, and then to *C* for life, if he was living, on *B*'s death. The last devisee was given a power of appointment. It is submitted that the bequest of life estates to *B* and *C* were contingent, but neither of the parties to the litigation was interested in raising the point. As to alternative bequests, see 126 and see Family Law and Social Change, p. 17 et seq.

7 Macnaghten. p. 50, s. 3; Baillie, 515-516; *Abdul Karim v. Abdul Qayum* (1906) 28 All. 342, 345.

8 *Cassamally v. Currimbhoy* (1911) 36 Bom. 214, 257-258, 12 I.C. 225.

9 *Sadik Hussain v. Hashim Ali* (1916) 43 I.A. 212, 219-221; 38 All. 627, 643-644, 36, I.C. 104.

10 *Ashraf Alii v. Mahomed Alli* (1946) 48 Bom. L.R. 642; ('47) A.B. 122.

11 *Nawazish Ali Khan v. Ali Raza Khan* (1948) 75 I.A. 62, ('48) A.P.C. 134.

CHAPTER XI

GIFTS

164.

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.[12]

"All our masters are agreed that when one has made a gift and stipulated for a condition that is *fasid* or invalid, the gift is valid and the condition is void": Baillie, 546.

Gift of a life-estate

Life estates were considered to come under this principle with the result that the donee took an absolute interest. But in *Amjad Khan's* case[13] the Judicial Committee did not regard the principle as applicable to the facts (*see* 55 and the cases there cited). "An amree (life grant) is nothing but a gift and a condition; and the condition is invalid; but the gift is not rendered null by involving an invalid condition": *Hedaya*, 489. In a later case the Privy Council[14] observed that there was no such thing as life estate or vested remainder in Mahomedan Law as understood in English Law, but a gift for life would be construed as an interest for life in the usufruct.

'Life estate' in the sense, that is, the transfer of the ownership of the property itself limited to the life of the donee, with a condition that the donee would have no right of alienation is not recognised by Mahomedan Law. But the view that once prevailed to the effect, that under the Mahomedan law, a life interest with such a condition is nothing but a gift with a repugnant condition, when the condition must fail and the gift must prevail as an absolute one, is no longer' good law in view of later decisions of the Privy Council.

A grant, however, creating a limited interest which can be construed without any inconsistency as one limited merely to the use of the property and enjoyment of the usufruct thereof, is valid under the Mahomedan law.[15]

> &uot;A life estate does not militate against the validity of the gift because the corpus of it is absolutely given over to a named individual and the condition whereby the income should be enjoyed either by the donor or his nominee does not detract from or violate the essence of a valid gift. If in a given illustration the subject-matter of the gift is sliced away by the donor, or the condition or restriction contemporaneously imposed by the donor is so obvious that one would understand the gift as taking away a portion of the corpus of the gift, then Mohamedan Law does not accept it as a valid gift. The reason is obvious. By imposing such a restriction as above, the entirety of the property which is the subject-matter of the gift is not given away but only a portion thereto. This is not possible to make it a valid gift. If however the restriction or the condition is such whereby a right to enjoy the income from the gifted property is contemplated, and whether such enjoyment is by the donor or by his nominee, it would not be tantamount to the taking away of a portion of the corpus of the property, but it is only a temporary right to enjoy the usufruct therefrom.&uot;[16]

In *Mrs. Hazara Bai v. Mohamed Adam Sait.* [17] The donor intended to give only a life-estate to the plaintiff. The preamble to the gift deed used the word 'absolute' but the deed was not in favour of the plaintiff only. It was in favour of her children also, on whom absolute rights were conferred. The fact that the preamble did not mention the children would not make any difference. The operative clause showed that only a life estate was given to the plaintiff, while the children were given an absolute right. The document cannot be construed as conferring an absolute interest on the plaintiff with a condition against alienation. If, under Mahomedan law, life estate cannot be created by gift, then in this case it must be held that the plaintiff got nothing under the document. If the document in terms creates only a life estate, there is no warrant to construe the same as one creating an absolute estate with a condition against alienation, on the theory that life estates by way of gifts are unknown to Mahomedan law. If such theory holds good, under a document creating a life estate the donee would get nothing and not an absolute estate at all. It should be taken to be settled law that if, in a Mahomedan gift, a life-estate is created, it would take effect out of the usufruct. Therefore, in the present case the plaintiff having, been granted only a life estate it takes effect out of the usufructs of the property.

Mahomedan law makes a distinction between the corpus of the gift (*Ayn*) and the usufructs (*Manafi*). A reservation of rights in manaft, so long as the *ayn* is transferred, does not render the gift bad. If however, possession of the corpus is reserved, the gift will be bad.[18]

In general, Muslim Law draws no distinction between real and personal property and no authoritative work is found, which affirms that Muslim Law recognizes the splitting up of ownership of land into estates, or in point of quality like legal and equitable estates, or in point of duration like estate in fee sample, in tail, for life or in remainder. What Muslim Law does recognize and insist on is the distinction between the corpus of the property itself (any) and the usufruct in the property (*manafi*). Over the corpus of the 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 interest 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.[19]

Where the donee reserved to himself the usufruct. It was held that such reservation does not detract from the validity of the gift, and does not make it void in law.[20]

In *Jameela Begum v Controller of Estate Duty Madras* .[21] The Supreme Court has laid down that Mahomedan law makes a distinction between the corpus of a gift (*Ayn*) and the usufruct (*Manafi*). A reservation of rights in '*Manafi*' so long as the '*Ayn*' is transferred does not render the gift bad.

In the instant case, the condition revealed that the settlement confirmed absolute right, title and interest in the property on the beneficiary subject to the only obligation of payment of the income from the property to the settlor during his lifetime and after his death to his wife, i.e. the mother of the beneficiary during her lifetime. The settlement and the condition being thus valid and the wife of the settlor having had a charge on the property for realisation of the income only. She should be taken to have had interest in the property which ceased on her death, and the corresponding benefit created

will go to the beneficiary.

The Kerala High Court also insists that there is no life interest in Mahomedan law, for the corpus, though it is possible to provide for a provision reserving the right to take usufruct while giving the absolute right in the corpus to the donee.[22]

Where a husband before his death executed gift deed of the suit property in favour of wife towards life maintenance, the Andhra Pradesh High Court has correctly held that here gift is only of usufruct (*manafi*) and not corpus. Wife has only life interest in such property but she cannot alienate such property.[23]

12 *Nizamuddin v. Abdul Gafur* (1888) 13 Bom. 264, 275 affirmed on appeal to P.C. subnomine *Abdul Gafur v. Nizamuddin* (1892) 17 Bom. 1, 5, 19 I.A. 170, 178 [as to the last decision, see *Mahomed Ibrahim v. Abdul Latiff* (1913) 37 Bom. 447, 458, 17 I.C. 689]; *Suleman v. Dorab Ali* (1881) 8 I.A. 117, 122; *Abdoola v. Mahomed* (1905) 7 Bom. L.R. 306; *Mahomed Shah v. Official Trustee of Bengal* (1909) 36 Cal. 431, 2 I.C. 292; *Ma Hmvin v. R.L.S.A.R.S. Chettyar* (1935) 158 I.C. 848, ('35) A.R. 318.

13 (1929) 56 IA. 213, 4 Luck. 305; 116 I.C. 405, ('29) A.P.C. 149.

14 *Nawazish Ali Khan v. Ali Raza Khan* (1948) 75 I.A. 62, ('48) A.P.C. 134.

15 *Marzina Bibi v. Anjaman Bibi* 81 C.W.N. 1967 [A.K. Sen, J.].

16 *Jameela Beevi v. Sheik Ismail* A.I.R. 1979 Mad. 193.

17 (1977) 1 M.L.J. 291.

18 *Mundayat Vedake v. Chiru Kandan* (1971) K.L.J. 796.

19 *Mohan Ali v. State of M.P.* (1975) 2 S.C.W.R. 511 [V.R Krishna Iyer, R.S. Sarkaria and A.C. Gupta, JJ.].

20 *Madathil Thattantavita Khalid v. Palott Moothammantakath Sainabi* (1981) Ker.L.T. 621: A.I.R. 1981 Ker. 230 [G. Viswanatha Iyer and T. Kochu Thommen, JJ.].

21 A.I.R. 1991 SC 414.

22 *Kochu Ahammed Pillai v. Pathummal* A.I.R. 2003 Ker. 217, (2003) 1 KLT 826, LNIND 2003 Ker. 100.

23 *Abdul Khader v. Muzaffarudin* LNIND 2010 AP 339 See also, *K. Mohamed Muthu v. Mrs Habeeba Beebi* (2004) 3 M.L.J. 84.

Illustrations

(a) If a Sunni Mahomedan says, &uot;this mansion is to *thee oomree* (for thy life), and when thou art dead it reverts to me,&uot; the gift is lawful, and the condition is void: Baillie, 517; *Hedaya*, 489,

The result is that the donee takes an absolute interest in the mansion, and not only a life-interest, this is the *legal effect* of the gift. Similarly, if a house is given to *A* for life, and after his death to B, the legal effect of the gift is that *A* takes the house absolutely, and *B* takes nothing. The same rule applies to a testamentary gift.[24] But if the gift is not of an absolute interest with a condition of defeasance but of a limited interest it would appear to be valid as a gift of the usufruct. (*see* 55(1)).

(b) *A* makes a gift of Government promissory notes to *B*, on condition that *B* should return a *fourth part of the notes* to *A* after a month, the condition is void and B takes an absolute interest in the notes: see Baillie, 547; Hedaya, 488. (Here the condition relates to the *return* of part of the *corpus*.)

(c) *A* makes a gift of a house to *B* on condition that he shall not sell it, or that he shall sell it to a particular individual, or that *B* shall give *some part of it in iwaz* or exchange. The condition is void, and *B* takes an absolute interest in the house: Baillie, 547. (*see* 165).

Restraint against alienation.--In the case of a gift, a restraint against alienation, whether absolute or partial, is void. In the case of a transfer for a consideration, it is valid if the restraint is partial, as where it is provided that the transferee shall not sell the property to any one but the members of the transferor's and transferee's family,[25]but void if the restraint is absolute. (see Transfer of Property Act, s. 10)

(d) *A* makes a gift of certain property to *B*. It is provided by the deed of gift that *B* shall not transfer the property. The restraint against alienation is void, and *B* takes the property absolutely.[26]

Life-grant under Shafei law.--A gift for life is recognized among Shafeis, a sub-sect of Sunnis.[27](But see 55)

24 *Abdul Karim v. Abdul Qayum* (1906) 28 All. 342; *Ma Hymin v. P.L.S.A.R.S. Chettyar* (1935) 158 I.C. 848, ('35) A.R. 318.

25 *Muhammad Raza v. Abbas Bundi Bibi* (1932) 59 I.A. 236, 7 Luck. 257, 36 C.W.N. 774, 137 I.C. 321, ('32) A.P.C. 158.

26 *Babu Lal v. Ghansham Das* (1922) 44 All. 633, 70 I.C. 84, ('22) A.A. 205.

27 *Mahomed Ibrahim v. Abdul Latiff* (1913) 37 Bom. 447, 458, 17 I.C. 689.

Life-grant under Shia law

The Shia law recognizes a gift of a life-estate.[28] Thus it is that in Baillie, II, 226, that if a man says, "I have bestowed on thee this mansion for thy life or my life," it is a valid gift. In *Nisar Ali Khan v. Mahomed Ali Khan* [29] the Privy Council construed a Shia will as creating a succession of life estates but did not have to consider the validity of the second and third life interests. (But *see* 55)

28 *Bano Begum v. Mir Abed Ali* (1908) 32 Bom. 172; *Siraj Husain v. Mustaf Husain* (1921) O.C. 321, 49 I.C. 58.

29 (1932) 59 I.A. 268, 7 Luck. 324, 34 Bom. L.R. 1299; 137 I.C. 539, ('32) A.P.C. 172.

CHAPTER XI

GIFTS

165.

Condition in the nature of a trust

Where property is transferred by way of gift, and the donor does not reserve dominion over the corpus, of the property nor any share of dominion over the corpus, but stipulates simply for and obtains a right to the *recurring income* during his life, the gift and the stipulation are both valid. Such a

stipulation is not void, as it does not provide for a return of any part of the corpus as in 164 ills, (b) and (c). The stipulation may also be enforced as an agreement raising a trust and &uot;constituting a valid obligation to make a return of the proceeds during the time stipulated. It was so held by the Privy Council in *Nawab Umjad Ally v. Mohumdee Begum,* [30](where it was held that the donor had not divested himself completely of all dominion over the property in that the deed of trust contained a condition that the trustees should not sell the property without the consent of the donor, and that the reservation of a life-interest by the donor to himself was therefore invalid). [ill. (a)] which was a Shia case and in *Mohammad v. Fakhr Jahan,* [31] which was a Sunni case. .

The principle of the above decision has been extended by the Courts in India to cases where a gift is made subject to the condition that the donee shall pay the income to a person or persons nominated by the donor during the life of such person or persons [ills, (b) and (c)].

Illustrations

(a) *A* transfers and endorses Government promissory notes into the name of his son *B*, and delivers them to *B* as a gift, with a condition that *B* should pay the income thereof to *A* during his life. Both the gift and the condition are valid, and *B* is bound to pay the income to *A* during *A*'s life: *Nawab Umjad Ally v. Mohumdee Begum* [32] The same principle applies to a gift by a Sunni Mahomedan: *Mohammad v. Fakhr Jahan* ;[33]*Zohara Khathum v. Mahaboob Bi.* [34]

(b) *A* makes a gift of his house to his son *B* with a condition that *B* should give the income of one-third of the house to *A's* grandson *C* during *C*'s life, both the gift and the condition are valid, and *B* is bound to pay the income to *C* during *C*'s lifetime.[35]

(c) *A* makes a gift of certain property to her son *B* with a condition that *B* should pay out of the income thereof Rs.40 every year to *C* during *C*'s life and divide the remaining income equally between him *(B)* and *(D)* during *D*'s life. Both the gift and the condition are valid, and *B* is bound to pay Rs.40 per annum to *C* and divide the remaining income equally between himself and *D* until *D*'s death.[36] Where a Mahomedan made a *hibanama*, gifting the corpus of his properties to his two sons *A* and *B*, and out of the usufruct thereof an allowance of R s. 350 annually to his daughter, *C*, and after her life, to that lady's heirs and successors permanently, the gift was held as creating a valid obligation on *A* and *B* to pay the annual allowance to *C*.[37]

(d) A Mahomedan lady transfers certain immovable properties by way of gift to her nephews upon condition that they should pay her Rs.900 every year for her maintenance. She also reserves a right of residence for herself in a portion of one of the properties. The deed of gift contains a stipulation that if the payments are not regularly made, she should be at liberty to recover them, by a suit. This is not a valid gift, for the payment of Rs.900 is not made dependent upon the profits of the *corpus* being sufficient to meet it, as in ills, (a), (b) and (c); the consideration for the transfer is the promise to make the payment in any event.[38]

(e) A Mahomedan executed a deed of trust of part of his property for the benefit of his sons with the condition that he was to remain in possession so long as he lived with power to deal with the rents and profits and that the legal estate was to pass to his sons after his death.--Held that the condition was invalid-as the donor reserved the legal and beneficial interest during his lifetime; that the gift was invalid as possession was not given to the sons; and that the gift was also invalid as it was to take effect *in futuro.*[39]

(f) *A* makes a gift to *B* of the whole of his property on condition that *B*shall pay all/fs debts. The gift is valid and the condition is valid to the extent of the property gifted. Section 128 of the Transfer of Property Act is not in violation of any rule of Mahomedan law.[40]

(g) *A* makes a gift of land to 5, who is not related within the prohibited degrees, subject to the condition that *B* maintains *A* for his life. The gift is valid, but if *B* fails to maintain *A*, *A*

may file a suit for revocation of the gift.[41]

(h) The Nawab Nazim of Bengal, a Shia, deposited certain sums of money with the British Government for the benefit of his seven daughters for life. The Government issued promissory notes in favour of the daughters and continued to pay interest to them. On a suit by the successor to the Nawab Nazim it was held that the life interests created in favour of the daughters were valid under Mahomedan law and the daughters were only entitled to the income during their lives, after which the property passed to the heirs of the grantor.[42]

A limited estate may be created by family arrangement provided it is supported by consideration. This is not repugnant to Mahomedan Law.[43]

Note.--The transaction in each of the illustrations (a), (b), (c) and (f) is in substance a *hiba-ba-shart-ul-iwaz*, as to which see 169 below.

30 (1867) 11 M.I.A. 517, 547-548; *Mirza Hashim v. Bindaneem* (1928) 6 Rang. 343, 113 I.C. 255, ('28) A.R. 323.

31 (1922) 49 I.A. 195, 208-210, 44 All. 301, 314-416, 68 I.C. 254, ('22) A.P.C. 281

32 (1867) 11 M.I.A. 517, 547-548, a Shia case.

33 (1922) 49 I.A. 195, 44 All. 301, 68 I.C. 254, ('22) A.P.C. 281.

34 (1943) 2 M.L.J. 99. ('43) A.M. 677.

35 *Lali Jan v. Muhammad* (1912) 34 All. 478,16, I.C. 105, a Sunni Case.

36 *Tavakalbhai v. Imatiyaj Begam* (1916) 41 Bom. 372, 39 I.C. 96, a Sunni case.

37 *Duriesh Mohideen v. State of Madras* ('51) A.M. 577.

38 *Sarifuddin v. Mohiuddin* (1927) 54 Cal. 754,767, 105 I.C. 67. ('27) A.C. 808.

39 *Phul Bee v. R.P.M. Chettyar Firm* (1935) 13 Rang. 679, 156 I.C. 1038.

40 *Krishna Behari v. Mt. Ahmadi* (1925) 11 Luck. 199. 155, I.C. 303, ('35) A.O. 432.

41 *Ali Jan v. Praguni* ('50) A.P. 300.

42 *Anjumanara Begum v. Nawab Asif Kadar* (1955) 2 Cal. 109.

43 *Jainulabdeen Rowther v. Pappathi Ammal* I.L.R. (1968) 1 Mad. 477.

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CHAPTER XI

GIFTS

166.

Gift over

The Chief Court of Oudh has held that a gift of property to *A* and *B* in equal shares with a condition that if either of them died without leaving male issue his share should go to the other, is valid according to the Shia law.[44] But the reasoning in *Nawazish Ali Khan v. Ali Raza Khan* would indicate that the gift over would be void and *A* and *B* would take absolutely.[45]

According to the Sunni law, the condition would be void, and *A* and *B* would each take his share of the

property absolutely, and it would descend on his death to his heirs. (*see* 164)

44 *Musammat Wahibunnisa v. Mushaj Husain* (1927) 2 Luck. 187, 95 I.C. 113, ('27) A.O. 328.

45 (1948) 75 I.A. 62, ('48) A.P.C. 134.

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CHAPTER XI

GIFTS

167.

Revocation of gifts

(1) A gift may be revoked by the donor at any time before delivery of possession. The reason is that *before* delivery there is no completed gift at all.

(2) Subject to the provisions of sub-sec. (4), a gift may be revoked even after delivery of possession except in the following cases:--
- (a) when the gift is made by a husband to his wife or by wife to her husband;
- (b) when the donee is related to the donor within the prohibited degrees;
- (c) when the donee is dead;
- (d) when the thing given has passed out of the donee's possession by sale,[46] gift or otherwise;
- (e) When the thing given is lost or destroyed;
- (f) when the thing given has increased in value, whatever be the cause of the increase;[47]
- (g) when the thing given is so changed that it cannot be identified, as when wheat is converted into flour by grinding;[48]
- (g) when the thing given is so changed that it cannot be identified, as when wheat is converted into flour by grinding;[48]
- (h) when the donor has received something in Exchange (*iwaz*) for the gift (*see* 168 and 169).

(3) A gift may be revoked by the donor, but not by his heirs after his death.[49] It is the donor's law that will apply to a revocation and not that of the donee.[50]

(4) Once possession is delivered, nothing short of a decree of the Court is sufficient to revoke the gift. Neither a declaration of revocation by the donor nor even the institution of a suit for resuming the gift is sufficient to revoke the gift. Until a decree is passed, the donee is entitled to use and dispose of the subject of the gift.[51]

Hedaya, 485; Baillie, 533-537. The reason why a gift to a person other than a husband or wife or to a person other than one related within the prohibited degrees may be revoked is thus stated in the *Hedaya*, p. 486: &uot;The object of a gift to a *stranger* is a return:-- for it is a custom to send presents to a person of high rank that he may protect the donor; to a person of inferior rank that the donor may obtain his services; and to person of equal rank that he may obtain an equivalent;--and such being the case it follows that the donor has power of annulment, so long as the object of the deed is not answered, since a gift is capable of annulment. Mere cancellation of the gift deed does not cancel the

gift. For the cancellation of a gift, a decree of the court is required.[52]

A stranger cannot challenge the validity of a gift even if not followed by delivery of possession. Such an inquiry can only be between the donor and his donee, or between those claiming under them.[53]

A gift by an uncle to a sister's son is revocable.[54] A gift by a brother to a brother is irrevocable, for if they had belonged to opposite sexes, they could not have married each other.[55] There is a conflict in the reasoning of these two cases.

See Kuttialikutty Marakkar v. Kandakutty, [56](It is a rule of Shafei Law that the revocation of a gift to a child by the father must be express and cannot be by implication of a subsequent dealing of the property by the donor.)

46 *Wali Bandi v. Tabeya* (1919) 41 All. 534, 50 I.C. 919; *Mulani v. Maula Baksh* (1924) 46 All. 260, 78 I.C. 222, ('24) A.A. 307.

47 Ibid.

48 Maqbul&uot; procphrase=&uot;v.&uot; party2=&uot;Ghafur-un-nissa&uot;>Ibid.

48 *Maqbul v. Ghafur-un-nissa* (1914) 36 All. 333, 24 I.C. 225. *Abdur Rehman v. Khalilur Rehman* P.L.D. 1966 (W.P.) Pesh. 121 (right of revocation of gift dies with the death of the donor).

49 *Mahboob Khan v. Abdul Rahim* ('64) A. Raj. 250.

50 *Someshwar v. Barkat Ullah,* ('63) A.M. 469.

51 See *Mahboob Khan v. Abdul Rahim (supra)* .

52 *Abu Khan v. Moriam Bibi* (1974) 40 C.L.T. 1306.

53 *Masoom Sab v. Madan Sab* (1973) 1 A.P.L.J. 91*Karim Bi v. Mariam Bi* ('60) A. Mad. 447. (*see* also, 46 A. Nag. 57).

54 *Ghulam Mohammad v. Din Mohammad* (1936) 166 I.C. 230, ('36) A. Pesh. 208.

55 *Tajju Khan v. Mazhar Khan* ('52) A.A. 614.

56 ('67) A. Ker. 78.

Reservation of power of revocation

Where a settlor reserves to himself the power of revocation, the question arises whether a gift made through the medium of a trust is valid and, if valid, whether the settlor is entitled to exercise the power of revocation. Beaman, J., was of the opinion that the reservation of the power of revocation detracted from the completeness of the gift. In such a case, the donor could not be said to have parted with all control over the subject of the gift, and therefore, there was no valid gift.[57](*see*s. 126 of the Transfer of Property Act, 1882)

57 *Cassamally v. Currimbhoy* (1911) 36 Bom. 214, 248-249, 12 I.C. 225. (The head note is erroneous.) See also *Miraz Hashim v. Bindaneem* (1928) 6 Rang.. 343, 113 I.C. 255, ('28) A.R. 323.

Shia law

The Shia law differs from the Hanafi law in the following particulars:-- .

(a) a gift to any blood relation, whether *within the prohibited degrees or not*, is irrevocable after delivery of possession;
(b) a gift by a husband to his wife, or by a wife to her husband, is, according to the better opinion, *revocable* (Baillie, II, 205-206);
(c) a gift may be revoked *by a mere declaration* on the part of the donor without any proceedings in Court (Baillie, II, p. 205, f.n. (10)).[58]

58 *Someshwar v. Barkat Ulla* ('63) A. All. 469.

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Hiba-bil-iwaz (gift with exchange)

(1) A *hiba-bil-iwaz*, as distinguished from a *hiba* or simple gift, is a gift for a consideration. It is in reality a sale, and has all the incidents of a contract of sale. Accordingly, possession is not required to complete the transfer as it is in the case of a *hiba*, and an undivided share (*mushaa*) in property capable of division may be lawfully transferred by it, though this cannot be done in the case of a *hiba*.[59]Two conditions, however, must concur to make the transaction valid, namely, (1) act ual payment of consideration (*iwaz*) on the part of the donee, and (2) a *bona fide* intention on the part of the donor to divest himself in *praesenti* of the property and to confer it upon the donee.[60] The adequacy of consideration is not material; but whatever its amount, it must be *actually and bona fide* paid.[61] Such a transaction is called the hiba-biliwaz of India as distinguished from &uot;true&uot; *hiba-bil-iwaz* dealt with in the notes below. It was introduced by the Muslim lawyers of India as a device for effecting a gift of *mushaa* in property capable of division.[62]
(2) The High Courts of Calcutta, Madras, Lahore, Allahabad, Patna and Nagpur have held that a transaction of this character is nothing but a sale; therefore, where the property is immovable and is of the value of Rs.100 and upwards, it must be effected by a registered instrument as a required by s. 54 of the Transfer of Property Act, 1882, which relates to sales.[63] As a sale, it also gives rise to a right of pre-emption.[64]
(3) The Chief Court of Oudh,[65] has held that where a Mahomedan husband, by a document, transfers immovable property to his wife in lieu of her dower, the transaction is not a sale. This view has been dissented from by the Allahabad High Court,[66] and it is to be noted that in *Mahabir Prasad v. Mustafa Hussain* ,[67] a case from Oudh, the Privy Council observed that such a transaction was a sale. The Bombay High Court has held that where in lieu of money land is gifted by the husband to the wife at the time of marriage, a registered document is not necessary, and if delivery of possession is given, the transaction amounts to a *hiba* but is subject to the doctrine of *mushaa*.[68] This view has been followed by the High Court of Hyderabad.[69]

(a) *A* and *B*, two Mahomedan brothers, own certain villages which are held by them as tenants-in-common. *A* dies leaving his brother *B* and a widow *W*. Some time after *A*'s death, *B* executes a deed whereby he grants two of the villages to *W*. Two days after the date of the grant, *but as part of the same transaction, W* executes a writing whereby in *consideration* of the grant to her of the two villages she gives up her claim to her husband's estate in favour of B. The transaction is a *hiba-bil-iwaz*, and it is valid though possession may not have been delivered.[70]

(b) A Mahomedan executes a deed in favour of his wife whereby he grants certain immovable property to her in lieu of her dower. Possession of the property is not delivered to the wife. The transaction is nevertheless valid as *hiba-bil-iwaz.*[71] The same rule applies to a deed of settlement in consideration of a promise of marriage.[72]

Ismail Beevi v. Sulaikkal Beevi ,[73](Gift in consideration of promise of marriage and subject to condition that debts due on the property to be discharged by the donee--valid).

(c) A Mahomedan lady, who owns an undivided share (mushaa) in an immovable property which is capable of division, executes a deed whereby she transfers her share in the property by way of gift to her two nephews in consideration of the nephews paying R s. 900 to her every year for her maintenance. The deed provides that if they fail to make the payments regularly she should be at liberty to recover them by a suit. The deed is duly registered. The transaction is not a *hiba*, and it is valid though it is a transfer of a mushaa.[74](*see* also ill. (d) under 165)

59 *Baillie*, 122-123; Macnaghten, pp. 51-52, ss. 14 and 15; *Hitendra Singh v. Maharaja of Darbhanga* (1928) 55 I.A. 197, 7 Pat. 500, 109 I.C. 858, ('28) A.P.C. 112; *Sarifuddin v. Mohiuddin* (1927) 54 Cal. 754, 105 IC 67, ('27) A.C. 808; *Fateh Ali v. Muhammad* (1928) 9 Lah. 428, 119 I.C. 258, ('28) A.L. 516; *Mohammad Hassan v. Safdar Mirza* (1933) 14 Lah. 473, 144 I.C. 45, ('33) A.L. 601; *Mt. Aimna v. Lakshmichand* ('34) A.L. 705, 154 I.C. 979; *Tajunnissa Bibi v. Rahmath Bibi* ('59) A. Mad. 630.

60 *Mt. Khairunnissa v. Karamtulla* (1933) 142 I.C. 42, ('33) A.O. 99, *Mt. Bashiran v. Mohammad Husain* (1941) 16 Luck. 615, (1941) O.W.N. 249, 193 I.C. 161, ('41) A.O. 284.

61 *Khajooroonissa v. Roshan Jehan* (1876) 2 Cal. 184, 3 I.A. 291; *Muhammad Faiz v. Ghulam Ahmad* (1881) 3 All. 490, 8 I.A. 25; *Chaudhri Mehdi Hasan v. Muhammad Hasan* (1906) 28 All. 439, 33 I.A. 68; *Mohan Lal v. Mahmud* (1922) 44 All. 580, 67 I.C. 67, ('22) A.A. 347.

62 Baillie, p. XXXV.

63 *Abbas Ali v. Karim Bakksh* (1909) 13 C.W.N. 160, 4 I.C. 466; *Sarifuddin v. Mohiuddin* (1927) 54 Cal. 754, 105 I.C. 67, ('27) A.C. 808; *Saburannessa v. Sabdu Sheikh* (1934) 38 Cal. W.N. 747, 152 I.C. 422, ('34) A.C. 693; *Gopaldas v. Sakina Bibi* (1936) 16 Lah. 197, 156 I.C. 70, ('36) A.L. 307; *Mohammad Usman v. Amir Mian* (1949) 26 Pat. 561, ('49) A.P. 237; *Zainab Bi v. Jamalkhan* (1949) Nag. 426; *Masum Vali v. Illuri Modin* ('52) A.M. 671; *Ghulam Abbas v. Razia Begum* (1950) All. L.J. 30, ('51) A.A. 86 [F.B.].

64 *Satyendra Nath v. Kulsom Bibi* (1932) 36 C.W.N. 486, 139 I.C. 403, ('32) A.N. 625.

65 *Bashir Ahmed v. Zubaida Katun* ('26) A.O. 186; *Abdul Hamid v. Abdul Ghani* (1934) 148 I.C. 801, ('32) A.O. 163.

66 *Ghulam Abbas v. Razia Begum* (1950) All. L.J. 30, ('51) A.A. 86 [F.B.]

67 (1937) 39 Bom. L.R. 990, 168 I.C. 418, ('37) A.P.C. 174.

68 *Jaitunbi v. Fatrubhai* (1947) 49 Bom. L.R. 669, ('48) A.B. 114.

69 *Mohammad Hashim v. Aminabai* ('52) A. Hyd. 3.

70 see *Muhammad Faiz v. Ghulam Ahmad* (1881) 3 All. 490, 8 I.A. 25.

71 *Muhammad Esuph v. Pattamsa Ammal* (1889) 23 Mad. 70.

72 *Tajunnissa Bibi v. Rahmath Bibi* ('59) A. Mad. 630.

73 ('67) A.M. 250.

74 *Sarifuddin v. Mohiuddin* (1927) 54 Cal. 754, 105 I.C. 67, ('27) A.C. 808.

True nature of transaction

Though a transaction may be described in the plaint as a *hiba-bil-iwaz*, it is open to the plaintiff to show that it was in fact a simple *hiba,* provided that the point is raised at an early stage of the proceedings.[75]

(d) A Mahomedan dies leaving two brothers and a daughter. Subsequently, each brother relinquishes his share in the estate of the deceased in favour of the daughter in consideration of the other doing so. The transaction is not a *hiba*, the relinquishment by one brother being the consideration for relinquishment by the other, and delivery of possession to the daughter is not necessary to validate the transaction.[76]

(e) A gift made by the donor in favour of an employee who was already paid adequately for his services, would not be a *hiba-bil-iwaz*.[77]

A gift &uot;in consideration of your being my cousin&uot; is not a gift for a consideration or a *hiba-bil-iwaz*. Such a transaction is a *hiba* or simple gift, and delivery of possession is necessary to validate the gift.[78] Similarly, a gift &uot;for having with cordial affection and love rendered service to me, and maintained and treated me with kindness and indulgence, and shown all sorts of favour to me,&uot; is a *hiba* or simple gift. Such a transaction is not a *hiba-bil-iwaz*, there being no iwaz or consideration, and delivery of possession is necessary to validate the gift.[79]

75 *Serajuddin v. Isab* (1922) 49 Cal. 161, 70 I.C. 203, ('22) A.C. 258; *Sardar Khatun v. Secretary of State* (1939) Kar. 348, 179 I.C. 252 ('39) A.S. 9.

76 *Ashidbai v. Abdulla* (1906) 31 Bom. 271.

77 *Someshwar v. Barkat Ullah,* ('63) A.M. 469].

78 *Jafar Ali v. Ahmed* (1868) 5 Bom. H.C.A.C. 37.

79 *Rahim Baksh v. Muhammad Hasan* (1881) 11 All. 1; *Ewaz Mahammad v. Gafoor Khan* (1934) 147 I.C. 867 ('34) A.O. 27.

Adequacy of consideration

In *Khujooroonissa v. Roushun Jehan,* [80]which is the leading case on the subject, their Lordships of the Privy Council said: &uot;Undoubtedly the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration; but whatever its amount, it must be act ually a *bona fide* paid.&uot; It would seem to follow from this, that however small the consideration for a *hiba-bil-iwaz* may be, the transaction would be valid if the consideration was actually a *bona fide* paid. A mere promise to pay is not sufficient.[81] In a Bombay case, decided before the above Privy Council case, there was a grant by *A* to *B* of property, and the consideration for the grant was stated to be R s. 10. It was held that the consideration being only R s. 10, the transaction could not be sustained as a *hiba-biliwaz*.[82] This decision can no longer be regarded as good law. Even a copy of the Koran,[83] or a prayer carpet and rosary *(tasbih)*[84] is a good consideration for a *hiba-bil-iwaz*.

80 (1876) 2 Cal. 184, 197, 3 I.A. 291, 308.

81 *Mohammad Yahya Ali Shah v. Sardar Ali Shah* (1939) P.L.R. 267, 184 I.C. 556, ('39) AL. 292.

82 *Rujabai v. Ismail* (1870) 7 Bom. H.C.O.C 27, 30.

83 *Abbas Ali v. Karim Baksh* (1909) 13 Cal. W.N. 160, 4 I.C. 466.

84 *Jerafat Mondal v. Kamrezvan Bibi* (1955) 1 Cal. 144.

Intention to transfer in praesenti

When property was transferred to a donee *subject* to a reservation of the possession and enjoyment to the donor and his wife during their lives, it was held by their Lordships of the Privy Council that there was no intention on the part of the donor to divest himself *in praesenti* of the property and that the transaction could not be upheld as a *hiba-bil-iwaz*.[85] Where in a registered deed of gift it was stated that the donor made the gift in favour of his wife in lieu of her dower debt and that he had put the donee in possession of the land gifted from the date of its execution, and it was further stated that he had no further concern with the land gifted, and that all his rights were thereafter to be enjoyed by the donee, the gift was held to be valid although the possession of the land was not delivered.[86]

85 *Chaudhri Mehdi Hasan v. Muhammad Hasan* (1906) 28 All. 439, 453, 33 I.A. 68 (it was also found that no consideration passed from the donee to the donor); *Moosa Adam Patel v. Ismail Moosa* (1909) 12 Bom. L.R. 169, 194, 5 I.C. 946; *Mt. Bashiran v. Mohammed Hussain* (1941) 16 Luck. 615, 1931.C161, ('41) A.O. 284; *Mohammad Yahya Ali Shah v. Sardar Ali Shah* (1939) P.L.R. 267, 184 I.C. 556, ('39) A.L. 292.

86 *Mt. Bashiran v. Mohammad Husain* (1941) 16 Luck. 615, 193 I.C. 161, ('41) A.O. 284; *Mohammad Kazim Husain v. Mt. Nadri Begum* (1941) O.W.N. 532, 194 I.C. 87 ('41) A.O. 348.

True hiba-bil-iwaz

Hiba-bil-iwaz means, literally, a gift for an exchange. It is of two kinds, one being the true *hiba-bil-iwaz*, that is, *hiba-bil-iwaz* as defined by the older jurists, and the other *hiba-bil-iwaz* of India. In the former, there are two act s, namely, (1) the *hiba*, which is followed by (2) an independent and uncovenanted *iwaz* (*return-gift*, that is, an iwaz not stipulated for at the time of *hiba*. In the latter, there is only one act, the *iwaz* or exchange being involved in the contract of gift as its *direct consideration* (Baillie, 122). In the true *hiba-bil-iwaz*, the *hiba* and *iwaz* are both governed by the law of gifts. There must be delivery of possession of both the *hiba* and *iwaz*, and they are both subject to the doctrine of *mushaa*. The donor may even after delivery revoke the gift (167) at any time before the *iwaz* is delivered to him, but after delivery of the *iwaz* neither party can revoke his gift. The transaction consists of *two distinct acts of donation* between two persons, each of whom is alternately the donor of one gift and the donee of the other. Thus if *A*, *without having stipulated for any return*, makes a gift of a ring to *B* and delivers it to him, and *B*, without having promised it, subsequently makes a gift of a watch to *A*, saying that it is the *iwaz* or return for the gift of the ring, and delivers the watch to him, the transaction is a true *hiba-bil-iwaz*, and neither *A* nor *B* can revoke the gift. But if *B* delivers the watch to *A* without saying that it is the *iwaz* or return for his gift, the transaction does not amount to a *hiba-bil-iwaz*. The case is then one of two *hibas*, and either party may revoke his *hiba* (167). If *A* makes a gift of a ring to *B* saying "I have given this to you for so much," it is a *hiba-bil-iwaz* of India. It is in reality a sale, while a true *hiba-bil-iwaz* is not a sale either in its inception or completion.[87]

87 *Baillie*, 122-123, 541-543; *Rahim Baksh v. Muhammad Hasan* (1888) 11 All. 1; *Sarifuddin v. Mohiuddin* (1927) 54 Cal. 754, 105 I.C. 67, ('27) A.C. 808; *Kulsum Bibi v. Bashir Ahmed* (1937) All. 285, 166 I.C. 439, ('37) A.A. 25; *Kulsum Bibi v. Shiam Sunder Lal* (1936) All. L.J. 1027, 164 I.C. 515, ('36) A.A. 600.

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Hiba-ba-shart-ul-iwaz

Where a gift is made with a *stipulation (shart)* for a return, it is called *hiba-ba-shart-ul-iwaz*. As in the case of a *hiba* (simple gift), so in the case of a *hiba-ba-shart-ul-iwaz*, delivery of possession is necessary to make the gift valid, and the gift is also revocable (167). But the gift becomes irrevocable on delivery by the donee of the *iwaz* (return) to the donor.[88]

The main distinction between the *hiba-bil-iwaz* of India, and *hiba-ba-shart-ul-iwaz,* is that delivery of possession is not necessary in the former case, while it is necessary in the latter case.

The main distinction between *hiba-bil-iwaz,* as defined by the older jurists, and *hibaba-shart-ul-iwaz,* is that in the former the *iwaz* proceeds *voluntarily* from the donee of the gift, while in the latter it is expressly *stipulated* for between the parties. The former bears the character of a gift throughout and does not partake of the character of a sale either in its inception or completion, while as regards the latter, it is a gift in its first stage, but it partakes of the character of a sale after possession has been taken by the donee of the thing given and by the donor of the *iwaz*, so that the transaction, when completed, is exposed to *shufaa* or pre-emption, and either party may return the thing delivered to him for a defect. These two incidents, namely, the right of pre-emption and the right to return a thing for a defect, are two of the incidents of the contract of sale in Mahomedan law. As *hiba-ba-shart-ul-iwaz* is not common in India, it is unnecessary to pursue the matter further. As to the incidents of sale in Mahomedan law, the reader is referred to Baillie's Digest.[89](*see* ills (a), (b) and (c) to 165, and notes)

88 *Baillie*, 534-544; *Hedaya*, 488; *Mogulsha v. Mohammad Saheb* (1887) 11 Bom. 517 (having regard to the decision that possession was necessary, the transaction is wrongly described in the judgment as *hiba-bil-iwaz*).

89 2nd ed., Introduction to the Chapter on Sale, pp. 775-783

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Areeat

The grant of a license, resumable at the grantor's option, to take and enjoy the usufruct of a thing, is called areeat.[90]

Hedaya, 478.

A *hiba* is a transfer of *ownership* without consideration. A *hiba-bil-iwaz* is a transfer of *ownership* for a

consideration. An *areeat* is not a transfer of *ownership*, but a temporary *licence* to enjoy the profits so long as the grantor pleases, and is defined by the Durrul Mukhtar as &uot;making another the owner of the usufruct without any consideration&uot;. A *hiba* is revocable except in certain cases (167). A *hiba-bil-iwaz* is not revocable in any case. An *areeat* is revocable in every case.

In *areeat* it is not necessary for the donor to be of age, nor that the thing given should not be undivided (*mushaa*). The prohibitions governing gifts do not extend to *areeats*, for ownership is not conveyed by the latter transaction.[91]

90 *Muhammad Faiz v. Ghulam Ahmad* (1881) 3 All. 490, 8 I.A. 25, 38; *Mumtaz-un-Nissa v. Tufail* (1906) 28 All. 264, as explained in *Khalil Ahmad, in the matter of*(1908) 30 All. 309; *Muhammad Siddiq v. Risaldar* (1927) 2 Luck, 216, 95 I.C. 220, ('26) A.O. 360; *Naziruddin v. Khairat Ali* (1938) 13 Luck. 713, 172 I.C. 384 ('38) A.O. 51.

91 *Shaikh Mastan Bi v. Shaikh Bikari Saheb* (1958) 2 An. W.R. 473, ('58) A. Andh. Pra. 751.

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Sadaqah

A *sadaqah* is a gift made with the object of acquiring religious merit. Like *hiba*, it is not valid unless accompanied by delivery of possession; nor is it valid if it consists of an undivided share in property capable of division (160). But unlike *hiba*, a *sadaqah*, once completed by delivery, is not revocable; nor is it invalid if made to two or more persons all of whom are *poor* (161).

Baillie, 554-556; *Hedaya*, 489. The distinction between *hiba* and *sadaqah* lies in the object with which it is made. In the case of *hiba*, the object is to manifest affection towards the donee, or to win his regard or esteem; in the case of *sadaqah*, the object is &uot;to acquire merit in the sight of the Lord.&uot; A gift of property even to the rich would be a *sadaqah* if made with the object of acquiring religious merit.

Sadaqah and wakf are two different concepts and the plaint must clearly allege one or the other. One of the differences is that in a *sadaqah* the corpus of the gift may be consumed but in a wakf only the usufruct can be used. A *sadaqah* is not complete without delivery of possession but a wakf can be completed by a declaration only.[92]

Sadaqah distinguished from wakf

In the case of a *sadaqah*, the *corpus* may be consumed; in the case of a wakf, the *income* only can be spent.[93](*see* 207 and 208 *below*)

What is material is the intention to create a wakf and it is not necessary that the express words 'dedication of property in favour of God' should be used. The document must be construed as a whole and the intention must be gathered from the words used. Surrounding circumstances may be looked into for purpose of finding out the intention expressed. *Sadaqah* and wakf are distinguishable from the way the corpus of the property, is to be dealt with. In *sadaqah* the corpus may be consumed but in a wakf the corpus is to be preserved and only the income utilized. Where the wakf deed prohibits

alienation of property, any alienation is invalid.[94]

92 *Nabi Hassan v. Gajadhar Singh* ('74) A. Patna 141; *Banubi v. Narsingrao* 31 Bom. 250.

93 *Ramanadham v. Vada Levvai* (1911) 34 Mad. 12, 14; *Abdulsakur v. Abubakkar* (1930) 54 Bom. 358, 369, 127 I.C. 401, ('30) A.B. 191. *Gulam Ali v. Sultan Khan,* ('67) A. Ori. 55 (distinction between *sadaqah* and wakf).

94 *Sk. Mamtaj v. Alli* ('68) A. Ori. 208. (Essentials of *sadaqah* set out.)

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Gift by a Mahomedan governed by Marumakkathayam law to a tawazhi

A *tawazhi* consists of a mother and *all* her children and descendants in the female line. It is a corporate unit, and capable of holding property as such. Therefore, where a Mahomedan who follows the *Marumakkathayam* law, makes a gift of property to his wife and *all* her children constituting a *tawazhi*, without any expression of intention as to how they are to hold and enjoy it, the gift will be deemed to be a gift to the *tawazhi*, and the donees will take the property subject to the incidents of an ordinary *tarwad* or *tawazhi* property, one of which is impartiality.[95] But when the gift is to the wife and her children by him, to the exclusion of her children by a former husband, the gift cannot be deemed to be one to a *tawazhi*, and the donees will take the property as tenants-in-common in equal shares with power to alienate their respective interests.[96]

95 *Kunhacha Umma v. Kutti Mammi* (1893) 16 Mad. 201; *Chakkra Kannan v. Kunhi Pokker* (1916) 39 Mad. 317, 30 I.C. 755.

96 *Moithiyan Kutty v. Ayissa* (1928) 51 Mad. 574, 110 I.C. 480, ('28) A.M. 870.

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173.

Wakf as defined in the Wakf Act

&uot;Wakf means the permanent (174) dedication by a person professing the Mussalman faith of any property (175-177) for any purpose recognized by the Mussalman law as religious, pious or charitable (178).&uot;[1]

The above is the definition of wakf as given in the Mussalman Wakf Validating Act, No. VI of 1913, s. 2. That Act came into force on the 7th March 1913. It has a retrospective effect, and applies to all

wakfs, whether created before or after that date (*see* 199 below). Referring to the above definition, the Judicial Committees observed that it was a definition for the purposes of the Act, and not necessarily exhaustive.[2](*see also* 182).

The definition given under s. 2 of the Mussalman Wakf Validating Act, 1913 has been slightly changed by the Wakf Act, 1954. Section 3(r) of the 1995 Act lays down that-- "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 mushrut-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 "Wakif" means any person making such dedication.

The Wakf (Amendment) Act, 2013[3]has substituted the definition of 'wakf' in s. 3(r) of the 1995 Act . After its substitution, s. 3(r) of the Wakf Act, 1954 reads as follows:

"Waqf" means the permanent dedication by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes--

(i) a waqf by user but such waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such cesser;
(ii) a Shamlat Patti, Shamlat Deh, Jumla Malkkan or by any other name entered in a revenue record;
(iii) "grants", including mashrat-ul-khidmat for any purpose recognised by the Muslim law as pious, religious or charitable; and
(iv) a waqf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable, provided when the line of succession fails, the income of the waqf shall be spent for education, development, welfare and such other purposes as recognised by Muslim law,

and "waqif" means any person making such dedication.

Wakf as defined by Mahomedan jurists

The term wakf literally means *detention*. Basically, the whole institution of wakf has derived its authority from a tradition reported in Bukhari Sharif. Bukhari[4] has recorded the tradition reported of Hazrat Umar in several chapters of his sahih. It is narrated that "Umar came in the presence of the Prophet for taking his advice about the land that he (Umar) had obtained in Khaybar. He said, O' Prophet! The land that I obtained in Khaybar is the best of the properties I ever got. What are your instructions about putting the same into use in the name of Allah. The Prophet said "If you wish, confine the real and make propitiatory offering of its usufruct." Umar, accordingly, made the propitiatory offerings of the same with the condition that the land must not be sold away or given away in gift nor it be open to inheritance. Its income (alone) should be spent on the poor and the relatives and on freeing the slaves and on services rendered to travellers and on hospitality. The person who shall manage the land shall with propriety take some of its income for self and the rest of it he shall spend on feeding others. He shall not amass its income for self and thus try to become wealthy. The legal meaning of wakf, according to Abu Hanifa, is the detention of a specific thing in the ownership of the *wakif* or appropriator, and the devoting or appropriating of its profits or usufruct "in charity on the poor or other good objects." According to the two disciples, Abu Yusuf and Muhammad, *wakf* signifies the extinction of the appropriator's ownership in the thing dedicated and the *detention* of the

thing in the implied ownership of God, in such a manner that its profits may revert to or be applied &uot;for the benefit of mankind.&uot; (Baillie, 557-558. see *Hedaya*, 231, 234). A wakf extinguishes the right of the wakif or dedicator and transfers ownership to God. The mutawalli is the manager of the wakf, but the property does not vest in him, as it would in a trustee in English law.[5]The expression &uot;vested in trust&uot; in s. 10 of the Limitation Act does not apply to the mutawalli of a wakf[6]: and it was for this reason that the section was amended by s. 2 of the Limitation Act, 1929. It is also for this reason that the Indian Trusts Act, 1882 exempts from its scope the rules of law applicable to wakfs.[7]A wakf, however, is a trust for the purposes of s. 92 of the Code of Civil Procedure .[8]

A *wakf* may be made in writing or the dedication may be oral. There must, however, be appropriate words to show an intention to dedicate the property. The use of the word '*wakf*' is neither necessary nor conclusive. The word '*wakf*' means detention or stoppage. There is extinction of the proprietor's ownership and detention in the implied ownership of God.[9]

By dedication and declaration, the property in the wakif is divested and vests in the Almighty.[10]

To constitute a wakf it is not necessary that the word 'wakf' should be used. A grant to a *Kazi* for the purpose of his performing religious or pious duties constitutes a wakf.[11]

As pointed out by the Privy council--&uot;. the Mahomedan Law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means 'the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings.' When once it is declared that a particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows, as in the case of *Jewun Doss v. Shah Kubeer-ood-deed* ,[12] that a dedication to a pious or charitable purpose is meant, the right of the wakif is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit.&uot;.[13]

There is no prohibition in Muslim law to create a charitable trust as in English law. Distinction between a wakf and an English Charitable trust pointed out.[14]

To constitute a valid wakf, whether religious or charitable, except in the case of donations to neighbours or charitable public utilities, the beneficiaries should be Muslims.[15]

1 The Wakf (Amendment) Act, 2013 has made sweeping changes to the Wakf Act, 1954. The title of the Act*i.e.,*'The Wakf Act, 1954' has been changed to 'The Waqf Act, 1995'*vide* s. 4 of the Wakf (Amendment) Act, 2013. The words 'wakf', 'wakfs' and 'wakif' have been substituted with the words 'waqf', 'auqaf' and 'wakif' *vide*s. 4 of the Wakf (Amendment) Act, 2013. See Appendix III for the text of the Wakf Act, 1954 as amended by the Wakf (Amendment) Act, 2013 (w.e.f. 1-11-2013).

2 *Ma Mi v. Kallander Ammal* (1927) 54 I.A. 23, 27, 5 Rang. 7, 100 I.C. 32, ('27) A.PC. 22; *Mst Peeran v. Hafiz Mohd.* ('66) A. All. 201. See also *Mst. Mundaria v. Shyam Sunder* ('63) A.P. 98.

3 See Appendix III for the text of the Wakf Act, 1954 as amended by the Wakf (Amendment) Act, 2013 (w.e.f. 1-11-2013).

4 *Al-Bukhari*, *Al-Sahih*, *Karachi*, p. 282.

5 *Muhammad Rustom Ali v. Mustaq Husain* (1920) 47 I.A. 224, 42 All. 609, 57 I.C. 329. See also *Zain Yar Jung v. Director of Endowments* ('63) A.S.C. 985.

6 *Mt. Allah Rakhi v. Shah Mohammad Abdur Rahim* (1934) 61 I.A. 50, 56 All. 111, 147 I.C. 887, ('34) A.PC. 77.

7 Per Ameer Ali J., In *Vaidya Varuti v. Balusami* (1921) 48 I.A. 302, 44 Mad. 831, 65 I.C. 161, ('22) A.PC. 123.

8 *Mahomed Kazim v. Syed Abi* (1932) 11 Pat. 238, 136 I.C. 417, ('32) A.PC. 33.

9 *Mariam Bai v. Jaffar Abdul Rahiman Sait* ('73) A. Mad. 191.

10 *Ahmed G.H. Ariff v. Commr. of Wealth-tax* ('71) A.S.C. 1691.

11 *Yarakareddi Mallereddi v. Sayed Amanulla* (1972) 2 A.W.R. 327D.B.

12 (1840) 2 M.I.A. 390.

13 *Vidyavaruthi v. Balusami* 48 I.A. 302; ('22) A.PC. 123.

14 *Mariam Bai v. Mohd. Jaffar (supra)* .

15 See *Kassimiah Charities v. M.S.W. Board* ('64) A.M. 18; See also *Sk. Mamtaj Ali v. Sk. Alli* ('68) A. Ori. 208. (*see* the same case under s. 171)

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The dedication must be permanent

The dedication must be permanent. A wakf, therefore, for a limited period, *e.g*., twenty years, is not valid. Further, the purpose for which a wakf is created must be of a permanent character.

Baillie, 565; *Hedaya*, 234. (see 197 below)

The dedication is not permanent and the wakf is invalid, if the wakfnama contains a condition that in case of mismanagement the property should be divided among the heirs of the settlor.[16] Nor can the dedication be permanent if the wakif is only a usufructuary mortgagee and has no permanent control over the property.[17] The wakf of a house standing on land leased for a fixed term has been held to be invalid as the dedication could not be said to be of property of a permanent character.[18]

In *U.P. Sunni Control Board of wakf v. Mazhar Hasan and others* ,[19] the High Court was of the view that dedication carries with it an idea of voluntary self donation without any demand or appeal for the same and that subscription of donation made on appeal by public at large cannot be taken to be the donation or property of permanent character which is the essential ingredient of the definition of 'wakf' under the Act . Under the Act, if a property is set apart for a definite purpose, such property would become dedicated for a purpose.

The Supreme Court held, altering the findings of the Tribunal and the High Court, that it cannot be said that it is only in cases when an individual divests himself of the property and after declaration of trust it is binding on the settlor with the object for which the property thereafter to be held. If out of the money given by general public a property is purchased for a public purpose which is religious or charitable in character, the Court does not think, such property will lose the character of a 'wakf' defined in the Act . The Apex Court also concurred the view of the High Court and the Tribunal that the object for which the property in question has been dedicated is charitable, pious or religious in nature and, therefore, the dedication was complete and it could not be divested for any other purpose. Therefore, when a property can be used only for religious or charitable purpose, it acquires a permanent character.

To constitute a valid wakf it is thus necessary that there must be a dedication of property and secondly, it must be permanent. It means that once a wakf is created relating to any property, it remains a wakf property for ever. This was affirmed by the Supreme Court in *Sayyed Ali v. A.P. wakf*

Baard, Hyderabad .[20] The Court in the instant case observed that a wakf is a permanent dedication of property for purposes recognized by Muslim law as pious, religious or 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 favor of *Mokhasadar*under the Inams 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 for all time to come and further continues to be so governed by the provisions of the Wakf Act and the grant of patta does not affect the original character of wakf.

16 *Habib Ashraff v. Syed Wajihuddin* (1933) 144 I.C. 654, ('33) A.O. 222.

17 *Rahiman v. Bagridan* (1936) 11 Luck. 735, 160 I.C. 495, ('36) A.O. 213.

18 *Mst. Peeran v. Hafiz Mohd.* ('66) A. All. 201.

19 A.I.R. 2001 SC 3359.

20 A.I.R. 1998 SC 972.

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Subject of wakf

The subject of wakf under the Wakf Act may be &uot;any property.&uot; A valid wakf may, therefore, be made not only of immovable property, but also of movables, such as shares in joint stock companies, Government promissory notes, and even money.[21]

In case, before the Wakf Act, there was a conflict of opinion whether a valid wakf could be made of movables. It was held in Calcutta, Bombay and Madras, that a valid wakf could not be made of movables, unless the movables were accessory to immovable property, such as cattle attached to agricultural land and implements of husbandry, or unless a wakf of movables was allowed by custom.[22] This was in accordance with the view taken by Mahomedan jurists on the subject (Baillie, 570-571; *Hedaya*, 234-235). On the other hand, it was held in Allahabad that a valid wakf may be made of movables, and that a wakf even of coins or shares in a joint stock company was not invalid.[23]Such a wakf would be valid under the Wakf Act. In a Privy Council case, the question arose whether a valid wakf can be made under the Wakf Act of Government promissory notes, but it was not decided, as the wakf had been acted upon for a number of years and it was held valid on that ground.[24] It has been held that a wakf of a money decree is not valid, as the decretal amount may not be realised.[25]

21 *Abdulsakur v. Abubakkar* (1930) 54 Bom. 358, 369-370, 127 I.C. 401, ('30) A.B. 191. Cf. *Syed Ali Zamin v. Syed Akbar Ali Khan* (1937) 64 I.A. 158 (a Shia case); *Sattar Ismail v. Hamid Sait* (1944) 2 M.L.J. 92. ('44) A.M. 504.

22 *Kulsom Bibee v. Golam Hossein* (1905) 10 Cal. W.N. 449; *Fatmabai v. Gulam Husen* (1907) 9 Bom. L.R. 1337; *Kadir Ibrahim v. Mahomed* (1909) 33 Mad. 118, 4 I.C. 136.

23 *Abu Sayid v. Bakar Ali* (1901) 24 All. 190; see *Hashim Haroon v. Gounsalishah* (1942) Kar. 179, ('42) A.S. 137.

24 *Mohammad Sadiq v. Fakhr Jahan Begam* (1932) 59 I.A. 1, 17-18, 6 Luck. 556, 136 I.C. 385, ('32) A.PC. 13.

25 *Ghulam Mohiuddin v. Hafiz Abdul* (1947) All. 334, ('47) A.A. 127.

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Subject of wakf must belong to wakif

The property dedicated by way of wakf must belong to the wakif (dedicator) at the time of dedication.[26] A person who is in fact the owner of the property but is under the belief that he is only a mutawalli thereof is competent to make a valid wakf of the property. What is to be seen in such cases is whether or not that person had a power of disposition over the property.[27]

Baillie, 562.

Wakf of property subject to mortgage or lease

A valid wakf may be made of property though it is subject to a mortgage[28] or lease.[29](Baillie, 563-564)

26 *Masihuddin v. Ballabh Das* (1912) 35 All. 68, 17 I.C. 471; *Ehsan Beg v. Rahmat Ali* (1934) 10 Luck. 547, 152 I.C. 798, ('35) A.O. 47; *Mahomed Ali v. Dinesh Chandra Roy* (1940) 2 Cal. 189, 44 C.W.N. 718, ('40) A.C. 417; *Commissioner of Wakfs v. Mohammad Mohsin* ('54) A.C. 463, 48 C.W.N. 252.

27 *Haider Husain v. Sudama Prasad* (1940) 15 Luck. 30, (1939) O.W.N. 858, ('40) A.O. 18.

28 *Shahazadee v. Khaja Hossein* (1869) 12 W.R. 498; *Jinjira v. Mohammad* (1922) 49 Cal. 477, 483, 67 I.C. 77, ('22) A.C. 429.

29 *Hashim Ali v. Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 180 (case under the Shia Law).

Usufructuary mortgagee

A usufructuary mortgagee cannot make a valid wakf of his rights, for he is not the owner and the mortgage is an evasion of the Mahomedan law against usury.[30]

30 *Rahiman v. Bagridan* (1936) 11 Luck. 735, 160 I.C. 495, ('36) A.O. 213; *Abdul Qavi v. Asaf Ali* ('62) A. All. 364.

Groveholder

A Groveholder has permanent dominion and full proprietary right over the trees. A wakf of full groveholder's rights is therefore valid.[31]

31 *Haji Amir Ahmed v. Mahomed Ejaz Hussain* (1936) 58 All. 464, 160 I.C. 354, ('36) A.A. 15.

Property agreed to be purchased by wakif

A valid wakf may be made of property, of which the wakif has been put in possession under a contract for the purchase thereof by him, provided the sale is eventually completed.[32]

32 *Mussammat Bismilla v. Mohammad Ali* ('27) A.O. 162, 102 I.C. 77.

Wakf in fraud of heirs

A wakfnama executed by a widow as part of a transaction which is a fraud on the heirs of her husband is altogether void and not effective even against the share which she inherits.[33]

33 *Har Prasad v. Fayaz Ahmad* (1933) 60 I.A. 116, 55 All. 83, 142 I.C. 271, ('33) A.PC 83.

Dower debt

A dower debt which may or may not be paid to the widow at the option of the residuaries, cannot be made the subject of a wakf.[34]

34 *Nosh Ali v. Shamsunnissa Bibi* (1939) All. 322, (1939) A.L.J. 138, 183 I.C. 379, ('39) A.A. 319.

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Wakf of mushaa

A *mushaa* or an undivided share in property may, according to the more approved view, form the subject of wakf, whether the property be capable of division or not.[35]

Exception.--The wakf of a *mushaa* for a mosque or burial ground is not valid, whether the property is capable of division or not.

Hedaya, 233; Baillie, 573. The approved opinion above referred to is that of Abu Yusuf. According to Muhammad, the wakf of a *mushaa* in property *capable* of partition is not valid, for he holds that delivery of possession by the endower to a *mutawalli* is a condition necessary for the validity of a wakf (see 186 below). But though Abu Yusuf holds that a wakf of *mushaa* is valid though the property may be capable of partition, he has declared that a wakf of a *mushaa* for *a mosque or burial ground* is invalid. He gives two reasons, one of which is that &uot;the continuance of a participation in anything is repugnant to its becoming the exclusive right of God.&uot;

It follows from what is stated above that one of several heirs of a deceased Mahomedan cannot make a valid wakf of his undivided share of the inheritance *for a mosque or burial ground* though he may do so for other purposes. In a Rangoon case,[36] however, it was held, relying on a passage in Wilson's

Anglo-Muhammadan Law,[37] and on the judgment of the Privy Council in *Muhammad Mumtaz v. Zubaida Jan* ,[38] that if one of several heirs takes possession of the *whole* property and delivers possession of it to the trustees of a mosque for the benefit of the mosque, though it be without the consent of the other heirs, the wakf is valid to the extent of *his own share*. The passage referred to above is in these terms: &uot;But if a wakf is valid as in the cases noted in n. 1 above, they are valid for the endowment or construction of mosques or burial grounds.&uot; This passage appears for the first time in the 6th ed., and the cases referred to there are cases of a wakf of a *mushaa* for purposes *other than a mosque* or *a burial ground.* The Privy Council case referred to above is a case of a *gift* of a *mushaa*. A wakf of a *mushaa* for a mosque or burial ground is invalid for the specific reasons stated by Abu Yusuf. However, it has been held by the Calcutta and Allahabad High Courts that a wakf of *Mushaa* for maintenance of a mosque is valid.[39]

A *mushaa* or an undivided share in property may not be dedicated by way of wakf for a mosque or burial ground irrespective of whether the property is or is not capable of division. The wakf of *mushaa* for a purpose like a mosque or burial ground is invalid for the reasons that the continuance of participation in anything is repugnant to its becoming the exclusive right of God.

In the instant case, a Mahomedan died leaving behind a widow, two sons and three daughters as heirs to his property. The widow created a wakf of *mushaa* or undivided share in the property for purpose of a mosque.

Held, inasmuch as there could be no wakf of a *mushaa* or undivided share in the property for a purpose like a mosque, the creation of the wakf by the widow was invalid.

Execution of the wakf by the mother for and on behalf of the minor was illegal and void, inasmuch as a *de facto*guardian had no right to alienate the minor's property and it was not the case of the mother that she had been appointed by the Court, moreover, had no power, without the previous permission of the Court under the Guardians and Wards Act, 1890, to make transfer including by way of wakf. No such permission was claimed to have been sought in the present. It follows, therefore, that the mother in the instant case was not competent to execute wakf as a guardian for or on behalf of the minor child, and wakf so executed was illegal and void.[40]

35 *Mohammad Badrul v. Shah Hason* (1935) All. L.J. 400, 159 I.C. 37. ('35) A.A. 278; *Mohamed Ayub Ali v. Amir Khan* (1939) 43 C.W.N. 118, 181 I.C 76, ('39) A.C. 268.

36 *Abdul Rahman v. Maung Mutu* ('32) A.R. 65, 138 I.C. 851.

37 6th ed., para 321.

38 (1889) 11 All. 460, 16 I.A. 205.

39 *Mahomed Ayub Ali v. Amir Khan* (1939) 43 C.W.N. 118, 181 I.C. 76, ('39) A.C. 268; *Mst. Peeran v. Hafiz Mohd.* ('66) A. All. 201.

40 *Gyasuddin v. Allah Tola Wakf Mausama,* A.I.R. 1986 All. 39.

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Objects of wakf

The purpose for which a wakf may be created must be one recognized by the Mahomedan law as &uot;religious, pious or charitable&uot; (Wakf Act, s. 2(1)). A wakf may also be created in favour of the settlor's family, children and descendants (Wakf Act, s. 3).

A. The following are valid objects of a wakf:--
- (1) mosques and provision for imams to conduct worship therein;[41]
- (2) colleges and provision for professors to teach in colleges;[42]
- (3) aqueducts, bridges and caravanserais;[43]
- (4) distribution of alms to poor persons, and assistance to the poor to enable them to perform the pilgrimage to Mecca;[44]
- (5) celebrating the birth of Ali Murtaza;[45]
- (6) keeping *tazias* in the month of Muharram,[46] and provision for camels and *duldul* for religious processions during Muharram;[47]
- (7) repairs of imambaras;
- (7a) the maintenance of a khankah;[48]
- (8) celebrating the death anniversaries (*barsi*) of the settlor and of the members of his family;[49]
- (9) performance of ceremonies known as *kadam sharif;*[50]
- (10) burning lamps in a mosque;[51]
- (11) reading the Koran in public places, and also at private houses;[52]
- (12) performance of annual *fateha* of the settlor and of the members of his family;[53] [The ceremony of *fateha* consists in the recital of prayers for the welfare of the souls of deceased persons, accompanied with distribution of alms to the poor.]
- (13) the construction of a *robat* or free boarding house for pilgrims at Mecca;[54]
- (14) maintenance of poor relations and dependents;[55]
- (15) payment of money to *fakirs*, *i.e*., the poor;[56]
- (16) grant to an Idgah;[57]
- (17) A durgah or shrine of a *pir* which has long been held in veneration by the public.[58]

Charitable trusts created with the object of starting a school or a college or constructing a mosque or establishing a hospital are not prohibited by Muslim law.[59]

Where the deed is not clear, previous and subsequent conduct and attendant circumstances may be called in aid to clear the ambiguity. But this is only permissible to remove the ambiguity.[60]

B. The following are not valid objects of a wakf:
- (i) objects prohibited by Islam, *e.g*., erecting or maintaining a church or a temple; Baillie, 560;
- (ii) the Madras High Court has held that if there is no distribution of alms, the reading of the Koran and the performance of ceremonies for the benefit of the soul of the deceased is not a valid object of a wakf.[61] This is on the ground that the object, though religious and pious, is not charitable: *sed quare*, for there is nothing in the Indian statutes or in Mahomedan law which draws a clear-cut distinction between religious and pious purposes on the one hand, and charitable purposes on the other.[62] In the Bombay High Court, Mirza, J., has held that the performance of such ceremonies whether at the tomb of a saint or the grave or a private person, is a valid object of wakf;[63]
- (iii) the High Court of Allahabad has held, following the opinion of Ameer Ali, expressed in his Mahomedan law,[64] that a provision for the wages and pensions of servants and dependants is valid.[65] A similar question arose in a case before the Privy Council,[66] and it was argued, relying on the same passage in Ameer Ali's work, that a wakf for servants was valid, but the point, it would appear, was later on abandoned, and the Board said: &uot;It is admitted that a trust for slaves and dependants is not within the terms of the Wakf Validating Act (VI of

1913).&uot; The Chief Court of Oudh had taken the view that a wakf providing for maintenance of servants is valid under Mahomedan law. In *Hashim Ali v. Iffat Ara Hamidi Begum* , the Calcutta High Court took the view that a provision for a small pension for three of the faithful servants would not render the wakf invalid, as the main purpose of the wakf in question was not to make a settlement on those servants.[67]

(iv) A wakf in favour of utter strangers was held to be invalid although there was an immediate and substantial gift to charity.[68]

(v) A provision in a wakf for the repair of the wakif's secular property is invalid according to Shia law.[69]

(vi) A direction to spend a certain sum of money for feasting Cutchi Memons every year on the anniversary of the settlor's death is not valid.[70]

It is fundamental for the creation of a valid wakf that there should be permanent dedication of the property forming the subject-matter of the wakf for any purpose recognised by the Musalman law as religious, pious or charitable. What is involved in the creation of the wakf is &uot;the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings. As a result of the creation of a wakf, the right of wakf is extinguished and the ownership is transferred to the Almighty.&uot; In the instant case, under the deed Ext. A-2 there is no dedication at all of either the corpus or even the income of the property for any religious or charitable purpose. The ownership of the property is not transferred in favour of God the Almighty; on the other hand, it is expressly stipulated that the property shall remain as the joint property of executants No s. 4, 5 and 6 and they are to hold that the property from generation to generation, subject only to the restrictions that the property should not be alienated in favour of any strangers nor burdened with debts, attachments or injunctions, and that from out of the income the recitation of Quran and reading of Moulood in the family house should be got performed. Since the basic requisite that there should be a permanent dedication of the property for religious or charitable purposes is not satisfied in the present case, it must be held that no valid wakf has been created in respect of the plaint schedule property in question.[71]

The reading of Moulood in the private residence of the family and recital of the Quran at the said place cannot, by themselves, be regarded as objects for which a wakf can be validly created.[72]

41 *Baillie*, 574.

42 *Baillie*, 574.

43 *Hedaya*, 240.

44 *Hedaya*, 240.

45 *Biba Jan v. Kalb Husain* (1909) 31 All. 136, 1 I.C. 763; *Sayid Ismail v. Hamidi Begum* (1921) 6 Pat. L.J. 218, 235-236, 62 I.C. 455, ('21) A.P. 125; *Haji Abdul v. Haji Hamid* (1903) 5 Bom. L.R. 1010 [Cutchi Memon will].

46 *Ibid.*

47 *Syed Ali v. Syed Muhammad Ali* (1928) 7 Pat. 426, 116 I.C. 525, ('28) A.P. 441.

48 *Mahomed Kazim v. Syed Abi* (1932) 11 Pat. 288, 136 I.C. 417, ('32) A.P. 33. *Ghulam Rasul v. Chief Administrator of Auqaf,* P.L.D. 1966 Lah. 978 (upkeep and maintenance of Khankah).

49 *Sattar Ismail v. Hamid Sait* (1944) 2 M.L.J. 92, ('44) A.M. 504.

50 *Phul Chand v. Akbar Yar Khan* (1896) 19 All. 211.

51 *Mazhar Husain v. Abdul* (1911) 33 All. 400, 9 I.C. 753; *Gobinda Chandra v. Abdul Majid* (1944) 1 Cal. 329, 216 I.C. 143, ('44) A.C. 163.

52 *Ibid, Sattar Ismail v. Hamid Sait* (1944) 2 M.L.J. 92, ('42) A.M. 504.

53 *Luchmiput Singh v. Amir Alum* (1882) 9 Cal. 176; *Phul Chand v. Akbar Yar Khan* (1896) 19 All. 211; *Biba Jan v.*

Kalb Husain (1909) 31 All. 136, see p. 139 of the report: 1 I.C. 763; *Mazhar Hussain v. Abdul* (1911) 33 All. 400, 9 I.C. 753, (*Stanly, C.J., dubitante*); *Mutu Ramanadhan v. Vava Levvi* (1917) 44 I.A. 21, 27, 40 Mad. 116, 122, 39 I.C. 235. See also *Salebhoy v. Safiabu* (1912) 36 Bom. 111, 12 I.C. 702.

54 *Mahomed Yusuf v. Muhammad Sadiq* (1933) 14 Lah. 431, 144 I.C. 271, ('33) A.L. 501.

55 *Mukaram v. Anjuman-un-Nissa* (1923) 45 All. 152, 69 I.C. 836, ('24) A.A. 223; *Abdul Karim v. Rahimabai* (1946) 48 Bom. L.R. 67, ('46) A.B. 342.

56 *Abdul Karim v. Rahimabai* (1946) 48 Bom. L.R. 67, ('46) A.B. 342.

57 *Kulsambi v. Mohamam Abdul Satar* ('48) A.N. 183.

58 *Sunni Central Board of Wakf v. Sirajul* ('54) A.A. 88. *Ghulam Ali v. Sultan Khan* ('67) A. Ori. 55.

59 *Moriam Bai v. Jaffar Abdul Rahiman Sait* ('73) A. Mad. 191.

60 *Mahomed Khan Rowther v. A. Rahman* (1968) Ker. L.T. 564.

61 *Kaleloola v. Nusserudeen* (1894) 18 Mad. 201; *Kunhamutty v. Ahmed Musaliar* (1935) 58 Mad. 204, 154 I.C. 151, ('35) A.M. 29.

62 *Gholam Hossain Shah v. Syed Muslim Hossain* (1934) 58 Cal. LJ. 356, 150 I.C. 124, ('34) A.C. 348.

63 *Abdulsakur v. Abubakkar* (1930) 54 Bom. 358, 127 I.C. 401, ('30) A.B. 191; *Azimunnissa Begum v. Sirdar Ali Khan* (1927) 29 Bom. L.R. 434, 102 I.C. 129, ('27) A.B. 387 dissenting from *Fakr-ud-din v. Kiayat-ullah* (1910) 7 All. L.J. 1095, 8 I.C. 578.

64 [4th ed., vol. I, p. 276].

65 *Ghulam Mohammad v. Ghulam Husain* (1932) 59 I.A. 74, 85, 54 All. 93, 136 I.C. 454, ('32) A.PC. 81.

66 *Ibid* at p. 86.

67 *Mt. Akhtar Banu Begum v. Kanhaiya Lal* (1941) 16 Luck. 769, (1941) O.W.N. 829, 195 I.C. 326, ('41) A.O. 492; *Hashim Ali v. Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 182.

68 *Ismail Haji Arat v. Umar Abdulla* (1942) 44 Bom. L.R. 256, ('42) A.B. 155.

69 *Pulin Behary v. M.A. Davar* (1946) 49 C.W.N. 721, 224 I.C. 32, ('46) A.C. 83.

70 *Abdul Karim v. Rahimabai* (1946) 48 Bom. L.R. 67, ('48) A.B. 342.

71 *Mariyumma v. Andunhi* (1965) S.C. 985, relied on.

72 *Mariyumma v. Andunhi* (1979) K.L.T. 231, [Krishna Eradi and Narendran, JJ].

CHAPTER XII

WAKFS

179.

Wakf void for uncertainty

The objects of a wakf must be indicated with reasonable certainty; if they are not, the wakf will be void for uncertainty (*see* note (1). But it is not necessary that the objects should be *named*.[73] Nor is it necessary, where the objects are specified, to name the sum to be spent on each object[74] (*see* note (2).

By a deed of wakfnama, one Md. Safulla created a wakf-al-al-aulad for the maintenance and support of his family, children and descendants and ultimately &uot;for such purpose or purposes as are

recognised by the Mussalman law as religious, pious and charitable, as the then Mutawalli shall think fit add proper&uot;. He appointed himself as the first mutawalli during his life time and confined the succession to mutwalliship to the eldest male members of his descendants for the time being. He also reserved to himself the right to alter the terms of the wakfnama and the beneficiaries of the wakfnama, either by adding to their number or excluding some and to increase or reduce their shares. He directed the creation of certain reserve funds which in fact were not created. The Income tax Authorities initiated certificates proceedings under the Bengal Public Demands Recovery Act, 1913 for the realisation of income-tax due from the said Safulla from the properties which were the subject-matter of the wakf. The certificate officer held that the wakf was a valid one and rejected the certificate. The Union of India thereupon brought the suit out of which the present appeal arose for a declaration that the deed of wakf was fraudulent, illegal and void, and that the order of the certificate officer was not binding on the plaintiff. The lower Court held that the wakf was void for uncertainty, because the wakif did not divest himself of ownership and because it was not acted upon, and that the order of the certificate officer was not binding upon the plaintiff. It was held:

(i) The wakfnama is not void for uncertainty, because the wakf has used general words of the proviso to s. 3 of the Mussalman Wakf Validating Act, 1913 in making the ultimate gift to charitable purposes.

(ii) Under the Muslim law, the wakif is entitled at the time of dedication to reserve to himself the power to alter the beneficiaries, either by adding to or excluding from their number and to increase or reduce their shares; the wakf was not, therefore, void on that ground;

(iii) when a wakf is found to be validly created, the failure of the first mutawalli to carry out the terms of the wakfnama does not make the wakf invalid or void;

(iv) The suit was barred under s. 37 of the Bengal Public Demands Recovery Act, 1913; s s. 10 and 55 of the said Act have no application to the facts of the present case.

(v) On facts it has to be held that the wakf was acted upon.[75]

Note (1).--According to the English law, the object of a trust, whether private or public, must be certain, otherwise the trust is void for uncertainty. The leading English case on public trusts is *Morice v. The Bishop of Durham* .[76] In that case, it was held by Lord Eldon that a bequest for &uot;such objects of benevolence or liberality as the executor should most approve of was too vague to be enforced&uot;. It has similarly been held that a trust for &uot;charitable or benevolent purposes&uot;,[77] or for &uot;purposes charitable or philanthropic&uot;,[78] or for &uot;such charitable or public purposes as my trustee thinks proper&uot;,[79] is void for uncertainty. Following this principle, it has been held by the Privy Council that a gift by a Hindu for *dharam*, an expression equivalent to &uot;charitable, religious or philanthropic purposes,&uot; is void for uncertainty.[80]

Turning now to Mahomedan cases, there appears to be a conflict of decisions. The High Court of Bombay expressed the opinion in an old case that a bequest by a Khoja Mahomedan for *dharam* was void for uncertainty.[81] In a later Bombay case, a bequest by a Mahomedan for *dharam*, *kherat, vigere*, was held to be void for uncertainty. The Gujarati word &uot;kherat&uot; it was said was derived from the Arabic &uot;Khairat,&uot; and that &uot;Khair&uot; in Arabic means &uot;good&uot;, and &uot;khairat,&uot; means &uot;good works, alms, charities&uot;.[82] In a Punjab case, it was held that a wakf for such charitable objects as the trustees should think proper and for such purpose as that the settlor should obtain certain bliss therefrom, is void for uncertainty.[83] In an Allahabad case it was held that a *wakf* for *fateha* and for *amar-i-khair* including the maintenance of poor relations and dependants, was not void for uncertainty.[84] In another Allahabad case, the opinion was expressed that a trust for &uot;khairat&uot; or of &uot;Khairati kam&uot; was valid, and in such a case, specification of objects of charity is not necessary. But, if a trust is for *umure khair* or *kare khair*, it is a question of construction in what sense the expression is used, and if it is used in the sense of benevolent purposes or good purposes, the trust will be void for uncertainty.[85] So also, *kar-kher*which means &uot;any good act &uot;.[86] But &uot;amar-i-khair&uot; means &uot;khair&uot; or &uot;good&uot; works, and if that is the correct meaning of the word,[87]the wakf would be void for uncertainty, unless it can be said that when a Mahomedan dedicates his property by way of wakf for &uot;good works,&uot; it must be taken that the dedication is for &uot;purposes recognized by the Mussalman law as religious, pious or charitable&uot; within the meaning of s. 2(1) of the Wakf Act.

This contention was accepted in an Oudh case,[88]but the Lahore High Court dissented holding that the use of the general words of the proviso to s. 3 of the Wakf Act &uot;religious and charitable objects&uot; is not a sufficient specification of the object.[89] But the Lahore High Court has dissented from this view and held that the words *mazhabi aur khairati kam,* meaning &uot;religious and charitable works&uot; were sufficient to uphold the validity of a wakf.[90] In appeal to the Privy Council, this view was upheld.[91] A Full Bench of the Chief Court of Oudh, however, has now taken the view that a dedication in general terms for &uot;charitable purposes highly commendable according to the Hanafi school of Mussalman law&uot; is not a valid dedication.[92]The High Court of Calcutta in a case it held that the use of the general words of the proviso to s. 3 of the Wakf Act without specification of the object of charity does not invalidate a wakf as it contemplates an ultimate gift effective in law, and that the ultimate benefit in a*wakf-alalaulad*can also be impliedly reserved for the poor or for any purpose of a permanent character. Those purposes need not be expressed in clear terms in the wakfnama. In that case, it was held that the wakf deed manifested an overriding intention to charity in the contingency of the failure of the descendants of the settlor and the ultimate gift of &uot;proper act s of charity&uot; was held to be valid, as these words would imply a gift to the poor, and the benefit to the poor is the prime concern of the Muslim jurists.[93] A dedication of the property for the benefit of the Mahomedan community on the occasions of rejoicings and mournings was held not to be void for uncertainty. It was construed with reference to the congested condition of the testator's town to mean the provision of a building for the accommodation of marriage and funeral parties.[94] A discretion to pay money to *Sayyads*, i.e., descendants of the Prophet, is void for uncertainty, as it would be impossible to ascertain who were genuinely the members of the Prophet's family.[95]

Note (2).--A bequest by a Khoja Mahomedan under a will in the English language of a fund &uot;to be disposed of in it as my executor shall think fit,&uot; is not void for uncertainty.[96]

The salient features of a document executed by a Muslim are: (a) The document is styled as a Wakf deed; (b) The charities mentioned therein are for reading of Koran five times a day, for imparting instructions in the school, for lighting, for drawing water from the tank, distribution of Narasa (Prasadam) of certain value at the end of every month and certain amount to be spent on dharamam by way of feeding annually, (c) the properties worth of R s. 3000 shall be subject to the above charities; (d) During the lifetime of the executant be alone shall be the mutawalli and perform charities, paying kist, land cost etc., and (e) After the death of the executant, his son and thereafter his heirs according to the law of primogeniture, shall take possession of and enjoy the properties and from and out of its income they are to perform the abovementioned charities as mutawalli without any power of alienation or creating encumbrances.

Where the document was executed by a pious Muslim in the year 1944, who, under normal circumstances, could not have thought of anything but a wakf to create a method by which there should be a perpetual performance of certain charities. The various classes show (1) that on and from the date of creation of the document, the executant ceases to own the properties in his personal capacity and he assumes the role of mutawalli. Therefore, there is a clear divestiture; (2) The executant has no power of alienation, but has a mere power to enjoy; (3) The line of succession in relation to mutawalli is something which runs counter to Muslim law because it is stated very emphatically that the succession shall be according to the law of primogeniture; (4) Those mutawalli who would succeeed will also have no power of alienation, nor the power of creating an encumbrance. By a reading of all these clauses and the document as a whole, one gains the only impression that this is a deed of wakf. Relying on certain words in the clause it cannot be contended that those words are clear enough to indicate the creation of a charge and the restraint on alienation is bad. If only that clause is taken into consideration, all the other clauses will be rendered as otiose or nugatory. The document has not the effect of creating a charge for the performance of charities.[1]

There is a distinction between an instrument creating a Wakf and a document recording a transaction in the nature of wakf which had taken place earlier by word of mouth. Where the executant had specifically stated in the document that she had created wakf of her properties, and the document did not say that the executant was creating a wakf in present through the instrumentality of the document itself, the document could be construed as a memo of wakf which had been orally created or a

document appointing mutwallis, and hence did not require registration.[2]

73 *Sheikh Ramzan v. Mussammat Rehmani* (1932) 7 Luck. 300, 135 I.C. 372, ('32) A.O. 71; *Gangabai v. Thavar* (1863) 1 Bom. H.C.O.C. 71.

74 *Mutu Ramanadan v. Vava Levvai* (1916) 44 I.A. 21, 28-29, 40 Mad. 116, 39 I.C. 235, ('16) A.PC. 86; *Syed Shah v. Syed Abi* (1932) 11 Pat. 288, 325-326, 136 I.C. 417, ('32) A.P. 33.

75 *Ayesha Khatoon v. Union of India,* 83 C.W.N. 776, [M.M. Dutt and R.K. Sharma, JJ.].

76 (1804) 10 Ves. 522.

77 *In re Riland*(1881) W.N. 173.

78 *In re Macduff*(1896) 2 Ch. 463.

79 *Blair v. Duncan* [1902] A.C. 37; *Grimond v. Grimond* (1905) A.C. 124.

80 *Runchordas v. Parvatibai* (1899) 23 Bom. 725, 26 I.A. 71.

81 *Gangabai v. Thavar* (1863) 1 Bom. H.C.O.C. 71.

82 *Mariambi v. Fatmabai* (1928) 31 Bom. L.R 135, 116 I.C. 242, ('29) A.B. 127.

83 *Shahab-ud-din v. Sohan Lal* (1907) Punj. Rec. No. 75. See also *Advocate General v. Hormusji* (1905) 29 Bom. 375.

84 *Mukkaram v. Anjuman-un-Nissa* (1923) 45 All. 152, 69 I.C. 836, ('24) A.A. 223.

85 *Mohammad Yusuf v. Azimuddin* (1941) All. 443. (1941) A.L.J. 269.196 I.C. 324, ('41) A.A. 235.

86 See *Faqir Mohammad v. Abda Khatoon* ('52) A.A. 127.

87 See *Mohammad Yusuf v. Azimuddin* A.I.R. 1941 All. 235.

88 *Sheikha Ramzan v. Mussammat Rahmani* (1932) 7 Luck, 300,135 I.C. 372, ('32) A.O. 71.

89 *Punjabi Sindh Bank v. Anjuman Himayet Islam* (1935) 158 I.C. 937, ('35) A.L. 596.

90 *Mohammad Afzal v. Din Mohammad* ('47) A.L. 117.

91 *Beli Ram v. Mohammad Afzal* (1949) Lah. 1,50, Bom. L.R. 674, ('48) A.PC. 168.

92 *Ahmadi Begum v. Badrurn Nisa* (1940) 15 Luck. 586, (1940) O.W.N. 689, 189 I.C. 391, ('40) A.O. 324(F.B.) See *Mohammad Yusuf v. Azimuddin* (1941) All. 443, (1911) A.L.J. 269, 196 I.C. 324, ('41) A.A. 235.

93 *Hasim Ali v. Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 180 (case under Shia Law); *Haji Ishak v. Faiz Mohomed* (1943) Kar. 166, ('43) A.S. 134; *Syed Ahmed v. Julaiha Bivi* (1946) 2 M.L.J. 335, ('47) A.M. 176.

94 *Fazal Din v. Karam Hussain* (1936) 162 I.C. 404, ('36) A.L. 81.

95 *Abdul Karim v. Rahimabai* (1946) 48 Bom. L.R. 67, ('46) A.B. 342.

96 *Gangabai v. Thavar* (1863) 1 Bom. H.C.O.C. 71.

1 5 Cal. 438 1941 Mad. 59 : 1 L.W. 223, A.I.R. 1974 S.C. 740, distinguished; A.P. No. 103 of 1972 dated 20th August, 1975 (Mad.). *Kani Ammal v. Tamil Nadu State Wakf Board* (1982) 2 M.LJ. 196 [S. Natarajan and S. Mohan JJ.].

2 A.I.R. 1921 P.C. 105; A.I.R. 1958 S.C. 532; A.I.R. 1966 S.C. 337; A.I.R. 1959 S.C. 620. Rel. on *Anjuman Islamia v. Mohammad Khair Husain* (1981) All. L.J. 1120, [SJ. Hyder, J.]

CHAPTER XII

WAKFS

180.

Objects partly valid and partly invalid

Where a wakf is created for mixed purposes, some of which are lawful and some are not, it is valid as to the lawful purposes, but invalid as to the rest, and so much of the property as is dedicated for invalid purposes will revert to the wakif (dedicator).[3] Where the property is not specifically dedicated to an object which fails, the whole amount will be devoted to the valid object of charity.[4]

3 *Mazhar Husain v. Abdul* (1911) 33 All. 400, 406. 9 I.C 753; *Abdul Husain Moosaji v. Sugranbai* ('39) A. S. 322.

4 *Mt. Ruqia Begum v. Sarajmal* (1936) All. L.J. 231,163 I.C. 344 ('36) A.A. 404; *Sattar Ismail v. Hamid Sait* (1944) 2 M.L.J. 92, ('44) A.M. 504.

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WAKFS

181.

Doctrine of cy-pres

Where a clear charitable intention is expressed in the instrument of wakf, it will not be permitted to fail because the objects, if specified, happen to fail, but the income will be applied for the benefit of the poor or to objects as near as possible to the objects which failed.[5]

The doctrine is not applicable unless the original wakf is valid. A wakf that is void for uncertainty cannot be validated by the application of the doctrine,[6] nor can a *wakfalal-aulad* which fails and is invalid be turned into a public wakf by applying the doctrine.[7]

Shia law

The same is the rule of Shia law: Baillie, II, 216.

5 *Kulsom Bibee v. Golam Hossein* (1905) 10 CW.N. 449, 484-485; *Salebhai v. Safiabu* (1912) 36 Bom. 111, 12 I.C. 702; *Hashim Ali v. Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. LJ. 261, ('42) A.C. 180.

6 *Punjab Sindh Bank v. Anjuman Himayet Islam* (1935) 158 I.C. 937, ('35) A.L. 596.

7 *Mohamad Sabir Ali v. Tahir Ali* (1954) 2 All. 556.

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182.

Persons capable of making a wakf

Every Mahomedan of sound mind and not a minor may dedicate his property by way of wakf.

Baillie, 560. As to majority, (*see* notes to 115 above)

It has been held that a non-muslim may also create a wakf for any purpose which is religious under the Mahomedan law, provided it is also lawful according to his own religious creed.[8]

The definition of wakf in the Wakf Act, 1954 limits wakfs to dedication by persons professing Islam.

8 *Mst. Mundaria v. Shyam Sunder* ('63) A.P. 98; *Kassimiah Charities v. M.S. W. Board* ('64) A.M. 18.

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WAKFS

183.

Form of wakf immaterial

A wakf may be made either verbally or in writing. It is not necessary in order to constitute a wakf, that the term &uot;wakf&uot; should be used in the grant, if from the general nature of the grant itself such a dedication can be inferred.[9] Where it is not clear whether a grant constitutes a wakf, the statements and conduct of the grantee and his successors, and the method in which the property has been treated, are circumstances which, though not conclusive, are worthy of consideration.[10]

Note that the provisions of the Indian Trusts Act II of 1882 do not apply to wakfs. (*see* 1 of the Act)

Though a wakf may be created orally, yet when the terms of a dedication have been reduced to writing, no evidence can be given to prove the terms except the document itself or secondary evidence of its contents.[11]

It is not absolutely necessary that the writing by which a wakf is created should exist or that there should be direct evidence about the creation of a wakf and its terms. A wakf can be proved by showing immemorial user of the property as wakf.[12]

9 *Jewun Doss v. Shah Kuber-ood-Deen* (1840) 2 M.I.A. 390; *Saliq- un-Nissa v. Mali Ahmad* (1903) 25 All. 418 [Shia law]; *Muhammad Hamid v. Mian Mahomud* (1923) 50 I.A. 92, 104, 4 Lah. 15, 28, 77 I.C. 1009, ('72) A.PC. 384; *Budrul Islam Ali Khan v. Mt. Ali Begum* (1935) 16 Lah. 782,158 I.C. 465, ('35) A.L. 251; *Ram Rup v. Saran Dayal* (1936) 160 I.C. 289, ('36) A.L. 283; *Mohammad Qasim v. Mohummad Mehdi* (1938) 13 Luck. 458, ('37) AO. 465; *HaiderHussain v. Sudama Prasad* (1940) 15 Luck. 30, (1939) O.W.N. 858, ('40) AO. 18; *Khurshed Jahan Begum v. Qamquam Ali* ('47) AO. 17.

10 *Muhammad Raza v. Yadgar* (1924) 51 I.A. 192, 195, 51 Cal. 446, 80 I.C. 645 ('24) A.PC. 109.

11 *Shaikh Muhammad v. Bibi Mariam* (1929) 8 Pat. 484, 117 I.C. 638, ('29) A.P. 410.

12 *Chief Administrator of Auqaf v. Rashid-ud-daula* P.L.D. 1961 (W.P.) Lah. 993.

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WAKFS

184.

Wakf may be inter vivos or testamentary

A wakf may be created by act inter vivos or by will (185).

A wakf created by will is not invalid because it contains a clause that the wakf shall not operate if a child is born to the testator. The reason is that a testator has power in law to revoke or modify his will at any time he likes, and he may therefore revoke a wakf created by will even without reserving any express power in that behalf.[13]

Shia law

It was held at one time that a Shia cannot create a wakf by will. But this view was erroneous, and it has been held by the Privy Council that a Shia may create a wakf by will.[14]

There is a distinction between a *wakf-bil-wasiyat*, i.e., a will which conveys the property on the death of the testator to the mutawalli as wakf and a *wasiyat-bil-wakf*, i.e., a will which makes a gift of the property with a direction to the donee to create the wakf desired. The distinction is of form, not of substance. In the latter case, the property is not impressed with the character of wakf immediately.[15]

13 *Muhammad Ahsan v. Umardaraz* (1906) 28 All. 633; *Abdul Karim v. Shofiannissa* (1906) 33 Cal. 853.

14 *BaqarAli Khan v. Anjuman Ara Begam* (1902) 25 All. 236, 30 I.A. 94.

15 *Mahabir Prasad v. Mustafa* (1937) 41 Cal. W.N. 933,168 I.C. 418, ('37) A.PC. 174; *Baqar Ali Khan v. Anjuman Ara Begam* (1902) 30 I.A. 94, 25 All. 236; *Agha Ali Khan v. Altaf Hasan Khan* (1892) 14 All. 429.

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CHAPTER XII

WAKFS

185.

Testamentary wakf and wakf made in death-illness

A Mahomedan may dedicate the whole of his property by way of wakf. But a wakf made by will or during *marz-ul-maut* cannot operate upon more than one-third of the net assets without the consent of the heirs.

Hedaya, 233; Baillie, 612.

Shia law

The same is the rule of Shia law.[16]

A testamentary wakf is no more than a bequest to charity, and it is subject to the same restrictions as a bequest to an individual.[17](*see* 118 above)

16 *Ali Husain v. Fazal* (1914) 36 All. 431, 23 I.C. 291; *Budrul Islam Ali Khan v. Mt. Ali Begum* (1935) 16 Lah. 782,158 I.C. 465, ('35) A.L. 251,

17 *Nanhoobeg v. Gulam Husain* (1950) Nag. 633, ('51) A.N. 327.

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WAKFS

186.

Wakf how completed

(1) A wakf inter vivos is completed, according to Abu Yusuf, by a mere declaration of endowment by the owner. This view has been adopted by the High Courts of Calcutta,[18] Rangoon,[19] Patna,[20] Lahore,[21] Madras,[22] and Bombay,[23] and by the Oudh Chief Court.[24] According to Muhammad, the wakf is not complete unless, besides a declaration of wakf, a mutawalli (superintendent) is appointed by the owner and possession of the endowed property is delivered to him (*Hedaya*, 233; Baillie, 550). At one time the High Court of Allahabad[25] adopted this view, but a Full Bench decision of that Court has since decided that a mere declaration of endowment by the owner is sufficient to complete the wakf.[26] The Nagpur High Court[27] has also adopted this view.

(2) The founder of a wakf may constitute himself the first mutawalli (superintendent). The founder and the mutawalli being the same person, no transfer of physical possession is necessary, whichever of the two views is upheld. Nor is it necessary that the property should be transferred from his name as owner to his name as mutawalli.[28] Such a transfer is not necessary even in Allahabad where the view of Muhammad prevails.[29]

Intention

Where there is neither a declaration of wakf nor delivery of possession, a mere *intention* to set apart property for charitable purposes is not sufficient to create a wakf, even if the income of the property is applied to the intended purpose.[30] If the document purporting to create a wakf is invalid, subsequent conduct proving the intention to treat the property as wakf cannot render the endowment valid.[31]

If a wakf is created by a document which establishes by its terms a religious or charitable trust, and it is completed by delivery of possession, it is not open to the settlor or those claiming under him to say that it was not intended to be acted upon. For, if a wakf has been created, it is immaterial that it has not been act ed upon as that is only a matter of breach of trust.[32] But the settlor and those claiming under him are not precluded from showing that no wakf has been created at all and that the deed was

not intended to operate as a wakf, but was illusory and fictitious. This is a question of intention evidenced by facts and circumstances showing that it was not to be acted upon. For the purpose of such an enquiry, subsequent conduct, if it is merely a continuation of conduct at the time of execution, is relevant.[33]An apparent transaction must be presumed to be real and the onus of proving the contrary is on the person alleging that the wakf was not meant to be act ed upon.[34] It has been held by the Privy Council that if a person executes a deed of wakf but without any intention of divesting himself of his ownership of the property, the real intention being to utilise the document, should it become necessary, as a shield against any claims that any other person might have against him either then or at any future time, the deed cannot be given effect to as a wakf.[35]

Evidence of intention is always admissible if the wakf is not created by a document[36] or, if it is created by a document, the language used is ambiguous.[37] A creditor, of course, is always entitled to show that a wakf was created to defraud the creditors.

Importance of subsequent conduct and circumstances at the time of the execution of the wakf-deed has been considered in *Official Receiver v. Kassim Moosa* .[38] A wakf *inter vivos* is completed by a mere declaration of endowment by the owner.[39]

A wakif may constitute himself as the first Mutawalli and no transfer of physical possession is necessary. Nor is it necessary that the property should be transferred from the name of the owner to his name as a mutawalli. An apparent transaction must be presumed to be real and the onus of proving the contrary is on the person alleging that the wakf was not intended to be acted upon. The settlor and those claiming under him can however show that no wakf was created and the wakf was illusory or fictitious. Subsequent conduct, if it is in continuation of conduct at the time of the execution of the deed, is irrelevant. Note: In this case, the Mussalman Wakf Act, 1923 is wrongly referred to as the Mussalman Wakf Validating Act, 1923. Penalties of s. 10 held applicable only in those cases to which the Act of 1913 applied and the benefit for the time being was claimed by the wakif or any of his family.[40]

18 *DeodemJuan Beebee v. Abdollah Barber* (1838) Fulton 345; *Jinjira v. Mohammad* (1922) 49 Cal. 477, 485-488, 67 I.C. 77, ('22) A.C 29; *Gobinda Chandra v. Abdul Majid* (1944) 1 Cal. 329, 216 I.C. 143, ('44) A.C 163.

19 *Ma E Kin v. Maung Sein* (1924) 2 Rang. 495, 88 I.C. 167, ('25) A.R.71.

20 *Muhammad Ibrahim v. Bibi Mariam* (1929) 8 Pat. 484, 117 I.C. 638, ('29) A.P. 410.

21 *Muhammad Said v. Mt. Sakina Begam* (1935) 16 Lah. 432,159 I.C. 250, ('35) A.L. 626; *Zaffar Hussain v. Mahomed Ghiasuddin* (1937) 18 Lah. 276, ('37) A.L 552.

22 *Pathu Kutti Umma v. Nedungadi Bank Ltd.,* (1938) Mad. 148,173 I.C. 699, ('37) A.M. 731.

23 *Abdul Rajak v. Jimbabai* (1911) 14 Bom. L.R. 295, 300-301, 14 I.C 988; *Husseinbhai v. Advocate-General of Bombay* (1920) 22 Bom. L.R. 846,57 I.C. 991.

24 *Rahiman v. Baqridan* (1936) 11 Luck. 735,160 I.C. 495, ('35) A.O. 213.

25 *Muhammad Aziz-ud-din v. The Legal Remembrancer* (1893) 15 All. 321; *Muhammad Yunus v. Muhammad Ishaq* (1921) 43 All. 487, 62 I.C. 896, ('21) A.A. 103; *Muhammad Shafi v. Muhammad Abdul* (1927) 49 All. 391,99 I.C. 1052, ('27) A.A. 255.

26 *Mohammad Yasin v. Rahmat Ilahi* (1947) All. L.J. 85, ('47) A.A. 201 F.B.

27 *Zainab Bi v. Jamalkhan* (1949) Nag. 426, ('51) A.N. 428.

28 *Beli Ram v. Mohammad Afzal* (1949) Lah. 1, 50 Bom. L.R. 674, ('48) A.PC 168; *Abdul Rajak v. Jimabai* (1911) 14 Bom. L.R 295, 300, 14 I.C. 988; *Muhammad Rustom Ali v. Mushtaq Hussain* (1920) 47 I.A. 224, 227, 42 All. 609, 612, 57 I.C. 329; *Husseinbhai v, Advocate-General of Bombay*(1920) 22 Bom. L.R. 846, 57 I.C. 991; *Jinjira v. Mohammad* (1922) 49 Cal. 477, 488, 67 I.C. 77, ('22) A.C. 429; *Abdul Jalil v. Obed-ullah* (1921) 43 All. 416, 62 I.C. 725, ('21) A.A. 165; *Muhammad Zain v. Nur-ul-Hasan* (1923) 45 All. 682, 74 I.C. 142, ('24) A.A. 113; *Tafazzal v. Majid Ullah* (1924) 5 Lah. 59; 79 I.C. 120, ('24) A.L. 432; *Ailmunnissa Bibi v. Mohammad Abdul Rahman* (1938) A.L.J. 727, 177 I.C. 205, ('38) A.A. 485; *Mohammad Afzal v. Din Mohammad* (1946) L. 867, ('47) A.L. 117.

29 (1923) 45 All. 682, 74 I.C. 142, ('24) A.A. 113, *supra*; *Ghazanfar v. Ahmadi Bibi* (1930) 52 All. 368, 123 I.C. 369, ('30) A.A. 169; *Mohamed Abdul Aziz Khan v. Mahbub Singh* (1936) All. L.J. 488, 160 I.C. 48, ('36) A.A. 202.

30 *Banubi v. Narsingrao* (1907) 31 Bom: 250; *Zaffar Hussain v. Mahomed Ghiasuddin* (1937) 18 Lah. 276, ('37) A.L. 552; *Rahima Bibi v. S. Mustafa* (1938) 178 I.C. 83, ('38) A.R. 264.

31 *Mahomad Safi v. Khadim Ali* ('44) A.O. 291.

32 *Beli Ram v. Mohammad Afzal* ('48) A.PC 168; *Syed Zainuddin Hussain v. Moulvi Mohammad Abdur Rahim* (1933) 58 Cal. L.J. 259, 140 I.C. 799, ('33) A.C. 102; *Muhammad Said v. Mt. Sakina Begum* (1935) 16 Lah. 432, 159 I.C. 250, ('35) A.L. 626; *Kulsom Bibee v. Golam Hossein* (1905) 10 C.W.N. 449, 484.

33 *Masuda Khatun v. Muhammad* (1932) 50 Cal. 402, 133 I.C. 657, ('32) A.C. 93; *Ebratennessa Bibi v. Sarat Chandra* (1934) 34 Cal. W.N. 892, 150 I.C. 386, ('34) A.C. 14; *Gobinda Chandra v. Abdul Majid* (1944) 1 Cal. 329,216, I.C. 143, ('44) A.C. 163.

34 *Gobinda Chandra v. Abdul Majid* (1944) 1 Cal. 329, 216 I.C. 143, ('44) A.C. 163.

35 *Mohammad Ali v. Mt. Bismillah Begam* (1930) 35 C.W.N. 324, 128, I.C. 647, ('30) A.PC. 255; *Beli Ram v. Mohammad Afzal* ('48) A.PC. 168.

36 *Salig Ram v.Amjad Khan*(1906) All. W.N. 159; *Zooleka Bibi v. Syed Zynul Abedin* (1904) 6 Bom. L.R. 1058, 1067; *Muhammad Imdad v. Mt. Bishmillah* (1947) 227 I.C. 50, ('46) A.A. 468.

37 *Kulsom Bibee v. Golam Hoosein* (1905) 10 C.W.N. 449, 484.

38 ('67) A Ker. 73.

39 Mulla 16th. Edn. page 178, article 186 approved.

40 *Garib Das v. MunshiAbdul Hamid* ('70) A SC. 1035.

Shafei law

According to Shafei law, delivery of possession is not necessary to validate a wakf.[41]

41 *Pathu Kutti Umma v. Nedungadi Bank Ltd.* (1938) Mad. 148,173 I.C. 699, ('37) A.M. 731.

Shia law

Under the Shia law, a wakf *inter vivos* cannot be created by a mere declaration; there must also be delivery of possession (Baillie, II, 212). Under the Shia law, the wakif is entitled to constitute himself the first mutawalli and he is entitled to reasonable remuneration as a mutawalli; the ordinary rule being that he should not take more by way of salary than that which is fixed for other mutawallis.[42] No delivery of possession is necessary when the wakif constitutes himself the first mutawalli, but it is necessary in that case that the character of his possession should be changed from that of owner to that of mutawalli or custodian of the wakf. Where the ordinary means of showing change of possession is mutation of names in a public register, the absence of change of names is significant and important; but mutation is not for this purpose the only method nor is it necessary as to every item of the property dedicated. In any case of doubt, the settlor's conduct must be regarded broadly and as a whole. But where change of possession has been effected, the settlor's actions in dealing with the property as his own will not invalidate the wakf, but amount to breaches of trust.[43] If the wakf is testamentary, a clear and unequivocal direction in the will dedicating specified property of God and &uot;vesting&uot; it in a mutawalli is sufficient.[44]

Under Shia law for the creation of a *wakf*, delivery of possession of property to a *mutawalli* must be proved. If the wakif becomes the first *mutawalli*, he must change the nature of his own position accordingly. In case of oral dedications, cogent evidence is required.[45]

42 *Hashim Ali v. Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 180.

43 *Abadi Begum v. Kaniz Zainab* (1927) 51 I.A. 33, 6 Pat. 259, 99 I.C. 669, ('27) A.PC. 2, approving *Hamid Ali v. Mujawar Husain* (1902) 24 All. 257; *Syed Ali Zamin v. Syed Akbar Ali Khan* (1937) 64 I.A. 158 16 Pat. 344, 41 Cal. W.N. 709,167 I.C. 884, ('37) A.PC. 127 reserving 7 Pat. 426.

44 *Badrul Islam Ali Khan v. Ali Begum* (1935) 16 Lah. 782,158 I.C. 465, ('35) A.L. 251.

45 *Jamaluddin v. Mosque Mashakganj* ('73) All. 328.

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CHAPTER XII

WAKFS

187.

Registration

A wakfnama by which immovable property of the value of R s. 100 and upwards is dedicated by way of wakf requires to be registered under the Indian Registration Act, 1908, though the wakif (dedicator) may have constituted himself sole mutawalli thereof, but a &uot;trusteenama&uot; by which he appoints additional mutawallis does not require registration if the document does not purport to transfer any interest in the property to them.[46]

Every wakfnama, that is, a document creating a wakf, operates to extinguish the ownership of the wakif in the wakf property (*see*note to 173), and therefore requires registration under s. 17(l)(b) of the Registration Act. This was assumed in the Privy Council case of*Muhammad Rustom Ali v. Mushtaq Husain* ,[47]upon which the present section (187) is founded. The facts of the case are more fully reported in 42 All. 609, than in 47 I.A. 224. In that case, the wakif first executed a wakfnama by which he constituted himself as the first mutawalli, and reserved to himself the power to appoint additional mutawallis. By that document he defined the powers and duties of the mutawallis and the relation in which they were to stand to the property. After three months, he executed another document called &uot;trusteenama,&uot; by which he appointed additional mutawallis, some to act jointly with him, and others to act after his death. He died after about a month, and the suit was brought by the mutawallis to recover possession of the property from his heirs. The wakfnama was registered in fact, but it was argued for the heirs that it was not *duly*registered as certain rules made under s. 69 of the Registration Act were contravened. The Privy Council held that it was duly registered. The &uot;trusteenama,&uot; however, was not registered, and it was argued that, not being registered, it did not confer upon the mutawallis any right of suit. But this argument was not accepted, and it was held that the document, even if read with the wakfnama, did not purport to assign the property to the mutawallis, and did not therefore require registration. See in this connection s. 202 which defines the position of a mutawalli. See also the following case:

Document purporting to be a memo of wakf which has already been orally created or a document appointing Mutawallis--Validity--If required to be registered.[48]

46 *Muhammad Rustam Ali v. Mushtaq Husain* (1920) 47 I.A. 224, 42 All. 609, 57 I.C. 329.

47 (1920) 47 I.A 224, 42, All. 609, 57 I.C. 329.

48 1981 All. L.J. 1120.

CHAPTER XII

WAKFS

188.

Wakf by immemorial user

If land has been used from time immemorial for a religious purpose, e.g., for a mosque, or a burial ground or for the maintenance of a Mosque, then the land is wakf by user although there is no evidence of an express dedication.[49]

As a matter of law, a wakf normally requires express dedication, but if land has been used from time to time immemorial for a religious purpose, then the land is wakf by user although there is no evidence of an express dedication.

Thus, where to the original mosque, which is proved to be a wakf property, an area is added by the mutawallis by way of construction of rooms and this area is used by the public for religious purposes alongwith the old mosque, then if the area has been made into a separately demarcated compact unit for a single purpose, namely, collective and individual worship in the mosque, it must be regarded as one unit and be treated as such. The whole becomes accordingly wakf by user.[50]

Baillie, 622.

49 *Mazar Husain v. Adiya Saran* (1948) 1 M.L.J. 259, ('48) A.PC. 42; *Mohd Shah v. Fasihuddin* ('56) A.S.C. 713.

50 *Mohammad Shah v. Fasihuddin Ansari,* A.I.R. 1956 S.C. 713.

Mosque

Land used from time immemorial for the purpose of a masjid and for its courtyard which formed part and parcel of the masjid and for celebration of Moharram festival, has been held to constitute a wakf by user.[51] If a building has been set apart as a mosque, it is enough to make it wakf if public prayers are said there with the permission of the owner. Both a mosque and a saint's tomb become wakf by user.[52] If a mosque has stood for a long time and worship has been performed in it, the Court will infer that it does not stand by leave and licence of the owner of the site but that the land is dedicated property and no longer belongs to the original owner.[53]If the entire premises can be regarded as one whole and members of the public have exercised act s on parts of it in assertion of their right to the whole, the whole property will be considered wakf.[54] Where to the original mosque, which is proved to be a wakf property, an area is added by the mutawallis by way of construction of rooms and this area is used by the public for religious purposes along with the old mosque, then it must be regarded as one unit and treated as such. The whole becomes, accordingly, *wakf* by user.[55] But it has been held that rooms occupied by a mullah or muezzin solely for his residential purposes with the leave and licence of a third party which are some distance away and not a part of the mosque construction, did not become wakf property.[56] A platform used as a praying place, not by the general public, but by the Mahomedan inhabitants of an "ahata" is private property and cannot be appropriated for the building of a mosque.[57] In the absence of an intention to dedicate or of a dedication by the owner, the user will not divest land of its private character and make it wakf.[58] The construction of a mosque in a private house does not by itself mean that the public are entitled to worship there. There must be proof of dedication or of user such as by the saying of prayers in a congregational manner.[59]

In order to create a valid dedication of a public nature, the following conditions must be satisfied: (1) the founder must declare his intention to dedicate a property for the purpose of a mosque. No particular form of declaration is necessary. The declaration can be presumed from the conduct of the founder, either express or implied; (2) the founder must divest himself completely from the ownership of the property, the divestment can be inferred from the fact that he had delivered possession to the Mutawalli or Imam of the mosque. Even if there is no actual delivery of possession, the mere fact that members of the Mahomedan public are permitted to offer prayers with *azan* and *ikamat*, is sufficient to hold that the wakf is complete and irrevocable; and (3) the founder must make some sort of a separate entrance to the mosque which may be used by the public to enter the mosque.

As regards the adjuncts, the law is that where a mosque is built or dedicated for the public, if any additions or alterations, either structural or otherwise, are made which are incidental to the offering of prayers or for other religious purposes, those constructions would be deemed to be accretions to the mosque and the entire thing will form one single unit so as to be a part of the mosque.

The Mahomedans of village Vijayapuram, Tiruvarur District, Madras State, the plaintiffs' ancestors (who constituted the bulk of the Muslim population in the village) sought permission of the founder, the defendants' ancestors (being a small family in that village) for erecting a building for the purpose of worship on the land belonging to them. There was no mosque at all in the village which consisted of a substantial portion of the Muslim population. The idea of constructing the mosque originated from the plaintiffs' ancestors (the Rowthers). The agreement following the permission recited: (i) that the Rowthers (the plaintiffs' ancestors) were constructing a Pallivasal at the raised platform belonging to Labbai M.K.A. Sahib (the founder or the owner) with his permission; (ii) that after completion of the construction which was described as a mosque in the agreement, the Rowthers would have no claim or right, except the right to worship therein; (iii) that the only rights which the Muslims would claim would be the right to worship, to light lamps and would also be responsible for the maintenance of the mosque; (iv) that the said construction was made purely for the purpose of worship; (v) that there should be a doorway and two windows affixed on the southern hall of the mosque and one doorway on the eastern side so as to serve as entrances. It was held that the document unmistakably evidenced the clear intention of the founder to consecrate the mosque for public worship and amounted to a declaration of a public wakf.

Once the mosque was constructed, it stood dedicated to God and all the right, title and interest of the owner got completely extinguished.

Once there was a complete dedication to the mosque, as a place of public worship, any reservation or condition imposed by the owner would be deemed to be void and would have to be ignored. However, the so-called stipulation by the plaintiffs, ancestors at the time of erecting the prayer hall, not to claim any right or interest in the mosque, could not be construed as an assertion that the mosque was not a public wakf. Reading the statements made in the agreement as a whole what, the plaintiffs' ancestors meant was that the mosque would be undoubtedly a public wakf meant 'for the purpose of public worship' and that they would not interfere with the management of the same. This does not mean that if the founder's descendants indulged in mismanagement of the mosque, the plaintiffs as members of the Mahomedan community could not take any act ion under the law against the defendants.[60]

Held further, As regards the adjuncts of the mosque which were built by the Mahomedan community from time to time for the purpose of the mosque or by way of gift to the mosque, the question of the person who actually made the construction is wholly irrelevant, because all the constructions made by any person used for religious purposes, incidental to offering prayers in the mosque, would be deemed to be accretions to the mosque itself.[61]

In the absence of a custom or usage to the contrary, the Mahomedan Law does not favour the hereditary rights of being an Imam, because an Imam must possess certain special qualities and certain special knowledge of the scriptures before he can be allowed to lead the prayers. This,

however, is a matter for the entire Muslim community to decide, because an Imam is normally chosen under the Mahomedan Law by the Muslim community.[62]

The High Court of Madras in *N.R. Abdul Azeez v. E. Sundaresa Chettiar* ,[63] has made a very important observation that &uot;it is a fundamental principal of Mohamedan Law of wakf that when a mosque is built and consecrated by public worship, it ceases to be the property of builder and vests in God. A mosque once so consecrated cannot in any case revert to the founder and every Mohamedan has the right to enter it, and perform devotions according to his own tenets so long as the form of worship is in accord with the recognised rules of Mohamedan Ecclesiastical Law. Once the mosque was constructed, it stood dedicated to God and the owner is divested of his right, title and interest in the property. The very concept of a private mosque is unknown to Muslim Law. Once the founder dedicates a particular property for the purpose of a public mosque, no Muslim can be denied the right to offer prayers therein on the ground that the mosque fell into disuse long back. In the instant case, the Court held that the village plan has shown that the mosque existed in the year 1938, therefore, this disputed piece of land has become a wakf by user although there is no evidence of an express dedication and any attempt on the part of respondents to prevent the appellants from coming over to property and saying their prayers cannot be permitted.&uot;

51 *Khati v. Mirza Hossain* ('62) A. Ori. 95.

52 *Syed Maher Husain v. Haji Ali Mahomed* (1934) 36 Bom. L.R. 526,152 I.C. 50, ('34) A.B. 257.

53 *Miru v. Ram Gopal* (1935) All. L.J. 1269, 156 I.C. 942, ('35) A.A. 891; *Abdul Rahim v. Fakir Mohammad* (1946) Nag. 518 ('46) A.N. 401.

54 *Abdul Rahim v. Fakir Mohamed* (1946) Nag. 588, ('46) A.N. 401; *Busquid v. Newaj Ahmed Khan* (1929) 119 I.C. 116, ('29) A.C. 533; *Maher Hussein v. Ahonahmed* (1934) 152 I.C. 50, ('34) A.B. 257.

55 *Mohd Shah v. Fosihuddin* ('56) A.S.C. 713.

56 *State of Madras v. Mohd. Sahib* ('63) A.M. 39.

57 *Mt. Mamik Devi v. Habib Ullah* ('36) A.L. 876.

58 *Zaffar Hussain v. Mohomed Ghiasuddin* (1937) 18 Lah. 276, ('37) A.L. 552; *Fail Modh. v. Kanahiyalal* (1964) Raj. L.W. 567.

59 *Musaheb Khan v. Rajkumar Bakshi* (1938) O.W.N. 937, 177 I.C. 718, ('38) A.O. 238; *Khalil Ahamed v. Sheikh Md. Askari* (v65) A. All. 320.

60 *Zafar Hussain v. Mian Mohammad Ghias-ud-Din* A.I.R. 1937 Lah. 552; *Nawab Zain Yar Jung v. The Director of Endowments* A.I.R. 1963 S.C. 985 and *Jawaharbeg Umraobeg Musalman v. Abdul Aziz Bhondumiya Musalman* A.I.R. 1956 Nag. 257.

61 *Syed Mohd Salie Labbai v. Mohd. Hanifa* A.I.R. 1976 S.C. 1569 [P.K. Goswami and S. Murtaza Fazl Ali JJ.].

62 *Syed Mohd. Salie Labbai v. Mohd. Hanifa* A.I.R. 1976 S.C. 1569 [P.K. Goswami and S. Murtaza Fazl Ali JJ.].

63 A.I.R. 1993 Mad 169.

Graveyard

The Oudh Chief Court, relying on a decision of the Allahabad High Court[64] has held that the question whether a plot of land is a graveyard or not is primarily a question of fact.[65] In an earlier decision, the same Court took the view that the question whether a certain property is private or public property, held in trust for religious or charitable purposes, is a mixed question of law and fact.[66] In a later case,[67] it was held by the same Court that whether a building is a private or public mosque is not a question of fact but a question of law. That is a question of a legal inference to be drawn from the proved facts. In *Hosansab v. Mohidinsab* ,[68] the Bombay High Court held that the question whether a particular building is a public mosque or not is a question of fact. The Sind Chief Court held that

whether instances of burial proved in any particular case are &uot;adequate in character, number and extent&uot; to justify an inference of dedication is a question of pure fact. It is submitted that the proper legal effect of a proved fact is essentially a question of law and the view taken by the Oudh Chief Court in the later decision is correct and supported by the observations of the Privy Council in *Dhanna Mal v. Moti Sagar* .[69] A description in a settlement register of a site as a *kabaristan* is *jrima facie* evidence that it is a public graveyard in the sense known to Mahomedan law,[70] and long user makes such evidence conclusive,[71] but the mere fact of a few burials many years ago has been held to be no evidence of public user.[72] In order to prove dedication by evidence of burials in a land and to justify the inference that the land is a cemetery, it is necessary to prove a number of instances adequate in character, number and extent. Long user, as evidence of a dedication, must be long and absolute and there should be no break. If there is evidence of discontinuance of the use of the land as a burial ground, that may cause the land to lose its consecrated character. A stray burial or two in a plot does not furnish ground for treating the land as a burial ground and there is no wakf by user.[73] Where a certain land was used as a Mahomedan graveyard and it is amply supported by the entries in the revenue records, the mere fact that in recent years it was not so used does not deprive it of its character as a wakf.[74] If a site is described in the revenue register as a grove and is owned by a Hindu zemindar, the existence of a few graves will not justify the presumption of a dedication;[75] for the burials must be adequate in number, character and extent to justify the inference.[76] But although one burial in a plot will not make the land wakf,[77] it has been held in an Allahabad case that the presumption is that the part of the site where the dead body is buried is dedicated with the consent of the owner so that the grave is wakf and the Muslim community have access to it.[78] But in the absence of evidence of user, such a claim for a private grave would seem to be of doubtful validity: a Pir's tomb or a Dargah is accessible to the public and proof of user would establish the nature of the institution. Where in a public graveyard, one portion was used as burial ground from time immemorial and another portion was quite separate and distinct and in the possession of the mutawalli but was not shown in the settlement papers as the personal property of the mutawalli, and there were no burials in the built portion, it was held that the whole piece of land in the graveyard could not be considered wakf property; the built portion was the private property of the Mutawalli.[79] A public graveyard is wakf property and therefore inalienable even after it has been closed by the Municipality.[80] The Muslim community has a right to require the demolition of a house built on a disused graveyard in contravention of the original purposes of the wakf.[81] But the building of a temporary hut by the custodian of the graveyard does not amount to an assertion of title hostile to the wakf.[82] When the land has become wakf for a graveyard, the rights of the former owner are extinguished and he has no right to graze his cattle on it.[83] Private ownership of a plot is incompatible with the plot having been dedicated as a wakf for graveyards.[84] Where a mortgage decree was obtained in respect of the alleged wakf property, there would be an inference against wakf by user.[85]

Under the Mahomedan Law, graveyard may be of two kinds; a family or private graveyard and a public graveyard. A graveyard is a private one which is confined only to the burial of corpses of the founder, his relations or his descendants. In such a burial ground, no person who does not 'belong to the family of the founder is permitted to bury the dead. On the other hand, if any member of the public is permitted to be buried in a graveyard and this practice grows, so that it is proved by instances, adequate in character, number and extent, then the presumption will be that the dedication is complete and the graveyard has become a public graveyard where the Mahomedan public will have the right to bury their dead. It is also well settled that a conclusive proof of the public graveyard is the description of the burial ground in the revenue records as a public graveyard.

Once a Kabaristan has been held to be a public graveyard, it vests in the public and constitutes a wakf and it cannot be divested by non-user but will always continue to be so whether it is used or not.

The following rules apply in order to determine whether a graveyard is a public or a private one:

(1) even though there may be no direct evidence of dedication to the public, it may be

presumed to be a public graveyard by immemorial user, i.e., where the corpses of the members of the Mahomedan community have been buried in a particular graveyard for a large number of years without any objection from the owner. The fact that the owner permits such burials will not make any difference at all; (2) if the graveyard is a private or a family graveyard then it should contain the graves of only the founder, the members of his family or his descendants and no others. Once even in a family graveyard members of the public are allowed to bury their dead, the private graveyard sheds its character and becomes a public graveyard; (3) in order to prove that a graveyard is public dedication it must be shown by multiplying instances of the character, nature and extent of the burials from time to time. In other words, there should be evidence to show that a large number of members of the Mahomedan community had buried their corpses from time to time in the graveyard. Once this is proved, the Court will presume that the graveyard is a public one; and (4) where a burial ground is mentioned as a public graveyard in either a revenue or historical papers, that would be conclusive proof of the public character of the graveyard.[86] It was held on facts, that the entire burial ground of village Vijayapuram, Tiruvarur District, Madras State, was a public graveyard and the Mahomedan community have a right to bury their dead subject to payment of pit fees and other charges that may be fixed by the defendants Labbais, descendants of the founder. That the Labbais used to realize pit fees or other incidental charges would not detract from the public nature of the dedication.[87]

It has been held that a Hindu may dedicate a plot of land for the purpose of a Muslim graveyard.[88]

In the absence of a plea that a presumption of dedication arises from long user, there can be no such presumption. Land was recorded in *Jamabandis* in 1909-1910 and in 1954-56 as '*gher mumkin kabrastan*' the entry was held to be not correct because the village was predominently Hindu before partition of India and no Muslim remained afterit. No graves were found on the spot. The entries of 1957-58 and 1960-61 were held to repeat merely the earliers entries.[89]

Land used as a graveyard ceases to be private property.[90] Apart from immemorial user of land as a graveyard, evidence of instances must be given. From the number of instances a reasonable inference of dedication can he drawn, if the nature of the property admits it.[91]

64 *Shevoraj Chamar v. Mudee Khan* (1934) 149 I.C. 797, ('34) A.A. 868.

65 *Quadir Baksh v. Saddullah* (1938) 173 IC. 260, ('38) A.O. 77.

66 *Hari Kishen v. Raghubar* (1926) 1 Luck. 489, 97 I.C. 853, ('26) A.O. 578.

67 *Musaheb Khan v. Rajkumar Bakshi* (1938) O.W.N. 937, 177 I.C. 718, ('38) A.O. 238.

68 (1923) 70 I.C. 850, ('23) A.B. 42.

69 (1927) 8 Lah. 573, 54 I.A. 178, ('27) A.PC. 102.

70 *Ballabh Das v. Nur Mahomed* (1936) 40 Cal. W.N. 499, 70 Mad. L.J. 55, 160, I.C. 579 ('36) A. PC. 83 affirming 7 Luck. 198; *Imam Baksha Munawar Din v. Narasingh Puri* (1938) 175 I.C. 1005, ('38) A.L. 246.

71 *Court of Wards v. Ilahi Baksh* (1912) 40 Cal. 297, 40 I.A. 18,17 I.C. 744; *Mehraj Din v. Ghulam* (1931) 12 Lah. 540,134 I.C. 492, ('31) A.L. 607; *Mehar Din v. Hakim Ali* (1935) 157 I.C. 561, ('35) A.L 912; *Jhao Lal v. Ahmadullah* (1934) All. L.J. 248, 149 I.C. 966, ('34) A.A. 335; *Abdul Rahim v. Fakir Mohamed* (1946) Nag. 518, ('46) A.N. 401; *Ramzan Momin v. Dasrath Raut* ('53) A.P. 138; *Gulam Mohideen Khan v. Abdul Majid Khan* (1956) Andh. W.R. 922; 1956 Andh. L.T. 673; ('57) A. Andh. Pr. 941.

72 *Raushan Din v. Mahomed Shariff* (1936) 161 I.C. 650, ('36) A.L. 87; *Quadir Baksha v. Saddullah* (1938) 173 I.C. 260, ('38) A.O. 77.

73 *Quadir Baksha v. Saddullah* (1938) 173 I.C. 260, ('38) A.O. 77; *Mohammed Kasam v. Abdul Gafoor* ('64) A.M.P. 227; *Punjab Waqf Board, Ambala v. The Panchayat Deh* ('71) A. Punjab 482.

74 *Arur Singh v. Badar Din* (1940) 188 I.C. 877, ('40) A.L. 119; *Mohammad Kasam v. Abdul Gafoor supra* .

75 *Baqar Khan v. Badu Raghindra Pratap Sahi* (1934) 9 Luck. 568 148 I.C. 433, ('34) A.O. 263.

76 *Mahabir Prasad v. Mustafa* (1937) 41 Cal. W.N. 933,168 I.C. 418, ('37) A.PC. 174.

77 *Ballabh Das v. Nur Mahomed supra; Siraj Ahmad Khan v. Gaya Prasad* (1939) A.LJ. 115,180 I.C. 942, ('39) A.A. 219.

78 *Nazira v. Subhdarshan Lal* (1936) All. L.J. 651.

79 *Mohammad Kasam v. Abdul Gafoor* ('64) A.M.P. 227. See also: *Abdul Gafoor v. Hakim Ali* ('59) A. All. 78.

80 *Abdul Ghafoor v. Rahmat Ali* (1930) 122 I.C. 326, ('30) A.O. 245.

81 *Ehsan Beg v. Rahmat Ali* (1934) 10 Luck. 547, 152 I.C. 798, ('35) A.O. 47.

82 *Ramzan v. Mohammad Ahmad Khan* (1936) 165 I.C. 104, ('36) A.O. 207.

83 *Jhao Lal v. Ahmudallah* (1934) All. L.J. 248,149 I.C. 966, ('34) A.A. 335.

84 *Dost Mahomed v. Chainrai* (1940) Kanr 174,187 I.C. 227, ('40) A. S. 43.

85 *Jawaharbeg v. Abdul Aziz* ('56) A.N. 257.

86 A.I.R. 1936 P.C. 83; A.I.R. 1938 Lahore 246; A.I.R. 1934 All. 868; A.I.R. 1938 Oudh. 77 and A.I.R, 1964 MP 227 Ref.

87 *Syed Mohd. Salie Labbai v. Mohd Hanifa.* A.I.R. 1976 S.C. 1569, [P.K. Goswami and S. Murtaza Fazl Ali. JJ.].

88 *Arur Singfx v. Badar Din* (1940) 188 I.C. 877, ('40) A.L. 119 (Decision of a single Judge); *Motishah v. Abdul Khan* (1955) Nag. 1000.

89 *Panchayat Deh v. Punjab Wakf Board* ('69) A. Punj 344.

90 *Pirbux v. Sher Mohd.* 1969 All. L.J. 169.

91 *Skh. Bashir Ahmad v. Shk Abdul Jabbar* ('68) A. Pat. 29.

CHAPTER XII

WAKFS

189.

Revocation of wakf

(1) A testamentary wakf, that is a wakf made by will, may be revoked by the wakif (dedicator) at any time before his death[92] (184).

A testamentary wakf, being no more than a *bequest for* a religious or charitable purpose, may be revoked as any other bequest may be, *see* 128 above. A wakf created during marz-ulmaul is invalid stands on the same footing,[93](*see* 135 above).

(2) Where at the time of creating a non-testamentary wakf, the wakif reserves to himself the power of revoking the wakf, the wakf.[94]

Baillie, 565; Hedaya, 234.

92 *Muhammad Ahsan v. Umardaraz* (1906) 28 All. 633.

93 *Sayad Abdulla v. Sayad Zain* (1889) 13 Bom. 555, 560.

94 *Fatmabibi v. The Advocate-General of Bombay* (1882) 6 Bom. 42, 51; *Assoobai v. Noorbai* (1906) 8 Bom. L.R. 245, 250-251; *Pathukutti v. Avathalakutti* (1890) 13 Mad. 66, 73-74; *Ashna Bibi v. Awaljadi* (1917) 44 Cal. 689, 702, 37 I.C. 887; *Abdul Satar v. Advocate-General of Bombay* (1933) 35 Bom. L.R. 18, 143 I.C. 799, ('33) AB. 87; *Janabali Sardar v. Sabha Khatun* (1938) 177 I.C. 307, ('38) A.C. 257.

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CHAPTER XII

WAKFS

190.

Power to alter beneficiaries and to increase or reduce their shares

The wakif (dedicator) may, at the time of dedication, reserve to himself the power to alter the beneficiaries either by adding to their number or excluding some, and to increase or reduce their shares.[95]

In the absence of such a reservation the wakif cannot alter the terms of the wakf[96] nor can he make a change in the personnel of the mutawallis.[97] He cannot, of course, so reduce the shares as to withdraw any part of the *property* from the wakf. Nor can he substitute an invalid for a valid purpose, for the effect would be to withdraw so much of the property as would be appropriated for the invalid purpose. Nor can he alter the objects of the wakf.[98]

&uot;Syed Mahmood Hasan, the Mutawalli of the first lot, is vested with the power to fix stipends for his children and their descendants and for his wives during his lifetime whatsoever he pleases or to lay down conditions by means of a registered document or may get any writing kept reserved in the custody of the District Judge, so that after him, it be binding upon every Mutawalli; such in case he might not get any writing registered or kept in the custody of the District Judge of the district, then under such circumstances the twenty (20) per cent of the income of the wakf property having been set apart for the expenditure of collection and realisation and right of the Mutawalliship and the amount of R s. 6000 (Rupees six thousand) for meeting the expenditure of 'Azadari' as detailed at para No. 7 above; the entire remaining balance will be distributed among the heirs of Mahmood Hasan according to their respective legal share provided under Mohammadan Law.&uot;.

Held that the meaning of the clause was that Saiyed Mohammad Hasan, the Raja was given a special power and right to fix stipends for his children, wives and descendants either by a registered document and/or by a document in writing kept in the custody of the District Judge so that after him it might be binding on every subsequent Mutawalli. If he failed to do so, then after setting apart 20 per cent of the gross income to meet the expenditure of collection and realisation of R s. 6000 the charitable expenditure, mentioned in Cl. 7 the balance was to be distributed amongst the heirs of Saiyed Mohammad Hasan according to their respective legal shares provided under the Mahomedan Law. On a reasonable view of the matter, either by way of construction of Cl. 18 or as necessary implication of it the Raja was vested with the power to fix stipends for his children and their descendants and for his wives during the lifetime also. Apart from the fact that in Cl. 27 of the wakf deed it was specifically mentioned that any condition or phrase laid down in any of the paras of the wakf deed was not meant to go against the Mahomedan Law and was not to be of any effect if it did so, it was difficult to conclude that the Raja was conferred an absolute power or discretion to fix any stipend for any beneficiary and no stipend for some beneficiary. Equally amongst all is a golden thread which runs throughout the Mahomedan Law. The power given to the Raja under Cl. 18 had to

be reasonably exercised within a reasonable limit of variation according to the exigencies and special needs of a particular beneficiary. He had no power to spend money quite disproportionately for the benefit of one beneficiary. He had no power to spend money for acquisition of any immovable property for a beneficiary. It would be a startling proposition of Mahomedan law to cult out from Cl. 18 of the wakf deed that a property acquired obviously and clearly out of the funds of the wakf estate in the name of one of the beneficiaries should be treated as having been acquired for him or her in exercise of the power under Cl. 18. The law relating to benami transactions, strictly speaking, could not be applied in all its aspects to a transaction of the kind in question. Even if applied, the real owner of the property was the Raja in his capacity as Mutawalli and the beneficiary was a mere benamidar. The property in reality, therefore, belonged to the wakf estate.[1]

95 *Ma E Khin v. Maung Sein* (1924) 2 Rang. 495, 88 I.C. 167, ('25) A.R. 71; *Abdul Wahab v. Mussammat Sughra* (1932) 54 All. 455, 136 I.C. 619, ('32) A. A. 248.

96 *Niamatunnissa v. Hafizul Rahman* (1933) 8 Luck, 482, 144 I.C. 473, ('33) A.O. 261; *Sibte Rasul v. Sibte Nabi* (1942) A.LJ. 722, ('43) A.A. 74.

97 *Rahiman v. Baqridan* (1936) 11 Luck. 735,160 I.C. 495, ('36) A.O. 213.

98 *Khalil Ahamed v. Malka Mehar* ('54) A.A. 362 (F.B.).

1 *Bibi Siddique Fatima v. Saiyed Mohammad Mahmood Hasan,* (1978) All. LJ. 634. (S.C.), [R. S. Sarkaria, N.L. Untwalia and P.S. Kailasam, JJ.].

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CHAPTER XII

WAKFS

191.

Contingent wakf not valid

It is essential to the validity of a wakf that the appropriation should not be made to depend on a contingency.

A Mahomedan wife conveys her property to her husband upon trust to maintain herself and her children out of the income, and to hand over the property to the children, on their attaining majority, and *in the event of her death* without leaving children, to devote the income to certain religious uses. This is not a valid wakf, for it is contingent on the death of the settlor without leaving issue.[2]

A Mahomedan executes a deed of wakf which contains a direction that until payment of specified debts due by him, no proceedings under the wakfnama should be enforceable. The provision for the payment of debts does not import a contingency and the wakf is valid.[3]

A direction in the deed of wakf to create a reserve fund intended for preserving, improving and extending the wakf properties does not invalidate the wakf.[4]

Where the deed of wakf provides that the ultimate gift to charity is to take effect only if a certain person dies without leaving any issue, the rule of contingency under the Mahomedan law would affect such disposition, and the position in that respect is not altered by anything in the Mussalman Wakf Validating Act, 1913. That Act undoubtedly authorizes a postponement of the ultimate gift to charity, which would not have been valid under the original law, but it does not abrogate the rule of contingency under the Mahomedan law.[5](*see also* the notes on 197 below)

The Supreme Court of India in *Punjab Wakf Board v. Shakur Masih* [6] reiterated that a disposition by way of will given in future or subject to contigency or conditional one is void under Muslim Law. A bequest creating a wakf contingent upon the life time of Mussamat Kariman is invalid and therefore, the contigent wakf is not a wakf valid.

In the instant case, the deed of wakf provides that the ultimate gift to charity is to take place only if a certain person dies without leaving any issue, the rule of contingency under Mohamedan Law would affect such disposition, and the positon in that respect is not altered by anything in the Mussalman Wakf Validating Act, 1913. The Act undoubtebly authorises a postponement of the ultimate gift to a charity which would not have been valid under the original law, but it does not aborgate the rule of contingency under the Mohmedan Law.

Shia law

The same is the rule of Shia law;[7] Baillie, II, 218. If a widow and her sons make a dedication of their inheritance and some of the sons are minors the dedication cannot take effect at once for it depends upon the minors attaining majority and doing likewise. The wakf is therefore wholly invalid.[8]

2 *Pathukutti v. Avathalakutti* (1888) 13 Mad. 66; *Cassamally v. Currimbhoy* (1911) 36 Bom. 214, 258, 12 I.C. 225; *Habib Ashraff v. Syed Wajibuddin* (1933) 144 I.C. 654, ('33) A.O. 222; *Mahomed Safi v. Khadim Ali,* ('44) A.O. 291: Baillie, 564.

3 *Khalil-ud-din v. Shri Ram* (1934) 56 All. 293,148 I.C. 294, ('34) A.A. 176.

4 *Hashim Ali v. Iffat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 180.

5 *Commissioner of Wakfs, Bengal v. Haji Rashid Ali Dina* ('58) A.C. 413.

6 A.I.R. 1997 SC 104.

7 *Syeda Bibi v. Mughal Jan* (1902) 24 All. 231. The actual decision in this case cannot be supported since the Privy Council ruling in *Baqar Ali Khan v. Anjuman Ara Begam* (1902) 25 All. 236, 30 I.A. 94.

8 *Mahabir Prasad v. Mustapha* (1937) 41 Cal. W.N. 933,168 I.C. 418, ('37) A.PC. 174.

Shaffei law

Under Shaffei law also a wakf dependent on a contingency is invalid, a wakf to come into operation on the death of the wakif is valid, but it is to be treated on the same footing as a testamentary wakf.[9]

9 *Hussain v. Salah* ('53) A Hyd. 195.

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CHAPTER XII

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192.

Reservation of life interest for benefit of wakif (dedicator)

(1) Under the Hanifi law, the wakif (dedicator) may provide for his maintenance out of the income of the wakf property. He may, if he wishes, reserve even the whole income for himself for his life.[10]

On the amount of maintenance becoming not sufficient to make both ends meet, the amount of maintenance can be increased on a suit by a beneficiary against Mutawalli.[11]

(2) *Payment of wakifs debts.*--Under the Hanifi law, the wakif may provide for the payment of his debts out of the income of the wakf property.[12]

This was well established before the Wakf Validating Act, 1913, and it is now reproduced in s. 3, Cl. (b) of the Act. (*see* 198 below)

(a) A Hanafi Mahomedan female conveys her house to her husband upon trust to pay the income of the house to her for her life, and from and after her deafh to devote the whole of it to certain charitable purposes. This is a valid wakf, though the charitable trust is not to come into effect until after the founder's death.[13]*Hedaya*, 237. Such a wakf is not valid under the Shia law. (*see* below &uot;Shia law&uot;)

(b) A Hanafi Mahomedan executes a deed of wakf by which he directs his debts to be paid out of the rents and profits of the wakf property. This is a valid wakf. Such a wakf is not valid under the Shia law. (see below &uot;Shia law&uot;)

(c) A Hanafi Mahomedan executes a deed of wakf by which he reserves the whole legal and beneficial interest to himself during his lifetime. The wakf is invalid.[14]

It is submitted that this case is wrongly decided. Later cases in Allahabad and Madras have dissented from the view expressed here.

(d) Where in a wakf benefit was reserved in the wakf for some individual and it was claimed that this was not a wakf, the analogy of the Bombay Public Trusts Act was not applied. It was held that the Act being a piece of legislation cannot determine the issue and a Muslim wakf is not bad because it reserves some benefit in favour of persons.[15]

'Family' in Mussalman Wakf Validating Act, 1913, means persons descended from one common progenitor and having a common lineage. Brother's son, brother's daughter and their descendants are included. Intermediate beneficial interests do not matter as the ultimate benefit is to charity:1944 Bom. 91 and 1933 Cal. 581 dissented from: 1943 Mad. 234 held overruled by 1947 Mad. 176.[16]

Wakf to defraud creditors

A wakf made with intent to defeat or defraud creditors is voidable at the option of creditors[17] but cannot be revoked by the wakif or his heirs.[18]

10 *Doe dem Juan Beebee v. Abdollah* (1838) Fulton's Rep. 345; *Fatmabibi v. Advocate-General of Bombay* (1881) 6 Bom. 42, 51-52; *Cassamally v. Currimbhoy* (1912) 36 Bom. 214. 12 I.C. 25; *Muhammad Zain v.Nur-ul-Hasan*(1923) 45 All. 682. 74 I.C. 142 ('24) A.A. 113; *Ma E Khin v. Maung Sein* (1924) 2 Rang. 495, 88 I.C. 167, ('25) A.R. 71.

11 1937 Oudh W.N. 429. Reld. on A.I.R. 1932 All. 248, Dist. *Smt. Nawab Sarukh Jahan Begam v. Saiyed Enayat Husain Khan.* A.I.R. 1975 All. 452, [S.K. Kaul, J.].

12 *Luchmiput v. Amir Alum* (1882) 9 Cal. 176; *Jinjira v. Mohammad* (1922) 49 Cal. 477, 483, 67 I.C. 77, ('22) A.C. 429

[a case under the Wakf Validating Act]; *Khalil-uddin v. Shri Ram* (1934) 56 All. 293. 148 I.C. 294, ('34) AA. 176.

13 See cases cited in f.n. (10) above.

14 *Phul Bee Bee v. R.M.P Chettyar Firm* (1935) 13 Rang. 679, 156 I.C. 1038; *Abdul Karim v. Rahimbai* (1946) 48 Bom. L.R. 67, ('46) A.B. 342.

15 *G. Venkataswamy v. Mir Zahid Hussain Saheb* ('73) A. My s. 145.

16 *V. Mohamed Mohini v. Wakf Board Madras,* ('68) A. Mad. 243.

17 *Bismillah Begam v. Tahsin Ali* (1930) 52 All. 710, 124 I.C. 722, ('30) A.A. 562; *Hanuman Prasad v. Mahomed Ismail* (1936) 162 I.C. 495, ('36) A.L, 72; *Mohammad Ismail v. Hanuman Parshad* (1938) 178 I.C. 476, ('38) A.PC. 290; *Har Prasad v. Mohammad Usman* (1942) A.L.J. 645, ('43) A.A. 2.

18 *Zafrul Hasan v. Farid-ud-din* (1945) All. 161, 47 Bom, L.R. 239, ('46) A.PC 177.

Provision for settlor's residence

It would seem that a provision for the residence of the settlor for his life in the endowed property is not invalid.[19]

19 See *Muhammad Shafi v. Muhammad Abdul* (1927) 49 All. 391, at p. 395, 99 I.C. 1052, ('27) A.A. 255.

Shia law

According to the Hanafi law, the settlor may reserve the usufruct of the endowed property of himself for his life. According to the Shia law a wakf is not valid unless the settlor divests himself of the ownership of the property and of everything in the nature of usufruct from the moment the wakf is created.[20] Hence a settlor cannot, according to that law, reserve for himself a life-interest in the income or any portion thereof: Baillie, II, 218-219. It has been held by the High Court of Allahabad that if the settlor reserves the whole income for himself, the wakf is wholly void; but if he reserves a portion of the income i.e., one-third, the wakf is void as to one-third only of the corpus, but valid as to the remaining two-thirds.[21] But in *Abadi Begum v. Kaniz Zainab* ,[22] the Privy Council expressed the opinion that in such a case, the wakf would be entirely void. Their Lordships approved the four conditions governing the validity of a wakf under Shia law as set out in Baillie's Digest, II, 218-219. These are &uot;(1) it must be perpetual; (2) absolute and unconditional; (3) possession must be given to the *mowkoof* (beneficiary) of the thing appropriated; and (4) it must be taken entirely out of the wakif or appropriator,&uot; The last condition has been expressed in direct and homely language by saying that the wakif must not eat out of the wakf. The case was one in which the settlor under colour of fixing her salary as mutawalli really reserved for herself a portion of the income very much in excess of the salary fixed for future mutawallis. The case was not decided on this ground but the wakf was held to be invalid as the settlor had not parted with possession so as to comply with the third condition set out above.

But though a Shia cannot provide for his own maintenance out of the wakf property he may provide for the maintenance of his family, children and dependants.[23]This is recognized in s. 3(a) of the Wakf Act. But a Shia may provide for the expenses of Roza, Namaz, Haj, Ziarat, etc., to be performed after his death for his spiritual benefit.[24] He may also reserve a life interest for a beneficiary in the usufruct of the property if the intention that the property should become wakf on the settlor's death is clear.[25] If the settlor is the first mutawalli he may lawfully take the remuneration of the mutawalli.[26] The High Court of Allahabad has held that a provision that the endowment shall not take effect till the death of the settlor's wife is valid,[27] but this view of the law has been overruled by the Privy Council in *Mt. Ali Begitm v. Badr-ul-Islam Ali Khan* ,[28] in which it was held that a direction that certain property should become wakf after the death of a person surviving the testator was invalid.

Again according to the Shia law, a wakf is not valid, if it provides for the payment of *personal* debts of the settlor. But a provision for payment of debts *charged* on the estate is valid; in other words, a Shia may like a Sunni, make a valid wakf of property which is subject to a mortgage.[29](Baillie, II, 218-219)

In *Syed Ali Zamin v. Syed Akbar Ali Khan* ,[30] the Judicial Committee held that the settlor has divested himself of all interest in the property dedicated though he had appointed himself Mutawalli with uncontrolled powers of management. Whether he has so divested himself, is a question of construction of the wakfnama, and is not to be confounded with the question whether there has been a transfer of possession or change in the character of his own possession.

20 *Ali Raza v. Sanwal Das* (1919) 41 All. 34, 48 I.C. 212; *Hemraj Radhanji v. Shahbhan* (1939) 179 I.C. 692, ('39) A.S. 22, affirmed in *Shabhan Mohib v. Hemraj* (1941) Kar. 474, ('42) A.S. 14.

21 *Hajee Kalub v. Mehrum Bee Bee* (1872) 4 N.W.P. 155; *Hamid Ali v. Mujawar Husain* (1902) 24 ALL. 257.

22 (1927) 54 IA. 33, 6 Pat. 259, 99 I.C. 669, ('27) A.PC. 2.

23 54 LA, 33 *supra*; *Mt. Ali Begum v. Badrul-Islam Ali Khan* (1938) 65 I.A. 198, ('38) A.PC. 184; *Sibte Rasul v. Sibte Nabi* (1942) A.LJ. 722, ('43) A.A. 74.

24 *Mohammad Qasim v. Mohammad Mehdi* (1938) 13 Luck. 458, ('37) A.O. 465.

25 *Mt. Ali Begum v. Badr-ul-lslam Ali Khan* (1938) 65 I.A. 198, ('38) A.PC. 184.

26 *Mahabir Prasad v. Syed Mustafa Husain* (1933) 8 Luck. 246, 141 I.C 501 ('33) A.O. 107 approved by the Privy Council on this point in (1937) 41 Cal. W.N. 933.168. I.C. 418, ('37) A.PC. 174.

27 *Muhammad Ahsan v. Umardaraz* (1906) 28 All. 633.

28 (1938) 65 I.A. 198, ('38) A.PC. 184. See also *Chief A dministrator of Auqaf v. Mohd Sher Nawab Khan* P.L.D. 1967 Lah. 672.

29 *Musharaf Begum v. Sikandar* (1929) 51 All. 40, 49-50, 111 I.C. 583, ('28) A.A. 516 explaining *Hamid Ali v. Mujawar* (1902) 24 All. 257, 263.

30 (1937) 64 I.A. 158, 16 Pat. 344, 41 Cal. W.N. 709, 167, I.C 884, ('37) A.PC 127.

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CHAPTER XII

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193.

Wakf property cannot be alienated

Wakf property cannot be alienated except in the cases mentioned in 207 and 208.[31]

Hedaya, 231, 232; *Baillie*, 558-560.

31 *Abdur Rahim v. Narayan Das* (1923) 50 I.A. 84. 50 Cal. 329, 71 I.C. 646, ('73) A.PC. 44.

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CHAPTER XII

WAKFS

194.

Attachment of wakf property

Wakf property is not liable to attachment and sale in execution of a personal decree against the mutawalli,[32] nor can the rents and profits thereof be seized in execution.

32 *Bishen Chand v. Nadir Hossein* (1887) 15 CaJ. 329, 15 I.A. 1; *Mutu Ramanadan v. Vava Levvai* (1917) 44 I.A. 20, 40 Mad. 116, 39 I.C. 235; *Shah Mohammad v. Mohammad* (1927) 2 Luck. 109, 100 I.C 241, ('27) A.O. 113; *Muhammad Ismail v. Muhammad* (1921) 43 All. 508. 62 I.C. 904, ('21) A.A. 224.

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CHAPTER XII

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195.

Suit for a declaration that property is wakf

A suit for a declaration that property belongs to a wakf can be brought by Mahomedans interested in the wakf without the sanction of the Advocate-General. The provisions of s. 92 of the Code of Civil Procedure , 1908, do not apply to such a suit. That section applies only to suits claiming any of the reliefs specified in it.[33]

Even acquisition of immovable property directly with the wakf fund is an accretion to the wakf property.[34] Suit for declaration that property belongs to wakf can be filed by any Mahomedan interested in wakf.

It is settled law that in a case where a long period has elapsed since the origin of the alleged wakf, user can be the only available evidence to show whether the property is wakf or not.[35]

Whether the Wakf falls within s. 92C.P.C. is to be seen with reference to the objects of the Wakf. They must be substantially for public purposes. The suit under s. 92 must be in a representative capacity and not to vindicate private rights. The wakf may create intermediate private rights but if there is substantial benefit for charity, the suit, if it is to vindicate public rights will fall in s. 92 and the consent of the Advocate-General is a condition precedent.[36]

Even a worshipper will be entitled to maintain a suit for possession of a trust property where the trustee has alienated the trust property and would not proceed to recover possession of the same or has disabled himself otherwise from maintaining suit in respect thereof, or declines to institute a suit. The Court may after setting aside the alienation hand over the property to the trustee or to the worshippers, if there is no trustee.[37]

FAMILY SETTLEMENTS BY WAY OF WAKF

33 *Abdur Rahim v. Mahomed Barkat Ali* (1928) 55 I.A. 96, 55 Cal. 519, 108 I.C. 361, ('28) A.PC. 16; *Muslim Orphanage v. Khatoon Bi* ('58) A. My s. 28.

34 *Bibi Siddique Fatima v. Saiyed Mohammad Mahmood Hasan,* 1978 All. LJ. 634(SC), [R.S. Sarkaria, N.L. Untwalia and P.S. Kailasam, JJ.].

35 *Anjuman Islamia v. Najim Ali,* A.I.R. 1982 M.P. 17.

36 *Sughra Bibi v. Haji Kummu Miamn* ('69) A.S.C. 884.

37 *Amir Jan v. Shaik Sulaiman Sahib,* (1968) II M.L.J. 559.

History of the Wakf Validating Act, 1913

In order to understand, the wakfs may be divided into two classes, *viz*., (1) public and (2) private. A public wakf is one for a public religious or charitable object. A private wakf is one for the benefit of the settlor's family and his descendants, and is called *wakf-alal-aulad*. It was considered at one time that "to constitute a valid wakf there must be a dedication of property *solely* to the worship of God or to religious or to charitable purposes,[38] in other words, that a private wakf was in no case valid. But this extreme view is no longer tenable,[39]and a private wakf may now be made subject to certain limitations. These limitations were very strict under the law as it stood before the Wakf Act of 1913. They have been considerably relaxed by the Wakf Act. Wakfs are divided into private and public. A wakf means the divesting of the property of the donor and vesting it in the Almighty.[40]The case deals with the positions before and after the Wakf Act .

Wakf *exclusively*for the benefit of the settlor's family, children, and descendants in perpetuity.--Such a wakf was invalid before the Wakf Act. It is also invalid under that Act . (*see*Wakf Act, proviso to s. 3 reproduced in 198 below)

Wakf both for the benefit of the settlor's family, children, and descendants, and for charity.--According to the Privy Council decisions before the Wakf Act, such a wakf was valid if there was "a*substantial* dedication of the property to charitable uses at some period of time or other".[41] But if the primary object of the wakf was the aggrandizement of the family, and the gift to charity was illusory whether for its small amount or from its uncertainty and remoteness, the wakf for the benefit of the family was invalid and no effect could be given to it. The leading case on the subject was *Abul Fata Mahomed v. Russomoy* ,[42]decided in 1894 [see ill. (d) to 196 below). Under the Wakf Act, a wakf for the benefit of the family is valid, even if the gift to charity is illusory. All that is necessary under the Act is that there should be an ultimate gift to charity. (*see*Wakf Act, s. 4, reproduced in 198 below).

In *Abul Fata Mahomed's* case referred to above, the income of the wakf property was to be applied in the first instance for the benefit of the settlor's descendants from generation to generation, and the trust in favour of charity was not to come into operation *until after the extinction of the whole line of the settlor's descendants*. Their Lordships of the Privy Council, held that the gift of charity was illusory, and that the sole object of the settlor was to create a family settlement *in perpetuity*, and that the provision for the settlor's family was therefore invalid. In the course of the judgment their Lordships said (p. 631):--

"As regards precepts, which are held up as the fundamental principles of Mahomedan law (see s. 33), their Lordships are not forgetting how far law and religion are mixed up together in the Mahomedan communities; but they asked during the argument how it comes about that by the general law of Islam, at least

> as known in India, simple gifts [*hiba*] by a private person to remote unborn generations of descendants, successions that is of inalienable life-interests, are forbidden; and whether it is to be taken that the very same dispositions, which are illegal when made by ordinary words of gift, become legal if only the settlor says that they are made as *wakf* in the name of God, of for the sake of the poor. To those questions no answer was given or attempted, nor can their Lordships see any.&uot;

The decision of the Privy Council in *Abdul Fata Mahomed's* case caused considerable dissatisfaction in the Mahomedan community in India. It can hardly be doubted that under the pure Mahomedan law a wakf exclusively for the benefit of the settlor's family and descendants was valid. Such a settlement may be one in favour of *unborn persons*; for it may create successive *life-interests* in favour of such persons; it may be &uot;a *perpetuity*, of the worst and most pernicious kind,&uot; but it was recognised by Mahomedan law. The Privy Council, however, held that such a wakf was invalid. A representation was thereupon made to the Government of India, with the result, an Act was passed in 1913, called the Mussalman Wakf Validating Act, the object being to remove the disability created by that decision. But it was held as to this Act that it was not retrospective, that is to say, it did not apply to wakfs created before the Act'. This led to the enactment of another Act in 1930, by which a retrospective effect was given to the Wakf Act of 1913. The result is that the Wakf Act of 1913 now applies also to wakfs created before that Act (*see*199 below). We now proceed to state in the form of propositions the law before the Wakf Act and the law as laid down by that Act. (*See* also the Judgment of the Supreme Court in *Fazlul Rabbi Pradhan v. State of West Bengal* .[43]

38 *Abdul Ganne v. Hussen Miya* (1873) 10 Bom. H.C 7; *Mahomed Hamidulla v. Lotful Huq* (1881) 6 Cal. 744.

39 *Luchmiput v. Amir Alum* (1882) 9 Cal. 176; *Mahomed Ahsanulla v. Amarchand Kundu* (1889) 17 Cal. 498, 509, 17 I.A. 28.

40 *Ahmed G. Ariff v. Commr. of Wealth-tax.* ('71) A.S.C. 1691.

41 *Mahomed Ahsanulla v. Amarchand Kundu* (1899) 17 Cal. 498, 509, 17 I.A. 28, 37.

42 (1894) 22 Cal. 619, 22 I.A. 76.

43 (1965) 3 S.C.R. 307, 315-16).

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Law relating to private wakfs before the Mussalman Wakf Validating Act, VI of 1913

Under the law before the Wakf Act of 1913, a wakf was valid if the effect of the deed of wakf was to give the property in substance to charitable uses. It was not valid if the effect was to give the property in substance to the testator's family.[44]

Shia law

The same was held as to Shia wakfs.[45]

44 *Mutu Ramanadan v. Vava Levvai* (1916) 44 I.A. 21, 26-27, 40 Mad. 116, 39 I.C. 235, ('16) A.PC. 86.

45 *Hamid Ali v. Mujawar Husain* (1902) 24 All. 257.

Illustrations

(a) A Mahomedan conveys property to a mutawalli, *A.B.*, with a direction to defray out of the profits of the endowed land the expenses of a mosque, to give alms to mendicants, to educate poor students, and to utilize the surplus for the marriages, burials, and circumcision of the members of *A.B*'s family. Here there is a substantial dedication to charity; the wakf, therefore is valid.[46]

(b) *A*executes a document purporting to settle property as &uot;wakf&uot; for the benefit of his wife, daughter, and descendants of the daughter. The deed does not contain any provision for the application of the income in the event of the family becoming extinct. This was not a valid wakf under the law before the Wakf Act, as there was no gift to charity.[47]Nor is it a valid wakf under the Wakf Act, for there is no ultimate gift to charity. (*see* 197, note (3))

(c) A Mahomedan executes a document purporting to be a *wakfnama* which begins with a dedication of his entire property for the purpose of supporting a mosque and two schools, and for *sadir warid*. The dedication is qualified by the words &uot;in the manner provided by the following paragraphs,&uot; and these paragraphs contain provisions for the appointment of the settlor's sons and descendants as mutawalli and for their salary, and for the maintenance and support of his family and descendants *from generation to generation*. The only provision in the deed as to religious and charitable purposes is that the mutawallis should continue to perform them *according to custom*, and this requires a *very small expenditure*compared to the income. The effect of the deed, as a whole, is that while it professes to dedicate as wakf property bringing in an annual income of about R s. 12,000, it leaves it to the members of the family who as mutawallis are to retain the control and management, to spend a small amount for religious purposes, and to take as much as they like for themselves and the members of the family, for all time on account of salary as maintenance. This was not a valid wakf under the law before the Wakf Act, for the main purpose of the settlement was the*aggrandizement of the settlor's family*, and the gift of charity was illusory.[48]

Note.--In *Mahomed Ahsanull's* case[49] their Lordships of the Privy Council observed: &uot;If indeed it were shown that the *customary* uses were of such magnitude as to *exhaust* the income or to absorb the *bulk* of it, such a circumstance would have its weight in ascertaining the intention of the grantor.&uot; Accordingly, where a Mahomedan dedicated property, of which the average annual income was R s. 850, for the purpose of performing *fateha* and *kadam sharif* ceremonies, and it was found that according to the custom prevailing in the country the amount required for the ceremonies was R s. 500 per annum, it was held by the High Court of Allahabad that the dedication to religious purposes was *substantial*, and that the wakf was therefore valid.[50]

(d) Two Mahomedan brothers executed a deed purporting to make a wakf of all their immovable property for the benefit of their children and their descendants from generation to generation, and *on total failure of all their descendants*, for the benefit of widows, orphans, beggars' and the poor. The provision for the settlor's children and their descendants was void according to the law before the Wakf Act, for the gift to the poor was too remote, and it was not to take effect until the total extinction of all the descendants of the settlor.[51](Such a wakf is valid under the Wakf Act:*see* s. 4 of the Act reproduced in 198 below.)

In the above case their Lordships of the Privy Council said: (p. 89) &uot;If a man were to settle a crore of rupees, and provide ten for the poor, that would be at once recognised as illusory. It is equally illusory to make a provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family; possibly not for hundreds of years; possibly not until the property had vanished away under the wasting agencies of litigation or malfeasance or misfortune; certainly not as long as there exists on the earth one of those objects whom the donors really cared to maintain in the high position. Their Lordships agree that the poor have been put into this settlement merely to give it *colour of piety*, and so to legalize arrangements meant to serve for the *aggrandizement of a family*.&uot;

(e) Two Mahomedan brothers execute a deed whereby they settle lands of the value of Rs.20,000 in trust to apply an indeterminate portion of the income for the due performance of customary *fateha* for ancestors and to almsgiving, and to apply the residue of the income in perpetuity for the benefit of the settlor's sons and their descendants without power of alienation. The amount required for *fateha* and almsgiving is estimated by the Court at R s. 600 per annum. The total income of the trust estate is estimated at Rs. 1,500, leaving a balance of Rs. 900 for the benefit of the settlor's descendants. It was held by their Lordships of the Privy Council that though *two-fifths* of the income was to be devoted to the charity, and three-fifths was to go to the family, the effect of the deed was to give the property m substance to charitable uses, and that the deed was therefore valid. Their Lordships said: &uot;But these figures may vary. They are not fixed and unalterable. The income may fluctuate or decrease permanently, and needs of the charity may expand even. The *paramount* purpose of the grantors was evidently to provide for all the needs of these charities up to the limit of the trust funds, the income received from the land. Those needs are the first burden upon that income. *It is the residue, which may be a dwindling sum, that is given to the family*. The contention that, because the share of the income going to the family is at present larger than that going to the charities, the effect of the deed is so to give the property in substance to the family, and that therefore it is invalid as a deed of wakf, is, their Lordships think, entirely unsound&uot;.[52]

46 *Muzhurool Huq v. Phuraj* (1870) 13 W.R. 235; *Deoki Prasad v. Inait Ullah* (1892) 14 All. 375.

47 *Nizamuddin v. Abdul Gafur* (1888) 13 Bom. 264 affirmed on appeal by the Privy Council, sub-nominee *Abdul Gafur v. Nizamuddin* (1892) 17 Bom. 1, 19 I.A. 170; *Abdul Ganne v. Hussen Miya* (1873) 10 Bom. H.C. 7.

48 *Mahomed Ahsanulla v. Amarchand Kundu* (1889) 17 Cal. 498, 17 I.A. 28; *Mujib-un-nissa v. Abdur Rahim* (1900) 23 All. 233, 28 I.A. 15 [where the income to be devoted to charity was left entirely to the discretion of the mutawalli for the time being]; *Muhammad Munawar v. Razia Bibi* (1905) 27 All. 320, 32 I.A. 86; *Fazlur Rahim v. Mahommad Obedul* (1903) 30 Cal. 666; *Balla Mal v. Ata Ullah Khan* (1927) 54 I.A. 372, 9 Lah. 203, 193 I.C. 518, ('27) A.PC. 191 [annual income Rs.1,558--fees.146 per annum to be applied to charity and the rest to go to the settlor's descendants--wakf held to be invalid]; *Rukeya Banu v. Najira Banu* (1928) 55 Cat. 448, 105 I.C. 647, ('28) A.C. 130, [annual income R s. 10,000--R s. 456 per year to be applied to charity and the rest to go to settlor's descendants--wakf held to be invalid]. [All these would constitute a valid wakf under the Wakf Act].

49 (17 I.A. 28, 38-39).

50 *Phul Chand v. Akbar Yar Khan* (1896) 19 All. 211. See also *Gobinda Chandra v. Abdul Majid* (1944) 1 Cal. 329, 216 I.C. 143, ('44) A.C. 163; *Subhan Ali Makhadomunnissa*(1947) A.L.J. 214, ('48) A.A. 11.

51 *Abdul Fata Mahomed v. Russomoy* (1894) 22 Cal. 619, 22 I.A 76.

52 *Mutu Ramanadan v. Vava Levvai* (1917) 44 I.A. 21, 40 Mad. 116, 39 I.C. 235, ('16) A.PC. 86.

Family settlement based on invalid wakf

A executes a deed of wakf. After *A*'s death some of his heirs bring a suit against the mutawalli and the other heirs to set aside the wakf on the ground that the gift to charity is illusory. The suit is compromised and an agreement is made whereby the members of the family agree that the wakf is binding and that allowances fixed thereunder should be paidout *of the income of the endowed property* to named members of the family, and upon the death of any of the named persons, to his heirs. The agreement, being for consideration, is enforceable as constituting a valid charge upon the property, although the wakf is invalid.[53]

53 *Khajeh Solehman v. Nawab Sir Salimullah* (1922) 49 I.A. 153, 49 Cal. 820, 69 I.C. 138, ('22) A.PC. 107.

Effect of Shariat Act

Section 2 of the Shariat Act expressly makes the Muslim personal law applicable *inter alia*to wakfs. The result is that Mussalman law is expressly made applicable to wakfs whereas previously the law relating to wakfs had to be decided on principles of equity and good conscience under the terms of the Act s and Regulations which have been in part repeated by the Shariat Act. There is nothing in the Shariat Act to affect the Privy Council decisions previous to the Mussalman Wakf Validating Act as they expressly interpret what was held to be the Mussalman law on the subject of wakf.[54]

54 *Mohiuddin Ahmed v. Sofia Khatun* (1940) 2 Cal. 464, 44 C.W.N. 947, 192 I.C 693, ('40) A.C. 501; *Beli Ram v. Mohammed Afzal* (1949) Lah. 1, 50 Bom. L.R. 674, ('48) A.PC 168.

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(1) It is now declared by s. 3 of the Mussalman Wakf Validating Act that it is lawful for a person professing the Mussalman faith to create a wakf which is all other respects is in accordance with the provisions of the Mussalman law, for the following among other purposes:--

(a) for the maintenance and support wholly or partially of his family, children or descendants, and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated. (see 192 above)

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

(2) No such wakf is to be deemed to be invalid merely because the ultimate benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants, of the

person creating the wakf.

Note(1).--A wakf may be created for the support of the "family" [Wakf Act, s. 3(a). "The Act authorises the maintenance and support not only of children and descendants but also of the family of the wakif, and it is by no means clear what that word includes"]. The term "family" includes a daughter-in-law[55] and has also been held to include an adopted son who has resided with the settlor as a dependent relation.[56] It is not confined to persons who are dependent for their maintenance on the wakif. It has accordingly been held that the son of a half-brother, the son and grandson of a paternal uncle, and the son of a half-sister, though not dependent of the wakif for their maintenance and residing separately from him, are included in the term "family".[57]

A sister's son, who resides with the wakif and is maintained by him, is also a member of the family.[58] A provision for the maintenance of the settlor's nephews and of their descendants generation after generation has also been held to be valid.[59] The Allahabad High Court has held that the word "family" in s. 3(a) has to be given a wide and not a restricted meaning and a person may belong to a "family" either if he is from a common progenitor or if he is living under the same roof and is being supported and maintained by the settlor. Thus the step-daughter, of the wakifs sister, bred, brought up and married by the settlor was held to be a member of the wakifs family, but not her descendants.[60] A valid wakf can be created in favour only of some members of the family or of some of the children or descendants whether males or females and to the exclusion of others.[61] It is not illegal to make a wakf deliberately to deprive an heir of the share of his inheritance.[62] But if there is no provision of the maintenance of the family a wakf for a solely religious purpose, though valid as a wakf, is outside the Act even though the founder's daughter-in-law and after her, her daughter are appointed mutawallis with a remuneration.[63] It has been held by the Calcutta High Court that if the ultimate gift to charity be postponed till after the extinction of the family, children or descendants of the wakif, the wakf would be valid, but if it is to take effect on the extinction of the heirs how-low-soever, the wakf would be invalid.[64] The Lahore High Court[65] has, however, held that if a life-interest is given *inter alia* to a stranger such provision is void, but that does not invalidate the wakf. It merely accelerates the succession in favour of the settlor's family and ultimately of charity. The view, however, did not find favour when the case went to the Privy Council. The Hyderabad High Court has held that the dedication to the poor must be *bona fide*.[66]

Note (2).--The *ultimate* gift must be one for a religious, pious or charitable purpose[67](Wakf Validating Act, s. 3, proviso). It is not necessary, as it was under the law before the Act, that there should also be a *concurrent*gift to charity. Under the Act a Mahomedan need not provide for any gift of charity until after the extinction of the whole line of his descendants. This is in accordance with the view of Mahomedan law taken by West, J., in *Fatma Bibi v. The Advocate-General* ,[68] by Farran, J., in *Amrutlal v. Shaik Hussein* ,[69] and by Ameer Ali J., in *Bikani Mia v. Shuk Lal* .[70] In the first of these cases, West, J., said: "If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied; a wakf is not made invalid by an intermediate settlement on the founder's children and their descendants. The benefits these successively take, may constitute a perpetuity in the sense of the English law; but according to the Mahomedan law, that does not vitiate the settlement, provided the ultimate charitable object be clearly designated." It will be remembered that the view taken by West, J., Farran, J., and Ammer Ali, J., was disapproved by the Privy Council in *Abul Fata Mahomed v. Russomoy* .[71](*see* ill. (d) to 196). *See*, however, *Mohd Ismail v. Sabir Ali* ,[72] where it was held by the Supreme Court that a deed of *wakf-ala Llaulad*, for the benefit of the wakif and his descendants, which was in respect of Talukdari property governed by Oudh Estates Act, 1899 was invalid as infringing s. 12 of that Act which embodied the rule against perpetuity. This was so because the Act was a complete code governing Talukdari estates and the holder's right of transfer must be determined and circumscribed by the Act . It was also held that though the wakf property may vest in God on the creation of the wakf, the absolute vesting (i.e. of both the legal and beneficial estate) which s. 12 contemplated would be postponed beyond the period prescribed by it.

After the Validating Act of 1913, on the basis of the law as it prevailed even before, creation of the wakf for the purpose of the maintenance of the members of the Wakif s family and their descendants is also a charitable purpose. According to Shia Law, the wakf is irrevocable after possession is given to the beneficiaries or the Mutawalli. The settlor divests himself of the ownership of the property and of everything in the nature of usufruct from the moment the wakf is created. In purely metaphorical sense the expression &uot;ownership of God&uot; is used but unlike Hindu Law, since conception of a personal God is not recognized, there is no ownership of God or no property belongs to God in the jural sense, although the ownership of the property becomes reverted in God as he is originally the owner of all things. The Shia authorities considered the property as transferred to the beneficiaries or to the object of the Wakf. Strictly speaking, the ownership of the wakf property has no jural conception with any exactitude. The corpus is tied down and is made inalienable. Only the usufructs and the income from the corpus of the wakf property is available for carrying out the objects of Mutawalli, who is like a Manager rather than a trustee. The Mutawalli, so far as the wakf property is concerned, has to see that beneficiaries got the advantage of the usufruct.[73]

Note (3).--The ultimate gift to charity may be an &uot;implied&uot; gift; it need not be express (The Wakf Validating Act, s. 3 proviso). What does &uot;implied&uot; mean? In a case where there was no express disposition of the ultimate benefit, the Allahabad High Court implied an ultimate benefit for charity, from intention of the founder as disclosed by the terms of the deed, from the fact that there was a provision for charity and from the fact that the wakf was to be perpetual, although the founder contemplated the possible extinction of his descendants.[74] It has been held by the Madras High Court that where a wakf provides for the maintenance of the founder's descendants and concurrently for charity, a reservation for charity in case of failure of descendants may be implied.[75] According to Abu Hanifa and Muhammad, it is necessary for a wakf to be complete that the ultimate benefit for the poor should be expressly reserved. According, however, to Abu Yusuf, such benefit may be reserved *impliedly*, and this can be done by the mere use of the word &uot;wakf.&uot; Thus according to Abu Yusuf, if a person simply says &uot;I give this land by way of wakf to Zeyd,&uot; the wakf is complete, and Zeyd has the usufruct of his life, and after his death, the income will go to the poor, though the poor are not expressly mentioned.[76] The *Fatawa Alamgiri* declares a preference for the opinion of Abu Yusuf.[77] In the first case cited in ill. (b) to 196, the High Court of Bombay held that the opinion of Abu Hanifa and Muhammad was to be preferred to that of Abu Yusuf, and it accordingly held that in the absence of an ultimate gift to charity, the deed was not valid as a wakf. This decision was upheld by the Privy Council on appeal.[78]Is it intended by the word &uot;impliedly,&uot; which appears in s. 3 of the Wakf Validating Act, to give effect to the opinion of Abu Yusuf, so that an ultimate gift to charity may be implied even where none is named from the mere use of the word &uot;wakf&uot;? It has been held in AIlahabad,[79] Calcutta,[80] and Oudh,[81] that it is not to be so implied. A similar view has been taken by the Privy Council.[82]

The Mahomedan law recognises the existence of a private trust which is also of a charitable nature and which is generally called *Wakf-allal-aulad*, where the ultimate benefit is reserved to God but the property vests in the beneficiaries and the income from the property is used for the maintenance and support of the family of the founder and his descendants. In case the family becomes extinct then the Wakf becomes a public wakf, the property vested in God. A public wakf under the Mahomedan law is called *wakffisabilil-lah*.[83]

55 *Musharraf Begum v. Sikandar* (1929) 51 All. 40, 111 I.C. 583, ('28) A.A. 516.

56 *Mubarak Ali v. Ahmed Ali* (1935) 158 I.C. 149, ('35) A.L. 414.

57 *Imdad Ali v. Ashiq Ali* (1929) 4 Luck. 101, 113 I.C. 494, ('29) A.O. 25.

58 *Ismail Haji Arat v. Umar Abdulla* (1942) 44 Bom. L.R. 256, ('42) A.B. 155.

59 *Ghazanfar v. Ahmadi Bebi* (1930) 52 All. 368, 123 I.C. 369, ('30) A.A. 169; *Badrul Islam Ali Khan v. Mt. Ali Begum* (1935) 16 Lah. 782, 158 I.C. 465, ('35) A.L. 251; *Muhammad Azam Khan v. Hamid Shah* (1946) All. 575, ('47) A.A. 137.

60 *Abdul Qavi v. Asaf Ali* ('62) A. All. 364. See also *K.M.U. Ahmad v. Board of Wakfs,* 1959 All. LJ. 486.

61 *Mt. Mubarak Jan v. Mt. Tej Begum* (1938) 19 Lah. 435, 177 I.C. 439, ('38) A.L. 453.

62 *Beli Ram v. Mohammad Afzal* (1949) Lah. 1.50 Bom. L.R. 674, ('48) A.PC. 168.

63 *Rahiman Begum v. Baqridan* (1936) 11 Luck. 735, 160 I.C. 495, ('36) A.O. 213.

64 *Mohiuddin Ahmed v. Sofia Khatun* (1940) 2 Cal. 464, 44 C.W.N. 974, 192 I.C. 693, ('40) A.C. 501; *Mahammad Nassair v. Mohammad Yusuf* ('54) A.C. 524.

65 *Mohammad Afzal v. Din Mohammad* ('47) A.L. 117. 50 Bom. L.R. 674, ('48) A.PC. 168. See also *Abdul Qavi v. Asaj Ali, supra* .

66 *Salah v. Husain* (1954) Hyd. 608, ('55) A. Hyd. 229.

67 *Ghulam Mohammad v. Ghulam Husain* (1932) 59 I.A. 74, 54 All. 93, 136 I.C. 454, ('32) A.PC. 81; *Abdul Hasan v. Rajbir* ('31) A.O. 124, 131, I.C. 433; *Phul Bee Bec v. R.M. P. Chettyar Firm* (1935) 13 Rang. 679, 156 I.C. 1038.

68 (1881) 6 Bom. 42, 53.

69 (1887) 11 Bom. 492.

70 (1893) 20 Cal. 116, 132-177.

71 (1894) 22 Cal. 619, 22 I.A. 76.

72 ('62) A.S.C. 1722.

73 A.I.R. 1933 All. 407, disapproved. *Bibi Siddique Fatima* v. *Saiyed Mohammad Mahmood Hasan*. 1978 All. LJ. 634(S.C.), [R.S. Sarkaria, N.L. Untwalia and P.S. Kailasam, JJ.].

74 *Baqa Ullah Khan v. Ghulam Siddique Khan* (1935) All. L.J. 647, 155 I.C. 416, ('35) A.A. 616.

75 *Thanga Mayil Ammal v. Pappa* (1960) 1 M.L.J. 150, ('60) A.M. 318.

76 Hedaya, p. 234.

77 Baillie's Digest, p. 558.

78 *Abdul Gaful v. Nazamuddin* (1892) 17 Bom. 1, 19 I.A. 170.

79 *Iran Ali v. Official Receiver* (1930) 52 All. 748, 130 I.C. 631, ('30) A.A. 837; *Mt. Ruqia Begum v. Surajmal* (1936) All. L.J. 231, 163 I.C. 344, ('36) A.A. 404.

80 *Masuda Khatun v. Mahommad* (1932) 59 Cal. 402, 412-414, 133 I.C. 657, ('32) A.C. 93; *Tahiruddin Ahmed v. Masihuddin Ahmed* (1933) 60 Cal. 901, 37 Cal. W.N. 741, 147 I.C. 196, ('33) A.C. 716; *Mahomed Ali v. Dinesh Chandra Roy* (1940) 2 Cal. 189, 44 C.W.N. 718, ('40) A.C 417.

81 *Sheikh Ramazan v. Musammat Rahmani* (1932) 7 Luck. 300, 135 I.C 372, ('32) A.O. 71.

82 *Ghulam Mohammad v. Ghulam Husain* (1932) 59 I.A. 74, 86 [see the argument of counsel], 54 All. 93, 136 I.C. 454, ('32) A.PC. 81.

83 *Radhakanta Deb v. The Commissioner of Hindu Religious Endowment,* Orissa, A.I.R. 1981 S.C. 798 [S. Murtaza Fazl Ali, A. Varadarajan and A. N. Sen. J.J.].

Religious, pious or charitable purpose

It is not sufficient to use these general words but the particular purpose must be specified.[84] But this view has been dissented from in a subsequent case where it was held that a wakf for &uot;religious and charitable purposes&uot; was valid.

Under the Mussalman Wakf Validating Act, 1913 (s s. 3, 4) the ultimate test is that a wakf alal-aulad must reserve the ultimate benefit for the poor or any other religious, pious or charitable object of a permanent nature and not that its benefit should be substantially for any such object. If an immediate beneficiary is outside the class for whom provision can be made, the deed is not void but they can be cut out and the rest of the provisions can be given into effect to. The charitable disposition in that

behalf is accelerated.[85]

This is nothing in the Mussalman Wakf Validating Act, 1913 that in a wakf alal-aulad the wakf property vests in the wakif and not in God.

Observations in 1933 All. 407 over-ruled, to the effect 'that the estate vests in the beneficiaries'.

The mutawalli is only a manager or superintendent; unless so provided he can have no beneficial interest even in the income.[86]

In a private wakf if the amount of maintenance becomes insufficient to make the ends meet, the amount of the maintenance can be increased on a suit by a beneficiary against the Mutawalli.[87]

A private gift to one's own self or kith and kin may be meritorious and pious, but it cannot be regarded as being for religious or charitable purposes.[88]

Private wakf after the Wakf Act, 1954.--The Calcutta High Court in *Anis Fatima v. Board of Wakf West Bengal* ,[89]through JJ Altamas Kabir and Alok Kumar observed that the Wakf Act, 1954 will have application to*wakfs-alal-aulad*or wakf, created for private and secular purposes to the extent of the provisions made therein for religious or charitable purposes. But the wakf character of the remaining portion of the wakf properties will not be affected or altered merely because they would no longer be governed by the provisions to the aforesaid Act . They would continue to retain their wakf character and would be governed by Mohammedan Law and enactments enacted in respect thereof, such as the Mussalman Wakf Validating Act, 1913 and 1930, the Religious Endowments Act, 1863 and the Shariat Law application Act, 1937 the definition to 'wakf' in s. 3(r) of the Act, 1995, also indicates that the legislature with deliberate intent kept private wakfs out of the ambit of the said Act and the administrative control of the authorities appointed under the Act, except to the extent that provision was made therein for religions and charitable purposes.

As an extension of the alteration of the circumstances contemplated under the Act of 1934 and those of the Act of 1995, s. 96 of the 1995 Act empowers the Central Government to regulate the secular act ivities of wakfs. If the definition of wakf in 1995 Act excludes privates wakfs, s. 96 brings within the ambit of the 1995 Act wakfs which are created for secular purposes which would include social, economic, educational and other welfare activates. In order to give a harmonious construction between the definition of wakf in s. 3(r) and the provisions of s. 96 of the Act, 1995, one will have to construe certain social activities for which wakfs are created in relation to act ivities which are of a charitable nature extending to persons who are not members of the wakf's family, to that extent, wakf's for secular purposes have also been included within the scope and ambit of the 1995 Act.

However, the mutawalli cannot unilaterally partition the wakf properties and decide which portion of the property will be utilised for religious or charitable purpose and which portions are to be utilised for purely private purposes. Of course, the usufruct from the properties may be divided for the aforesaid purposes in accordance with the directions of the wakf.

84 *Punjab Sind Bank v. Anjuman Himayat Islam* (1935) 158 I.C. 937, ('35) A.L. 596.

85 *Abdul Rauf v. Shamshulhaq* ('69) A. All. 35.

86 *Moattar Raza v. Joint Director of Consolidation* ('70) A. All. 509(F.B.)

87 *Smt. Nawab Sarukh Jahan Begum v. Saiyid Enayat Husain* ('75) A. All. 452.

88 *Fazlul Rabbi Pradhan v. State of West Bengal* (1965) 3 S.C.R. 307.

89 A.I.R. 2004 Cal. 91.

Family settlement

As in the case of wakfs under the law before the Act, a wakf which is invalid as a wakf may yet be binding on the parties as a family settlement.[90]

90 *Latifunissa v. Najimuddin* (1935) 156 I.C. 609, ('35) A.A. 856; *Sekander Ali v. Sadruddin Bhuniya* (1935) 40 Cal. W.N. 174, 159 I.C. 1008, ('35) A.C. 792; *Mohammad Irfan Ali Khan v. Mohammad Tabiz Ali Khan* (1933) All. L.J. 97, 147 I.C. 173, ('33) A.A. 277 (following *Mahomed Ahsanulla v. Amarchand Kundu* (1889) 17 I.A. 28, 17 Cal. 498.

Wakf-bil-wasiyat

Though the wakf fails as a wakf, the directions contained in the *wakfnama* for maintenance allowance, etc. in favour of persons who are alive at the date of the death and for expenses to be incurred for charity are binding on the heirs as the will of the deceased.[91]

91 *Mohammad Sabir Ali v. Tahir Ali* (1954) 2 All. 556.

Shia wakfs

The Wakfs Act applies to Shias also, except s. 3 (b).

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CHAPTER XII

WAKFS

198.

Text of the Mussalman Wakf Validating Act, 1913

The following is the text of the Wakf Act VI of 1913, which came into force on 7th March, 1913:--

An Act to declare the rights of Mussulmans to make settlements of property by way of &uot;wakf&uot; in favour of their families, children and descendants.

Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes; and whereas it is expedient to remove such doubts: it is hereby enacted as follows:--

1. **Short title and extent.--**
(1) This Act may be called the Mussalman Wakf Validating Act, 1913.
(2) It extends to the whole of India except part B States.
2. **Definitions.--**

In this Act unless there is anything repugnant in the subject or context:--

(1) &uot;Wakf&uot; means the permanent dedication by a person professing the

Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable[92]

(2) "Hanafi Mussalman" means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi school of Mussalman law.

3. **Power of Mussalmans to create certain wakf.--**

If shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law,[93] for the following among other purposes:--

(a) for the maintenance and support wholly or partially of his family,[94] children or descendants, and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated[95]:

Provided that the ultimate benefit[96] is in such cases expressly or impliedly[97] reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

4. **Wakfs not to be invalid by reason of remoteness of benefit to poor, etc.--**

No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

5. **Saving of local and sectarian custom.--**

Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect.

92 See. 177.

93 See 173-191.

94 As to meaning of "family" see note (1) to 197 above.

95 This is not new. It is in accordance with the law as settled before the Act . See 192 and notes thereto.

96 See note (2) to 197 above.

97 See note (3) to 197.

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CHAPTER XII

WAKFS

199.

Wakf Validating Act of 1913 has now retrospective effect

The Wakf Act of 1913 came into force on the 7th March, 1913. It was held not to be retrospective, that is to say, that it did not apply to wakfs created before that date.[98]To give it retrospective effect, an Act

was passed in 1930, called the Mussalman Wakf Validating Act, 1930 (XXXII of 1930). It came into force on the 25th July, 1930. The effect of it is that trie Wakf Act of 1913 applies also, from and after the 25th July, 1930, to wakfs created before the 7th March, 1913.

98 *Khajeh Solehman v. Nawab Sir Salimullah* (1922) 49 I.A. 153, 49 Cal. 820, 69 I.C. 138, ('22) A.PC. 107; *Balla Mal v.Ata Ullah Khan*(1927) 54 I.A. 372, 9 Lah. 203, 103 I.C. 518, ('27) A PC. 191

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CHAPTER XII

WAKFS

200.

Succession among descendants

Where a wakf is made for the benefit of the settlor's descendants, but no rules of succession are laid down in the deed of wakf, the descendants take *per stirpes*, and not *per capita*,[1] and males and females take equal shares.[2]

The Allahabad High Court has held that as each line branches off, the shares should be divided between the various branches, but in the same branch the nearer should exclude the more remote.[3] The High Court of Andhra Pradesh, however, differs from this view and maintains that the rule of exclusion of remoter by nearer heirs does not apply to endowed property. Thus if wakf is in favour of the descendants &uot;generation after generation&uot;, the implication is that the nearer line or class takes first, arid after them the line next after. But the principle that the children of a predeceased son are excluded by their uncles and aunts does not apply to endowed property. Hence, where there are no such words as &uot;generation after generation&uot; the profits are to be divided equally among all the descendants.[4]

1 Macnaghten, 341; *Sayad Mahomed v. Sayad Gobar* (1881) 6 Bom. 88, 90-91.

2 Macnaghten, 342; Baillie, 553 *et seq*. See *Abdul Ganne v. Hussen Miya* (1873) 10 Bom. H.C. 7 at p. 14; *Sheikh Karimodin v. Nawab Mir Sayad* (1885) 10 Bom. 119.

3 *Maqsood Ali v. Zabid Ali* ('54) A.A. 385.

4 *Mazhar Ali v. Murtuja* ('58) A. Andh. Pra. 8.

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WAKFS

201.

Forfeiture of interest under Wakfnama on remarriage of widows

A condition in a deed of wakf that the interest given by the deed to a widow or to the wife of a beneficiary shall be forfeited on her remarriage is not invalid.[5] The Wakfnama, being a gift, may expressly provide for the order of succession and the Wakf will not be invalid because such provisions are contrary to the rules of inheritance.[6]

5 *Latafatunnisa v. Shaharbanu* (1932) 139 I.C. 292, ('32) A.O. 108.

6 *Birijis Mahal v. Humayun Reza* (1944) 23 Pat. 203, ('44) A.P. 234.

CHAPTER XII

WAKFS

OF MUTAWALLIS OR MANAGERS OF WAKF PROPERTY

202.

Mutawalli

Under the Mahomedan law the moment a wakf is created all rights of property pass out of the wakif and vest in the Almighty. The mutawalli has no right in the property belonging to the wakf; the property is not vested in him, and is not a trustee in the technical sense. He is merely a superintendent or manager.[7] The admissions of a mutawalli about the nature of the trust are not binding on his successors.[8]

Suit for a declaration

A mutawalli may sue in his personal capacity for a declaration that he is mutawalli without suing for possession.[9]

Where a suit, the plaintiffs admit that the defendant is in possession of the suit properties but they assert that he is there as mutawalli and that his possession is on behalf of the Sunni Muhammadan community and for that reason, the plaintiffs say that a declaratory suit will lie and that they need not sue for possession, then the burden lies on the plaintiffs to prove their claim. As the defendant is admittedly in possession and except for the fact that the plaintiffs claim that he is in possession of their behalf (a fact which the defendant denies) the plaintiffs are out of possession, they must prove that the defendant is in possession on their behalf. The only way in which the plaintiffs can do that is by showing that the properties in suit are wakf property.[10]

7 *Vidya Varuthi v. Balusami* (1921) 48 I.A. 302, 312, 44 Mad. 831, 65 I.C. 161, ('22) A.PC. 123; *Abdur Rahim v. Narayan Das* (1923) 50 I.A. 84, 90; 50 Cal. 329, 71 I.C. 646, ('23) A.PC 44; *Saadat Kamel Hanum v. Attorney General Palestine* (1939) 183 I.C. 101, ('39) A.PC. 185; *Daw Ein v. Daw Chan Tha* (1940) Rang. 136, 186 I.C. 210 ('39) A.R. 365.

8 *Sibte Rasul v. Sibte Nabi* (1942) A.L.J. 722, ('43) A.A. 74.

9 *Muhammad Jafar v. Muhammad Taqi Khan* (1934) 9 Luck. 170, 145 I.C. 1003, ('33) A.O. 517.

10 *Mohammad Shah v. Fasihuddin Ansari* A.I.R. 1956 S.C. 713.

Suit for possession

A mutawalli is entitled to sue for possession, though the property is not vested in him.[11] Limitation is under Art. 142 from the date of dispossession, Art. 134 does not apply.[12]If the mutawalli's name has been recorded as a co-sharer, he is entitled under s. 226 of the Agra Tenancy Act, 1926, to sue the lambardar for his share of the profits.[13]

11 See *Jawaharbeg v. Abdul Aziz* ('56) A.N. 257.

12 *Wahid Ali v. Mahboob Ali Khan* (1936) 11 Luck. 297, 156 I.C. 92, ('35) A.O. 425.

13 *Muhammad Qamar v. Salamat Ali* (1933) 55 All. 512, 147 I.C. 926, ('33) A.A. 407.

Appointment of mutawalli by arbitration

The office of mutawalli of a public wakf, being in the nature of a public office, the question as to which of two persons is entitled to be mutawalli cannot be referred to arbitration.[14] But where *A* claims that certain property is wakf property and that he is the mutawalli thereof and *B* denies that the property is wakf property, an award made by an arbitrator that each shall be entitled to an equal share in the management and profits of the property until the matter is decided by the Court, is perfectly valid.[15]

14 *Muhammad Ibrahim v. Ahmad* (1910) 32 All. 503, 6 I.C. 219.

15 *Moazaam v. Raza* (1924) 46 All. 856, 81 I.C. 851, ('24) A.A. 818.

Superintendent or manager

The functions of a mutawalli are the same as those of a trustee but he is not a trustee either generally or under the Indian Trusts Act.[16]

Although the wakf property is not vested in the mutawalli, he has the same rights of management as an individual owner. He is not bound to allow the use of the wakf property for objects which though laudable in themselves are not objects of the wakf. The Muslim community cannot compel the mutawalli of a mosque to allow a school building to be erected on a site attached to the mosque.[17]Again although a mutawalli is not a trustee in the sense in which the expression is used in English law he has duties akin to those of a trustee and if he wrongfully deprives a beneficiary of the profits he is liable for interest in cases in which, under s. 23 of the Trusts Act, a trustee would be liable.[18] It has even been said that in the case of a private wakf (i.e., a wakf for the family of the founder where only the ultimate benefit is reserved to charity) the mutawalli is not a mere superintendent or manager but is &uot;practically speaking the owner&uot;[19]--*sed quare*.

A *de facto* mutawalli is not unknown in Mahomedan law. A *de facto* mutawalli can sue for rents without establishing his *de jure* character. In this case the owner of a house created a wakf and appointed himself as a mutawalli. He then appointed certain persons as his agents and gave them a power of attorney which included powers of management and bringing suits to evict tenants and to recover rent. The agent brought the suit as agent. It was held that the suit was validly constituted.[20]

16 *Hashim Husain v. Ahmad Raza* ('74) A. All. 305(D.B.)

17 *Syed Ahmed v. Hafiz Zahid* (1934) 153 I.C. 1095, ('34) A.A. 732.

18 *Kishwar v. Zafar* (1933) 55 All. 164, 146 I.C. 733, ('33) A.A. 186.

19 *Mohammad Qamar v. Salamat Ali* (1933) 55 All. 512, 147 I.C. 926. ('33) A.A. 407.

20 *Abdul Raheem Khan v. Mamdu* (1970) M.P.L.J. 968.

Mutawalli not duly appointed

The liabilities of a mutawalli not duly appointed are the same as those of a duly appointed mutawalli.[21]

While it is true that s. 92 of the applies only when there is any alleged breach of any express or constructive trust created for a public, charitable or religious purpose there is no doubt that it also applies where the direction of the Court is necessary for the administration of any such public trust. Where the defendants have been looking after the suit properties in one capacity or the other and been enjoying the usufruct thereof, they are trustees *de son tort* and the mere fact that they put forward their own title to the properties would not make them trespassers.[22]

Where there is evidence to show that the defendants (Trustees *de son tort*) were guilty of grave mismanagement, it is clear case for formulating a scheme under s. 92 of the Code of Civil Procedure by a suit.[23]

The definition of a Mutawalli includes a person who for the time being manages wakf property.[24]

21 *Jawaharbeg v. Abdul Aziz* ('56) A.N. 257.

22 A.I.R. 1946 Nag. 401; A.I.R. 1942 Cal. 343 and A.I.R. 1940 Pat. 425, approved.

23 *Syed Mohd. Salie Labbai v. Mohd. Hanifa.* A.I.R. 1976 S.C. 1569, [P.K Goswami and S. Murtaza Fazl Ali, JJ.].

24 *Syed Mustafa Peeram Sahib v. State Wakf Board* ('69) A. Mad. 66.

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CHAPTER XII

WAKFS

OF MUTAWALLIS OR MANAGERS OF WAKF PROPERTY

203.

Who may be appointed mutawalli

(1) Subject to the provisions of sub-sec. (2), the founder of a wakf may appoint himself,[25] or his children and descendants[26] or any other person, even a female[27] or a non-Mahomedan[28] to be mutawalli of wakf property.

But where the mutawalli has to perform religious duties or spiritual functions which cannot be performed by a female, *e.g.,* the duties of a *sajjadanashin* (spiritual superior)[29](220) or *khatib* (one who reads sermons) or *mujavar* of a dargah[30] or an *imam* in a mosque (whose function it is to lead the congregation),[31] a female is not competent to hold the office of mutawalli, and cannot be appointed as such.[32] Similar remarks apply to non-Mahomedans. The duties of a manager of a graveyard are secular

and can be performed by a female.[33]

(2) Neither a minor nor a person of unsound mind can be appointed mutawalli.[34]But where the office of mutawalli is hereditary and the person entitled to succeed to the office is a minor, or where the mode of succession to the office is defined in the deed of wakf and the person entitled to succeed to the office on the death of the first or other mutawalli to act in his place during his minority.[35]

Female as mutawalli

The Privy Council had said that there is no legal prohibition against a woman holding a mutawalli-ship when the trust by its nature involves no spiritual duties such as a woman could not discharge in person or by deputy.[36] In a case where a woman was the founder of a wakf for a mosque and other religious and charitable purposes, and appointed herself first mutawalli, and directed that two male relations should be mutawallis after her and then directed that their legal heirs should succeed as mutawallis--the Calcutta High Court held that the expression legal heirs did not exclude female heirs.[37] The Madras High Court has held that a woman can be appointed head *mujawar* of an *astan* or platform where mohurram ceremonies are performed.[38] The Court observed that the rule of exclusion did not apply if the religious duties were such as could be performed by deputy. The Bombay High Court has also taken the view that in the absence of any usage a woman can be appointed a *mujawar*.[39] The Madras High Court has held that a woman in the Nellore District is not disqualified from holding the office of *khatiba*.[40] In a Bombay case it was considered that religious duties cannot be performed by proxy and it was accordingly held that a female is excluded from succession to land assigned as remuneration of a Mulla or village preacher.[41] The decision may well be supported on narrower grounds as the performance ofthe duties of a preacher like those of the Imam of a mosque depends upon the personality of the incumbent and cannot be assigned to a deputy. But in the case of an appointment, where the duties are secular or religious, the Court may prefer to appoint a male mutawalli owing to the habits of seclusion of Mahomedan females.[42]

The Madras and Andhra Pradesh High Courts have the same views so far as the appointment of a female as a mutawalli are concerned. There is no prohibition for a woman act ing as a mutawalli of a wakf. In the instant case, Andhra Pradesh High Court observed that office of mutawali and sajjadanashin can be held by woman and she can perform functions which are secular in character as mutawalli on her own and for sajjadanashin where purely religious and spiritual functions are to be performed, can be performed by her through deputy.[43]

25 Baillie, 601; *Hedaya*, 238; Baillie, II, 214; *Advocate-General v. Fatima* (1872) 9 B.H.C. 19; *Abdul Rajak v. Jimbabai* (1911) 14 Bom. L.R. 295, 14 I.C. 988; *Muhammad Rustam Ali v. Mushtaq Husain* (1920) 47 I.A. 224, 42, All. 609, 57 I.C. 329.

26 Baillie, 601.

27 Baillie, 601; *Wahid Ali v. Ashruff Hossain* (1882) 8 Cal. 732; *Shahar Banoo v. Aga Mahomed* (1907) 34 I.A. 46, 34 Cal. 118; *Munnavaru Begam v. Mir Mahapalli* (1918) 41 Mad. 1033, 51 I.C. 489; *Syed Abdul Hameed v. Syed Unnissa Bibi* (1934) 67 Mad. L.J. 907, 152 I.C. 630, ('34) A.M. 692; *Mohammad Bhai v. Waziribi* (1946) Nag. 646, 224 I.C. 338, ('47) A.N. 31.

28 Ameer Ali, 4th Ed., Vol. 1, p. 446.

29 *Kaniz v. Saiyid* (1923) 2 Pat. 819. 77 I.C. 209, ('23) A.P. 576.

30 *Hussain Beebee v. Hussain Sherif* (1868) 4 M.H.C. 23; *Ibrahimbibi v. Hussain Sheriff* (1880) 3 Mad. 95. As to dargah, see *Piran v. Abdool Karim* (1891) 19 Cal. 203; *Mahomed Oosman v. Essak Salemahomed* (1937) 39 Bom. L.R. 502.

31 *See Munnavaru Begam v. Mir Mahapalli* (1918) 41 Mad. 1033, 1038, 51 I.C. 489.

32 *Kaniz v. Saiyid* (1923) 2 Pat. 819, 77 I.C. 209, ('73) A.P. 576. See also *Munavaru Begam v. Mir Mahapalli* (1918) 41 Mad. 1033, 51 I.C. 489, and *Ismailmiya v. Wahadani* (1911) 36 Bom. 308, 14 I.C. 469.

33 *Abbasali v. Mohammad Shah* ('51) A. Madh. Bharat 92.

34 Baillie, 601; *Piran v. Abdool Karim* (1891) 19 Cal. 203, 219- 220; *Syed Hasan v. Mir Hasan* (1917) 40 Mad. 941, 38 I.C. 528; *Kaniz v. Saiyid* (1923) 2 Pat. 819, 77 I.C. 209, ('23) A.P. 576 *Abdus Salam v. Abdul Aziz* (1944) 48 C.W.N. 465, ('44) A.C. 299.

35 (1891) 19 Cal. 203, 220, *supra*; *Ejaz Ahmad v. Khatan Begam* (1917) 39 All. 288, 37 I.C. 885; *Bibi Zohra v. Bibi Habibunnisa* (1938) 18 Pat. 417, 186 I.C. 28, ('40) A.P. 9.

36 *Shahar Banoo v. Aga Mahomed* (1907) 34 I.A. 46, 34 Cal. 118; *Muhammad M. Hussain v, Syed Abdul Huq*(1942) 1 M.L.J. 564, ('42) A.M. 485; *Mohamad Bhai v. Waziribi* (1946) Nag. 646, 224 I.C. 338, ('47) A.N. 31.

37 *Wares Ali v. Sheikh Shamsuddin* (1936) 63 Cal. LJ. 573; *Abdul Mannan v. Mutwali of Sm. Janebali* ('56) A.C. 584.

38 *Munnavaru Begum v. Mir. Mahapalli* (1918) 41 Mad. 1033.51 I.C. 489: followed in *Kasim v. Hazara Begum* (1920) 32 Cal. L.J. 151, 60 I.C. 165, ('20) A.C. 800.

39 *Abdul Aziz v. Mahomed Ibrahim* (1941) Bom. 341, 43 Bom. L.R. 126, 196 I.C. 181, ('41) A.B. 238, affirming *Husainbi v. Sayad Khairuddin* (1939) 41 Bom. L.R. 875, 185 I.C. 675, ('39) A.B. 487.

40 *Mahomed Husain Farok v. Syed Abdul Huq* (1942) 1 M.L.J. 564, ('42) A.M. 485.

41 *Biyamma v. Ahmed Sahib* (1935) 37 Bom. L.R. 257, 156 I.C. 656, ('35) A.B. 245.

42 *Syed Mahomed Ghouse v. Sayabiran Sahib,* (1935) 68 Mad. L.J. 684, 156 I.C. 757, ('35) A.M. 638.

43 *Syed Gulam Sarwar v. Afzalunnisa Begum* A.I.R. 2004 A.P. 485. See also *Mohammed Sheikh v. Mohammed Fasil Yousuf* (2000) 2 M.L.J. 82.

Difference of sect

In one case the Court appointed a Shia to be mutawalli of a Sunni wakf, but he was a person of considerable local influence both among Sunnis and Shias.[44] In another case the Court refused to appoint a woman of the Babi sect to be mutawalli of a Shia wakf, though she was a lineal descendant of the founder of the wakf who was himself a Shia.[45]

44 *Dyal Chund v. Syud Keramut Ali* (1871) 16 W.R. 116.

45 *Shahar Banoo v. Aga Mahomed* (1907) 34 I.A. 46, 34 Cal. 148.

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CHAPTER XII

WAKFS

OF MUTAWALLIS OR MANAGERS OF WAKF PROPERTY

204.

Appointment of mutawalli

(1) The founder of the wakf has power to appoint the first mutawalli, and to lay down a scheme for the administration of the trust and for succession to the office of mutawalli. He may nominate the successors by name, or indicate the class together with their qualifications, from whom the mutawalli may be appointed, and may invest the mutawalli with power to

nominate a successor after his death or relinquishment of office.[46]

(2) If any person appointed as mutawalli dies, or refuses to act in the trust, or is removed by the Court, or if the office of mutawalli otherwise becomes vacant, and there is no provision in the deed of wakf regarding succession to the office, a new mutawalli may be appointed[47] --

(a) by the founder of the wakf;[48]

(b) by the executor (if any);

(c) if there be no executor, the mutawalli for the time being may, subject to the provisions of 205 below, appoint a successor on his death-bed;

(d) if no such appointment is made, the Court may appoint a mutawalli. In making the appointment the Court will have regard to the following rules:--

(i) the Court should not disregard the directions of the founder except for the manifest benefit of the endowment;[49]

(ii) the Court should not appoint a stranger, so long as there is any member of the founder's family in existence qualified to hold the office;[50]

(iii) where there is a contest between a lineal descendant of the founder and one who is not a lineal descendant, the Court is not bound to appoint the lineal descendant, but has a discretion in the matter, and may in the exercise of that discretion appoint the other claimant to be mutawalli.[51]

Baillie, 603-604; Macnaghten, p. 70, s. 6, p. 244, Case X.

Now the Parliament has passed an Act, namely the Wakf Act, 1954. Under this Act a 'mutawalli' may be appointed by the wakf board under certain circumstances. Section 63 of the Act provides that where there is a vacancy in the office of the mutawalli of a wakf and there is no one to be appointed under the terms of the deed of the wakf, or where the right of any person to act as mutawalli is disputed, the Board may appoint any person to act as mutawalli for such period and on such conditions as it may think fit.

46 *Ghazanfar v. Ahmadi Bibi* (1930) 52 All. 368, 123 I.C 369, ('30) A.A. 169; *Shah Ghulam v. Mahomed* (1875) 8 Mad. H C. 63.

47 *Advocate-General v. Fatima* (1872) 9 B.H.C. 19; *Khajeh Salimullah v.Abdul Khair*(1909) 37 Cal. 263, 3 I.C. 419; *Phatmabi v. Haji Musa* (1913) 38 Mad. 491, 21 I.C. 964.

48 *Rugghan v. Dhanno* (1927) 49 All. 435, 99 I.C. 1045, ('27) A.A. 257.

49 *Khajeh Salimullah v. Abdul Khair* (1909) 37 Cal. 263, 268, 3 I.C. 419.

50 *Advocate-General v. Fatima* (1872) 9 B.H.C. 191; *In re Mahomed Haji Haroon Kadwani*(1935) 59 Bom. 424, 156 I.C. 655, ('35) A.B. 254; *Asha Bibi v. Nabissa Sahib* ('57) A.M. 583.

51 *Shahar Banoo v. Aga Mahomed* (1907) 34 I.A. 46, 34 Cal. 118.

Appointments and Removal of Mutawalli by State Governments

Section 66 of the Wakf Act, 1954 lays down that whenever a deed of wakf or any decree or order of a court of any scheme of management of any wakf, provides that, a court or any authority other than a board may appoint or remove a mutawalli or settle or modify such scheme of management or otherwise exercise superintendence over the wakf, then notwithstanding anything contained in such deed of wakfs decree, order or scheme such power as aforesaid shall be exercisable by the State Government:

Provided that where a board has been established, the State Government shall consult the Board before exercising such powers.

Shia law

Under Shia law a wakf does not become effective until transfer of possession to the mutawalli or beneficiary (*see* note 'Shia law' under 186). The founder of the wakf is *functus officio* after he has transferred possession. He may appoint a mutawalli after dedication and before transfer of possession but not after transfer of possession.[52] If he has not appointed a mutawalli, he cannot make an appointment or settle a scheme after he has transferred possession, for after that the beneficiaries have the right to administer the wakf.[53]

52 *Syed Ali v. Syed Muhammad* (1928) 7 Pat. 468, 110 I.C. 12: ('28) A.P. 532.

53 *Ghulam Ali v. Mohammad Ali* (1933) 144 I.C. 467, ('33) A.L. 342.

Lineal descendant

In *Shahar Banoo v. Aga Mahomed* ,[54] the founder was a Shia and his 'lineal descendant, who claimed to be appointed mutawalli was a female of the Babi sect. The trial judge appointed her a mutawalli, but the High Court set aside the appointment and appointed another person. This was not on the ground that she was not qualified, but because as a female ' she would have to perform many of her duties by deputy, and as a Babi she might not take zealous interest in carrying out the religious observances of the Shia school for which the trust was founded'. This decision was upheld by the Privy Council on appeal. In considering the authorities their Lordships said: &uot;The authorities seem to their Lordships to fall far short of establishing the absolute right of the lineal descendants of the founder of the endowment, in a case like the present, in which that founder has not prescribed any line of devolution.&uot; If the line of devolution is prescribed from generation to generation it does not follow that a female, or persons claiming through females, are excluded though it may not be desirable to appoint a female owing to their habits and seclusion.[55] In a case where the founder of the wakf was a Mahomedan lady who had appointed herself first mutawalli and directed that the succession should be to the legal heirs of the second mutawalli, it was held that female heirs were not excluded.[56] Where the wakif appointed his son as mutawalli and provided that the descendants *(ba farzandan-farzandan)* should succeed as mutawallis, it was held that the words *ba farzandan* did not exclude the daughters of male descendants, but excluded the children of daughters.[57]

54 (1907) 34 I.A. 46, 54, 34 Cal. 118.

55 *Syed Mahomed Ghouse v. Sayabiran Sahib* (1935) 68 Mad. LJ. 684, 156 I.C. (757), ('35) A.M. 638.

56 *Wares Ali v. Sheikh Shamsuddin* (1936) 63 Cal. LJ. 573.

57 *Mohammad Eshaque v. Mohammad Amin* ('48) A.C. 312.

Resignation of Wakif as mutawalli

In *Ali Asghar v. Farid Uddin* ,[58] the wakif appointed himself as the first mutawalli, and after his death *A.* The wakif resigned from the mutawalli-ship and appointed *B* as mutawalli. It was held that *A* was entitled to become a mutawalli only on the death of the wakif, and as there was nothing in the Wakfnama providing for the appointment of a mutawalli on the resignation of the first mutawalli, there was a vacancy, and the wakif was entitled to appoint *B* as mutawalli, but such appointment was valid only for the lifetime of the wakif. &uot;There is nothing in Mahomedan law&uot;, said Braund J., &uot;which prevents the appropriator or wakif, who is himself the first mutawalli from resigning his office, and, out of is own residuary or general powers as wakif or appropriator, appointing his own successor provided that thereby he does not oust any express power already conferred by the deed of wakf.&uot; Where the wakif has

reserved the power of appointing a mutawalli, he is entitled to appoint a mutawalli, but he is not entitled to dismiss him, unless he has reserved to himself the power to do so.[59]

58 1946 All. 661, ('47) A.A. 261.

59 *Sheikh Masthan Sahib v. Balarami* ('53) A.M. 958.

Powers of Courts

As regards the management of public, religious or charitable trusts, the Privy Council in *Mahomed Ismail v. Ahmed Moola* ,[60] said:--

> &uot;It has further been contended that under the Mahomedan law the Court has no discretion in the matter [i.e., appointment of trustees of the mosque in question] and that it must give effect to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or mutawallis. Their Lordships cannot help thinking that the extreme proposition urged on behalf of the appellants is based on the misconception. The Mussalman law, like the English law, draws a wide distinction between public and private trusts. Generally speaking, in case of a wakf or trust created for specific individuals or a determinate body of individuals, the Kazi, whose place in the British Indian system is taken by the Civil Court, has, in carrying the trust into execution, to give effect, so far as possible, to the expressed wishes of the founder.'With respect, however, to public religious or charitable trusts, of which, a public mosque is a common and well-known example, the Kazi's discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards *management*, which must be governed by circumstances, he has complete discretion. He may differ to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution.&uot; Even if a wakf deed has provided that a certain person should be appointed mutawalli during the minority of a mutawalli, the Court ought not to appoint that person as mutawalli if he has repudiated the wakf.[61] The District Court has no power to remove a *de facto*mutawalli and to appoint a receiver in a summary proceeding. This can only be done in a suit instituted either under the Religious Endowments Act of 1863 or under s. 92 of the Code of Civil Procedure .[62]

In the case cited above the dispute was as regards the management of a Sunni mosque in Rangoon. The Sunnis of Rangoon consist partly of Randherjias and partly of Soorties. The mosque was founded by a Randheria, it was subsequently rebuilt and improved with money the bulk of which was supplied by Randherias, and the management had been for about 50 years in the hands of Randherias. It was not alleged that they had mismanaged the mosque. In these circumstances their Lordships held that all other conditions being equal, the Randheria section was entitled to manage and act as trustees of the mosque.

It has been held by the Orissa High Court that the participation by the public in the management of the mosque by subscriptions and donations is not inconsistent with the mutawalli-ship of the person in office. A member of the public by completing the construction of the mosque and by making improvements in it, whether with his own funds or funds raised by public subscriptions, cannot disentitle the person who has the right to its mutawalli-ship and himself become the mutawalli. Mahomedan law permits anybody to do such acts of piety which the mutawalli cannot refuse.[63]

The mutawalli has to carry out the provisions of the wakf strictly. In considering whether there should be a deviation from the original user of a mosque, the civil court, which has taken the place of the Kazi, has to decide on the evidence available whether the interest of the public to whom the mosque is dedicated require a change in the object of the foundation, whether the conditions necessary for making the change exist and whether the object of the founder was comprehensive enough to include the change.[64]

The question whether a mosque is a private or public endowment is a question of fact.[65]

60 (1916) 43 I.A.127, 134, 43 Cal. 1085. 1100, 35 I.C. 30; *Mahomedally Adamji Peerbhoy v. Akbarally Abdul Hussain Peerbhoy* (1934) 36 Bom. LR. 386, 59 Cal. L.J. 133, 38 Cal. W.N. 952, 66 Mad. L.J. 733, 147 I.C. 882, ('34) A.PC. 53. See also *Ibrahim Esmael v. Abdool Carim* (1908) 35 I.A. 151, 164 [a case from Mauritius].

61 *Bibi Zohra v. Bibi Habibunnisa* (1938) 18 Pat. 417, 186 I.C. 28, ('40) A.P. 9.

62 *Saliluddin Ahmad v. Mohiuddin Ahmad* (1948) 26 Pat. 531, ('48) A.P. 374.

63 *Ali Mohammed v. Mohd. Yusuf* ('62) A Orr. 111.

64 *Kunhalavi Musaliar v. Abdulla* A.I.R. 1965 Ker. 200.

65 *Imdad Ali Khan v. Sardar Khan* ('54) A. Ori. 15. *Shri Ghasi v. Waqfalalaulad* (1969) All. LJ. 923.

Vacancy may be filled up on application to Court

Where there is a vacancy in the office of mutawalli, and there is no question of removing an existing trustee, the vacancy may be filled up by an application to the Court. It is not necessary to bring a suit under s. 92 of the Civil Procedure Code[66] but before making the appointment the Court should issue notices to all persons interested.[67]

After the enactment of the Wakf Act, 1954 when there is a vacancy in the office of the mutawalli of a wakf and there is no one to be appointed under the terms of the deed of the wakf or where the right of any person to act as mutawalli is disputed, the Wakf Board under s. 63 is empowered to appoint any person as mutawalli. But while making such appointment by the Wakf Board in favour of any person to act as mutawalli, the period for which the said person is appointed should be specified in the order. In the instant case, appointment order appointing the petitioner as mutawalli of the Durgah does not specify the period for which the petitioner was appointed. The Andhra Pradesh High Court has held that though it is indicated in the order of the appointment that the Board has got right to revise/alter/change the proceedings at any time without assigning any reason, it cannot be understood to say that the Board has specified the period for which the petitioner was appointed to the office of mutawalli. Thus the appointment order so made appointing the petitioner as mutawalli is not in tune with the provisions of the s. 63 of the Act and the setting aside of the same by the Tribunal is proper.[68]

However, the Madras High Court has observed that the power of Wakf Board in appointing mutawalli should be in accordance with the tenor and spirit of the scheme decree passed. The Board cannot nullify or supercede the scheme decree if any passed[69]

66 *Abdul Alim v. Abir Jan* (1928) 55 Cal. 1284, 110 I.C. 416, ('28) A.C. 368; *Bibi Zohra v. Bibi Habibunnisa* (1938) 18 Pat. 417, 186 I.C. 28, ('40) A.P. 9 *Abdul Hasan Khan v. Jafar Husain* (1938) 13 Luck. 523, ('37) A.O. 381; *Allah Rakhoo v. Nasinruddin* (1943) O.W.N. 154 ('43) A.O. 278; *Mohammad Bhai v. Waziribi* (1946) Nag. 646, 224 I.C. 338 ('47) A.N. 31. The above passage was applied in *Mian Jan v. Fakir Mohammad* P.L.D. 1960 (W.P.) Karachi 420.

67 *Elahi Baksh v. Mahomed Ghaus* (1933) 141 I.C. 169, ('33) AL. 27.

68 *Shaik Ghouse Mohiuddin v. AP State Wakf Board* A.I.R. 2002 AP 394. See also Mohammed. *Sulaiman v. AP wakf Board* A.I.R. 1997 AP 387.

69 *Syed Thajuddin v. Syed Mohideen* [2011] 2 M.L.J. 105.

Appointment by congregation

In the case of an institution confined to a particular locality, such as a mosque or a graveyard, the appointment of a mutawalli may be made by the congregation of the locality.[70]

70 *Piran v. Abdool Karim* (1891) 19 Cal. 203; *Dilawar Husain v. Subhan Kha* ('31) AO. 375, 136 I.C. 241 *Ghulam*

Mohammad v. Abdul Rashid (1933) 14 Lah. 558, 144 I.C. 636, ('33) A.L. 905; *Khagum Khan v. Mohd Ali Sahib* ('55) A. Andh. Pra. 209 (1955) Andh. W.R. 1.

Appointment of imam

An imam is ordinarily appointed by the mutawalli, but in the absence of a mutawalli, an imam is to be appointed by the wakif's descendants and members of his family. If, however, the imam is found to be incompetent, the congregation is entitled to select a fit person after applying to the Kazi for the removal of the incompetent imam and for the appointment of the person selected by the congregation.[71] The High Court of Calcutta has held that a *de facto* mutawalli has the power to appoint an Imam and also to dismiss him on proper grounds.[72]

An interesting question was raised by All India Imam Organization before the Supreme Court in *All India Imam Organization v. Union of India* ,[73]which was whether Imams of the mosque be treated as employees of the Board. In the instant case, Imams incharge of religious act ivities of the mosque had approached the Apex court by way of petition under Art. 32 of the Constitution for enforcement of fundamental right against the exploitation by Wakf Board. The relief sought in the petition was to direct the Central and State Wakf Boards to treat the petitioner as employees of the Board and to pay basic wages to them to survive.

The Supreme Court observed that the objective and purpose of every mosque being community worship, and it being the obligation of Board under the Act to ensure that the objective of the wakf is carried on. So the Board cannot escape from its responsibility for proper maintenance of religious service in mosque. To say therefore, that the Board has no control over the mosque or imam is not correct. Absence of any provision in the Act or the rules providing for appointment of imam or laying down condition of their service is probably because they are not considered as employees. At the same time it cannot be disputed that due to change in social and economic set up they too need sustenance. Nature of their job is such that they may be required to be present in the mosque nearly for the whole day. Moreover, a large number of imams are such who have no occupation or profession or service for their livelihood except doing their duty as imam. What should be their fate? Should they be paid any remuneration and if so, how much and by whom? According to the Board they are appointed by the mutawallis and therefore, any payment by the Board was out of question. *Prima facie*it is not correct. Assuming that they are appointed by the mutawallis, the Board cannot escape from its responsibilities as the mutawallis too under s. 36 of the Act of 1954 are under the supervision and control of the Board. The right to life means the right to live with human dignity as enshrined in Art. 21. Therefore, it cannot be said that in our set up or in absence of any statutory provision in the Wakf Act, 1954, the imam who look after the religious activities of a mosques is not entitled to any remuneration. Financial difficulties of the institution cannot be above the fundamental right of a citizen. The Apex Court has directed that since the Boards have been entrusted with the responsibility of supervising and administering the wakf, it is their duty to harness resources to pay those persons who perform the most important duty of leading community prayer in a mosque the very purpose for which it is created. The court issued the following directions.

(1) The Union of India and the Central Wakf Board will prepare a scheme within a period of six months in respect of different kinds of mosques.
(2) Mosques which are under the control of the Government shall not be governed by this order. But if their imams are paid any remuneration and they have no independent income, the government may fix their emoluments.
(3) For other mosques, except those which are not registered with the Board or their respective Boards or which are not manned by members of Islamic faith, the scheme shall provide for payment of remuneration to such imams taking guidance from scale of pay prevalent in Punjab and Haryana.
(4) The State Boards shall ascertain income of each mosque and the nature and number of

imams required by it, namely full time or part time.

(5) For the full time imams, the pay scale of Punjab Wakf Board may be treated as guideline. That shall also furnish guidelines for payment to part time imams.

(6) The scheme shall also take into account those mosques which are small or are in the rural area and have no source of income and to find out ways and means to raise its income.

(7) The scheme framed by the Central Wakf Board shall be implemented by every State Board.

71 *Shakul Harmred v. Mahomed Hussain* (1940) 2 M.LJ. 446, 193 I.C. 131, ('41) A.M. 42.

72 *Wajid Ali v. Dadannessa Bibi* (1947) 51 C.W.N. 111, ('47) AC. 282; *Khagum Khan v.Mohd Ali Sahib (supra)*.

73 A.I.R. 1993 SC 2086.

Religious Endowments Act, 20 of 1863

The section does not apply to a mutawalli appointed by a Committee under this Act. Such a mutawalli is merely a servant of the Committee[74]

74 *Gholam Hussain Shah v. Syed Altaf Hossain* (1934) 61 Cal. 80, 149 I.C 1215, ('34) A.C. 328.

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CHAPTER XII

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205.

Mutawalli may appoint successor on his death-bed

If the founder and his executor are both dead, and there is no provision in the wakfnama to succession to the office, the mutawalli for the time being may appoint a successor on *his death-bed*. He cannot, however, do so while he is in health, as distinguished from death-illness.[75] Nor if the office goes by hereditary right.[76]

(*see*s. 63 of the Wakf Act, 1954)

A mutawalli may on his death-bed appoint even a stranger as his successor; he is not bound to appoint a member of the founder's family.[77] The Lahore High Court has decided that the above rule applies only where the mutawalli transfers the mutawalli-ship to another, but he may appoint his successor by will;[78] but in appeal to the Privy Council,[79] their Lordships refrained from expressing an opinion on this point.

The office of a mutawalli is not transferable.[80]

A mutawalli cannot delegate his functions in his life-time while he is in good health. He can, however, nominate his successor in his life-time and even while in good health, but it must be effective after his death. Its only the delegation or parting with his duties when he is in good health that is prohibited. The Privy Council explained this in the following passage:

&uot;Death may come without warning or expectation of death may not be realised. In the former case no appointment will be made, and in the latter any appointment will be ineffective.&uot;.[81]

75 Baillie, 604; *Piran v. Abdool Karim* (1891) 19 Cal. 203, 219; *Zooleka Bibi v. Syed Zymul Abedin* (1904) 6 Bom. L.R. 1058; *Mt. Kammon v. Allah Baksha* (1941) 193 I.C. 323, ('41) A.L. 36; *Ali Mohammad v. Mohd Yusuf* ('62) A. Ori. 111.

76 *Hakim Khan v. Sahebjan Sahib* (1935) 69 Mad. LJ. 722, 159 I.C. 694, ('35) A.M. 1040; *Muhammad M. Hussain v. Syed Abdul Huq* (1942) 1 M.LJ. 564, ('42) A.M. 485.

77 *Sheikh Amir Ali v. Syed Wazir* (1905) 9 C.W.N. 876.

78 *Abdul Razak v. Ali Baksh* (1945) Lah. 554, 228 I.C. 100, ('46) A.L. 200.

79 *Haji Abdul Razaq v. Sheikh Ali Bakhsh* (1948) 75 I.A. 172.

80 *Khalil Ahmad Khan v. Siddiq Ahmad Khan* A.I.R. 1974 All. 382.

81 *Ahsanullah Shah v. Ziauddin* (1937) All. LJ. 585.

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CHAPTER XII

WAKFS

OF MUTAWALLIS OR MANAGERS OF WAKF PROPERTY

205A.

Succession where two or more mutawallis are jointly appointed

Where two or more mutawallis are appointed as joint mutawallis i.e., as joint holders of a single office, and there is no direction, express or implied, given by the wakif and where there is no evidence of custom supporting a usage to the contrary, the office of mutawalli-ship held jointly will pass on the death of one holder to the survivor or survivors.[82]

Where two mutawallis are appointed jointly and one dies, the mutawalli-ship passes to the survivor in the absence of any provision in the wakf deed, or if there is no usage or custom to the contrary. The surviving mutawalli can nominate his successor after the death of the other mutawalli.[83]

A, *B* and *C* are appointed joint mutawallis of a wakf. There is no direction in the wakfnama with regard to what is to happen if one of them were to die and there is no evidence of custom. *A* dies, but before he dies he appoints *X* as mutawalli to succeed him. *X* cannot act as mutawalli because on the death of *A*, the mutawalli-ship passes to *B* and *C*, and *A* has no power to appoint *X* as a mutawalli.

82 *Haji Abdul Razaq v. Sheikh Ali Bakhsh* (1948) 75 I.A. 172. ('48) A.PC. 163.

83 *Commr. of Wakfs v. Asraful Alam Shami* ('75) A Cal. 162.

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CHAPTER XII

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206.

Office of mutawalli not hereditary

The Mahomedan law does not recognise any right of inheritance to the office of mutawalli. But the office may become hereditary by custom, in which case the custom should be followed.[84]

Where there is a vacancy in the office of mutawalli, and the Court is called upon to appoint a mutawalli, the Court will ordinarily appoint a member of the founder's family in preference to a stranger, and a senior member in preference to a junior member. But where no such appointment is to be made, and the suit is merely one to oust from the office of mutawalli, a defendant who is *already in possession and enjoyment of the office*, the Court will not oust the defendant from the office merely because the plaintiff is the elder brother and the defendant a younger brother, or because the plaintiff is a member of the founder's family and the defendant a stranger. The reason is that, according to Mahomedan law, no right of inheritance attaches to the office of mutawalli. The office, however, may be hereditary by custom. Such a custom, however, is opposed to the general law, and must be supported by strict proof.[85]

A suit was filed for a declaration that the plaintiff was mutawalli and for a permanent injunction restraining the defendant from interfering. The defences raised were limitation and prescription and that the suit was bad as no consequential relief was asked. It was held that the mutawalli Putship being heritable or hereditary the suit was maintainable as the property vests in the Almighty; and a suit for the possession of the office of a mutawalli was sufficient. The claim for permanent injunction made this a suit for declaration and a claim for recovery of the office of a mutawalli. It was held that one trespasser cannot tack on the possession of another trespasser when there is no connection between the two.[86]

84 Macnaghten, p. 344, case X; *Sayad Abdula v. Sayad Zain* (1889) 13 Bom. 555, 561, *Phatmabi v. Haji Musa* (1913) 38 Mad. 491, 21, I.C. 964; *Atimannessa v. Abdul Sobhan* (1916) 43 Cal. 467, 32 I.C. 21; *Mahomed Haji Haroon Kadwani, In re*(1935) 59 Bom. 424, 156 I.C. 655, ('35) A.B. 254; *Mohammad Soleman v. Tasadduq Hassan* (1935) 158 I.C. 544, ('35) A.C. 623.

85 *Sayad Abdula v. Sayad Zain* (1889) 13 Bom. 555; *Phatmabi v. Haji Musa* (1913) 38 Mad. 491, 21, I.C. 964.

86 *Hazera Khatoon v. Abdul Latif* 75 C.W.N. 114.

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CHAPTER XII

WAKFS

OF MUTAWALLIS OR MANAGERS OF WAKF PROPERTY

207.

Power of mutawalli to sell or mortgage

A mutawalli has no power, without the permission of the Court, to mortgage, sell or exchange wakf property or any part thereof, unless he is expressly empowered by the deed of wakf to do so.

Section 51 of the Wakf Act, 1954 has completely changed the position regarding transfer of wakf property by mutawalli. It provides that - (1) Notwithstanding anything contained in wakf deed, any gift, sale, exchange or mortgage of any immovable properly which is wakf property shall be void unless such gift sale, exchange or mortgage is effected with the prior sanction of the Board.

Provided that no mosque, Dargah or Khanquah shall be gifted, sold, exchanged or mortgaged except in accordance with any law for the time being in force.

(2). The board may.accord sanction to such transaction if it is of opinion that such transaction is (i) necessary or beneficial to the wakf; (ii) consistent with the object of the wakf; (iii) the consideration thereof is reasonable and adequate:

Provided that the sale of the property sanctioned by the Board shall be effected by public auction and shall be subject to confirmation by the Board within such time as may be prescribed:

Provided further that the tribunal may, on the application of the aggrieved mutawalli or other persons, for reasons to be recorded by it in writing permit such sale to be made otherwise than by public auction, if it is of the opinion that it is necessary to do so in the interest of the wakf..[87]

A mutawalli of a wakf although not a trustee in the true sense of the term is still bound by the various obligations of a trustee. He like a trustee or a person standing in a fiduciary capacity, cannot advance his own interests or the interests of his close relations by virtue of the position held by him. The use of the funds of the wakf for acquisition of a property by a muttawalli in the name of his wife would amount to a breach of trust and the property so acquired would be treated as wakf property.[88]

A mutawalli is not allowed to sell, mortgage or lease the wakf property unless he obtains permission of Court which has the general powers controlling the act ions of mutawalli. Save and except as recognised by any custom, the law does not favour the right to act as mutawalli becoming heritable. When the mutawalli dies, the wakif is still alive, possesses the right to appoint another and in his absence his curator and in the absence of both, the Court appoints the successor mutawalli. Mutawalli has no ownership rights or estate in the wakf property, he holds the property as a manager for fulfilling the purpose of wakf. Even a Sajja Danishina, who has larger interest in the usufruct has no right in the property endowed. These features distinguish a mutawalli from a shebait. The elements which render shebaitship a property are absent in mutawalli-ship and mutawalli-ship is an office.[89]

Baillie, 605.

87 *See* Appendix IV. The Wakf (Amendment) Act 2013 has substituted sub-section (1) of s. 51 and omitted sub-section (2). For s. 51 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

88 *Bibi Siddique Fatima v. Saiyed Mohammad Mahmood Hasan,* 1978 All. L.J. 634(S.C), [R. S. Sarkaria, N.L. Untwalia and P.S. Kailasam, JJ.].

89 47 Indian Appeals 224 (P.C).. 48 Indian Appeals 303 (P.C.). Ref. to: (1932) I.L.R. 60 Cal. 452 (F.B.) L.R.I.A Supp. Vol. 47, 70 I.A 57, 68 I.A 448 and A.I.R. 1954 S.C. 282, A.I.R. 1963 S.C. 985 and A.I.R. 1970 All. 509. Rel. on [A.K. Sen and B.C. Roy. 33]; *Zohra Khatoon v. Md. Jane Alan,* 82 C.W.N. 51.

Power of sale

An instance of such power is a deed of wakf which authorized the mutawalli to sell the property and utilize the proceeds for the construction and maintenance of a resthouse at Mecca.[90] But a sale after the death of the Wakif by the mutawalli according to the directions in a void wakf is void against the heirs.[91]

90 *Muhammad Usuf v. Muhammad Sadiq* (1933) 14 Lah., 431, 144, I.C. 271, ('33) A.L. 501.

91 *Anwar Reza v. Hachinur Reza* (1944) 1 Cal. 680, 221 I.C. 262, ('45) A.C. 189.

Unauthorized mortgage cannot be partly valid

The Court removed a mutawalli for mortgaging the wakf property, and appointed a new mutawalli. When the new mutawalli sued to recover possession from the mortgagee, the latter claimed that the mortgage was valid as to the portion of the property which was settled for the benefit of the settlor's family. The Judicial Committee held that such a contention was inconsistent with the character of a wakf under which all rights of property pass out of the wakif and vest in Almighty God.[92]

92 *Abdur Rahim v. Narayan Das* (1923) 50 I.A. 84, 91, 50 Cal. 329, 71 I.C 646, ('73) A.PC 44, on appeal from Cal.

Retrospective confirmation

It has been held in Calcutta that a mortgage of wakf property, though made without the previous sanction of the Court, may be retrospectively confirmed by the Court. A mortgage without the previous leave of the Court is not void *ab initio*.[1]The Allahabad High Court act ing on this principle validated a usufructuary mortgage by a mutawalli.[2] Both these cases proceeded on the grounds (1) that the mortgage was necessary for the purposes of the wakf, and (2) that the pledge was not of the corpus but of the income. The Madras High Court[3] has also decided that an alienation which was for the benefit of the wakf can be retrospectively confirmed. The same view has been taken by the Orissa High Court.[4]

The court exercises the same powers as a *Kazi*and the orders of the court are revisable under s. 115 of the Code of Civil Procedure . The court can grant permission for transfer of property.[5]

1 *Nimai Chand v. Golam Hossein* (1909) 37 Cal. 179, 3 I.C. 353; *Shailendranath v. Hade Kaza* (1932) 59 Cal. 586, 137 I.C. 500, ('32) A.C. 356 [where confirmation was refused].

2 *Afzal Hussain v. Chhedi Lal* (1935) 57 All. 727, 155 I.C. 791, ('35) A.A. 792.

3 *Abdul Kadir v. Kadiria Sabha* ('53) A.M. 143.

4 *Saleb Khan v. Madar Saheb* ('54) A. Ori. 239.

5 *Jan Mohamad v. Mahomood Ali* ('74) A. All. 124.

Procedure for obtaining permission of Court

It was held by the Calcutta High Court in a case decided in 1909 that a mutawalli, desirous of obtaining the sanction of the Court for a sale, mortgage, or lease of wakf property, must proceed by way of suit, and not by an application under the Trustees Act XXVII of 1866, the reason given being that, that Act applies only to trusts in the English form constituted by persons of purely English domicile or by persons governed by the Indian Succession Act, and that does not apply to Mahomedans.[6] But this decision has been disapproved in recent cases where it was held that the sanction may be obtained on an application and that it is not necessary to bring a suit.[7]It would seem that in Bombay, leave may be obtained on an application under the Trustees Act .[8] The Chief Court of Sind has held that the procedure is by way of suit and not by application.[9]

6 *Halima Khatun, In re*(1909) 37 Cal. 870, 7 I.C. 33.

7 *Fakrunnessa v. District Judge* (1920) 47 Cal. 592, 56 I.C. 475; *Habibar v. Saidannessa* (1924) 51 Cal. 331, 77 I.C. 949, ('24) A.C. 473; *Wazir Ali v. Ladley Begum* (1938) 177 I.C. 417, ('38) A.C. 437; *Jan Mohamad v. Mahmood Ali* ('74) A. All. 124.

8 See *In re Kahandas Narrandas*(1881) 5 Bom. 154, and *Lang v. Moolji* (1919) 21 Bom. L.R. 1111, 54 I.C. 455, where it was held on a petition for appointment of new trustees that the Act applied to Hindus in Bombay.

9 *In re Muhammad Ismail*(1944) Kar. 69, ('44) A.S. 183.

Unauthorized alienation.--who can sue the mutawalli?

Where a mutawalli makes an unauthorized alienation of wakf property, any beneficiary has the right to bring a suit for possession. It is not necessary to file a representative suit.[10]

10 *Thangachi v. Ahmad Husain* ('57) A.M. 194.

Unauthorized alienation and limitation

The law as regards the period of limitation for a suit to follow wakf property in the hands of a mutawalli and to set aside unauthorized transfers of such property, and to recover possession thereof from the transferee, was amended and altered by Act I of 1929. The amendments consist of an addition of para. 2 to s. 10 of the original Act (Limitaion Act, 1908), and of the insertion of new articles, being Art s. 48B, 134A, 134B and 134C. As to the law before the amendment, see the undermentioned case.[11]

11 *Vidya Varuti v. Balusami* (1921) 48 I.A. 302, 44 Mad. 831, 65 I.C. 161, ('22) A.PC. 123; *Abdur Rahim v. Narayan Das* (1923) 50 I.A. 84, 50 Cal. 329, 71 I.C. 646, ('23) A.PC. 44 [mortgage]; *Subbaiya v. Muhammad* (1923) 50 I.A. 295, 46 Mad. 751, 74 I.C 492, ('23) A.PC. 175 [sale in execution of decree]; *Alia Rakhi v. Shah Mohammad Abdul Rahim* (1934) 61 I.A. 50, 56 All. 111, 147 I.C. 887, ('34) A.PC. 77; *Arumugam Pillai v. Khazi Mohideen Sheriff Sahib* (1933) 64 Mad. L.J. 706, 144 I.C 541, ('33) A.M. 533. *See*also the Limitation Act 1963 and A.I.R. Manual Vol. 13 (3rd Edn.) pp. 381-382 for corresponding provisions.

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208.

Power of mutawalli to grant leases

A mutawalli has no power to grant a lease of wakf property, if it be agricultural, for a term exceeding three years, and, if non-agricultural, for a term exceeding one year--

(a) unless he has been expressly authorized by the deed of wakf to do so;
(b) or, where he has no such authority, unless he has obtained the leave of the Court to do so[12] such leave may be granted even if the founder has expressly prohibited a lease for a longer term.

Section 56 of the Wakf Act, 1954 has also altered the power of the mutawalli to make a lease of wakf property. This section provides--

(1) A lease or sub-lease for any period exceeding three years of any immovable property which is wakf property shall, notwithstanding anything contained in the deed or instrument of wakf or in any other law for the time being in force, be void and of no effect.
(2) A lease or sub-lease for a period exceeding one year and not exeeding three years of any immovable property which is wakf property shall, notwithstanding anything contained in the deed or instrument of wakf or in any other law for the time being in force, be void and of no effet unless it is made with the previous sanction of the Board..[13]

A mutawalli cannot lease agricultural land for more than three years and other land for more than one year without the permission of the Wakf Board. A longer lease than the one permitted is not void, but voidable at the instance of the mutawalli or the beneficiaries. It can be validated by the Board even retrospectively.[14]

A mutawalli executed a lease of property subject to a wakf for a period exceeding one year without the sanction of the Court. It was held that the test to apply would be (a) whether the transaction was for a legal necessity, or (b) whether it was for the benefit of the wakf or (c) whether it was of the benefit of the beneficiaries. If so found the sanction can be given retrospectively and the transaction need not be struck down. The transaction is voidable and not void *ab initio*.[15]

Baillie, 606-607.

12 *Woozatunnessa, in the matter of*(1908) 36 Cal. 21. See also; *Mayadhar v. Orissa Board of Wakfs,* ('66) A. Orr. 208.

13 *See* Appendix IV. For s. 56 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

14 *Ramdhani v. Janki Rai* ('71) A. All. 553.

15 *K M. Shaida v. Delhi Iron & Steel Co.* (1971) All. L.J. 510.

Permanent lease

It follows that a permanent lease cannot be granted by a mutawalli without leave of the Court.[16] Such leave must be obtained on an application to the District Judge. A Munsiff cannot validate such a lease by an order made in a pending suit.[17] A single judge of the Bombay High Court, however, has held that where a mutawalli has leased wakf property for a long term without the sanction of the Court, the Court has the power to sanction the lease retrospectively if it is satisfied that the transaction is for the benefit of the wakf.[18] The lease however binds the mutawalli personally during his lifetime and he cannot repudiate it and evict the lessee.[19] Where a mutawalli under a lease of Wakf property for agricultural purposes granted a right of a permanent nature, it was held by the Patna High Court that the lease was valid for the first three years and since no steps were taken to avoid the voidable lease, the lessee's possession continued to be lawful and was not that of a trespasser.[20]

16 *Alimunnisa Bibi v. Mohammad Abdul Rahman* (1938) A.L.J. 727, 177 I.C. 205, ('38) A.A. 485.

17 *Abdul Rahman Molla v. Abdul Hossain Molla* (1936) 40 Cal. W.N. 585.

18 *Zafarbhai v. Chaganlal* (1941) 43 Bom. L.R. 854, ('42) A.B. 21, See also *Sundaramurthi v. Chotti Bibi* (1942) 2 M.L.J. 164, ('42) A.M. 641.

19 *Sayed Arsad Hossain v, Naresh Nandini Dasi*(1936) 40 Cal. W.N. 584; *Sundaramurthi v. Chotti Bibi* (1942) 2 M.L.J. 164 ('42) A.M. 641.

20 *Shah Mohd. v. Manzoor Ali* ('66) A.P. 45.

Presumption of a legal origin

A mutawalli sought to evict a tenant who claimed that he and his ancestors had been for a long and indefinite time in occupation of the property as permanent tenants. The mutawalli relied on a Moghul sanad of 1772 which contained an absolute restriction on the mutawalii's power of granting a permanent lease. But as the wakf was of considerable antiquity and already established and subject to the rules of Mahomedan law before the grant of the sanad, the Court made the presumption of a lost and unrecorded permission of the Kazi.[21] No such presumption, however, can be drawn where the lease has been granted by the mutawalli in 1891 and proof of leave granted by the District Judge is not forthcoming.[22]

An interesting question arose before the Karnataka High Court as to whether a mutawalli of a wakf property can be construed as a tenant? The court held that a person in possession of land in the capacity of 'mutawalli' could not be construed as a tenant as he was only the caretaker of the property and therefore not entitled for grant of occupancy right in respect of wakf properties. However there was no bar for person other than mutawalli to claim occupancy right even in respect of wakf property if he was cultivating such land as tenant under lease obtained from a competent authority.[23]

The Supreme Court in *Markaz Construction v. Supra Humayun Mirza Wakf* ,[24]concurred to the view of the Andhra Pradesh High Court. The Court observed that the provisions of the Wakf Act, 1954 and Rule 12 of the Andhra Pradesh Wakf Rules, 1974 have been designed to ensure that the property, belonging to the wakf is used in the best interests of the wakf and any disposal of this property by the mutawalli is required to be sanctioned by the Wakf Board after following the procedure under Rule 12. These proposals must be considered by the Board, if necessary, after holding an enquiry. Mutawalli, who is incharge of the management of wakf property would in such circumstances be a party considered with the disposal of such property and notice would have to be given to him by the Wakf Board under the provision of sub-rule(4) of Rule 12. The Apex Court held that looking to the scheme of the provisions, the Wakf Board, however, must consider the views of the mutawalli on such proposals and in the kind of transaction in question, where a long term lease for construction of a commercial complex on the wakf property is proposed to be issued, the mutawalli must be given an opportunity to express his views on the choice of a contractor and the Wakf Board cannot decide the question on its own.

The Madras High Court in the instant case has held that there cannot be any permanent lease of wakf property or a lease or sub-lease for any period exceeding three years of any immovable property, and any lease given contrary to s. 56 of the Act, 1995 is void ab initio. Therefore, the contention of the respondents that one of the mutawalli has given on lease initially for a period of eleven months with an intention to continue it as a permanent lease, is unsustainable in view of the statutory bar contained in s. 56 of the Act of 1995.[25]

The Andhra Pradesh High Court has also held in clear terms that all leases exceeding three years relating to wakf property to be void. In the instant case, a lease was granted with the permission of the Wakf Board for 20 years, an application was made to extend it further for 31 years. The court held that it is void.[26]

21 *Mahamad Mazaffar-al-Musavi v. Jabeda Khatun* (1930) 57 I.A. 125, 57 Cal. 1293, 123 I.C. 722, ('30) A.PC. 103.

22 *Sundaramurthi v. Chotti Bibi* (1942) 2 M.LJ. 164, ('42) A.M. 641.

23 *Karnataka Board of Wakf v. Land Tribunal Sira* A.I.R. 2000 Kant 141.

24 A.I.R. 1996 SC 2763.

25 *H. Idayathulla v. Larabsha Dharga, Panruti* (2007) 2 M.L.J. 1034

26 *Shri Shinde Enterprises v. Arastu Talimi Trust* LNIND 2005 A.P. 31.

Limitation

See note to 207 above.

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209.

Creditor's rights

A mutawalli (unless authorized by the deed of wakf) has no power of alienation without the leave of the Court, a creditor advancing money to a mutawalli for carrying out the purpose of the trust has no right to be indemnified out of the trust property. In this respect a creditor of a mutawalli is in a worse position than a creditor of the shebait of a Hindu endowment.[27] A decree against *A.B*. "as mutawalli" is not sufficient to create a charge on the wakf property of which *A.B.* is mutawalli. A decree will not bind, the wakf property unless it expressly says so; and in that case the proper procedure in execution is to appoint a receiver of the income of the endowment.[28]

27 *Sailendra Nath Palit v. Hade Kaza Mane* (1932) 59 Cal. 586, 137 I.C. 500, ('32) A.C. 456; *Mahabir Prasad Marwari v. Syed Shah Muhammad Yehia* (1936) 15 Pat. 88, 163 I.C. 869, ('36) A.P. 390.

28 *Zubaida Sultan Begum v. Dawood Ismail Mukra* (1937) Cal. 99, ('37) A.C. 402.

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210.

Allowance of officers and servants

The mutawalli has no power to increase the allowance of officer and servants attached to the endowment where the allowance is fixed by the wakif (dedicator), but the Court may in a proper case increase such allowance.

Ameer Ali, 4th ed. I, 469.

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211.

Remuneration of mutawalli

The founder may provide for the remuneration of the mutawalli. Such remuneration may be a fixed sum or it may be a residue of the income of the wakf property after defraying the expenses necessary for the maintenance of the wakf.[29] If no provision is made by the founder for the remuneration of the mutawalli, the Court may fix a sum not exceeding one-tenth of the income of the wakf property.[30] If the amount fixed by the founder is too small, the Court, may increase the allowance, but it must not exceed the limit of one-tenth.[31]

The wakf concerned being a wakf-al-al-aulad, the mutawallis were also beneficiaries and the right, title and interest which other mutawallis or their predecessor in interest had in the estate vested by transfer, surrender or abandonment in her husband and on his death in herself. The prayer for declaration or right to wakf properties is as substantial as the claim in respect of the order of the commissioner of wakf. Such relief in respect of immovable properties situated outside the jurisdiction of the Court cannot be entertained by the Court.[32]

Duties of Mutawalli

Apart from many powers and privileges which the mutawalli enjoys with regard to wakf property, the Wakf Act, 1954 has imposed upon the mutawalli certain duties. Section 50 of the Act of 1995 provides that it shall be the duty of every mutawalli--

(a) To furnish such returns and supply such information or particulars as may from time to time be required by the Board in accordance with the provisions of this Act or of any rule or order made thereunder;
(b) To furnish such returns and supply such information or particulars as may from time to time be required by the Board in accordance with the provisions of this Act or of any rule or order made there under;
(c) To allow inspection of wakf properties, accounts and records or deed and documents relating thereto;
(d) To discharge all public dues; and
(e) To do any other act which he is lawfully required to do by or under this Act.

29 *Sayid Ismail v.Hamidi Begum*(1921) 6 Pat. L.J. 218, 233-234, 62 I.C. 455, ('21) A.P. 125.

30 *Mohiuddin v. Sayiduddin* (1893) 20 Cal. 810, 821; *Muntaz Qadar v. Advocate-General* (1946) 21 Luck. 516, 225 I.C. 21, ('46) A.O. 244.

31 Ameer Ali, 4th ed., Vol. 1, 469 *et seq*.

32 *Zohra Khdtoon v. Md. Jane Alan.* 82 C.W.N. 51 A.I.R. 1978 Cal. 133, [A. K. Sen and B. C. Roy, JJ.].

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212.

Statutory Control of Wakfs in India[33]

Notwithstanding anything contained in any other Act, the supervision, control and management of all wakf properties in India shall be governed by the Wakf Act, 1954, save the Durgah Khawaja Saheb Ajmer to which the Durgah Khawaja Saheb Act, 1955 applies.

The Wakf Act, 1954[34]

The Wakf Act, 1954 (43 of 1995) was passed by the Parliament on 22 November, 1995 to provide for the better administration and supervision of wakf in India. This Act extends to whole of India except the Jammu and Kashmir. The Act of 1995 has come into force by a notification in the Official Gazette on 1st January, 1996 vide S.O. 1007 (E) dated 27 January, 1995.[35]

The Act shall apply to all wakfs whether created before or after the commencement of this Act except the Durgah Khawaja Saheb Ajmer to which the Durgah Khawaja Saheb Act, 1955 (36 of 1955) applies.[36]

Prior to the enactment of the Wakf Act, 1954, the following enactments dealt with the administration and supervision of the Wakf properties in different States of India.

(i) Bengal Wakf Act, 1934;
(ii) Bihar Wakf Act, 1937;
(iii) U.P. Wakf Act, 1950;
(iv) Bombay Public Trust Act, 1950;
(v) Wakf Act, 1954;
(vi) Durgah Khawaja Saheb, 1955; and
(vii) Sections 92 and 93 of the Code of Civil Procedure, 1908.

Since 1913, a number of Act s have been passed by the Central and State legislatures for the better administration and supervision of Wakfs in India. The Wakf Act, 1954 was passed by the Parliament and the same was amended four times. The need for further amendments was felt and thus a consolidated enactment, The Wakf Act, 1954 was passed for better administration of Wakfs.

Section 112 of the Wakf Act, 1954 has virtually repealed not only the Wakf Act, 1954, but also all the State enactments having law corresponding to the 1995 Act, except the Durgah Khawaja Saheb Act, 1955 which provides for supervision and administration of the endowment of Durgah of Ajmer. However, anything done or any act ion taken in the exercise of any power conferred by or under the corresponding law shall be deemed to have been done or taken in the exercise of the powers conferred by or under this

Act as if this Act was in force on the day on which such things were done or such action was taken.

33 In the 20th Edition of this work, the commentary under the section, *Statutory Control of Wakfs in India*, has been replaced in view of the enactment of the Wakf Act, 1954. The commentary on the 1954 Act has been placed at the end of this rewritten portion.

34 The Wakf (Amendment) Act, 2013 has made extensive changes to the Wakf Act, 1954. The title of the Act*i.e.*, 'The Wakf Act, 1954' has been changed to 'The Waqf Act, 1995'*vide* s. 4 of the Wakf (Amendment) Act, 2013. The words 'wakf', 'wakfs' and 'wakif' have been substituted with the words 'waqf', 'auqaf' and 'waqif' *vide*s. 4 of the Wakf (Amendment) Act, 2013. See Appendix III for the text of the Wakf Act, 1954 as amended by the Wakf (Amendment) Act, 2013 (w.e.f. 1-11-2013).

35 See section 1 of the Wakf Act, 1954.

36 Section 2.

Survey of Wakf

The Act of 1995 provides that the State Government may appoint for the State a Survey Commissioner and other officers for the purpose of making a survey of wakfs existing in the State at the time of the commencement of this Act. The Survey Commissioner shall, after the survey, submit his report to the State Government relating to the wakfs existing in the State. The survey report shall contain the following particulars, namely, the number of wakfs in the State (Sunni or Shia), the nature and objects of each wakf, the gross income of the wakf property, the amount of land revenue, cesses, rates and taxes payable, the expenses incurred in the realisation of the income and the pay or other remuneration of the mutawalli of each wakf etc.[37]The Wakf (Amendment) Act, 2013 has added a new sub-s. 1A in s. 4 which provides that such survey shall be completed within a period of one year from the date of commencement of the Wakf (Amendment) Act, 2013 in case such survey was not done before the commencement of the Amendment) Act of 2013.[38]

The Andhra Pradesh High Court has observed that it is no doubt true that when a competent authority has decided the issue under the provisions of the Act, it is only to be challenged under the provisions of the Act and resort cannot be taken to Art. 226 of the Constitution of India . But, however, in case when the order passed is wholly without jurisdiction or the authority lacks the competence or there is infraction of statutory provisions, it cannot be said that the writ petition is not available to the aggrieved party. In the instant case, before notifying the property as Wakf property, no notice was issued to the petitioners who were occupants of property and recorded as such in revenue register nor any enquiry was conducted by the Survey Commission as required by s. 4 of the Wakf Act, 1954 as to whether the property in question was Wakf property; or not, writ petition challenging the notification notifying the property in question as Wakf property is maintainable. In such a case, it could not be said that the petitioners should approach the Tribunal or the Civil Court, as the case may be, even after the expiry of one year period after the publication of gazette notification because that situation would not arise in as much as when the notice itself was lacking and no purpose will be served by approaching the Tribunal or Civil Court.[39]

The Survey Commissioner shall during the inquiry, have the same powers as the Civil Court, namely regarding summoning and examining, witnesses, requisitioning any public record, issuing any commission or making any local inspection etc. This survey report shall be valid for 20 years and after the expiry of this period the State Government may direct the Survey Commissioner for second or subsequent report relating to the wakf property. The State Government shall forward this report to the Wakf Board. The Board then after proper scrutiny shall publish in the Official Gazette a list of Sunni or Shia wakfs in the State.[40]

In *Lakshmi Saroja v. Salem Muslim Burial Ground Protection Committee Salem* , the Madras High Court observed that if a person who is a non-Muslim and if he is in possession of a certain property, his right, title and interest cannot be put in jeopardy simply because that property is included in the list published under s. 5(2) of the Wakfs Act, 1995. The legistature could not have meant that he should be driven to file

a suit in a Civil Court for declaration of his title[41] simply because the property in his possession is included in the list.

In another case, the contention of the respondents was that the petitioner mosque is a regimental mosque and that without consulting authority of Defence Department, mosque has been declared a wakf property in gazette notification. The Madras High Court in the instant case observed that the mosque which is a notified Wakf under the Wakf Act and which had been in possession of the petitioner along with passage and compound wall is entitled to rebuild the compound wall which had collapsed due to heavy rain. The military authorities who had provided pathway to the mosque to enable the Muslim civilians to approach the mosque could not interfere with the mosque's right to reconstruct the compound wall. If it is the case of military authorities that the declaration of wakf is not proper, they could have proceeded to appropriate Tribunal. They could not interfere with the possession and the enjoyment of wakf property.[42]

37 Section 4.

38 See Appendix III for the text of s. 4 as amended by the Wakf (Amendment) Act, 2013 (w.e.f. 1-11-2013).

39 *B. Gowra Reddy v. Govt. of A.P.* A.I.R. 2002 A.P. 313. See also-*Gulisthan Shadi Mahal Trust v. Karnataka Board of Wakf* LNIND 2002 KANT 38.

40 Section 5. The Wakf (Amendment) Act, 2013 has amended s. 5 of the 1995 Act. The amended s. 5 provides that the Board shall examine the report forwarded to it by the State Government and forward it back to the Government within a period of six months for publication in the Official Gazette a list of Sunni auqaf or Shia auqaf in the State, whether in existence at the commencement of this Act or coming into existence thereafter, to which the report relates and containing such other particulars as may be prescribed. See Appendix III for the text of s. 5 as amended by the Wakf (Amendment) Act, 2013.

41 [2009] 7 M.L.J. 1.

42 *Masjid-E-Aalishan@ Military Mosque v. Union of India* (2008) 5 M.L.J. 630.

Disputes Regarding Wakf

If any question arises whether a particular property specified in the list as wakf property is a wakf property or not, or whether a wakf specified in such list is a Sunni wakf or Shia wakf, the Board or the mutawalli or any person interested therein may institute a suit in a Tribunal for the decision of such question. The period of limitation for instituting such a suit is one year from the date of the publication of the list of wakfs. However, it should be noted that the Survey Commissioner shall be immune from being made a party to any suit for anything done in good faith and in pursuance of this Act . The Wakf (Amendment) Act, 2013 has amended s. 6 of the 1995 Act and replaced the words " any person interested therein" in s. 6 with the words "any person aggrieved".[43]

In *U.P. Shia Central Board of Wakf v. U.P. Sunni Central Board of Wakf* ,[44] following questions were raised before the Supreme Court:

(a) Whether the disputed property is a wakf property?
(b) Whether the particular wakf property is a Shia Wakf or Sunni Wakf?
(c) Whether such a dispute can be referred to the tribunal for adjudication?

The Supreme Court held that the scheme of the Statute (U.P. Muslim Wakfs Act, 1960) laid down by s s. 6 and 8 is clear that in case of any dispute, whether a particular property is wakf property or not or whether a wakf is a Shia wakf or Sunni wakf, the Board concerned or the mutawalli of the wakf or any person interested in the wakf may in accordance with the provisions of the law refer the dispute for adjudication to the Tribunal. Under the proviso to sub-section (1) a restriction is imposed that no such dispute shall be

entertained by a Tribunal after the expiry of one year from the date of publication of the list of wakfs under sub-s. (4) of s. 6. The court observed that the section does not make any provision that the publication of a list of wakf by the commissioner under s. 6 is a *sine qua non*for reference under s. 8(1) of the Act . All that is laid down in the proviso of sub-section (1) is that after a list of wakfs has been published by the Commissioner then a dispute as contemplated in the proviso has to be raised within one year from the date of publication of the list of wakf and not thereafter. It is pertinent to note that in the present case, no list of wakfs has been published by the Commissioner under s. 6(4). Therefore, the limitation prescribed in the proviso to subsection (1) of s. 8 has no application in the case.

In the instant case, both the sects of Muslim in the locality have claimed the mosque, its Sehan and the imam Chowk as wakfs belonging to their sect and the registration of the properties accordingly. It is not disputed that a dispute of this nature comes within the purview of sub-s. (1) of s. 8 of the Act. In the circumstances of the case the contention against maintainability of the reference made to the Tribunal under s. 8(1) of the Act on the ground that such reference does not lie in the absence of the publication of the list of wakfs by the Commissioner or that the reference is barred by limitation cannot be accepted.

The question relating to the meaning of the "person interested" under s. 6 of the Wakf Act, 1954 was raised before the Madras High court. The Court relied on the judgment of the Apex Court,[45]and held that the person interested in the trust or any person connected with the Trust means mutawalli. A stranger who has nothing to do with the wakf cannot be considered as a person interested in the trust and consequently any failure on the part of a stranger to institute a suit under s. 6 of the Wakf Act will not affect his right.[46] Similarly in another case, the Madras High Court has observed, "once under the deed of wakf, the dedication of the property has been made in favour of wakf and once the wakf has been created under deed of wakf, thereafter under no circumstances it can be revoked; and the son of the executant of the deed of wakf cannot ask for the return of the same and also cannot claim any righ in respect of the property so dedicated on the basis of the entries in the revenue records.[47]

The decision of the Tribunal on any dispute regarding wakf property or its nature shall be final, provided that the care has been taken of the limitation period while filing an application.[48] In *Sardar Khan v. Syed Najmul Hasan* ,[49]the Supreme Court held that on a conjoint reading of subsection (5) of s. 7 and s. 85 of the Wakf Act, 1954, the result would be that the Act would not be applicable to the pending suits or proceedings or appeals or revisions which have commenced prior to 1-1-1996, i.e. coming into force of the Wakf Act, 1954. Thus the Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a Civil Court under sub-section (1) of s. 6 before the commencement of the Act and it will be continued and concluded as if Act has not come into force. The Act, will apply prospectively and cannot operate retrospectively. The expenditure incurred in making survey and publication of the list of wakfs shall be borne by all the mutawalli of the wakfs if the net annual income of the wakf exceeds five hundred rupees. However, any sum due from a mutawalli shall be recoverable from the wakf property in the same manner as an arrear of land revenue.[50]

43 Section 6. See Appendix III for the text of s. 6 as amended by the Wakf (Amendment) Act, 2013.

44 A.I.R. 2001 SC 2086.

45 *Board of Muslim Wakfs v. Radha Kishan,* A.I.R. 1979 SC 289.

46 *Tamil Nadu Wakf Board v. S.J. Syed Basha* (1999) 3 M.L.J. 534.

47 *Tamil Nadu Wakf Board v. Hakkim M. Mohammed Moideen* (2008) 1 M.L.J. 833.

48 See section 7, Appendix IV. For s. 7 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

49 A.I.R. 2007 SC 1447, (2007) 2 CTC 208, LNIND 2007 SC 266.

50 Section 8. Section 8 of the Wakf Act, 1954 has been amended by the the Wakf (Amendment) Act, 2013. The amended s. 8 reads as follows: " 8. State Government to bear cost of survey.--The total cost of making a survey including the cost of publication of the list or lists of auqaf under this Chapter shall be borne by the State Government."

Central Wakf Council

The Central Government may establish a Central Wakf Council for the purpose of advising it, on matters concerning the working of Boards and the due administration of Wakfs. The Central Wakf Council shall consist of a Chairman (Union Minister in charge of Wakf-exofficio) and twenty members (3 persons representing Muslim organisations having all India character, 4 persons of national eminence, 3 parliament members, 3 chair persons of Board by rotation, 2 Judges of the Supreme Court or High Courts, one advocate, one person to represent Mutawallis of wakf having gross annual income of 5 lakhs and 3 eminent scholars of Muslim Law) to be appointed by the Central Government.[51] It is the duty of every Wakf Board to pay from its wakf fund annually to the Council such contribution as is equivalent to one per cent of the aggregate of the net annual income of the wakfs.[52]

51 Section 9, Appendix IV. For s. 9 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

52 Section 10, Appendix IV. For s. 10 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

Establishment of Wakf Board

The State Government shall establish (i) a Board of Wakfs; or (ii) Boards of wakf each for Sunni wakfs and for Shia wakfs, as the case may be. Such Boards shall be the body corporate having perpetual succession and a common seal with power to hold and aquire property and to transfer such property.[53]

The Board for a State and the Union Territory of Delhi shall consist of a chairperson, one and not more than two of following categories: (a) MPs and MLAs, advocates, mutawallis of the wakf having annual income of one lakh or above (b) members representing eminent muslim organisations (c) recognised scholars in Islamic Theology (d) an officer of the State Government not below the rank of Deputy Secretary.[54]Thus, according to the Scheme of the Wakf Act, 1954, each Wakf Board for the States and for the Union Territory of Delhi shall have not less than 7 and not more than 13 members of which the majority should be Muslims. However, to protect the interest of Shia community, one of the members has to be a Shia Muslim where, there is a Shia Wakf in existence.

The scheme of the Board was contended before the Karnataka High Court in *Syed Shah Mohammad Al Hussaini v. Union of India.* [55]The petitioner argued that the scheme of the Act makes the purpose of wakf irreligious in the name of secularism, jeopardises and destroys the religiosity of the Wakf and thus violates Articles 25 and 26 of the Constitution. The Court rejected these arguments holding that the Act only provides for the better administration of the wakf and other incidental matters and does not either control the wakf or its properties.

The petitioner further contended that since these members are elected by the whole section of the society including non-Muslims such an elected person cannot really represent the interests of the Muslims or protect the community or preaching of Islam. The Court rejected this argument also holding that elected members have been sought to be included in the Board upon consideration of their obligation and responsibility to the people in general and Muslims in particular; thus they are suited most to provide better administration of wakfs.

It was argued before the Madras High Court that nothing is defined in the Act of 1995 about who could be considerd as a representative of eminent Muslim organisation in the composition of the Wakf Board. The Court observed that under s. 14(1)(c) and (d) of the Wakf Act, 1954, it is clear that the power to select a representative from eminent Muslim organisation is given to the State Government. Therefore, it is for the subjective satisfaction of the State Government to consider the representative from the eminent Muslim organisation after taking into relevant considerations that prevails in a particular State.[56]

In *Khasim Sab Bapu Sab Sirguppi v. State of Karnataka* .[57]The Karnataka High Court has held that sub-s. (1), (3) and (4) of s. 14 of the Act shall be read in conjuction with each other. Thus as per s. 14(4) of the Act ; the numbers of elected members of the Board, shall at all times, be more than the nominated members of the Board except as provided under subsection (3). Therefore, in the instant case, entire Annexure-A was quashed because there were seven nominees of the Government as against five elected members.

In another case, it was argued before the Nagpur High Court that the composition of the Wakf Board is defective because it did not contain any Shia members, secondly the nominated members were more than the elected members. It was prayed that the Board should be restrained from functioning till its valid constitution. The Court held that the power given to State Government to fill in the vacancy cannot be abused by it to defeat the mandatory scheme of the Wakf Act, 1954.[58]

However, a person shall be disqualified to be appointed as a member of the Board by the State Government if he is not a Muslim, or below the age of 21 years, or of unsound mind, or an undischarged insolvent, or has been convicted of an offence involving moral turpitude, or has been previously removed as a mutawalli, or a member by an order of a competent Court or Tribunal from any position of trust either for mismangment or for corruption.[59]The Wakf (Amendment) Act, 2013 has added a new ground which provides that a person shall be disqualified for being appointed, or for continuing as, a member of the Board if he has been held guilty of encroachment on any waqf property.

The Board is empowered to establish its committees for the supervision of wakfs but it shall not be necessary for the members of such committee to be members of the Board.[60]

The State Government shall, in consultation with the Board appoint a Chief Executive Officer. He shall be ex officio secretary of the Board and shall be under the administrative control of the Board.[61]

The functions of the Chief Executive officer shall include the investigation of nature and extent of wakfs and wakf properties, inspecting the accounts, records, deeds or documents relating to wakf properties. However, Board shall, while exercising its power of giving directions to the Chief Executive Officer in respect of any wakf, act in conformity with the directions by the wakif in the deed of the wakf, the purpose of the wakf as such usage and customs of the wakf as are sanctioned by the school of Muslim law to which the wakf belongs.[62]

53 Section 13. The Wakf (Amendment) Act, 2013 has added a new proviso to s. 13(1) of the 1995 Act, which reads as follows: &uot;Provided that in case where a Board of Waqf has not been established, as required under this sub-section, a Board of Waqf shall, without prejudice to the provisions of this Act or any other law for the time being in force, be established within six months from the date of commencement of the Wakf (Amendment) Act, 2013.&uot;

54 Section 14, Appendix IV. For s. 14 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

55 A.I.R. 1999 KANT 112.

56 *P.A.G.Hussain Maulana v. Union of India* A.I.R. 2005 Mad 111.

57 LNIND 2003 Kant. 693.

58 *Qamber Jeevaji v. State of Maharashtra,* (2010) 4 All MR 529, LNIND 2010 N.G.P. 283.

59 Section 16, Appendix IV. For s. 16 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

60 Section 18.

61 Section 23. The Wakf (Amendment) Act, 2013 has substituted s. 23(1) of the 1995 Act. After its substitution, s. 23(1) reads as follows: &uot;There shall be a full-time Chief Executive Officer of the Board who shall be a Muslim and shall be appointed by the State Government, by notification in the Official Gazette, from a panel of two names suggested by the Board and who shall not be below the rank of Deputy Secretary to the State Government, and in case of non-availability of a Muslim officer of that rank, a Muslim officer of equivalent rank may be appointed on deputation.&uot;

62 Section 25.

Delegation of powers by the Board

The Board may, by general or special order in writing, delegate the Chairperson, any other member, the Secretary or any other officer or servant of the Board or any area committee such of its powers and duties under this Act, as it may deem necessary.[63]

63 Section 27. The Wakf (Amendment) Act, 2013 has substituted s. 27 of the 1995 Act. After its substitution, s. 27 reads as follows: "27. Delegation of powers by Board.--The Board may, by a general or special order in writing, delegate to the Chairperson, any other member, the Chief Executive Officer or any other officer or servant of the Board or any area committee, subject to such conditions and limitations as may be specified in the said order, such of its powers and duties under this Act, as it may deem necessary, except the powers and functions of the Board mentioned under clauses (c), (d), (g) and (j) of sub-section (2) of section 32 and section 110."

Powers and functions of the Board

The general supervision of the wakfs in a State shall vest in the Board or the State, and it shall be the duty of the Board so to exercise its powers under this Act as to ensure that the wakfs under its superintendence are properly maintained, controlled and administered, and the income thereof is duly applied to the objects and for the purpose for which such wakfs were created or intended. The Board is under duty while exercising power, that its every act ion is in conformity with the direction of the *wakf*, the purpose of the wakf and any usage or custom of the wakf sanctioned by the school of Muslim law to which the wakf belongs.[64]

Generally, the function of the Board shall be to the maintain records relating to origin, income, object and beneficiaries of wakf, to ensure that the income of wakfs are to be applied to objects and purpose for which such wakfs were created, to give directions for the administration of wakfs, to settle scheme of management for a wakf, to scrutinise and approve the budget submitted by mutawallis, to appoint and remove mutawallis in accordance with the Act, to institute and defend suits and proceedings relating to wakfs, to sanction any transfer of immovable of a wakf by way of gift, sale, mortgage or lease and generally to do all such act s as may be necessary for the control, maintenance and administration of wakfs.[65] Any person interested in the wakf if affected by any scheme of management, settlement or direction of the Board may institute a suit in a Tribunal for setting aside such settlement or directions and the decision of the Tribunal thereon shall be final.

The Board has a power to ask the mutawalli, whose wakf land has the potential for development as a shopping centre market, housing flats and the like, to convey his decision whether he is willing to execute the development work specified in the notice. If the Board is satisfied that the mutawalli is not willing or is not capable of executing the work, it may, with the prior approval of the Government, take over the property for the execution of works. The money for this purpose will be taken from wakf fund or from finances which may be raised on the security of the wakf property concerned and control and manage the properties till such time as all expenses incurred by the Board are recovered.

64 Section 32, Appendix IV. For s. 32 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

65 *Ibid*.

Power of Inspection by Chief Executive Officer of Wakf Properties

The Chief Executive Officer or any other person authorised by him on this behalf has with the prior

approval of the Board, the power to examine all movable or immovable properties of wakf and all records relating thereto if he comes to know that by reason of any failure or negligence on the part of the mutawalli any loss or damage has been caused to the wakf property. If it appears that the mutawalli or any other employee of the wakf is guilty of misappropriation of wakf money or fraudulently retaining the wakf property, the Chief Executive Officer may after giving a reasonable opportunity of show cause pass an order for the recovery of the amount against the mutawalli or the concerned employee. The appeal against this order can be filed to the Tribunal within thirty days of the receipt of the order.[66]

66 Section 33.

Registration of wakfs

Every wakf, whether created before or after the commencement of the Act, shall be registered at the office of the Board. Every such application for registration shall be made in such form and manner and at such place as the Board may by regulation provide. The application for registration shall be made within three months from the date of - (a) the commencement of this Act ; (b) the creation of the wakf; (c) the establishment of the Board, as the case may.[67] It is the duty of the Board to maintain a register of wakfs which shall contain in respect of each wakf copies of the wakf deeds, the class of wakf, the name of the mutawalli, the rule of succession to the office of mutawalli and such other particulars as may be provided by the regulations.[68]

Whether a property is a wakf property or not or whether a wakf is a Sunni wakf or a Shia wakf, the Board may, after making such inquiry as it may deem fit, decide the question by itself. Such decision of the Board in this regard shall, unless revoked or modified by the Tribunal, be final.[69]

The Kerala High Court has observed that it is for the Board to consider and decide the question at the first instance, whether a property is wakf or not. The Tribunal can be called upon only to adjudicate on and after the decision taken by the Board on the disputed question. In the instant case petitioners submitted that the chairman of the Wakf Board is an interested party. In the proceedings and deliberations of the Wakf Board, interested members always abstain. Therefore, there is no basis for any apprehension. The Tribunal is hence right in remitting the matter to the Wakf Board to first decide on proper inquiry and with notice also to all the affected parties as to whether the disputed property is wakf property or not. The parties are free to take all available contentions before the Board since they are also to be issued notices. If they are approved by the decision of the Board, it will be open to them to invoke the Jurisdiction of the Tribunal.[70]

In another case, the Madras High Court observed- &uot;The Wakf Board in the case of enquiry under the provision of s. 43 of the Wakf Act, 1954 is like that of a Civil Court in conducting trial by giving proper opportunities to the parties. A fair enquiry into any matter signifies due notice to the persons against whom an accusation is made and examining the evidence that establishes the truth or otherwise of the accusation levelled against a person. Therefore, it is the duty on the part of the Wakf Board to furnish subcommittee report which is the minimum requirement of principles of natural justice.&uot;[71]

67 Section 36, Appendix IV. For s. 36 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

68 Section 37. The Wakf (Amendment) Act, 2013 has added sub-sections (2) and (3) to s. 37 of the 1995 Act . The newly added sub-sections (2) and (3) read as follows: &uot;(2) The Board shall forward the details of the properties entered in the register of auqaf to the concerned land record office having jurisdiction of the waqf property. (3) On receipt of the details as mentioned in sub-section (2), the land record office shall, according to established procedure, either make necessary entries in the land record or communicate, within a period of six months from the date of registration of waqf property under section

36, its objections to the Board.&uot;

69 Section 40, Appendix IV. For s. 40 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

70 *Thayyil Kunhimohanmmed Haji v. Darual Huda Islamic Academy* LNIND 2007 KER 360.

71 *Rashed About Gaffar v. Tamil Nadu Wakf Board* [2008] 8 M.L.J. 959.

Maintenance of wakf accounts

Every mutawalli of a wakf shall, in every year prepare a budget in respect of the financial year next ensuing showing the estimated receipts and expenditure during that financial year. Such budget shall be submitted to the Board.[72]The Act also makes it obligatory on mutawalli to let the wakf properties and its accounts be audited by auditors appointed by the Board or by the State Examiner of local funds or any other officer designated for the purpose by the State Government,[73] to furnish reports, returns and other documents to the Board, to obey the directions given by the Board and to prepare and submit annual budget to the Board.The Board can give such directions for making alterations, omissions or additions in the budget as it deems fit and consistent with the object of the wakf and the provision of the Act.[74]

72 Section 44, Appendix IV. For s. 44 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

73 Sections 46 and 47, Appendix IV. For s s. 46 and 47 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

74 Section 44. The Wakf (Amendment) Act, 2013 has substituted s. 44(3). The newly substituted s. 44(3) reads as follows: &uot;(3) In case the Board considers any item in the budget being contrary to the objects of the waqf and the provisions of this Act, it may give such direction for addition or deletion of such item as it may deem fit.&uot;

Duties of mutawalli

Every mutawalli shall be under duty to carry out the directions of the Board, to furnish such information as may be required by the Board, to allow inspection of wakf properties, accounts and records, to discharge all public dues and to do every other act which he is lawfully required to do under this Act[75] (*see* 211). A debt contracted by a mutawalli is his personal debt. A debt can be incurred by the mutawalli only when there are no wakf funds in his hands to meet the requirements of the wakf.[76]

75 Section 50.

76 *Wahid Ali v. Ashraf Hussain,* 8 col 732.

Alienation of wakf property by way sale, mortgage, gift or exchange

Alienation by means of gift, sale, exchange or mortgage, of any wakf property without the prior permission of the Board, shall be void (*see* 207 above).[77] No mosque, durgah or Khanquah shall be alienated in any way except in accordance with the law for the time being force. The wakf property can, with the prior sanction of the Board, be alienated for that such transaction is necessary or beneficial to wakf; consistent with the object of the a wakf and the consideration there of is reasonable and adequate. However, The Board is empowered to recover possession of wakf property which has been alienated without its previous sanction.[78]

In *Md. Mazhar Shaheed v. District Collector, Mahboob Nagar,* the Andhra Pradesh High Court held that property of wakf institution cannot be sold or transferred except by procedure established under s. 51 of the Wakf Act . In the instant case, a portion of the wakf property was transferred to the Government where Shadikhana or Urdughar were constructed on the land in question. The Court held that property

transferred in contravention of s. 51 can be recovered for the benefit of wakf.[79]

Similarly mutawalli has no power to purchase any immovable property from the wakf fund without prior sanction of the Board except under extreme necessity.[80]

77 Section 51. The Wakf (Amendment) Act, 2013 has substituted s. 51 of the 1995 Act. For s. 51 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

78 Section 52.

79 LNIND 2005 A.P. 128.

80 Section 53.

Removal of encroachment from wakf property

Under s. 54 of the Act; 1995, the Chief Executive Officer (CEO) has, after making reasonable inquiry, the power to require the encroacher to remove encroachments from a wakf property and deliver possession thereof to the concerned mutawalli. However any person aggrieved by the order of the Chief Executive Officer may institute a suit in a Tribunal to establish his right, tittle or interest in the land, building, space or other property. Any order made by the Chief Executive Officer under s. 54(3) may be enforced by the Sub-Divisional Magistrate within local limits, of whose jurisdiction the wakf property is situated.[81]

A question arose before a single Judge of Andhra Pradesh High Court whether Chief Executive Officer can make an order for removing encroachment from the wakf property. The single Judge held that this order of eviction is illegal since it has been made on the request of the Chairperson of the Wakf Board. On appeal, the Court held that Chief Executive Officer, in exercise of his powers conferred under s. 54(3) of the Wakf Act, conducted the inquiry and it is evident that CEO independent of order of the Chairperson has examined the matter, taking into consideration the report of Inspector, Auditor and Surveyor who conducted joint inspection of the property in dispute. Therefore, the order of the CEO is valid. If any person who feels aggrieved by such order may file a suit before the Tribunal. The High Court cannot go into question of validity of order passed by CEO by filing a writ petition by the aggrieved party unless he has availed of the alternate remedy available to him under the Statute and the Tribunal has determined the issue or dispute or the nature of the property as provided under the provisions of the Act.[82]

In another case, the same High Court has held that there is a clear distinction of the maintainability of the suits filed against the orders by the CEO under s. 54(3) and the suits filed against the act s done by the Wakf Board under s. 83(2) of the Act. Any suit against the order of the Wakf Board is not maintainable unless the expiration of two months notice under s. 89 of the Act .[83]

81 Section 55, Appendix IV. For s. 55 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

82 *Allauddin Charities and Zakath Wakf v. Hamid Ali* LNIND 2001 A.P. 1223.

83 *Gajjala Venkateswarulu v. A.P. State Wakf Board* LNIND 2003 A.P. 384.

Grant of lease by mutawalli

A lease or sub-lease of any wakf property for any period exceeding three years shall be void and a lease of immovable property which is wakf property for a period less than three years can be made only with previous approval of the Board.[84](*see* 208 of the book)

84 Section 56, Appendix IV. For s. 56 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

Power of board to pay dues in case of default by mutawalli

Where the mutawalli refuses to pay or fails to pay any revenue, cess or taxes due to the Government, the Board may discharge dues from the wakf fund and may recover the amount from wakf property.[85]

85 Section 58.

Penalties

If a mutawalli fails to apply for registration of wakf or furnish statements of particulars or accounts or supply information as required by Board or allows inspection of wakf properties, accounts or records, or deliver possession of wakf property if ordered by Board or Tribunal or discharge any public dues, or carry out the directions of the Board or do any other act which he is lawfully required to do under the Act, he shall be punished with fine upto 8000 rupees unless he satisfies the Court or Tribunal that there was reasonable cause for his failure.[86]The Wakf (Amendment) Act, 2013 has amended s. 61 of the 1995 Act . The amended section now provides that unless the mutawalli satisfies the Court or the Tribunal that there was reasonable cause for his failure, he shall be punishable with fine which may extend to ten thousand rupees for non-compliance of clauses (a) to (d) whereas in case of non-compliance with clauses (e) to (h), he shall be punishable with imprisonment for a term which may extend to six months and also with fine which may extend to ten thousand rupees.

Where the mutawalli omits or fails with a view of concealing the existence of Wakf, to apply for registration under this Act--

(i) In case of a wakf created before the commencement of this Act, within three months from the date of its commencement, or
(ii) In the case of any wakf created after such commencement, within three months from the date of creation of wakf he shall be punishable with imprisonment for a term which may extend to six months and also a fine upto 15000 rupees.

86 Section 61, Appendix IV. For s. 61 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

Removal of mutawalli

The Board may remove a mutawalli from his office if he is of unsound mind or suffering from other mental or physical defect or infirmity; or is an undischarged insolvent; or is proved to be addicted to drinking liquor or other spirituous preparation; or has been convicted of any offence of criminal breach of trust or moral turpitude; or has been convicted for more than once of an offence for not applying for registration of wakf or not complying the reasonable orders made by the Board under the Act; or does any act against the provisions of the Act.[87](*see* 213 below)

However, no act ion shall be taken against the mutawalli by the Board unless it has held an inquiry into the matter and the decision has been taken by a majority of not less than two-thirds of the members of the Board. The personal rights of the mutawalli in respect of the wakf property either as a beneficiary or in any other capacity shall not be affected by this removal. A mutawalli who is aggrieved by an order passed by

the Board under this section may file an appeal to the Tribunal within one month from the date of the receipt of the order. The decision of the Tribunal on such appeal shall be final.

87 Section 64.

Power of board to frame scheme for administration of Wakf

Where the Board is satisfied either on its motion or on the application of not less than five members of the wakf, that it is necessary or desirable to frame a scheme for the proper administration of the wakf, it may frame such scheme for the administration of the wakf, after consultation with the mutawalli or the applicant.[88] Such scheme may prescribe the removal of the mutawalli from the office immediately and the person next in the list will be appointed as mutawalli. However any person feels aggrieved by the order of the Board may prefer an appeal to the Tribunal within sixty days from the date of the order.

88 Section 69. The Wakf (Amendment) Act, 2013 has substituted s. 69(1). The newly substituted s. 69(1) reads as follows: &uot;(1) Where the Board is satisfied after an enquiry, whether on its own motion or on the application of not less than five persons interested in any waqf, to frame a scheme for the proper administration of the waqf, it may, by an order, frame such scheme for the administration of the waqf, after giving reasonable opportunity and after consultation with the mutawalli or others in the prescribed manner.&uot;

Assumption of direct management by the board

The Act of 1995 gives the power to the Board to assume direct management of certain wakfs. It provides that where no suitable person is available for appointment as a mutawalli or where the Board is satisfied that filling up of the vacancy in the office of a mutawalli is prejudicial to the interest of the wakf, the Board may assume the direct management of the wakf for a period not exceeding for five years. It is obligatory on the part of the Board to record reasons in writing for such order.[89] The failure to record reasons in writing for assuming the management by the Board constitutes violation of the requirements of the section. In such a case the order of the Board will be set aside.[90]

The State Government may, on its own motion or on the application of any person interested in wakf, call for records of any case for the purpose of satisfying itself as to the correctness, legality or propriety of the notification by the Board and pass such orders as it may think fit; and the order so made by the State Government shall be final.

The Board shall, after assuming the direct management of any wakf, be under obligation to send a detailed report, after the close of every financial year, to the State Government relating to the income of the wakf and the steps taken to improve the management of wakf property.

89 Section 65. The Wakf (Amendment) Act, 2013 has added a new sub-section (5) to s. 65 of the 1995 Act, which reads as follows: &uot;(5) Notwithstanding anything contained in sub-section (1), the Board shall take over the administration of a waqf, if the waqf Board has evidence before it to prove that management of the waqf has contravened the provisions of this Act .&uot;

90 *Asthan-e-Khadri Trust, Bangalore v. Karnataka Board of wakf* (2001) 2 Kant L.J. 509.

Finance of the board

The mutawalli of every wakf, the net annual income of which is not less than five thousand rupees, shall pay annually to the Board, such contributions, not exceeding seven percent of such annual income

derived by the wakf for the services rendered by it to the wakf.[91] No mutawalli, Executive Officer or other person in charge of the administration of a wakf shall lend any money belonging to the wakf or any wakf property; or borrow any money for the purpose of wakf property, without the previous sanction of the Board.[92]

91 Section 72, Appendix IV. For s. 72 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

92 Section 76.

Wakf fund

All moneys received or realised by the Board under this Act and all other moneys received as donations, benefaction or grants by the Board shall form a fund called the wakf fund. The money so received shall be deposited and accounted under a separate subhead by the Board. The wakf fund shall be under the control of Wakf Board and it shall be applied for payment of any loan taken under s. 75 of the Act; payment of the cost of audit of the wakf fund and the account of wakf; payment of salary and allowance to the officers and staff of the Board; payment of travelling allowance to the Chairperson and members of the Board and payment of all expenses incurred by the Board for the discharge of any of its obligations.[93]The Wakf (Amendment) Act, 2013 has added a new clause (g) in s. 77(4) which provides for the application of waqf fund towards the payment of maintenance to Muslim women as ordered by a court of competent jurisdiction under the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (25 of 1986).

The Board shall prepare a budget every year for the next financial year showing the estimated receipts and expenditure during that financial year and forward a copy of the same to the State Government.[94] The Board shall also maintain such books of accounts as may be provided in the regulations. The accounts of the Board shall be audited and examined annually by such auditor as may be appointed by the State Government.[95]

93 Section 77, Appendix IV. For s. 77 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

94 Section 78.

95 Section 80 of the Wakf Act, 1954 (43 of 1995).

Constitution of tribunals

Section 83 of the Wakf Act of 1995 provides that the State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act within the defined local limits.[96]Any mutawalli or any person interested in a wakf or any other person aggrieved by an order under this Act may make an application within the time specified for the determination of any dispute. Every Tribunal shall consist of one person with a District, Session or Civil Judge class I as its member. The Tribunal shall be deemed to be a civil court and shall have the same powers as may be exercised by the civil court under the Code of Civil Procedure. The Tribunal shall follow, notwithstanding any thing contained in the Code of Civil Procedure, its own procedure as may be prescribed. The decision of the tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a Civil Court. The decision of the Tribunal shall be executed by the Civil Court to which such decision is sent for execution. No appeal shall lie against the decision of the Tribunal except the supervisory power of the High Court conferred by the Constitution where it may upon application either by the Board or any aggrieved person or on its own relating to any dispute which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or properties of such decision and may confirm,

modify or review such determination or pass such other orders as it may think fit.

It was pleaded before the Andhra Pradesh High Court that the Jurisdiction of the Tribunal is limited only to determine dispute relating to nature of wakf under s. 6 of the Wakf Act, 1954. The Court rejected this argument and observed that going by the principles of interrelation of statute, a section should be read in a manner that both the sections should be operative so as to give effect to the intention of the legislature. It is discernible from reading ss. 83 and 6 of the Act, 1995 that the State Government can appoint a Tribunal for the determination of any dispute, question or any matter relating to wakf or wakf property under the Act and define the local Jurisdiction. Therefore, the jurisdiction of the Tribunal cannot be limited by reading s. 6 alone providing for the decision to determine the nature of the wakf property i.e. whether it is a wakf property or not, or whether it is Shia or Sunni wakf. The Court held that it is of the considered view that both the sections together and permitting them to operate in totality, it is within the Jurisdiction of the Tribunal to determine whether the wakf property is rightly leased or wrongly leased or any question relating to wakf property. Consideration or non-consideration of the application of the appellant for leasing out the wakf property is within the purview of the Wakf Board and any irregularity or illegality in its consideration is within the jurisdiction of the Tribunal.[97]

In another case, the Andhra Pradesh, Madras and Kerala High Courts have held that the Wakf Tribunal is the only forum for the determination of any disputes, question or other matter relating to wakf or wakf property, including the suits for perpetual injunction and the civil court has no jurisdiction to entertain any suits for the determination of any dispute relating to wakf or wakf property. The Court further observed that though it is not expressly provided under the Act that the Tribunal can also entertain the suit for injunctions or other relief, the specific wording &uot;the determination of any dispute, question or other matter relating to wakf or wakf property&uot; used in s. 83 coupled with the ouster of the jurisdiction of the Civil Court under s. 85 of the Act mandates that the Tribunal is the only competent authority to entertain all types of suits, which can be entertained by the Civil Court, relating to wakf or wakf property and the civil courts are barred from entertaining any suit relating to wakf or wakf property from the date of the constitution of the tribunal.[98]

The Madras High Court in the instant case has held that the dispute between the parties, as to whether the petitioner has attempted to disturb the peaceful possession and enjoyment of the respondent in respect of portion held by them as tenants and whether the respondent has defaulted in payment of rent, in Court's opinion, clearly falls outside the ambit of words &uot; other matter relating to any wakf or wakf property or other matter which is required by or under the Act to be determined by a Tribunal&uot;. Therefore the Civil Court's Jurisdiction is not ousted by either express or by implied exclusion. The Court further observed that the Tribunal created under the Statute provides a remedial forum only for certain specific matters relating to administration and management of wakf properties, which are regulatory in nature and it does not provide for a forum for adjudicating the common law remedies. Any person who has grievance that he has been wronged and the civil right is affected, where no remedial measure is provided under the statute, he can approach the ordinary Civil Court on the principle of law that where there is a right there is a remedy.[99]

In *M.G. Faiyaz v. Tamil Nadu Wakf Board* ,[100]the Madras High Court held that when the Wakf Tribunal is clothed with the power as that of Civil Court, it is to be held that the Wakf Tribunal alone is competent to decide the matter. When a High Court can decide a matter on the affidavit only, the Tribunal is competent to try the applications as that of a civil suit. As far as the availability of alternative remedy is concerned, alternative remedy is not an absolute bar for maintaining the writ petition. It is a self imposed restraint by this Court. The court further lays down that special Act will override the General Act . Therefore, when it is an admitted fact that the property is a wakf property, the provisions of Wakf Act alone would be applicable and no other Act would be pressed into service.

In *Ramesh Gobindram v. Sugra Humayun Mirza* ,[101] the question before the Apex Court was-whether Civil Court has Jurisdiction to adjudicate upon disputes regarding eviction of Wakf property? The Court in this case held that the Act does not provide for any procedings before the Tribunal for determination of a

dispute concerning the eviction of a tenant in occupation of a wakf property or the rights and obligations of the lesser and the lessee of such property. A suit seeking eviction of the tenants from what is admittedly Wakf property could, therefore, be filed only before the Civil Court and not before the Tribunal.

In *Board of Wakf, West Bengal v. Anis Fatima Begum* ,[1]the Supreme Court held that the Wakf Tribunal can decide all disputes, questions or other matters relating to a wakf or wakf property. The words "any dispute, question or other matters relating to a wakf or wakf property" should be given wide connotation. Any dispute, question or other matters whatoever and in whatever manner which arises relating to a wakf or wakf property can be decided by the Wakf Tribunal. The word 'wakf' has been defined in s. 3(r) of the Wakf Act, 1954, and hence, once the property is found to be a wakf property then any dispute, question or other matter relating to it should be agitated before the Wakf Tribunal.

Here the question before the High Court of Madras was-whether the legality of the decision to take over the management of Durgah by the Wakf Board under s. 65(1) can be challenged before the Tribunal? The Court held that s s. 83(1) and 84 of the Act are independent provisions, and they do not require an order to be passed under the Act before invoking the jurisdiction of the Wakf Tribunal. Hence it cannot be said that a party can approach the Wakf Tribunal only against an order passed under the Act . Even if no order has been passed under the Act, the party can approach the Wakf Tribunal for the determination of any question, dispute or other matters relating to Wakf or Wakf property.[2]

The Tribunal shall hold its proceedings as expeditiously as possible and shall as soon as practicable, on the conclusion of hearing, give its decision in writing and furnish a copy of such decision to each of the parties to the dispute.[3]

96 Section 83, Appendix IV. For s. 83 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

97 *M. Bikshapathi v. Government of Andhra Pradesh* LNIND 1999 A.P. 553. See also *T. Shivalingam v. A.P. Wakf Tribunal* LNIND 1999 AP 324.

98 *Mahboob Khan v. Mohd. Khaja* LNIND 2004 AP 1477, See Also *Mukram Sheriff v. Moinudeen Sherff* (2005) 2 LW 615, LNIND 2005 Mad. 617, *Salam Khan v. Tamil Nadu wakf Board, Chennai,* (2005) M.L.J. 648, *Waheed Bin Mohammed v. Niazunnissa* LNIND 2005 AP 1174, *Mutawalli, Madeena Masjid, pulleppady v. Kerala Jamath Islami Hind* LNIND 2007 KER 413, *Ansari Charitable Trust v. the Kerala wakf Board* LNIND 2006 KER 156, *Shaik Amir v. A.P. State Wakf Board* LNIND 2007 A.P. 92, *Abdul Subhan v. Karnataka Board of Wakf* 2007 (2) Kar.L.J 71; *Abdul Subhan v. Syed Tharu Hussain* (2007) M.L.J. 138, *A.K. Khalifulla v. S.A. Gulam Rasool* (2007) 6 M.L.J. 432, *M.A. Muhammed Kunju v. Biju* LNIND 2008 KER 224, *H.P Wakf Board v. Maulana Mumtaz Ahmad Quasmi* A.I.R. 2008 H P 94, *A.R. Abdul Thurab v. N.H. Md. Obaidullah Masood, Genral Secretary* [2009] 3 M.L.J. 857, *Janab Dr. Hisamuddin papa Saheb v. E. Niyamathulla* (2007) 2 M.L.J. 1069.

99 *Salem Mohammedpura p. Sunnath Jamath Masjid Commite v. P.A. Kareem* (2008) 4 M.L.J. 991.

100 [2010] 4 M.L.J. 177, See also, *Yousuf Begum v. Wakf Board* LNIND 2010 AP 462.

101 A.I.R. 2010 SC 2897, (2010) 8 SCC 726, LNIND 2010 SC 996, also see *D. Ravindran v. Kinasseri Yatheemlna* LNIND 2010 Ker. 577.

1 [2011] M.L.J. 219.

2 LNIND 2011 MAD 996.

3 Section 84 of Wakf Act, 1954 (43 of 1995).

Bar of jurisdiction of Civil Courts

Section 85 of the Act provides that no suit or other legal proceedings shall lie in any Civil Court in respect of any dispute, question or other matter relating to any wakf, property or other matter which is required by or under this Act, to be determined by a Tribunal. In the instant case, the question before the Madras High Court was-whether Tribunal has jurisdiction to entertain relief of recovery of possession against revision petitioners. The Court held that the bar created by s. 85 of the Wakf Act, 1954 will not apply in cases

relating to tenancy concerning recovery of possession. The Court further held that even though the Wakf Act, 1954 is itself a special enactment but the Act of 1961 is local special enactment relating to agricultural tenancy right and therefore that would prevail and thus Tribunal constituted under s. 8 of the Wakf Act would have no Jurisdiction. The Tribunal even cannot pass an order for the recovery of arrears of rent from tenant. Only by resorting to general law of the land, the Wakf has to take appropriate legal action.[4]

In another case, the dispute was relating to the right of management of wakf. The relief sought for in the suit was for a permanent prohibitory injunction restraining defendants from interfering with the affairs of a mosque. The Kerala High Court held that when the Tribunal was constituted, it had no jurisdiction to proceed with the suit. This bar applies even to pending proceedings. The Court further held that injuction is a relief which can be granted only by Civil Court.[5]

The Jurisdiction of the Wakf Tribunal is not restricted to determine as to whether it is a wakf or it is a wakf property alone, it can also determine whether the wakf property is rightly leased, or any other questions relating to wakf property.[6] All disputes relating to wakf property are to be decided by the Tribunal, Civil Court's jurisdiction is barred. The jurisdiction of the Tribunal is an original jurisdiction. It cannot be contended that the Tribunal is clothed with the Jurisdiction only when an order is passed by the Wakf Board.[7]

In any suit or proceeding in respect of wakf, the Board may appear and plead as a party to the suit or proceeding.[8] No suit can be compromised by or against the mutawalli without the sanction of the Board. In the case of public wakf no compromise can be said to be lawful which sacrifices the interests of wakf.[9] Where a mutawalli fails to discharge his duties with respect to wakf, the Board or any person interested in the wakf may apply to the Tribunal for passing a necessary order.

4 *Abdul Rahim v. Asharad Syed Badeshah* LNIND 2010 MAD 3381.

5 *Abdul Rahim Musaliar v. Muhammed Saheb* LNIND 2002 KER 446 see also *V.S.B Sikkandar v. K.M. Khader Gani* (2006) 4 M.L.J. 1800; *Syed Inamul Haq Shah v. State of Rajasthan* A.I.R. 2001 Raj 19.

6 *M. Bkshapathi v. Govt. of. AP* 2002(2) ALT 530 AP HC.

7 *Jai Bharat Coop. Housing Society v. A.P.State wakf Board* 2000(5) ALT 389 APHC.

8 Section 92, See *In re Madras State Wakf Board*(1996) Mad HC 212.

9 *Mysore Wakf Board v. Mahboob Ali* A.I.R. 1962 Mys 128.

Power of Central Government to regulate secular act ivities of wakf

To regulate the secular activities of wakf, the Central Government has the power to lay down general principles and policies of wakf administration relating to the secular act ivities of the Wakf. The Central Government shall coordinate the functions of the Central Wakf Council and the Board relating to their secular functions. It also has the power to review the administration of the secular activities of wakf generally and to suggest improvements, if any.[10] It is the duty of the State Government to submit a general annual report on the working and administration of the State Wakf Board and the administration of the wakf during that year before each House of State legislature.[11]

10 Section 96 of the Wakf Act, 1954 (43 of 1995).

11 Section 98 of the Wakf Act, 1954 (43 of 1995).

Power to supercede board

If the State Government is of the opinion that the Board is unable to perform its duty imposed on it by or under this Act or abused its powers or has willfully and without sufficient cause, failed to comply the direction given by the Central Government under s. 96 or the State Government under s. 97, or the State Government is of the opinion that the Board's continuance is likely to be injurious to the interests of the wakfs in the State, the State Government may supercede the Board for a period not exceeding six months.[12] The Wakf (Amendment) Act, 2013 has added a new proviso to sub-section (1) of s. 99 of the 1995 Act, which provides that the power of the State Government under this section shall not be exercised unless there is a *prima facie* evidence of financial irregularity, misconduct or violation of the provisions of the Waqf Act.

In the instant case, the Andhra Pradesh High Court held that the State Government in exercise of power under s. 97 of the Wakf Act of 1995 could not give any direction in a particular case and compel Wakf Board to decide its statutory duties and obligation in a particular manner. It would amount to controlling or guiding in statutory power of Wakf Board by State Government. The State Government has no jurisdiction or authority to set aside the order passed by the Wakf Board rejecting the request of a particular person for appointment as mutawalli of Wakf property.[13]

12 Section 99 of the Wakf Act, 1954 (43 of 1995).*See* Appendix IV. For s. 99 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

13 *Managing committee Wakf, Jamia Masjid Jaggayyapet v. State of Andhra Pradesh* LNIND 2000 AP 720.

Power of Central Government to constitute common board

Where the Central Government is satisfied that by reason of (i) Smallness of the Muslim population in two or more states, (ii) The slender resources of the wakf in such State, and (iii) The disproportion between the numbers and income of the wakf and the Muslim population in such state, a Common Board may be established after consultation with the Government of each concerned state by the Central Government. Whenever any common Board is established all powers vested in the State Government relating to wakf shall stand transferred to the Central Government.[14]

14 Section 106 of the Wakf Act, 1954 (43 of 1995).*See* Appendix IV. For s. 106 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

Limitation Act, 1963 not to apply for recovery of wakf properties

After the enactment of the Wakf Act, 1954, the Limitation Act, 1963 shall not apply to any suit for possession of immovable property comprised in any Wakf or for possession of any interest in such property.[15]After the enactment of the present Wakf Act, 1954 , and Wakf Act, 1984 repealed.[16]

The Andhra Pradesh High Court has held that the application of the Limitation Act, in relation to recovery of wakf properties by way of any suit for possession of immovable properties in any wakf or for possession of any interest in such property, is only barred under s. 107 which was incorporated in the Wakf Act, 1954 which replaced the Wakf Act, 1954. No provision similar or analogous to s. 107 of the Wakf Act, 1954 is found in the Wakf Act, 1954. Section 6(1) of the Wakfs Act, 1954 provides limitation of one year from the date of publication of notification in the Official Gazette as required under s. 5(2) for filing civil suit. This provision has no relevance, for in the instant case, the suit was already filed and it ended in a decree. As per Article 136 of the Limitation Act, 1963, the decree shall have to be executed within a period of 12 years.[17]

15 Section 107 of the Wakf Act, 1954 (43 of 1995).

16 Section 112 of the Wakf Act, 1954 (43 of 1995).

17 *The Managing committee Masjid-e-Ibrahimia v. The Hyderabad Allwyn Metal Works Ltd.* A.I.R. 2006 A.P. 330.

Joint Parliamentary Committee and its Report

In the Course of time, the Muslim community has found many loop holes and lacunas in the Wakf Act of 1995 and in its application. The Parliament, thus, to consider the apprehensions of the Muslim Community, constituted the Joints Parliamentary Committee (JPC) on 2 January, 2006 to give its recommendations for the improvement of wakf administration under the Wakf Act, 1954. The Joint Parliamentary committee submitted its report on 23rd october, 2008.

Brief of observation and recommendation of 9th Joint Parliamentary Committee (JPC)

The 9th JPC on wakf recommended to appoint a full time CEO and suggested that grants in aid would be provided to such State Wakf Board who undertake to fulfil the following conditions:

(i) Appointment of full time CEO's;
(ii) Timely audit of the accounts of the Boards as well as regular audit of the accounts of Mutawalli are conducted by the auditors appointed by the Wakf Boards;
(iii) Proper maintenance of law suit register and regular tracking of cases of encroachments of wakf properties;
(iv) Proper maintenance of wakf register and due preservation of document related to wakf deed and Gazette Notification of properties; and
(v) Timely constitution of Wakf Board and framing of rules and regulations by the State Governments.[18]

The committee urged the Central Government to intervene and find out a solution to the problem that a large number of wakf properties are in possession of governments, both State and the Centre. It is difficult for the Wakf Board to fight against the government in litigation, as the Boards are under the administrative control of the State Governments and hundreds of cases are pending between the two in the Courts in the country.[19]

The 9th JPC also took note of the fact that the then Prime Minister had in a letter addressed to some of the Chief Ministers in 1976, reiterated the suggestions which were made in 1961 requesting for dealing with the wakf properties in possession of Government Departments/local bodies, as per the following directions:

(i) Where feasible, the wakf property should be vacated and handed over to the Wakf Board concerned;
(ii) Where costly buildings have been put up on the land and the vacation is not feasible, the State Governments may enter into permanent leases with the Wakf Boards, after paying the Boards the bulk of the market value as premium; or
(iii) In the alternative, the State Governments may arrange to make over the fair market value of the lands to the Boards, which will relinquish their rights over the land, if in their direct management, or obtain from the mutwallis concerned, with their consent, necessary deeds of relinquishment.

The committee recommended that these guidelines may be strictly adhered to by the Central as well at the State Government and the Union territories.

The 9th JPC has recommended for an amendment in s. 54 of the Wakf Act, 1954. The committee desired that the community and the District Wakf Committee should be vigilant and whenever any encroachment comes to their notice, it should be immediately brought to the notice of Wakf Board, and on receipt of such information, the CEO should take immediate action for eviction. The Committee impressed upon the State Government to issue instructions to all District Magistrates/SDM's to proceed for eviction of encroachment of wakf properties on receipt of a report from the CEO of the Board, and they should not delay the process.

The committee also recommended that the Wakf Act, 1954 should be amended so as to make encroachment of wakf properties a criminal offence. The committee strongly recommended that the Wakf Boards may initiate criminal proceedings against the encroachers or trespassers which is an offence under the CrPC.

The committee further recommended that the Wakf Act, 1954 be further amended so as to bar the encroachers from approaching the Civil Court or the High Court.

The committee also recommended for addition of a new sub-section to s. 54 providing that the Central or the State Governments, as the case may be, by notification in the official Gazette, should declare all or any wakf institutions registered with the Wakf Board, other than *Wakf-al-aulad*, to be public premises. This, when incorporated in the Act and implemented, would remove many problems in the removal of encroachments, and could prevent further new encroachments.

The committee had suggested that there is no sufficient awareness about the wakf properties among the public, therefore, public awareness campaign should be launched about the wakf properties, and for this purpose the media including electronic media and local language newspapers may be used.

The committee strongly recommended that the Wakf Boards should not be used for providing political patronage by the State Governments. Politics should be kept away from the Wakf Boards because they deal with the religious and charitable institutions and discharge a very sacred duty. The State Governments should avoid superseding the Wakf Boards for extraneous political considerations.

The committee also suggested for computerisation of Wakf Boards. The National Informatics Centre should be asked to develop a software in consultation with the Central Wakf Council, containing details about the historical, religious, constitution, current status, wakf properties etc. of the Wakf Boards.

The Government of India after considering the recommendations suggested by the 9th JPC report felt to enact a law which would cover the recommendations of the JPC. So, the Wakf (Amendment) Bill, 2010 was introduced in Parliament. The Bill was passed by the Lok Sabha on May 7th, 2010 and is currently pending in the Rajya Sabha.

18 http://wakf.gov.in/wamsidocs/scheme_GoI_wakf.pdf (visited on 29-10-2012).

19 http://rajyasabha.nic.in/rsnewannual_report_2008waqf.Pdf (visited on 29-10-2012).

Highlights of the Wakf (Amendment) Bill, 2010[20]

The highlights of the Wakf (Amendment) Bill, 2010 are as follows:

1. The proposed bill gives the Wakf Council, currently an advisory body at the central level, powers to issue directions to Wakf Boards, that administer wakfs in each state. It gives

power to the Wakf Council to monitor Wakf Boards and issue directives to them.

2. The Bill makes changes to the composition of Wakf Boards. It also establishes a procedure for removal of a chairperson of a Wakf Board. Those states which have not yet established a Wakf Board must do so within one year.

Composition of Wakf Boards in the Act and the Bill

The Wakf Act, 1995	The Bill, 2010
Maximum of 13 members	Maximum of 11 members
1-2 members each from electoral colleges consisting of Muslim MP's, MLA's, Muslim members of Bar Councils, Mutawallis.	As in the Act, members to be elected from electoral college of each category, MP's & MLA's to hold office on ex-officio basis.
1-2 nominees from eminent Muslim organizations.	1 Muslim nominee with experience in town planning, business, social work, agriculture etc.
1-2 nominees who are Islamic Scholars.	1 Muslim nominee who is an Islamic Scholar.
1 State Government officer of Deputy Secretary level or above.	1 Muslim State Government officer of Deputy Secretary level or above.

(3) The Bill restricts the kind of powers that can be delegated by a Wakf Board to the chairperson or any other individual, including the CEO of the board. Powers to settle schemes of management or direct the administration of a wakf, to appoint and remove mutawallis, and to sanction the sale, lease or mortgage of wakf properties cannot be delegated.

(4) The Bill imposes restrictions on the types of transactions in wakf property and tightens the procedure by which such transactions are approved and carried out.

Type of transaction	The Wakf Act, 1995	The Bill, 2010
Sale, gift or total transfer	Void without prior approval of Board	To be treated as invalid; Acquisitions under the Land Acquisition Act, 1894 shall be undisputedly for restrictions apply.
Exchange, mortgage or lease	Prior sanction of Board needed	Must be sanctioned by the Board and shall be valid only if 50% of Board members are present and at least 2/3rd of members vote in favour of transaction otherwise void.
	Leases of property beyond 3 years are void.	Period of lease for commercial activities allowed for upto 10 years; or lease for educational purpose and health allowed for upto 30 years. Leases beyond 30 years are void and State Governments should be informed of leases.

(5) The Bill provides for rigorous imprisonment for up to 2 years to the encroachers who occupy wakf property without authorization. The offence shall be cognizable and non-bailable.

(6) The Bill makes changes to the composition of Wakf Tribunals to be set up in each State. In addition to a member with the rank of District, Sessions or Civil Judge (as is provided in the Act), each Tribunal shall also consist of a person of the rank of an Additional District Magistrate and one person with knowledge of Muslim law or jurisprudence. Under the Bill, the Tribunal shall have powers to assess damages from unauthorized occupation of wakf property, and to recover such damages as arrears of land revenue through the collector. Public servants who fail to prevent or remove encroachments are punishable with a fine of up to Rs 15000/-.

(7) State Governments cannot issue directions to the Wakf Board which are contrary to the wakf deed, or any usage, practice or custom of the wakf. State Governments cannot supercede the Board unless these is prime facie evidence of financial irregularity or violation of provisions of the Act.

20 http://www.prsindia.org/uploads/media/Wakf%20Board/Wakf%20Amendment%20Bill%202010.pdf (visited on 29.10.2012).

The Wakf (Amendment) Act, 2013

The Wakf (Amendment) Act, 2013 has made large scale changes to the Wakf Act, 1954. The title of the Act*i.e.,*'The Wakf Act, 1954' has been changed to 'The Waqf Act, 1995'*vide* s. 4 of the Wakf (Amendment) Act, 2013. The words 'wakf', 'wakfs' and 'wakif' have been substituted with the words 'waqf', 'auqaf' and 'wakif' *vide* s. 4 of the Wakf (Amendment) Act, 2013.[21]

The Wakf (Amendment) Act, 2013 seeks to provide[22]

(*i*) a specific time period for completion of survey of auqaf and to ensure that the list of auqaf based on the survey data is appropriately reflected while updating the land records by the revenue authorities;
(*ii*) for change in composition of the Central Waqf Council and State Waqf Boards so as to provide for representation of women, professionals and experts in the Council or Boards, as the case may be;
(*iii*) for reducing the scope of alienation of waqf properties by prohibiting the sale and gift of waqf properties;
(*iv*) stringent penal provisions to prevent encroachments and to streamline the process of removal of encroachments;
(*v*) for increasing the maximum permissible period of lease or sub-lease of waqf properties from three years, as at present, to thirty years;
(*vi*) statutory power of monitoring to the Central Waqf Council and to authorise it to issue directives and advice in specific cases, along with the provision for independent dispute resolution machinery in the shape of a Board of adjudication to be constituted by the Central Government, to be presided over by a retired Judge of the Supreme Court;
(*vii*) for constituting the Tribunals, for the determination of all disputes, questions and other matters relating to waqf or waqf properties, as a three member body consisting of a person not below the rank of District, Session or Civil Judge Class I as the Chairman and two other members, namely, an officer from the State Civil Service equivalent in rank to that of Additional District Magistrate and another person having knowledge of Muslim law and jurisprudence.

212. Statutory Control of Wakfs in India[23]

In addition to the enactments which apply to all trusts, including wakfs (listed in sec. 225, below), the supervision and control of wakfs is provided for by the following statutes:--

The Wakfs Act, 1954.--The Wakfs Act, 1954 (29 of 1954, as amended by Act 34 of 1964) which has been enforced in all the States except Bihar, Gujarat, Maharashtra, Uttar Pradesh and West Bengal, has been enacted by Parliament to provide for the better administration and supervision of wakfs. It provides for the incorporation of a Board of Wakfs in every State (ss. 9-24) consisting of members of Parliament, members of the State Legislature, persons having special knowledge of Muslim Law and representing the State

Jamiat-ul-Ulema for Sunni wakfs and the State Shia Conference for Shia wakfs, persons having special knowledge of administration, finance and law and mutawallis of wakfs. If the Shia wakfs in any State are more than fifteen per cent in number or their income is in excess of fifteen per cent of the income of all the wakfs in the State, then the State Government may establish separate Boards for Sunni and Shia wakfs [s. 9(1A)]. By the amendment Act of 1964, provision has been made (s s. 8A to 8D) for the establishment of a Central Wakf Council, with the Union Minister incharge of wakfs as its Chairman, for advising the Central Government on matters concerning the working of Boards and the administration of wakfs. The Act also provides for investigation, survey (s s. 4-8) and registration (s s. 25-29) of wakfs; and submission and audit of accounts of wakfs (s. 33) A new Section 36A now requires that previous sanction must be obtained for any transfer of the immovable property of a wakf. The Board of Wakfs in each State is empowered to make rules (s. 67) and regulations (s. 68) and to institute suits to obtain any of the reliefs mentioned in section 92 , of the Code of Civil Procedure , 1908 (V of 1908). The Act makes the Board of Wakfs a necessary party to every suit relating to title to wakf property or the right of a mutawalli (s. 57), and directs the Collector to give notice to the Board of Wakfs where any property sought to be acquired under the Land Acquisition Act, 1894 (I of 1894) is wakf property (s. 58). See also: Public Wakfs (Extension of Limitation); Amendment Act, 1967 (22 of 1967); Wakf Amendment Act, 1969 (38 of 1969); (this Act validates certain contributions and amends other sections). The Act repeals the following enactments in so far as they apply to wakfs to which the Act applies:--

(a) Bengal Regulation No. XIX of 1810;
(b) The Religious Endowments Act, 1863 (XX of 1863);
(c) The Charitable Endowments Act, 1890 (VI of 1890); and
(d) The Mussulman Wakf Act, 1923 (XLII of 1923).

WAKFS ACT (XXIX OF 1954).--Where there is no separate dedication for pious, religious and Charitable purposes and for purposes of the maintenance of the members of the family. The entire document has to be taken as creating wakf and the properties would come within the purview of the Act . In such a case it would be necessary for the Wakf Board to frame a scheme providing allocation among the different objects in the manner contemplated by the wakf.

An alienation of the wakf property is invalid and the Wakf Board can recover the property from the alienee. (1961) 1 M.LJ. 65. Rel. on A.I.R. 1977 All. 18, ref. to (1981) 94 L.W. 511; (1981) 2 M.LJ. 176. *Bihar*--Bihar Wakfs Act, 1947 (Bihar Act VIII of 1948).

Gujarat and Maharashtra.--The Mussulman Wakf Act, 1923 (XLII of 1923) still applies, as modified by the Mussulman Wakf (Bombay Amendment) Act, 1935 (Bom. Act XVIII of 1935).

Uttar Pradesh.--The Uttar Pradesh Muslim Wakfs Act, 1960 (U.P. Act XVI of 1960) applies. Sections 5-10 of the Central Act XLII of 1923 do not apply.

Under the U.P. Muslim Wakf Act 1960 (16 of 1960) as amended in 1971 (28 of 1971) permission of the wakf Board is required to file a suit but as the amending Act is not retrospective previously filed suits can go on.*Khalil Ahmad Khan v. Siddiq Ahmad Khan* ('24) A All. 382.

U.P. Muslim Wakf Act .--Dissolution of managing committee of Wakf--Controller is competent to pass such order.

Order of dissolution of managing committee of wakf without stating therein reasons--Error of law apparent on face of record--Order quashed and case remanded. Decision of Allahabad High Court, Reversed. *Mohammad Mustakhan v. U.P. Sunni Central Board of Wakf,* A.I.R. 1981 Supreme Court 1739.

West Bengal.--The Bengal Wakf Act, 1934 (Beng. Act XIII of 1934) applies. Sections 5-10 of the Central Act XLII of 1923 do not apply.

In this case the powers of the Commissioner and the wakf Board under Bengal Wakf Act (13 of 1934)

were considered. This was in connection with the cancellation of elections and ordering of fresh elections. Under s. 78 illegal acts of the Commissioner even if ratified by the Board cannot be sustained,*Syed Hamid v. Janab Mohamad* ('70) A, All. 509 F.B. This was a special case under s s. 69 and 70 of the Bengal Wakf Act (13 of 1934).

A commissioner under the Act having notice of a suit and being joined as a party cannot claim a second notice of a compromise, when the compromise took place in Court and he had asked earlier for a discharge from the array of parties. A.I.R. 1966 Cal. 68 reversed. *Mst. Ayesha Bibi v. Commr. of Wakf W.B.* ('70) A.S.C. 287.

Madras.--The State Wakf Board has no jurisdiction either to claim, demand or collect contribution from the income of the properties of a private wakf: The Board can only collect contribution in respect of the religious, charitable and pious purposes. The contribution is of the net income' *G.MA. Bhaimia v. The Madras State Wakf Board* (1968) I.M.L.J. 410.

(History of Mussalman Wakf Validating Act, 1913 given and Case law discussed.) Note:--The observations of the Supreme Court in*Mohd. Ismail v. Sabir Ali* ('62) A.S.C. 1722 were made in the context of the Oudh Estates Act, 1899 but have been generalised here. This is open to question. See S. 197 (Note 2 above).

Special Acts.--The Dargah of Khwaja Muin-ud-din Chishti at Ajmer, which is expressly excluded from the operation of the Wakfs Act, 1954, is governed by the Dargah Khawaja Saheb Act, 1955 (XXXVI of 1955) as amended by Act 20 of 1964.

Wakf Act, 1954: Recent cases on some of the provisions of this Act are summarised below: Note:--Under S.3 (1) wakf is defined to include:

(i) a wakf by suer;
(ii) mashrut-ul-khidmat; and
(iii) a wakf-alal-aulad.

S s. 3(1), 5(2)

Where properties were dedicated for charity but there was a small charge in favour of two of the testator's relations for the duration of their lives, it was held that notwithstanding the dispositions in favour of the relations, as the testator had substantially endowed the properties for charity permanently, the Wakf Board had jurisdiction to treat the wakf as one coming under the Act. Furthermore, though the wakf deed mentioned charitable and secular objects, an allocation of income from the wakf properties between the two objects was not necessary before the Board made a notification under s. 5(2): *Azemuddin v. M. S. Wakf Board* ('65) A.M. 121.

S s. 3(1), 28

Under the Wakf Act, the purpose for which a wakf can be created must be one which is recognised by Muslim Law as pious, religious, or charitable and the objects of public utility which may constitute beneficiaries under the wakf must be objects for the benefit of the Muslim community. There can be no doubt that the wakfs with which the Act deals are trusts which are treated as wakfs under the definitions of 3(1) and as such, a trust which does not satisfy the tests prescribed by the said definition would be outside the Act :*Zain Yar Jung v. Director of Endowments* ('63) A.S.C. 985.

S. 3(g), 46

In calculating &uot;net income&uot; for the purpose of s. 46(1) read with s. 3(g), the expenses of cultivation must be deducted: *Mahomed Ibrahim v. Kerala Wakf Board* ('64) A Ker. 310.

S. 18(l)(b).

Under s. 18(l)(b) three main requisites need to be satisfied before an order removing a member of the Board can validly be passed. First, the member must have done some allegedly prejudicial act; second, his explanation in respect of it must be heard and third, the Government before passing the order of removal must be satisfied, as an honest and reasonable person, that the act or conduct in respect of which the explanation was heard was prejudicial to the interests of the Wakf: *Akhtar Ahmed v. State of A.P.* ('64) A An. Pr. 244.

S s. 42, 43

Where there is a dispute as to the propriety or validity of the removal of a mutawalli and the appointment of another, s. 42 is attracted and the Board will have prima facie jurisdiction to go into the question; a petition under Art. 226 of the Constitution at this stage is therefore premature. It is for the Board, in the first instance, to consider whether there are grounds made out for the removal of a mutawalli under s. 43: *Mahd. Mohideen v. State Wakf Board Madras* ('63) A.M. 132.

s. 55

Consent of the Board under s. 55(2) required for instituting a suit involves neither an adjudication of rights of parties, nor need it be given after an enquiry or on the basis of any judicial adjudication. The question is more or less one of expediency of permitting a suit to be filed. Such a duty on the part of the Board cannot be regarded as a quasi-judicial act to entitle the High Court to interfere under Art. 226 of the Constitution: *Abdul Kasim v. Mohamed Dawood* (1963) Mad. 824.

S s. 55, 69

An application by any person or authority other than the Board made to the District Collector for sanction to institute a suit under s. 92, C.P.C. against the trustees of a muslim wakf governed by the Wakf Act, 1954, is maintainable and the Collector has jurisdiction to proceed with the enquiry in view of s. 55 (2),Wakf Act.

The necessity to obtain the leave referred to in the Religious Endowments Act, 1863, and the consent referred to in s. 92, C.P.C, are dispensed with by s. 55(1)Wakf Act only in the case of suits 'instituted by the Board' and not in the case of suits 'instituted by any person or authority other than the Board's':*Mohd. Jacco v. Dist. Collector* ('62) A. Ker. 343.

(As a result of the amendment of s s. 55 and 69 by the Amending Act of 1964, anyone other than the Board now only requires the consent of the Board to institute a suit and the Religious Endowments Act, 1863, has been repealed in so far as it applied to wakfs to which the Wakf Act, 1954 applies).

S. 59

In proceedings under sec. 145Cr. P.C. regarding wakf properties, the Wakf Board as a party vitally interested in the up-keep, management and functioning of the wakf, has a right under sec. 59 to appear and apply to be made a party:*Mysore Board of Wakfs v. MahboodAli* ('62) A. My s. 128.

Wakf Act, 1954*, as amended by Wakf (Amendment) Act*1964.--Under Order 41, r. 27 CP.C, the appellate Court was entitled to take into consideration the Amendment Act of 1964 which came into force pending a second appeal.

Under the Act of 1954, Wakf includes a Wakf by user.

From the fact that some preference is shown to the descendants of the founder in the administration of a scheme, it cannot be said that the endowment ceases to be a wakf. *Edulla Saheb Mohd. Ghouse v. Madras State Wakf Board,* ('66) A.M. 439.

S. 15

Where a Wakf is being properly administered in accordance with a scheme settled in a suit, the Board has no jurisdiction to decide a dispute over rights among descendants of the founder of the Wakf. Furthermore, the measure of relief in pursuance of such rights under the scheme cannot be decided in writ proceedings under Art. 226 of the Constitution. *Fatheuddin Ahmed v. State Wakf Board,* (66) A.M. 307,.

S. 15(2) bans the jurisdiction of the Civil Courts to take cognizance of an application for sanction of a lease for a term over three years and the Board alone is competent to accord such sanction. *Mayadhar Subudhi Tana v. Orissa Board of Wakfs,* ('66) A. Ori. 208.

A commissioner of Wakfs has no jurisdiction to adjudicate whether a particular property is Wakf property or not.

The expression &uot;any person interested there in&uot; in s. 6(1): explained. *Radhakrishan v. State of Rajasthan* ('67) A. Raj. 1. *Sk Sharfuddin v. Board of Wakfs* (1969) 3 Cut. LJ. 1198 details the duties of the Wakf Board.

The following cases may be seen: s. 3(e) *Mysore Board of Wakfs v. V.KS.L. Setty* ('74) A. Karnatak 28 (long user as. a wakf); s. 5.15. s.15 *Andhra Pradesh Wakf Board v. M. Hidayatullah* ('74) A.A.P. 287 s. 66(c) *Madras Wakf Board v. Kazi Mehuddin* (74) A. Mad. 225.

Later cases under the Wakf Act 1954 are noted below:-- (XXIX of 1954),

S.3(1)(i) --Wakf--Creation of--Presumption as to can be drawn even in absence of dedication and delivery of possession. 1981 All. LJ. 669,

S. 3 (11)--&uot;Wakf&uot; One &uot;E&uot; executed a deed styled wakf-cum-settlement. He constituted himself the Manager of the properties covered by the document and stated he would enjoy the properties only in his capacity as the Manager. After his death his son would be the Manager, Thereafter a suitable person from among the members of his family was to be constituted as the Manager. Properties were to be purchased in the name of 'E' estate. There was a ban on alienation either by the manager or by anybody in management of the properties, A lease deed for a period of not less than three years could however be executed. There was also a provision for making exchanges of the trust properties with other properties. The person in management was to draw a sum of R s. 600 as allowance per annum. Every person who was to be in management of the properties after the lifetime of 'E' was to pay the taxes and incur the necessary expenses for the maintenance of the properties. The balance of income was to be reserved for unforeseen expenditure. It should be constituted into a fund and according to the circumstances, property could be purchased out of it. During the period of Ramzan gruel was to be supplied to the poor people and clothes were also to be distributed out of one share of income, Out of eight shares, the income from seven shares excluding the share for charity was to be individually allotted to the respective branches. Thus one share alone was to be utilised for the pious and religious purposes mentioned above.

In the present case there was no separate dedication for pious, religious and charitable purposes and for purposes of maintenance of the members of the family, Therefore the entire document has to be taken as creating a wakf and the properties would come within the purview of the Wakf Act, 1954. The Wakf Board can recover possession of the property from the alienee. [V. Sethuraman, J.]*The Tamil Nadu Wakf Board by its Secretary v. Saennasi Munayathiriyan* (1981) 2 M.LJ. 176.

House given`by Muslim for the use of all travellers irrespective of their religion and financial position. Held: The dedication cannot be held valid. See Wakf Act(1954) S. 3 (f) and (a). (1982) 2 Karn. LJ. 176: A.I.R. 1982 Kant. 309.

S. 3(h)--&uot;Person interested in a wakf'--Meaning

The appellants applied under S. 14 of the Wakf Act before the State Wakf Board for conducting an enquiry into the administration and management of a wakf. The respondents raised the plea that the appellants were not &uot;persons interested in the wakf&uot; as defined in the Act and cannot invoke the Board's

jurisdiction under S. 44 of the Act, The board rejected the objection. A single Judge of the High Court, in writ proceedings upheld the objection and restrained the Wakf Board from conducting an enquiry into the affairs of the wakf. On appeal against the order.

Held: The former part of the definition of the word &uot;person interested in a wakf' appearing in S, 3(h) of the Wakf Act, 1954, apart from stating that a person interested in the wakf means any person who is certified to receive any pecuniary benefits, also states that it means any person who is entitled to other benefits from the wakf. The expression &uot;person who is entitled to receive other benefits from the wakf' is of the widest connotation, and there is neither reason nor principle to restrict the scope of that expression only to certain types of benefits analogous to pecuniary benefits, Whenever a benefit is reserved for the public in general without restricting the persons who will be entitled to participate therein either with reference to the age, or with reference to the social status any person who will fall within the particular category of the persons for whom the benefit is reserved will be a person entitled to receive that benefit as of right and such a person will certainly be entitled to invoke the jurisdiction of a body like the Wakf Board under S. 44. It may be that a person may not be entitled to call upon the trustees to perform the particular charity in which under the trust deed he has a right to participate. If a narrow interpretation is to be given to the expression &uot;any person interested in a wakf occurring in S. 3(h). 5.44 will become inapplicable to a large number of public wakfs. From the very nature of the case, a public wakf will not indicate or enumerate the beneficiaries but will merely refer to the beneficiaries in general terms.

S s. 3 and 11:--

The salient features of a document executed by a Muslim are: (a) The document is styled as a wakf deed, (b) the charities mentioned therein are for reading of Koran five times a day, for imparting instructions in the school, for lighting, for drawing water from the tank, distribution of narasa (Prasadam) of certain value at the end of every month and certain amount to be spent on dhramam by way of feeding annually, (c) the properties worth of R s. 3000 shall be subject to above charities (d) during lifetime of executant he alone shall be mutawalli and perform charities, paying kist, land cess etc., and (e) after death of the executant his son and thereafter his heirs according to law of primogeniture, shall take possession of and enjoy the properties and from and out of its income they are to perform above-mentioned charities as mutawallis without any power of alienation or creating encumbrances.

Held, that the document was executed by a pious Muslim in the year 1944 who, under normal circumstances could not have thought of anything but a wakf to create a method by which there should be a perpetual performance of certain charities. The various clauses show (1) that on and from the date of creation of the document, the executant ceases to own the properties in his personal capacity and he assumes the role of mutawalli. Therefore there is a clear divestiture. (2) The executant has no power of alienation, but has a mere power to enjoy (3) The line of succession in relation to mutawalli is something which runs counter to Muslim Law because it is stated very emphatically that the succession shall be according to the law of primogeniture. (4) Those mutawallis who would succeed will have also no power of alienation, nor the power of creating an encumbrance. By a reading of all these clauses and the document as a whole, one gains the only impression that this is a deed of wakf Relying on certain words in a clause it cannot be contended that those words are clear enough to indicate the creation of a charge and the restraint on alienation is bad. If that clause only is taken into consideration all the other clauses will be rendered as otiose or nugatoty. The document has not the effect of creating a charge for the performance of charities. [Natarajan and Mohan, JJ.] *Kani Ammal v. Tamil Nadu Wakf Board* (1982) 1 M.LJ. 196: A.I.R. 1983 Mad. 188.

Ss. 2, 4, 5 and 26--Mosque although not registered is wakf covered by Act --Authority is bound to register and enlist it as wakf. *Mohd. Ghouse v. Secy, Karnataka Board of Wakfs,* A.I.R. 1986 Karnataka 12.

Public Wakfs (Extension of Limitation) Act (29 of 1959), S. 3 (as amended from time to time)--Suit for possession of wakf properties filed on 2-1-1969 -- Held, even assuming that the commencement is from date of death of mutawalli in 1950, the suit is in time. *Mohammed Sab v. Abdul Gani* A.I.R. 1985 Karnataka 177.

Wakf Act (29 of 1954), S s. 3(f) and 55--Mutawalli--Plaintiffs tiling suit for possession of Wakf properties--Concurrent finding of Courts below that plaintiffs are trustees and first plaintiff is in de facto management of mosque--Suit maintainable without sanction.

-- Denial of execution of Wakf deed--Denial must be specific and in express terms--It should be definite and unambiguous--Held, that the denial in written statement in the case has not satisfied requirements of law. A.I.R. 1973 Bom. 242Disting, Wakf Act (29 of 1954), S s. 3 (e), 12 and 67-- Punjab Wakf Rules (1964), R. 6 --Tenure of office of Chairman of Wakf Board--Not fuced for five years--Word 'member' in s. 12 does not include Chairman.*Haji Anwar Ahmed Khan v. Punjab Wakf Board,* A.I.R. 1980 Punj. & H.P. 306.

Wakf Act (29 of 1954) S s. 3(1) and 27(2)--Wakf-- Proof--Mukambs--Presumption as to wakf by immemorial user, when cannot be drawn.*The Kerala Wakf Board, Ernakulam v. Valia Maliyekkal Koyanji Koya Thangal* A.I.R. 1985 Kerala 228.

Wakf Act (1954) (as amended by Act 34 of 1964) S s. 3(I) and 66C -- Essentials of Wakf within S. 3(1) indicated--Inam granted to individuals for service at Dargah--Grant resumable on failure to render service--Inam constitutes Wakf property--Whether grantor was Muslim or professed other religion is immaterial--Grant of patta to grantees under Inams Abolition Act would not change character of property as wakf.

Wakf Act, (1954), (as amended by Act. 34 of 1964) S s. 2, 15, 25 and 3(e)--Act applies to all wakfs created before or after it--whether wakf is registered under Act or not is not material.*A.P. Wakf Board, Hyderabad v. S. Syed Ali Mulla,* A.I.R. 1985 A.P. 127.

S. 6--Person disputing wakf itself was not a person interested--Suit or application to declare that certain property was not wakf property was not maintainable under S. 6.

The expression 'any person interested' occurring in S. 6 which enables the Board or Mutawalli of the Wakf or any person interested therein to file a suit in a Civil Court for decision in case any question about certain property being wakf property or not arising does not include one who disputes the existence of the wakf itself.

In the circumstances of the case the application for declaring that the property was not wakf property was not maintainable under S. 6 of the Act. A.I.R. 1979 SC 289, Followed. *Anjuman-E-Islamia v. Sakeenabi,* A.I.R. 1986 Kant. 75.

S s. 12, 20, 11 of Wakf Act (1954)--The object of the main Section 12 is to define the duration of the members of the Board and the object of the proviso is to see that there should not be any hiatus in the continuation of the membership. The proviso cannot be said to be invalid for the reason that it seeks to whittle down the effect of the main section. Object of the Act and Section 12 and effect of Section 20 pointed.*V.J. Mahamood v. State of Andhra Pradesh,* A.I.R. 1976 Andhra Pradesh 169.

In view of Section 12 and notwithstanding the fact that the term of the office of the members stood expired, still on account of the impact of the proviso, the members shall have to hold office until the appointment of the successor is notified in the official gazette. It is the State Government that is competent to appoint the members of the Board under Section 11, and it is only the State Government that can issue the proceedings securing the continuation of the Board. In view of section 20 the proceedings of the Board resulting in the reconstitution of the District Wakf Committee cannot be invalidated and, therefore, the impugned proceedings are valid in law.

V. J. Mahamood v. State of Andhra Pradesh, A.I.R. 1976 Andhra Pradesh 169.

S. 15 (2) (h), (i) and (o) of the Wakf Act empowers the Wakf Board to take measures for the recovery of lost property of any wakf, institute and defend suits and proceedings in a Court of law relating to the wakf, and generally do all such acts as may be necessary for the due control, maintenance and administration of wakfs. This section applies to all wakfs and therefore the suit is maintainable whether the suit property

belonged to 'F' Durga wakf or 'J' Durga wakf.

The period of one month prescribed in sub-s. (3) of S. 57 of the Act is applicable only to an application under S. 57 (3). This is a summary remedy available to the Wakf Board. This summary remedy does not bar the plaintiff from instituting a suit for declaration of title and recovery of possession at any time before the title of the wakf to the property is extinguished by adverse possession and enjoyment by party in possession. [S. Suryamurthy, J.] *The Tamil Nadu Wakf Board by its Secretary having its office at No. 4, Santhome High Road, Madras - 4 v. Dawood Bi* (1981) 1 M.LJ. 220.

S. 15--Board competent to appoint committee of Management for a mosque--It has general superintendence over all wakfs and duty to see to their proper management under S. 15--Power not lost by citing a wrong provision. *Mohd. Ghouse v. Secy., Karnataka Board of Wakfs,* A.I.R. 1986 Karnataka 12.

S. 15--Wakf Act (29 of 1954)--Board cannot appoint Executive Officer or/and Committee to manage wakf without removing Mutawalli or taking any proceedings against him.*Khadar Shariff v. Tamil Nadu State Wakf Board* , A.I.R. 1987 Madras 40.

--Suit against Wakf Board for declaration of plaintiff's title and injunction restraining Board from taking possession of property in execution of decree obtained by Board against third person --Act of Board falls under S. 15 --Section 56 notice is a must failure to give notice --Not formal defect --Plaint is liable to be rejected. See Wakf Act(1954) S. 561981 T.L.N.J. 377.

S. 15 (2)(h)(i)(o)--Wakf property--Wrongful alienation--Suit for declaration and recovery of possession--Name of Wakf mentioned in plaint different from the name mentioned in sale certificate--Held, suit is maintainable irrespective whether property belongs to one wakf or other in view of S. 15(2)(h)(i)(o). [Suryamurthy, J.] *Tamil Nadu Board v. Dawood Bi* (1981) 94 L.W. 81: (1981) 1 M.LJ. 220.

See also:--

(1982) 1 M.LJ. 245:

Wakf Act (1954), Section 15(2)(h).

The provision of S. 15(2)(h) is merely an enabling provision or in fact a provision which casts a duty on the Wakf Board to take measures for the recovery of lost property of any wakf, in accordance with law. This provision is not a substantive provision providing any procedure for recovery of the possession of any Wakf property.

P.S. Rudra Murthy v. Kant. Board of Wakfs , A.I.R. 1977, Karnataka 147.

Wakfs Act (29 of 1954), Ss. 18, 67--Punjab Wakf Rules (1964). R. 6--Chairman of Wakf Board --Removal--Members of Board can remove him by passing vote of no-confidence. I.L.R. (1975) Andhra Pradesh 242. Dissented from --[Art. 372 Constitution of India, (1); General Clauses Act (1897), S. 21].

In view of the principles of common law applicable to India by virtue of provisions of Art. 372 (1), there being no provision in the state barring the removal of the Chairman of the Board -by a vote of no confidence, the members who have the power to elect the Chairman also have the power to remove the Chairman by a majority of votes. This principle is also enshrined in the provisions of S. 21 of the General Clause Act . It is accepted principle of common law relating to the removal of the holder of an office that the body which has authority to elect its Chairman, has the inherent, and implied power to remove the Chairman. I.L.R. (1975) Andhra Pradesh 242 Dissented from. *Haji Anwar Ahmed Khan v. Punjab Wakf Board,* A.I.R. 1980 Punj. & H.P. 306.

Wakf Act (1954), S.25(8)

From the examination of the provisions of the Act, their scope, object and the consequences that would ensure, the only conclusion that can be drawn is that sub-sec. (8) of S. 25 is an imperative or mandatory

enactment and is not a directory enactment. *Shah Mansur Peer Dargah v. State of Karnataka,* A.I.R. 1980 Kant. 118.

If any of the properties are not included in a wakf that is already registered, the proper course for the Board is to collect such information under Section 27 and after making such enquiry as it may deem fit, decide that question in accordance with sections, the Rules and the principles of natural justice. In deciding that question, it is open to the Board to rely on any information (furnished by any person or any authority). The power conferred on the Board by S. 27 is a *suo motu* power to be exercised by the Board and cannot be exercised on an application made under Section 25(8).

Shah Mansur Peer Dargah v. State of Karnataka, A.I.R. 1980 Kant. 118.

S s. 36-A and 36-B--Transfer of Wakf Property in contravention of S.36-A--S.36-B provides for procedure for its recovery --Wakf property transferred long before Wakf Board came into existence-- Section 36-B cannot be invoked for its recovery. *P.S. Rudra Murthy v. Kant. Board of Wakfs* Al.R. 1977 Karnataka 147.

S s. 36(A) and 36(B)(1) and (2)--Where the property of a wakf was sold after obtaining the Board's sanction it was not open to the Board to prefer a requisition under S. 36 (B) (1) to the Collector and the Collector in his turn to order under S. 36B (2) delivery of the property to the Board. The requisition as also the order of the Collector were illegal. It was also pertinent to note that R. 3(1) of the Bihar Wakf Rules prohibiting the Board from according such sanction unless the transfer was for the benefit of the Wakf and also that it was unavoidable did not apply to transfers by sale. *Bihar State Shia Wakf Board v. Sheonandan Prasad,* A.I.R. 1986 Patna 10.

S s. 42, 3(f), 15 and 43--Wakf created under will--Line of succession to office of Mutawalli given by the testator--On arising of vacancy, Board of Trustees appointing Mutawalli--Mutawalli functioning as Managing Trustee in pursuance of order--Wakf Board enquiring into matter, considering conflicting claims and holding that appointment made by Board of trustees was not legal and proper --Order of Wakf Board is illegal and has to be set aside. *Kerala Wakf Board v. Alam Aboobacker Sait,* A.I.R. 1987 Kerala 176.

Muslim Wakfs Act (XXIX OF 1954), S. 43--Control of shrine by descendants of Shah Qumais -- Wakf property--Issuance of show cause notice to petitioner why he should not be removed from office Shah Qumais --Collector or Sub-Divisional Officer in the control --Collector of a District cannot act arbitrarily--He has to show his authority under law to issue such show cause notice. [Ajit Singh Bains, J.] *Syed Abdul Basith v. State of Haryana* (1983) Rev. L.R. 12.

Wakf Act (29 of 1954) S s. 42,43-A and 15 Scheme for management of wakf framed by Wakf Board-Direct management of wakf can be assumed by Board under s. 43-A--\Board can continue such management for 5 years --Thereafter it must implement scheme when there is no obstacle for it and appoint Committee of Mutawallis as provided therein to manage wakf--Appointment of ad hoc committee to manage wakf on ground that Board was contemplating to amend scheme is invalid.*Gulam Ali v. Secy., Kamataka Board of Wakfs,* A.I.R. 1985 Karnataka 242.

The act ion under S. 44 is meant for the better administration and management of the wakf as such, and the expression &uot;a person interested in a wakf' will have to be understood in that context. If so understood any person who will be entitled to derive a benefit from the wakf will be a &uot;person interested in the wakf&uot; being clothed with a right to invoke the jurisdiction of the Board under S. 44. Having regard to the objects and the terms of the present wakf, the appellants were &uot;persons interested in the wakf&uot; and therefore they were entitled to invoke the jurisdiction of the Wakf Board under S. 44 of the Act. [M.M. Ismail and V. Ratnam, JJ.] *K Jainulaludden v. K P. Jainulaludden* (1981) 1 M.LJ. 332.

Wakf Act (1954), Section 55

If a suit under Section 55(2) of the Wakf Act has been filed, then it should be for the vindication of a public right. Even then, the action should not be camouflaged with such a request or relief. It must be genuine desire on the part of the litigant to expose public rights.*Mohamed Ghouse v. Mohamed Yusuf* A.I.R. 1976

Madras 371.

S s. 56, 57--Suit by Mutawalli for declaration that Municipality had no right to make use of plaintiff's Kabrastan and for permanent injunction--Wakf Board joined as second defendant--No relief claimed against Board S. 56 notice to Board is not necessary--Notice under S. 57 was sufficient.

Syed Khersha Sajanshah Mutvalli v. The Bhuj Municipality, A.I.R. 1986 Guj. 1.

Preamble, S. 3(f), S s. 6, 36, 37, 38, 55, 60--Suit by Mutawalli respecting wakf property--Not barred by either S. 36 or S. 55--Hence suit by mutawalli for declaration that Municipality had no right to make use of suit Kabrastan and for permanent injunction--Not incompetent--Prior sanction of Board u/ s. 92, C.P.S. is not necessary. *Syed Khersha Sajanshah Mutvalli v. The Bhuj Municipality* , A.I.R. 1986. Guj. 1.

Wakf Act (XXIX OF 1954), S s. 63 and 15--The petitioner institution which was a society and a wakf was managed by a governing body elected at a general body meeting of the members and their term was due to expire on 30th July, 1980. By the order dated 14th March, 1980 the Board appointed*K* as virtually the administrator of the institution displacing the legally constituted governing body of the institution. In the other letter dated 1st April, 1980, the board requested the Secretary of the petitioner to hold elections. Both these orders were made in pursuance of a minute or note of the Minister for Wakfs communicated to it. The orders were challenged.

Held, that the power of the Government to issue general or special directions to a Board in its working cannot be construed as empowering the Minister for Wakfs or the Government to interfere with the day to day functioning of every wakf in the State. On a perusal of S s. 15 and 63 of the Wakf Act it is clear that the order or directions issued by the Minister for wakfs and the consequent orders made thereto by the Board were wholly without jurisdiction and manifestly illegal. Assuming that any elections had been held in pursuance of the impugned orders, the elections are also invalid. Unfortunately, a piquant situation has arisen in the affairs of the institution where there is no legally constituted governing body or a mutawalli to administer the affairs of the institution. That situation has to be remedied either by the Board exercising the powers under S. 42 of the Wakf Act and appointing a mutawalli or by the State Government exercising the powers conferred by S. 27-A(l)(b) of the Karnataka Societies Registration Act, 1960 and appointing an administrator with necessary powers to administer the institution and hold elections and make over the management of the institution to the new governing body to be elected in accordance with law. [K. S. Puttaswamy, J]*Masjid-E-Islammabad v. Karnataka Board of Wakf,* A.I.R. 1981 Kant. 154.

Wakf Act (1954), S. 67. Wakf Rules (1964), R. 6--It is no doubt true that in view of the provisions of S. 3 (e), wherever the word &uot;member&uot; of the Board exists, it includes the Chairman. This is so unless the context otherwise requires. As is clear from the scheme of the Act and R. 6 that after the members are appointed under S. 11 of the Act, the first meeting of the Board has to be convened by the Government as soon as possible by giving the members not less than 10 days' clear notice and in that meeting the Chairman has to be elected. It would thus be seen that there will be some time gap between the date of nomination of the members and the election of the Chairman. The Chairman continues in office on the strength of his being a member of the Board. It is, therefore, obvious that the period of five years shall start from the date when the members are nominated by the Government under S. 11 whereas the Chairman is elected on some subsequent date. In this view, the Chairman, in no case, can be there for complete period of five years. It will, therefore, be obvious that in view of the scheme of the Act, the word &uot;member&uot; used in S. 12 cannot be held to include &uot;Chairman&uot;. Therefore, the tenure of the office of the Chairman is not fixed for five years and the same is at the pleasure of the members of the Board. [Bhopinder Singh Dhillon and G. C. Mital, JJ.]*Haji Anwar Ahmed Khan v. The Punjab Wakf Board* A.I.R. 1980 P. and H. 306.

The following cases are under the Wakf Act read with Section 92 of the Code of Civil Procedure .

The Advocate-General has merely to see whether there is or there is not a prima facie case that should be allowed to go to a Court of law. He does not decide the rights of the person against whom the suit is intended to be filed as such a person will have full opportunity to present his case before the Court in

which the suit is filed. The Court cannot enquire whether the sanctioning authority has heard the parties though it can enquire into the competency of the authority to act under S s. 92 and 93. Case-law discussed. A.I.R. 1956 Pepsu 65, dissented. [Avadh Behari Rohatgi, J] *S.S. Bhagat v. N.S. Ahluwalia.* A.I.R. 1978 Del. 14.

S. 92--Applicability--Wakf governed by Wakf Act--Compromise decree--*A* and *B* appointed joint mutawallis--*B* put in charge of management of property--Suit by *A* against *B*for his share of income and rendition of accounts--Maintainability--S s. 15, 44 and 45 of Wakf Act--Scope of.*See*Wakf Act (1954), S. 15.A.I.R. 1978 Mad. 121.

The following case under U.P. Muslim Wakfs Act (16 of 1960) may be seen:--

U.P. Muslim Wakfs Act (16 of 1960), S s. 49-B(4), 29, 30--Appeal--Jurisdiction of appellate Court. *Afzal Hussain v. 1st Addl. Dist. Judge,* A.I.R. 1985 All. 79.

S. 57A --U.P. Muslim Wakfs Act (16 of 1960)

Before taking an action under S. 57A, for recovery of possession of Wakf property from unauthorized occupants the first enquiry which the Board has to make is whether the immovable property in respect of which act ion is to be taken is entered as property of wakf in the register of wakfs maintained under S. 30. The next enquiry that he is required to make is whether the said property is in unauthorised occupation of anyone. Action under S. 57A can be taken only when the first condition is satisfied, namely that the property is entered as wakf property in the register of wakfs maintained under S. 30. This is a jurisdictional fact and act ion under S. 57A would be permissible only when the property is so entered. Under this provision it is not enough that the property is wakf property. The said property has also to be entered as wakf property in the register of wakfs maintained under S. 30. It is on the satisfaction of this jurisdictional fact that action can be taken by the Board under S. 57*A Afzal Hussain v. 1st Addl. Dust. Judge* , AIR. 1985 All. 79.

Bengal Wakf Act (13 of 1934), S s. 27(l)(f) and 59(1) (as amended in 1973) --Provision requiring Wakfs to pay contribution to Wakf Fund and Education Fund are not ultra vires of Art s. 25, 26, 27 Constitution--Arts. 25 26 27. Constitution of India,*Mustt. Nasima Khatun v. State of West Bengal,* A.I.R. 1981 Cal. 302.

Wakf Act (29 of 1954), S. 15(2)(g) and S. 63--Mutawalli--Appointment of--Wakf Board and not the State Government is competent--Even approval of State Government is not necessary.*Jamia Masjid Magadi Town v. Karnataka Board of Wakfs,* A.I.R. 1981 Karnataka 37.

Wakf Act (29 of 1954), S s. 63 and 15 --Power of State Government to issue directions--Does not include power to interfere with day to day functioning of wakf.*Masjid-E-Islammabad v. Karnataka Board of Wakf* , A.I.R. 1981 Kar. 154.

Wakf Act (29 of 1954), S s. 15,55--Scheme framed under S. 92, C.P.C. prior to coming into force of Act--Scheme does not cease to be operative after coming into force of the Act.A.I.R. 1969 Mad. 350, Dissented from. *Amjadulla Siddiqui v. Mirza Nizamuddin Baig,* A.I.R. 1982 A.P. 342.

Wakf Act (29 of 1954), S. 57(1)--Andhra Pradesh Agricultural Indebtedness (Relief) Act (7 of 1977), S. 4 (1)--Notice to Wakf Board--Whether essential--Wakf Board in possession of property under invalid Wakf--Notice held not essential.*Md. Abdul Aziz v. G. Bhumavva,* A.I.R. 1982 Andhra Pradesh 349.

Wakf Act (29 of 1954), S. 3(1) and (a)--House given by Muslim for the use of all travellers irrespective of their religion and financial position--Dedication was not wakf.*The Karnataka State Board of Wakf v. Mohd. Nazeer Ahmed,* A.I.R. 1982 Karnataka 309.

Wakf Act (29 of 1954), s. 15--Wakf Board--Power of, as to wakf in respect of which scheme has been framed prior to passing of Act --Board has power to appoint mutawallis as per the scheme -- (Muslim Law-Wakf).*T.S. Yusuf v. Tamil Nadu Wakf Board,* A.I.R. 1982 Madras 115.

Wakf Act (29 of 1954), S s. 15, 42, 43, 44 and 45--Extent of Board's power to remove and appoint mutawalli indicated--Appointment to office of Managing Trustee of mutawalli--Board cannot adjudicate upon validity of appointment in terms of wakf deed--That is for Civil Court to decide.*Adam Aboobacker Sait v. Kerala Wakf Board,* A.I.R. 1982 Kerala 322.

Wakf Act (29 of 1954), sections 3(1), 15, 66C, 36A--Sanction under Section 36A--Necessity of -- Grant of land by a non-Muslim Ruler in favour of Fkkirs visiting the Mosque and not to the Mosque--It is neither wakf within Section 3(1), nor a deemed wakf under Section 66C--Scheme decree also framed for property--Sanction for lease of land under Section 36A is not necessary.*Tamil Nadu Wakf Board v. S. Syed Inam Saheb,* A.I.R. 1983 Madras 297.

Wakf Act (29 of 1954), S. 3(b)--Nature of document--Whether it is Wakf deed or whether it creates a charge for performance of charities--Document must be read as a whole--A clause should not be so read as to render other clauses nugatory.*Kani Ammal v. Tamil Nadu Wakf Board,* A.I.R. 1983 Madras 188.

Wakf Act (29 of 1954), S. 64--Order of supersession--Statement of reasons for the order--Whether necessary when show cause notice has not been replied.

An order superseding a statutory Board has such serious civil consequences that ordinarily it should be a reasoned order.

Wakf Act (29 of 1954), S. 44--Application under--Not necessary where mismanagement is by Board itself.

Section 44 pertains to an enquiry relating to the administration of Wakf. A person interested in a wakf can make an application for such an enquiry where the affairs are being mismanaged. The section has nothing to do with the corruption and mismanagement of funds by the Board itself. *Chairman, Wakf Board for the State of Punjab v. Union of India,* A.I.R. 1983 Delhi 439.

S. 6--Disputes regarding wakfs--Execution proceedings of decree passed in suit for possession of wakf property after Wakf Act came into force in State of Bihar--Cannot be instituted by Mutawalli of Wakf property.*Maulvi Reza Ansari v. Shyamlal Sah,* A.I.R. 1983 Patna 299.

Wakf Act (1954), S s. 2, 15 --Wakf created before Act --Scheme framed by Civil Court in force -- Wakf Board has power to direct Mutawalli to get properties registered under Act and to submit accounts etc. to it--Mutawalli need not file any return to Civil Court under the Scheme.*C.S. Peeran v. State Wakf Board,* A.I.R. 1969 Madras 350.

Wakf Act (29 of 1954), s. 11(d) Proviso --Appointment of members of Wakf board-Prohibition under Proviso that only one Mutawalli can be appointed as member under Cl. (d)--Prohibition does not apply if Mutawallis can be appointed under other clauses of S. 11.*Mohammad Yahyah Ali Khan v. State of Madhya Pradesh,* A.I.R. 1983 Madhya Pradesh 53.

Per S.S. Sandhawalia, C.J., and KS. Tiwana J. (Goyal J. Contra) Per Majority: S. 15--Administration of Evacuee Property Act (31 of 1950) S. 11--Section 11 is not impliedly repealed by S. 15 of the Wakf Act--Evacuee trust--Suit in respect of--Not maintainable by board.

Per Goyal J.: The public wakf property being not evacuee property within the meaning of S. 2(f) of the Evacuee Act never vested in the Custodian; and after the enactment of the Wakf Act, public wakfs are exclusively governed by its provisions and the Board constituted under this Act is the sole authority entitled to manage them; the authority of the Custodian to manage the wakfs, if any, comes to an end within the deletion of Explanation of S. 11 and in case S. 11 is taken to be still applicable to wakfs.
*Decided by Full Bench on order of reference made by S.S. Sandhawalia C.J. and S.P. Goyal J., D/- 25-3-1982.

**(Note: In this case the Judges of the Full Bench differ in their views. The majority view is taken by Sandhawalia C.J. & ICS. Tiwana J. and the majority view is taken by S.P. Goyal J.

The judgments are pointed in the order in which they are given in the Certified Copy. Ed.) even after deletion of the said explanation. Its provisions stand expressly repealed by the provisions of S. 69(2) of the Wakf Act and in the alternative by implication, the Wakf Act being special and later statute.

Per Majority: (Goyal J. Dissenting) Section 69(2) of the Wakf Act is no warrant for the proposition that S. 11 of the Administration of Evacuee Property Act, 1950, stands expressly repealed thereby.*Bachan Singh v. Punjab Wakf Board,* A.I.R. 1984 P.&H. 68.

Wakf ActSection 64.

One or two isolated cases of failure to act will not amount to persistent default within the meaning of Section 64. Persistent failure to carry out the directions issued by the Central or State Government under Section 62 or Section 63 will attract the section. Even a single act of disobedience of the direction may, added to certain continuing circumstances, depending upon the gravity of the matter, indicate persistence on the part of the defaulter. *Kerala Wakf Board v. State of Kerala,* A.I.R. 1984 Kerala 57.

Wakf Act (29 of 1954), S. 55(2) proviso--Suit against Mutawalli--Board also impleaded--Benefit of proviso cannot be claimed Board's act ion or direction not having been complained of--Suit filed without consent of Board--Not maintainable.*Shahabuddin v. S. Nohaman,* A.I.R. 1984 Madras 116.

Wakf Act (29 of 1954), S. 55--Civil P.C. (1908), Section 92 --Suit claiming relief against Wakf-- Consent of Board contemplated by Section 55 of Wakf Act not obtained--Suit was held not maintainable for want of consent.A.I.R. 1962 Ker. 343 (F.B.), Rel. on *Shamsuddin v. Tuticorin Jamia Masjid* , A.I.R. 1984 Madras 276.

Bengal Wakf Act (13 of 1934) S. 40. Appointment of Mutawallis of Wakf-Commissioner appointing strannity given to heirs of last Mutawallis of being substituted as Mutawallis --Appointment invalid.*Mt. Aziza Khatun v. State of West Bengal,* A.I.R. 1984 Calcutta 326.

Wakf Act (29 of 1954) S s. 55,57,59 --Suit under S. 92, Civil P.C, filed prior to enforcement of Wakf Act --Does not abate on coming into force of Wakf Act--Decree framing scheme for wakf passed after enforcement of Wakf Act is not void and unenforceable.*Mohammad Ghouse Sahib v. Muhammad Kuthubuddin Sahib,* A.I.R. 1985 Supreme Court 375.

Wakf Act (1954), S s. 3(1), 28--Nature of wakfs with which Act deals--Distinction between Wakfs recognised by Muslim law and religious endowments recognised by Hindu law on the one hand and public charitable trusts as contemplated by English law on the other.*Nawab Zain Yar Jung v. Director of Endowments,* A.I.R. 1963 Supreme Court 985.

TAX LAWS AND MAHOMEDAN LAWS

These three cases have discussed Mahomedan Law in relation to Income Tax and Wealth Tax Act . They may be seen, if necessary:

1. *Haji Abdul Hamid v. C.I. T.* (1983) 1441.T.R. 948.
2. *C.M.S. Abdus Salam v. Commissioner of Wealth Tax,* Madras (1983) Tax L.R. 1584.
3. *Commissioner of Wealth Tax v. Hasnate Burhaniya F. Wakf* (1984) 147 I.T.R. 509.

Gujarat and Maharashtra.--The Mussulman Wakfs Act, 1923, makes no express provision for the investigation or determination of the nature and extent of wakf property. The question whether such a power given to the Court by necessary implication has created a conflict of decisions in many High Courts. Before the Bombay Amendment Act of 1935, it was held by the Bombay High Court that in proceedings under section 10 (the penal section) a Magistrate can go into the question whether the property in reference is wakf or not.[24] In a later decision, the same Court held that an inquiry under s. 6-C(i) of the Mussulman Wakf (Bombay Amendment) Act, 1935, is confined to cases where the existence of a wakf is

admitted, and that where the existence of the wakf itself is disputed, the District Court has no power to inquire into its existence.[25]

Section 10-B(2) provides that proceedings under section 10 of the Act of 1923 shall not be dealt with by any court lower than that of a Magistrate of the First Class or a Presidency Magistrate. Before the Bombay Amendment Act of 1935, however, it was held that in a Miscellaneous Application the District Judge has jurisdiction to try an offence under section 10 of the Act .[26]

Under section 6-C of the Act, as applied in Bombay State, the Court has power to inquire whether property is wakf. District wakf committees have the right to institute suits with the Court's permission for the protection or recovery of the property of a wakf or for the application of the income of such property to any charitable or religious purpose, notwithstanding anything contained in section 92 , of the Code of Civil Procedure .

Uttar Pradesh.--The Central Boards of Wakf have wide powers of investigation, supervision and control. All the power formerly exercised by the District Judge in respect of wakfs, except the power to apply the doctrine of cy-pres, have now been given to the U.P. Central Board of Wakfs.[27]Section 47 of the U.P. Act of 1936 provided that the Board of Wakfs may file a suit in the District Court for an order applying the income of a wakf to similar objects. By section 50 of the U.P. Act of 1936 the orders of the Board of Wakfs cannot be questioned in a Court of law, except an order settling the scheme of management of a wakf.--

[See also the recent case of *Hafiz Mohd. v. U.P.S.C. Board of Wakf* ('65) A.A 333, where some of the provisions of the U.P. Muslim Wakfs Act, 1960, are considered, and particularly the constitutional validity of s. 55 empowering removal of mutawallis].

West Bengal.--The Commissioner of Wakfs has power to intervene in the interests of a wakf in any suit in respect of wakf property (s. 70, Bengal Wakf Act, 1934). But under s. 83, rights already accrued before the Act are saved. The Commissioner is therefore not entitled to intervene in an appeal[28]or after the Court has passed a decree for a scheme under section 92 of the Code of Civil Procedure .[29]The Commissioner may himself file a suit for the reliefs referred to in section 92 without the consent of the Advocate-General, or for the reliefs referred to in sec. 14 of the Religious Endowments Act, 1963, without the leave of the Court (s. 73). The consent' of the Commissioner is required to any suit filed by any other person under the abovementioned provisions.

Wakf for public purpose.--Where the wakf which is substantially for a public purpose provides that the surplus, if any, shall be enjoyed by the founder of the wakf or his family, the wakf is not a private wakf such as is described in the Mussulman Wakf (Validating) Act, 1913 (VI of 1913), s. 3: *Kadir Murthuza Hussain v. Mohammad Murthuza Hussain* (1942) 2 Mad. LJ. 672, ('43) AM. 234.

Under S. 48 of the U.P. Muslim Wakf Act 1960, the powers of the board to appoint a Mutawalli can only be exercised when there is a vacancy*Hashim Husain v. Ahmad Raza* ('74) All. 305(D.B.)

Under the Mahomedan Law, by nomination a mutawalli only proposes or selects his successor to exercise his duties as a mutawalli on his death. He does not part with or delegate his functions of a mutawalli during his lifetime. It is only the delegation or parting with duties by a Mutawalli, while in good health, that is prohibited. A.I.R. 1946 Lah. 200: I.L.R. (1945) Lah. 554, follow. [K. B. Asthana and K. C. Agarwal, JJ.] *Hashim Husain v. Ahmad Raza* A.I.R. 1974 All 305.

For removal of a mutawalli the procedure of Section 92 of the Civil Procedure Code is not necessary.*Khalil Ahmad v. Siddiq Ahmad* (74) A All. 382.

A mutawalli can be removed only by a suit *Jan Mohamad v. Mahmood Ali* ('74) A. All. 124.

21 See Appendix III for the text of the Wakf Act, 1954 as amended by the Wakf (Amendment) Act, 2013 (w.e.f. 1-11-2013).

22 *See* the Statement of Objects and Reasons, The Wakf (Amendment) Bill, 2010 (Bill No. 53 of 2010).

23 This section is being reproduced from the 19th Edition of the present book as a historical reference.

24 *In re Sayedna Taher Saifuddin*(1934) 58 Bom. 302, 36 Bom. L.R. 311,154 I.C. 940, ('34) A.B. 169.

25 *Mahomedhussein* v. *The Collector of Broach*(1945) Bom. 257,46 Bom. L.R. 925, 219 I.C. 449, ('45) A.B. 157.

26 *Kale Khan v. Karim Rahman* (1935) 37 Bom. L.R. 207, 156 I.C 203, ('35) A.B. 207.

27 *Sunni Central Board of Wakfs v. Sardar Khan* (1946) Al. 352, 222 I.C. 457. ('46) A.A. 256.

28 *Mahmuda Bibi v. Iffat Arah Begum* (1937) Cal. 77.

29 *Commissioner of Wakfs, Bengal v. Umma Salima* (1937) Cal. 673, 41 Cal. W.N. 382, 65 Cal. LJ. 340, ('37) A.C. 150.

Mulla: Mahomedan law, Updated 20th edition/CHAPTER XII WAKFS/OF MUTAWALLIS OR MANAGERS OF WAKF PROPERTY/213. Removal of mutawalli

CHAPTER XII

WAKFS

OF MUTAWALLIS OR MANAGERS OF WAKF PROPERTY

213.

Removal of mutawalli

A mutawalli may be removed by the Court on proof of misfeasance or breach of trust, or if it is found that he is otherwise unfit to hold the office, though the founder may have expressly directed that he should not be removed in any case. The *founder* has no power, after delivery of possession, to remove a mutawalli in any case, unless he has expressly reserved such a power in the deed of wakf.[30]

Now, the Wakf Act, 1954, by s. 64, has also given the power to remove the 'mutawalli' to the concerned Wakf Board. This section provides that (1) Notwithstanding anything contained in any other law or the deed of wakf, the Board may remove a mutawalli from his office if such mutawalli:--

(a) has been convicted more than once of an offence punishable under s. 61 of the Act of 1995, or
(b) has been convicted of any offence of criminal breach of trust, or any other offence involving moral turpitude, and such conviction has not been reversed and he has not been granted full pardon with respect to such offence; or
(c) is of unsound mind or is suffering from other mental or physical defect or infirmity which would render him unfit to perform the functions and discharge the duties of a mutawalli, or
(d) is an undischarged insolvent; or
(e) is proved to be addicted to drinking liquor or other spirituous preparations, or is addicted to the taking of any narcotic drugs; or
(f) is employed as a paid legal practitioner on behalf of, or against the wakf; or
(g) has failed, without reasonable excuse, to maintain regular accounts for two consecutive years, or has failed to submit, in two consecutive years, the yearly statement of accounts, as required by sub-section (2) of s. 46 of the Act, 1995; or
(h) is interested, directly or indirectly, in a subsisting lease in respect of any wakf property, or in any contract made with, or any work being done for, the wakf or is in arrears in respect of any sum due by him to such wakf; or
(i) continuously, neglects his duties or commits any misfeasance, malfeasance, misapplication of funds or breach of trust in relation to the wakf or in respect of any money or other wakf property; or

(j) wilfully and persistently disobeys the lawful orders made by the Central Government, State Government, Board under any provision of this Act, or rule or order made thereunder; and
(k) misappropriates or fraudulently deals with the property of wakf.[31]

Under the scheme of the new Act of 1995, a mutawalli can also be punished if he does not properly and sincerely, discharge his duties. Section 61 of the Wakf Act, 1954 provides that:--

(1) If a mutawalli fails to--
(a) apply for the registration of a wakf;
(b) furnish statements of particulars or accounts or returns as required under the Act ;
(c) supply information or particulars as required by the Board;
(d) allow inspection of wakf properties, accounts, records or deeds and documents relating thereto;
(e) deliver possession of any wakf property, if ordered by the Board or Tribunal;
(f) carry out the direction of the Board;
(g) discharge any public dues; or
(h) do any other act which he is lawfully required to do by or under this Act,

he shall, unless he satisfies the Court or the Tribunal that there was reasonable cause for his failure, be punishable with fine which may extend to eight thousand rupees.[32]

A suit was filed by some beneficiaries under a wakf deed for removal of the trustee and for framing a scheme. The suit was decreed as prayed for. The plaintiffs had alleged mismanagement of the trust funds, since they had not received anything from the trust. Though the defendant produced the account books, they were not examined by the plaintiffs and no fault had been made out. The defendant preferred an appeal: From an overall appreciation of a given situation, it should be made clear that if a suit under s. 55(2) of the Wakf Act had been filed, then : it should be for the vindication of a public right.

The mere fact that some mis-management had resulted through the misconduct of the trustees, was not a ground to modify a scheme which contained provisions, which, if properly worked out, were sufficient to protect the interests of the trust. The plaintiffs counsel harped upon the mis-management of the defendant in the light of the nondistribution of the share of the net income to the dependent of the donor. Apart from the fact that such an assertion was indicative of the private interest of the plaintiffs, for which purpose no suit either under s. 92 of the Code of Civil Procedure or under s. 55 of the Wakf Act, was maintainable, the plaintiffs had not even established reasonably that their apprehension about the accounts was justified.

In the absence of objective evidence about malversation or misfeasance on the part of the trustee, the subjective satisfaction of the Court without even a full probe into the evidence on the conduct of the trustee could not go a long way to prompt the Court to remove him, as the primordial consideration in such circumstances was the interests of the institution. In this case, no case had been rnade out by the plaintiffs for the removal of the defendant on the ground that the interests of the trust and its administration so required.[33]

Bajllie, 608, Macnaghten, p. 79, s. 5. A founder, who is himself a mutawalli, may be removed by the Court on the ground of misconduct.

In the case of a public, religious or charitable trust the primary duty of the Court is to consider the interests of the public. The Court will therefore remove a mutawalli who is insolvent,[34] or who does not perform the religious services as directed in the Wakfnama,[35] or who claims the wakf property as his private estate,[36] and will frame a scheme of management. It is conceivable that if there has been no mismanagement a claim to the property under a mistaken impression of right would not be good reason for removing a mutawalli; but the assertion of a claim adverse to the trust coupled with neglect of duty would render a mutawalli liable to be removed.[37]

A mutawalli appointed by a committee under the Religious Endowments Act (XX of 1863) is not a

mutawalli under Mahomedan law but a servant liable to be dismissed by the committee.[38]

Procedure

Although the District Judge, exercising his powers as a *Kazi*, has the jurisdiction on mere application to appoint a mutawalli when there is a vacancy, the removal of a mutawalli can only be effected by a suit properly instituted.[39]

The question before - the Karnataka High Court was - whether a mutawalli can be removed from his office on the recommendation of the Government without following the procedure laid down under s. 64 of the Wakf Act, 1995. In the instant case, the petitioner, a mutawalli, challenged the action of the Wakf Board of removing him from his office subsequent to the report of Lok Ayukta to Government and in turn asking the Wakf Board to take act ion and remove him from office. His contention was that his removal was illegal as the procedure required to be followed under s. 64 was not complied with. The court held that assuming that Government was acting on the report of Lok Ayukta under sub-s. (3) of s. 12 of Lok Ayukta Act and in turn had asked the Wakf Board to initiate necessary action, the Wakf Board could have act ed only in accordance with the statutory provisions and not independent of the same. If any action is contemplated against the mutawalli, particularly for his removal, the procedure as contemplated under s. 64 of the Wakf Act, 1995 will have to be followed. The compliance of requirement of s. 64(3) is mandatory.[40]

The Tamil Nadu High Court in *M. Ali Hussain v. Tamil Nadu Wakf Board* , observed that a person who is removed from the office of mutawalli under clauses (a) (b) or (k) of sub-s. (1) of s. 64 of the Wakf Act, 1995; though not entitled to file an appeal under s. 64(4), will be entitled to file an application before the Tribunal under s. 83(2) of the Act. The Court held that the Tribunal is conferred even with original power, wherever the dispute related to wakf properties. Therefore, when a mutawalli is removed on a charge of misappropriation, the same would naturally relate to a property of the wakf. Consequently, the interpretation entitling such a person to invoke the jurisdiction of the Tribunal under s. 83(2) would be consistent with the other provisions and the entire scheme of the Act .[41]

30 *Gulam Hussain v. Aji Ajam* (1868) 4 Mad. H.C. 44; *Advocate-General v. Fatima* (1870) 9 Bom. H.C. 19, 23-24 [a Shia case]; *Hiddaitoonnissa v. Syud Afzul* (1870) 2 N.W.P. 422 [a Shia case]. *Siddique Ahmed v. Syed Ahmed* (1945) 49 C.W.N. 311, ('45) A.C. 418; *Khalil Ahmad v. Malka Mehar* ('54) A.A. 362.

31 *See* Appendix IV. For s. 64 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

32 *See* Appendix IV. For s. 61 as amended by the Wakf (Amendment) Act, 2013 *see* Appendix III.

33 *Mahomed Ghouse v. Mohamed Yusuf.* (1976) 2 M.L.J. 184 : 89 L.W. 399, [T. Ramaprasada Rao and S. Ratnavel Pandian, JJ.].

34 *Mahomedally Adamji Peerbhoy v. Akberally Abdull Hussain* (1934) 36 Bom. L.R. 386, 59 Cal. L.J. 133, 38 Cal. W.N. 452, 66 Mad. L.J. 733, 147 I.C. 882, ('34) A.PC. 53.

35 *Mohammad Abdul Gani v. Mt. Kulsan* (1945) 49 C.W.N. 273, ('45) A.C. 328.

36 *Ahmad Shah Mubarak Shah v. Altakhan* (1934) 152 I.C 323, ('34) A.Pesh. 57.

37 *Nawaz Ahmed Khan v. Hasamuddin Ahmed* (1936) 162 I.C. 762, ('36) A.C. 262.

38 *Gholam Hussain Shah v. Syed Altaf Hossain* (1934) 61 Cal. 80, 149 I.C. 1215, ('34) A.C. 328.

39 *Mohammad Ali v. Ahmad Ali* (1945) All. 818, 221 I.C. 515, ('45) A.A. 261.

40 *Syed Enayathulla v. State of Karnataka* A.I.R. 2004 Kar 295.

41 (2009) 2 M.L.J. 342.

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CHAPTER XII

WAKFS

OF MUTAWALLIS OR MANAGERS OF WAKF PROPERTY

214.

Office of mutawalli not transferable

A mutawalli has no power to transfer the office to another, unless such a power is expressly conferred upon him by the founder. But he may appoint a deputy to assist him in management of the endowed property.[42] He cannot, however, appoint co-mutawallis unless he is expressly empowered to do so.[43]

A hereditary ministrant cannot make a valid settlement of his right to receive offerings at a Darga or Shrine.[44]

42 *Khajeh Salimullah v. Abdul Khair* (1909) 37 Cal. 263, 277-279, 3 I.C. 419; *Haji Ali v. Anjuman-iIslamia* (1931) 12 Lah. 590, 596, 135 I.C. 56 ('31) A.L. 379; *Mohammad Soleman v. Tasaddqq Hossain* (1935) 158 I.C. 544, ('35) A.C. 623; *Wahid Ali v. Ashruff Hossain* (1882) 8 Cal. 732; *Abdul Mannan v. Mutwali of Sm. Janebali* ('56) AC. 584.

43 *Abdul Sobhan v. Wasin Bhuvia* (1950) 54 C.W.N.

44 *Hakim Khan v. Sahibjan Sahib* (1935) 69 Mad. L.J. 722, 159 I.C. 694, ('35) AM. 1040.

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CHAPTER XII

WAKFS

OF MUTAWALLIS OR MANAGERS OF WAKF PROPERTY

215.

Attachment of office of mutawalli

The office of mutawalli cannot be attached in execution of a personal decree against the mutawalli.[45](*see* 194)

45 *Sarkum v. Rahaman Buksh* (1896) 24 Cal. 83, 91.

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CHAPTER XII

WAKFS

OF MUTAWALLIS OR MANAGERS OF WAKF PROPERTY

216.

Limitation for suit against mutawalli

No suit against a mutawalli or manager or wakf property, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, is now barred by any length of time.

Section 10 of the Limitation Act, 1908, as amended by s. 2 of Act I of 1929. As to limitation for suits where the property is transferred for a consideration,*see*Art s. 48B, 134A, 134B and 134C, inserted by s. 3 of Act I of 1929. Section 10 of the Limitation Act referred to a person in whom the property has become &uot;Vested in trust&uot; and the amendment was made in consequence of the decision in*Vidya Varuthi v. Balusami* .[46] that a mutawalli is not such a person. The amendment is not retrospective. In a suit instituted before the 1st January 1929, the mujawars or servants of a shrine who has been put in possession of a wakf land by the Sajjadanashin on account of their services could not claim the benefit of the section as assigns of the Sajjadanashin or manager of the shrine.[47]

46 (1921) 48 I.A. 302, 44 Mad. 831, 65 I.C. 161, ('22) A. PC. 123.

47 *Allah Rakhi v. Shah Mohammad Abdul Rahim* (1934) 61 I A. 50, 56 All. 111, 36 Bom. L.R. 408, 38 Cal. W.N. 400, 59 Cal. L.J. 157, 66 Mad. 431, 147 I.C. 887, ('34) A.PC. 77.

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CHAPTER XII

WAKFS

OF MUTAWALLIS OR MANAGERS OF WAKF PROPERTY

217.

Adverse possession against wakf

Wakf property may be lost by adverse possession.[48] But a *mutawalli's* possession cannot be adverse to the wakf.[49]

A stranger to the trust can encroach on the trust estate and will, in course of time, acquire a title by adverse possession. But a Mutawalli cannot take up such a position. If the Mutawallis of a mosque choose to build on part of the mosque property in such a way as to integrate the whole into one, unit then the Court is bound to regard this as an accretion to the estate of which they are trustees, and they will be estopped from adopting any other attitude because no trustee can be allowed to set up a title adverse to the trust or be allowed to make a benefit out of the trust for his own personal ends.[50]

48 *Shahidganj v. Gurdwara Parbhanda Committee* (1940) Lah. 493, 67 I.A. 251, ('40) A.PC. 116; *Abdur Rahim v. Narayandas* (1923) 50 I.A. 84, 50, Cal. 329, 71 I.C. 646, ('23) A.PC. 44; *Hafiz Mohammad v. Swarup Chand* (1941) 2 Cal. 434, 73 C.L.J. 475, 200 I.C. 822, ('42) AC. 1.

49 *Mohd Shah v. Fasihuddin* ('56) A.S.C. 713. *Kunhalavi Muschiar v. Kunhali* (1969) Ker. L.R. 685.

50 *Mohammad Shah v. Fasihuddin Ansari,* A.I.R. 1956 Supreme Court 713.

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CHAPTER XII

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MISCELLANEOUS

218.

Public Mosques

Every Mahomedan is entitled to enter a mosque dedicated to God, whatever maybe the sect or school to which he belongs, and to perform his devotions according to the ritual of his own sect or school. But it is not certain whether a mosque *appropriated exclusively by the founder to any particular sect or school* can be used by the followers of another sect or school.[51]

The right to offer prayers in a mosque is a legal right, for the disturbance of which a muslim is entitled to seek relief in a court of law.[52]

In *Ata-Ullah*'s case,[53] it was held by the High Court of Allahabad, that a mosque dedicated to God is for the use of all Mahomedans, and cannot lawfully be appropriated to the use of any particular sect. This ruling was referred to by their Lordships of the Privy Council in *Fazl Karim*'s case, but they did not express any opinion on it stating that the facts of the case before them did not properly raise that question. In *Abdus Subhan*'s case, the High Court of Calcutta doubted whether a special dedication of a mosque to any particular sect of Mahomedans was in accordance with Mahomedan Ecclesiastical law. The view taken in *Ata-Ullah*'s case was followed by the High Court of Lahore[54] and that Court has said that there is no such thing as a Shia mosque or a Sunni mosque.[55] The question therefore cannot be said to be definitely settled. But when a mosque is not appropriated to a particular sect, there is no doubt that it may be used by any Mahomedan for the purpose of worship or customary religious ceremonies[56] without distinction of sect. Thus a Shafei may join in a congregational worship, though the majority of worshippers in the congregation may be Hanafis; and he cannot be prevented from taking part in the service, because the Shafei practice is to pronounce *amin* (amen) in a loud voice and the Hanafi practice is to mutter the word softly. Similarly, Mahomedans of the *Amil-bil-hadis* or *Wahabi* sect have the right to worship in a mosque built primarily for the use of Hanafis and generally used by them, though their views in the matter of ritual differ from those of the Hanafis. Shias may worship in a mosque where the rest of the congregation are Sunnis but they are not entitled to have a separate call to prayer or to hold a congregation behind an Imam of their own; and there is no rule of Mahomedan law to entitle the members of a new sect to pray as a separate congregation behind an Imam chosen by themselves.[57]

A mosque is not capable of human ownership or possession as it belongs to God and is dedicated to His Worship.

The Court will not, in framing a scheme under a decree by which it is declared that the members of a particular sect are entitled to use a particular mosque, vest in the religious head of the sect the power to exclude at his discretion any member of the community from joining in congregational prayers, or to prevent him from attending the mosque for prayers.[58]

As to management of mosques, *see* note to 204, &uot;Powers of Court.&uot;

51 *Ata-Ullah v. Azim Ullah* (1889) 12 All. 494; *Jangu v. Ahmad-Ullah* (1889) 13 All. 419F.B. ; *Fazl Karim v. Maula Baksh* (1891) 18 Cal. 448, 18 I.A. 59; *Abdus Subhan v. Korban Ali* (1908) 35 Cal. 294; *Maula Baksh v. Amir-ud-Din* (1920) 1 Lah. 317, 57 I.C. 1000; *Jiwan Khan v. Habib* (1933) 14 Lah. 518, 144 I.C. 658, ('33) A.L. 759; *Syed Ahmed v. Hafiz Zahid* (1934) 153 I.C. 1095 ('34) A.A. 732.

52 *P. Majilissae Islamia y. Sheik Muhammad* ('63) A. Ker. 49. Follg. ('52) A.S.C. 245.

53 (1889) 12 All.494, *supra*.

54 (1950) 1 Lah. 317*supra*. (1933) 14 Lah. 518, *supra*.

55 *Mt. Iqbal Begum v. Mt. Syed Begum* (1933) 140 I.C. 829, ('33) A.L. 80; *Haji Mohammad v. Abdul Ghafoor* ('55) A.A. 688.

56 *Mohd Wasi v. Bachan Sahib* ('55) A.A. 68.

57 *Hakim Khalil v. Malik Israfi* (1917) 2 Pat. L.J. 108, 37 I.C. 302; *Safat Ali Khan v. Syed Ali Mian* (1933) All. L.J. 513, 144 I.C. 298, ('33) A.A. 284.

58 *Akbarally v. Mahomedally* (1932) 57 Bom. 551, 34 Bom. L.R. 655, 138 I.C. 810, ('32) A.B. 356.

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219.

Whether mosque a juristic person

In the undermentioned case[59] the Lahore High Court held that a mosque is a juristic person. The question was discussed in the Shahidganj case,[60] and although their Lordships of the Privy Council reserved their opinion on it, the trend of their observations seems to show that the view of the Lahore High Court did not commend itself to them. Their Lordships however held that suits cannot be brought by or against mosques as artificial persons. The Rajasthan High Court has held that a mosque is not a juristic person.[61]

59 *Maula Bux v. Hafizuddin* (1926) 94 I.C. 7, ('26) A.L. 372.

60 *Shahidganj v. Gurdwara Parbandha Committee* (1940) Lah. 493, 67 I.A. 251, ('40) A.PC. 116.

61 *Mahomed Shafluddin v. Chatur Bhuj* (1958) Raj. L.W. 461.

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CHAPTER XII

WAKFS

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220.

Sajjadanashin; Khankhah

A *sajjadanashin* is a head of a *khankhah*, a Mahomedan institution analogous in many respects to a *math* where Hindu religious instruction is given. He is the teacher of the religious doctrine and rules of life, and the manager of the institution and the administrator of its charities, and has, ordinarily speaking, a larger right in the surplus income than a mutawalli.[62] But this does not mean that in every case the whole income from a *khankhah* is at the disposal of the *sajjadanashin*. At certain shrines the members of the founder's family other than the *sajjadanashin* are entitled to share in the surplus offerings which remain after payment of expenses.[63]

These Khankhahs exist in all parts of India and, so far as can be gathered from the works relating to them, have come into existence under the following circumstances: &uot;A dervish or a Sufi of a particular sanctity has settled in some locality; so long as he has not attained sufficient importance, his place of abode is called a *takia* or *astana* according to his position in public estimation. His previous life and teachings attract public notice, disciples gather round him, and a place is constructed for their lodgement and the humble *takia* grows into a Khankhah. After his death his grave becomes a shrine and an object of pilgrimage, not only for his disciples, but for people of distant parts both Hindus and Mahomedans. The process of development indicated here is observable in the very Khankhah which forms the subject of dispute in the present case.&uot;.[64]

The word &uot;*sajjadanashin*&uot; (spiritual superior) is derived from *sajjada*, that is, the carpet used by Mahomedans for prayer, and *nashin*, that is, sitting. The *sajjadanashin* takes precedence on the carpet during prayers. The office of a mutawalli is a secular office; that of a *sajjadanashin* is a spiritual office, and he has certain spiritual functions to perform.[65] All dargahs are not Khankhas but there is nothing uniform or rigid. All Sajjadanashins are not necessarily mutawallis of the properties of the institution. The office of mutawalli may be in another person. A *Sajjadanashin* was said in this case to resemble a Mahant of a Hindu Math. A *sajjadanashin* of a Khankhah enjoys the unique position of being a spiritual preceptor *and* a mutawalli. Differences between a *sajjadanashjn* and a mutawalli were pointed out in *Ikramiul Haq Shah v. Board of Wakfs (Rajasthan)* .[66] The founder is generally the first *sajjadanashin* and after his death the spiritual line is continued by a succession of *sajjadanashins*.[67] In the absence of a direction in the wakfnama the succession to the office of *sajjadanashin* is regulated by custom. One custom is that the &uot;*bhek*&uot; or order *i.e.*, an electoral body consisting of *fakeers* and *murids*, instal a competent person generally a son or nominee of the late *sajjadanashin*.[68] In a case before the Privy Council the &uot;*bhek*&uot; delegated their power to elect a *sajjadanashin* and it was held that the appointment of the *sajjadanashin* made in this manner was valid.[69] If the Court is appointing a *sajjadanashin*, it should take account of the spiritual tradition and appoint if possible a descendant of the founder.[70] As to the importance of nomination by the last *sajjadanashin* see the observations of Agha Haider J., in *Ghulam Mahommad v. Abdul Rashid* .[71] The Lahore High Court[72] has decided that in the absence of directions in the Deed of Trust, or usage, a *sajjadanashin* can nominate his successor.

The status of a *sajjadanashin* is higher than that of a mutawalli. He is the head of the institution and has a right to exercise supervision over the mutawalli's management.[73] But the *sajjadanashin* may be a mutawalli and in that case, with reference to the wakf property he is in no better position than a mutawalli. He has no power to borrow money for the purpose of carrying out the objects of the trust, but he may like a mutawalli borrow money and incur debt, with the sanction of the Court, for the preservation of the wakf property.[74] The Court may remove a *sajjadanashin* for misconduct and when framing a scheme may separate the offices of *sajjadanashin* and mutawalli.[75] A minor cannot be appointed a *sajjadanashin*.[76]

If land purchased by the founder of a *khankhah* has been held by the *sajjadanashin* for several generations it is presumed to be wakf and attached to the *khankhah*.[77] But this presumption is rebuttable and it may be shown that the grant was a personal gift to the *sajjadanashin* even though his descendants made provision out of the income for the upkeep of the *khankhah*.[78] Property given for the upkeep of

buildings and schools connected with a *khankhah* cannot be attached in execution of a personal decree against the *sajjadanashin*.[79]

A provision in a wakfnama for *naubat nawaz* (drum-beaters) attached to a *khankhah* is not invalid.[80]

62 *Vidya Varuthi v. Balusami* (1921) 48 I.A. 302, 312, 44 Mad. 831, 841, 65 I.C 161, ('22) A.PC. 123; *Zooleka Bibi v. Syed Zymul Abedin* (1904) 6 Bom. L.R. 1058.

63 *Muhammad Hamid v. Mian Mahmud* (1923) 50 I.A. 92, 105-106, 4 Lah. 15, 29, 77 I.C. 1009, ('22) A.PC. 384.

64 *Mohiuddin v. Sayiduddin* 20 Cal. 810.

65 *Maule Shah v. Ghane Shah* (1938) 40 Bom. L.R. 1071, 42 CW.N. 1018, 175 I.C. 454, ('38) A.PC. 202; see *Piran v. Abdool Karim* (1891) 19 Cal. 203; *Secretary of State v. Mohiuddin* (1900) 27 Cal. 674; *Syed Husain Ali Shah v. Durgah Committee, Ajmer* ('59) A. Raj. 177.

66 A.I.R. 1973 Raj. 57D.B.

67 *Syed Shah v. Syed Abi* (1932) 11 Pat. 288, 136 I.C. 417, ('32) A.P. 33; *Ghulam Rasul v. Ghulam Qutab-ud-din* ('42) A.L. 142.

68 11 Pat. 288 *supra*; *Ghulam Mahommad v. Abdul Rashid* (1933) 14 Lah. 558, 144 I.C. 636, ('33) A.L. 905; *Ali Shah v. Fateh Mahammad Mutawalli* (1935) 159 I.C. 237, ('35) A.L. 657; *Ismailmiya v. Wahedani* (1912) 36 Bom. 398, 14 I.C. 469.

69 *Maule Shah v. Ghane Shah* (1938) Bom. L.R. 1071, 42 C.W.N. 1018, 175 I.C. 454, ('38) A.PC. 202.

70 *Najihudin Ahmad v. Amir Hasan* (1934) 153 I.C. 557, ('34) A.P 443.

71 (1933) 14 Lah. 558, 144 I.C. 636, ('33) A.L. 905.

72 *Ahmad Yar v. Ghulam Nabi* (1948) Lah. 116, ('49) A.L. 65, ('49) P. Lah. 470.

73 *Sardar Ali v. Gahana Shah* (1933) 142 I.C. 847, ('33) A.L. 444.

74 *Mahabir Prasad Marwari v. Syed Shah Mahomed Yahia* (1936) 15 Pat. 88, 163 I.C. 869, ('36) A.P. 390.

75 11 Pat. 288 *infra*.

76 *Piran v. Abdool Karim* (1891) 19 Cal. 203, 219.

77 *Miran Baksh v. Ghulam Nabi* (1933) 14 Lah. 624, ('33) A.L. 725.

78 *Ahmad Asliraff v. Murtaza Ashraff* (1935) 11 Lah. 93, 154 I.C. 1023, ('35) A.O. 299.

79 *Shah Mohammad v. Mohammad* (1927) 2 Luck. 109, l00 I.C. 241 ('27) A.O. 113.

80 *Syed Shah v. Syed Abi* (1932) 11 Pat. 288, 323, 136 I.C. 417, ('32) A.P. 33.

Members of the founder's family

In the absence of an express provision in the grant or proved custom, members of the family of the founder have no right to share in the surplus offerings; though the *sajjadanashin* may in his discretion make an allowance to indigent members.[81]

81 *Jaffar El Adroos v. Mahommed El Edroos* (1937) 39 Bom. L.R 277. 169 I.C. 232, ('37) A.B. 217.

Alienation by sajjadanashin

The right of a *sajjadanashin* to receive a share of the offerings is a right attached to his office and each successive incumbent of the office is entitled to receive that share as long as he holds the office. An alienation, therefore, of his share in the offerings made by a *sajjadanashin* cannot bind his successors.[82]

But where a *sajjadanashin* has made a grant of land for building purposes for the benefit of the endowment, the grant will be binding on his successors.[83]

82 *Altaf Hussain v. Ali Rasul Ali Khan* (1938) O.W.N. 253, 172 I.C. 985, ('38) A.PC. 71.

83 *Narsingh Das v. Safiullah* ('541 A.A. 773.

Offerings

In a case in respect of the tomb of Khwaja Moinuddin Chisti at Ajmer, the Privy Council held on the facts of the case that both the *sajjadanashin* and *Khadims* (servitors) were entitled to a share in the offerings made at the tomb, but it was held that such offerings as *qabarposhes* (*i.e.*, coverings for the tomb) which were presented for the specific use of the Durgah were the property of the Durgah and must be kept by the trustees.[84]

84 *Altaf Hussain v. Ali Rasul Ali Khan* (1938) O.W.N. 253, 172 I.C. 985, ('38) A.PC. 71.

Manager of a Pallivasal in South India

A *sajjadanashin* can be only of a *durgah* or *khankhah*. The term &uot;*sajjadanashin&uot;* carries with it the meaning of religious superior. The manager of a *Pallivasal* (a holy place of South Indian Muslims) is something higher than a mutawalli but lower than a *sajjadanashin*. He may be described as holding a position analogous to a &uot;swami&uot;.[85]

85 *Syed Shah Abdul Latif v. Mohammad Lebbai* (1958) 2 M.L.J. 199. *Chief Administrator of Auqaf v. Rashid-ud-Daula* P.L.D. 1961 (W.P.) Lah. 993.

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CHAPTER XII

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MISCELLANEOUS

221.

Kazi

The Mahomedan law does not regard the office of Kazi as hereditary.[86] A claim to such a right, though supported by custom, is not one that can be recognised by a Civil Court.[87]

A Kazi may be appointed by the Government[88] or by some internal arrangement among the Mahomedans of each locality.[89]

Kazis Act (12 of 1880)

Under s. 2, it is the State Government that has to appoint a kazi after consulting the principal

Muhammadan residents of such local areas.

In the instant case, the State Government has not exercised the power to appoint a kazi. From the orders of the Wakf Board addressed to the petitioner it is clear that the petitioner was appointed only as a kazi incharge by the Wakf Board itself but he did not acquire any right under those orders to hold the post of kazi. By the impugned order the Wakf Board recognised the right of the respondent to be the Kazi, she being the only legal heir and sole successor to late Kazi and terminated the appointment of the petitioner as Naib Kazi, to which post he was appointed earlier by the Wakf Board until further orders. The petitioner, having been appointed as Naib Kazi until further orders by the Wakf Board, cannot claim to continue the said post as of right and challenge the impugned order of the Board.[90]

The word kazi means a judge and the Privy Council has said that in the British system the place of a kazi was taken by the Civil Courts.[91] It has been generally supposed that the District Judge is the proper person to perform the functions of a Kazi.[92] But in *Burhan Mirdha v. Mt. Khodeja* ,[93] the Calcutta High Court pointed out that the idea is derived from cases which refer to wakf property and particularly power of sanctioning alienation of wakf property,[94] and this is because under the Mahomedan regime the administration of wakf property was in exercise of a power specially conferred on the Chief Kazi.[95]The Court also said that jurisdiction is a question of procedure which is governed not by Mahomedan law but by the Code of Civil Procedure. The Court, therefore, held that a suit by a Mahomedan wife for a declaration that her marriage had been dissolved by a divorce was triable by a Subordinate Judge as the relief was valued at R s. 10 for a declaration of R s. 5 for an injunction.*See* 6 supra, and 334 infra. In a later case,[1] the Calcutta High Court observed that if a Subordinate Judge had jurisdiction to entertain a matter relating to a wakf, any exercise of that jurisdiction was valid.

If a kazi has exercised his office for a long time, everything will be presumed in favour of the legality of the original appointment.[2]

86 *Jamal Walad Ahmed v. Jamal Walad Jallal* (1877) 1 Bom. 633; *Daudshah v. Ismalsha* (1878) 3 Bom. 72; *Baba Kakaji v. Nassaruddin* (1893) 18 Bom. 103; *Mohd. Isak Saheb v. Najaruddin* ('62) A. My s. 253.

87 *Kasamkhan v. Jazi Abdullah* (1926) 50 Bom. 133, 93 I.C 135, ('26) A.B. 153.

88 See the Kazi's Act XII of 1880, and *Sheikh Ummar v. Budan Khan* (1912) 37 Mad. 228, 25 I.C. 898.

89 See (1926) 50 Bom. 133, at p. 146, 93 I.C. 135, ('26) A.B. 153, *supra.*

90 *Mohd. Abbas Ali v. Wakf Board,* A.I.R. 1979 A.P. 116.

91 *Mahomed Ismail v. Ahmed Molla* (1916) 43 I.A. 127, 43 Cal. 1085, 35 I.C. 30.

92 *Mafizuddin v. Rahima Bibi* (1934) 37 C.W.N. 1043, 58 Cal. L.J. 73, 149 I.C. 1028, ('34) A.C 104; *Abdus Salam v. Abdul Aziz* (1944) 48 C.W.N. 465, ('44) A.C. 299; *Mohammad Ali v. Ahmad Ali* (1945) All. 818, 221 I.C. 515, ('45) A.A. 261.

93 (1937) 2 Cal. 79, 41 C.W.N. 314, 65 Cal. L.J. 21, 168 I.C. 639, ('37) AC 189.

94 *Shama Churn v. Abdul Kabeer* (1899) 3 C.W.N. 158; *Nemai Chand v. Golam Hussain* (1910) 37 Cal. 179, 3 I.C. 353; *Fakrurnessa v. District Judge* (1920) 47 Cal. 592, 56 I.C 475; *Abdul Rahman Molla v. Abdul Hossain Molla* (1936) 40 C.W.N. 584.

95 *Atimanessa v. Abdul Sobhan* (1916) 43 Cal. 467, 32 I.C. 21.

1 *Mohammad Abdul Gani v. Mt. Kulsan* (1945) 49 C.W.N. 273, ('45) A.C. 328.

2 *Mahammad Yusuf v. Sayad Ahmed* , (1870) 1 Bom. H.C.R. App. xviii.

CHAPTER XII

WAKFS

MISCELLANEOUS

222.

Takia

A *takia* may be the object of a valid endowment or wakf.

Takia means literally a resting place. Hence, a burial ground is sometimes called a *takia*.[3] The fact that a place is called a *takia* does not prove that it is wakf property.[4] A *takia* may be the only place of assembly in a village and devoid of any religious significance, or it may be the platform in a Muslim graveyard where Prayers are said.[5] A man may take charge of a graveyard and call himself a *takiadar* but that does not show that the land is wakf or that he is the mutawalli.[6] A fakir or holy man may build a hut and take up his residence near the *takia* or prayer platform in the graveyard and impart religious instructions and call the place a *khankhah*. Nevertheless, the *kankhah* is not wakf property. This seems to be what the Lahore High Court meant when it said that &uot;*khankhahs* and *takias* and such like institutions do not come within the strict purview of Mahomedan law&uot;.[7] But a *takia* may become wakf by long use.[8] The fakir may collect numerous disciples at his residence which will then develop into an institution of public importance and be a real *khankhah.* Such *khankhahs* are called *takias*;[9] and may be the object of a valid endowment.[10] In a later case, the Privy Council said: &uot;A *takia* is a place where a *fakir* or dervish (a person who abjures the world and becomes an humble servitor of God) resides before his pious life and teachings attract public notice, and before disciples gather round him, and a place is constructed for their lodgement. A *takia* is recognized by law as a religious institution, and a grant or endowment to it is a valid wakf or public trust for a religious purpose&uot;.[11]

3 Sec *Baqar Khan v. Babu Raghendra Pratap Sahi* (1934) 9 Luck 568, 148 I.C. 433, ('34) A.O. 263; *Mehar Din v. Hakim Ali* (1935) 157 I.C. 561, ('34) A.L. 912; *Chutko v. Gambhir* (1931) 6 Luck. 452, 130 I.C., 117, ('31) A.O. 45.

4 *Shafiq-ud-din v. Mahbub* (1930) 11 Lah. 632, 125 I.C. 893, ('30) A.L. 714.

5 *Jani v. Bishan Singh* ('35) A.L. 698.

6 *Mahomed Abid v. Haji Baksh* (1936) 158 I.C. 916, ('36) A.O. 133.

7 *Ali Shah v. Fateh Mohammad Mutawalli* (1935) 159 I.C. 537, ('35) A.L. 657.

8 6 Luck. 452, *supra*.

9 *SardarAli v. Gehna Shah* (1933) 142 I.C. 847, ('33) A.L. 444.

10 *Hussain Shah v. Gui Muhammad* (1925) 6 Lah. 140, 88 I.C. 816, ('25) A.L. 420.

11 *Maule Shah v. Ghane Shah* (1938) Bom L.R. 1071, 42 C.W.N. 1018, 175 I.C. 454, ('38) A.PC. 202; *Mahomed Bedial v. Shah Shamsuddin* ('48) A.C. 159.

CHAPTER XII

WAKFS

MISCELLANEOUS

223.

Imambara

An imambara is an apartment in a private house or a building set apart like a private chapel for religious purposes. It is intended for the use of the owner and members of his family, though the public may be admitted with the permission of the owner. It may be the object of a valid wakf--178. Such a wakf is a private wakf and not a public wakf nor a trust for the purposes of s. 92 of the Code of Civil Procedure ,[12] but it may be proved that a particular imambara is a public wakf.[13]

12 *Muhammad Yusuf v. Muhammad Shaft* (1935) All. LJ. 40, 153 I.C. 344, ('34) A.A. 1013; *Delrus Banoo v. Kazee Abdoor Ruhman* (1875) 15 Beng. L.R. 167, 53 W.R. 453.

13 See *Kaur Sen v. Mamman* (1895) 17 All. 87. *Mst. Mundaria v. Shyam Sundar* ('63) A.P. 98.

Mulla: Mahomedan law, Updated 20th edition/CHAPTER XII WAKFS/MISCELLANEOUS/224. Grant of land revenue

CHAPTER XII

WAKFS

MISCELLANEOUS

224.

Grant of land revenue

A grant of land revenue for the remuneration of a village Mulla does not constitute a wakf or endowment. The land is partible and heritable and if the holders do not perform the duties of the office, Government enforces its objects by levying full assessment.[14]

14 *Maktumsab v. Dadabhai* (1934) 36 Bom. L.R. 1098, 154 I.C. 684, ('34) A.B. 495; *Jdafar Mohi-uddin Sahib v. Aji Mohi-ud-din Sahib* (1864) 2 Mad. H.C. 19.

Mulla: Mahomedan law, Updated 20th edition/CHAPTER XII WAKFS/MISCELLANEOUS/225. Enactments relating to administration of trusts, which apply to wakfs

CHAPTER XII

WAKFS

MISCELLANEOUS

225.

Enactments relating to administration of trusts, which apply to wakfs also

The following is the list of enactments which provide for the protection, enforcement and administration of public endowments:--

(i) Official Trustees Act II of 1913.
(ii) Charitable Endowments Act VI of 1890, s s. 2, 3, 4, 5, 6 and 8.

(iii) Religious Endowments Act XX of 1863, s. 14.
(iv) The Code of Civil Procedure, 1908, s s. 92 - 93.

If a suit is to obtain one or more of the reliefs mentioned in s. 92(1) of the Code in respect of a wakf for a "public purpose," it must be brought with the sanction of the Advocate-General as provided by that section, but not if the wakf is not for a "public purpose." A suit in respect of a private imambara is not a suit in respect of a wakf for a "public purpose".[15] Nor is a suit in respect of a wakf where the effect of the deed of wakf is to give the property in substance to the settlor's family.[16] But a wakf for a mosque or a *khankhah* is a wakf for a public purpose, and a suit in respect of it must be brought in accordance with the provisions of that section.[17]

A suit was brought by the President of the Mosque management committee for possession of certain properties. The wakfnama was made in favour of the mosque on April, 23, 1948. The Wakif was first mutawalli till his death in May 1951 and had reserved a life interest till his death. After his death, the income was to be applied for the benefit of the mosque. The wakf was challenged. Following the views of Abu Yusuf, the reservation of life interest by the wakif was upheld relying on the Mussalman Wakf Validating Act, 1913. It was held that there is no difference between a wakf for a mosque and one for other charitable purposes. It was also held that a suit by a trustee against a stranger does not require sanction of the Advocate General under s. 92, C.P.C.[18]

(v) Charitable and Religious Trusts Act XIV of 1920.*Gujarat and Maharashtra.*--
(vi) The Bombay Public Trust Act, 1950 (Bom. Act XXIX of 1950).

For the statutes relating to the control of wakfs, *see* 212, and 212-A, above.

The provisions of the Mussulman Wakf Act, 1923, and those of the Charitable and Religious Trusts Act, 1920, overlap. This difficulty has been met in the Bengal Wakf Act, 1934, and the U.P. Muslim Wakfs Act, 1936, by excluding the provisions of the Charitable and Religious Trusts Act, 1920.

Prior to this local legislation, however, it was held that if the wakf is substantially for public purposes of a religious or charitable nature, it falls within the scope of the Act of 1920 and a party interested might either apply under that Act [19]or file a suit under s. 92 of the Code of Civil Procedure.[20]But if the wakf is a mixed wakf, i.e. a wakf partly for public purposes and partly for private purposes, an application must be made under the Mussulman Wakf Act, 1923.[21]

15 *Asghar Ali v. Delroos Banoo* (1877) 3 Cal. 324.

16 *Muhammad Shafiq v. Muhammad* (1929) 51 All. 30, 111 I.C. 93. ('28) A.A. 660.

17 *Syed Shah v. Syed Abi* (1932) 11 Pat. 288, 344-345, 136 I.C. 417, ('32) A.P. 33.

18 *Amir Bi v. Nalasandra Mosque* ('69) A. My s. 103.

19 *Syed Ali v. Bibi Akhtari* (1931) 10 Pat. 506, 134 I.C. 417, ('31) A.P. 354.

20 *Najihuddin Ahmad v. Amir Hasan* (1934) 153 I.C. 557. ('34) A.P. 443.

21 *Shabbir Husain v. Asuq Husain* (1929) 4 Luck. 429, 117 I.C. 739. ('29) A.O. 225; *Ali Bakhtiyar v. Khandkar Altaf Husain* (1933) 60 Cal. 790, 145 I.C. 638, ('33) A.C. 581; *Emda Ali Chaudhari v. Tubulla* ('37) A.C. 313; *Yusufally v. Yusufally* (1952) 54 Bom. L.R. 702, ('53) A.B.92.

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CHAPTER XIII

PRE-EMPTION

226.

Pre-emption

The right of *shufaa* or pre-emption is a right which the owner of an immovable property possesses to acquire by purchase another immovable property which had been sold to another person.

Baillie, 475.

The law of pre-emption has its origin in the saying of the Prophet (PBTJIH). A number of traditions are reported in *Hedaya* (p. 548). The right of *shufaa* appertains--(i) to a partner in the property of land sold, (ii) to a partner in the immunities and appendages of the land (such as the right to water, and to road, (iii) to a neighbour.

The right of *shufaa* in a partner, is founded on a precept of the Prophet, who has said, &uot;the right of *shufaa* holds in a partner who has not divided off and taken separately his share&uot;.

The establishment of it in a neighbour is also founded on a saying of the Prophet--&uot;the neighbour of a house has a superior right to that house; and the neighbour of lands has superior right to the those lands; and if he is absent, the seller must wait his return; provided however, that they both participate in the same road&uot;--and also &uot;a neighbour has a right, superior to that of a stranger, in the land-adjacent to his own.&uot;

Shafi school is of the opinion that a neighbour is not a Shafee; because the Prophet has said, &uot;*shufaa* relates to a thing held in joint property, and which has not been divided off&uot;-- when therefore, the property, has undergone a division, and the boundary of each partner is particularly discriminated and a separate road assigned to each, the right of *shufaa* can no longer exist. Besides, the right of *shufaa* is repugnant to analogy, as it involves the taking possession of another's property contrary to his inclination: whence it must be confined solely to those to whom it is particularly granted by the law (*Hedaya*). Now, it is granted particularly to a partner; but a neighbour cannot be considered as such, for the intention of the law, in granting to it a partner, is merely to prevent the inconveniences arising from a division; since if the partner were not to get that share which is the subject of the claim of *shufaa*, a new purchaser might insist upon a division, and thereby occasion to him a great deal of unnecessary vexation:--but as this argument does not hold good on behalf of a neighbour, he therefore, is not entitled to the privilege of *shufaa*.

The present[1] editor is of the view that since the right of *shufaa* to the neighbour is based on the precept of the Prophet, it is a sufficient ground for establishing the right of *shufaa* in a neighbour.

Section 4 of the Partition Act is confined not only to joint Hindu families or other families adopting Hindu notions of jointness, but also applies to Muslims who are undivided. The policy of the law. behind pre-emption is the same as that of s. 4 of the Partition Act, namely, (i) to prevent the introduction of a stranger into a residential house and (ii) to bring the property under one owner eventually.[2]

A married daughter enforcing a right under s. 4 of the Partition Act cannot be regarded as a member of the family.[3]

A *ghardamad* can be a member of the family.[4]

There was some doubt formerly as to whether pre-emption is a mere personal right or an incident of property. It was held in Calcutta[5] and Bombay,[6] that the right of preemption is a right of *re-purchase* from the buyer. In Allahabad,[7] it was held that it is *an incident of property*. The Supreme Court had now decided that the right of pre-emption is *an incident annexed to the property*[8]; but although it is essentially a right *in rem*, its exercise, from the time it arises upto the time of the decree, is restricted as a personal right, which is neither heritable non-transferable.[9]

The Supreme Court has also held that even if the law pre-emption creates a right which attaches to property, it creates a restriction on the right guaranteed under Art 19(l)(f) of the Constitution to acquire, hold and dispose of property. Accordingly, it requires to be considered in each case whether the right of pre-emption is reasonable and in the interests of the general public, and is thereby saved by Art. 19(5).[10]

On the constitutional validity of the right of pre-emption of different kinds, *see* 231.

Pre-emption is a right of substitution and not of repurchase. Thus, the right of preemptor cannot be defeated by subsequently transferring the property in favour of another person.[11]

In *Bishan Singh v. Khazan Singh* ,[12] the Supreme Court held that the right of preemption is a right of substitution but not of repurchase. The pre-emptor takes the entire bargain and steps into the shoes of the original vendee.

Hence, where a suit was filed on 2nd January, 1958 to pre-empt a sale dated 2nd January, the date on which the subsequent transferee was impleaded as a party, which was after the expiry of limitation, is not material and the contention that the suit was barred by limitation, has no force.[13]

The right of pre-emption is a very weak right and can be defeated by a defendant by all lawful means. In order to claim a right of pre-emption, it is necessary, first of all, for the plaintiffs to allege and prove that they were owners of the property on the basis of which they were claiming the right of pre-emption. Strangers have no right to join as co-plaintiffs.[14]

1 The revising editor of the 20th edition.

2 *Yacub Khan v. Mst Zaibunissa* (1974) 40 C.L.T. 202.

3 *Bai Fatma v. Gulam Nabi* ('36) A. Bom. 197.

4 *Ahmad Khan v. Shaik Naijar* (1971) I C W R 448.

5 *Kudratulla v. Mahini Mohan* (1869) 4 Beng. L.R. 134.

6 *Humedmiya v. Benjamin* (1929) 53 Bom. 525, 532-533, 118 I.C. 543, ('29) A.B. 206.

7 *Gobind Dayal v. Inayatullah* (1885) 7 All. 775; *Abdul Aziz v. Khairunnisa* (1949) Nag. 740.

8 *Audh Bihari Singh v. Gajadhar* ('54) A.S.C. 417, [1955] 1 S.C.R 70. See also *Bishan Singh v. Khazan Singh* ('58) A.S.C. 838; *Sheo Kumar v. Smt Sudama Devi* ('62) A.P. 125. *Ram Baran Prasad v. Ram Mohit* ('67) A.S.C. 744 (where a pre-emption clause in a contract was held to be binding on assignees or successors-in- interest.)

9 *Mohd Ismail v. Abdul Rashid* (1956) 1 All. 143(F.B.) .

10 *Bhau Ram v. Baij Nath* ('62) A.S.C. 1476; *Sant Ram v. Labh Singh* ('65) A.S.C. 314.

11 (1910) I.L.R. 32 All. 45 and A.I.R. 1924 All. 806, Relied on.

12 AIR 1958 SC 838.

13 AI.R. 1914 Oudh 216; AI.R. 1914 L.H. 402 and AIR. 1939 All. 158, Referred to *Pyare Mohan v. Rameshwar* . A.I.R. 1980 Raj. 116.

14 *Pyare Mohan v. Rameshwar* A.I.R. 1980 Raj. 116.

Mulla: Mahomedan law, Updated 20th edition/CHAPTER XIII PRE-EMPTION/227. Law of pre-emption not applied in the Madras Presidency

CHAPTER XIII

PRE-EMPTION

227.

Law of pre-emption not applied in the Madras Presidency

The Mahomedan law of pre-emption is applied by the Courts of India to Mahomedans as a matter of &uot;justice, equity and good conscience,&uot; except in the Madras Presidency where the right of pre-emption is not recognized at all [unless by local custom as in Malabar[15]].

The reason given by the Madras High Court in the earliest case on the subject for refusing to recognize the rights is that the law of pre-emption places a restriction upon the liberty to transfer property, and is, therefore opposed to &uot;justice, equity and good conscience.&uot; The right of pre-emption in that case was claimed on the ground of vicinage.[16]

See notes to 5 above.

15 *Krishna Menon v. Kesavan* (1897) 20 Mad. 305.

16 *Ibrahim v. Muni Mir Udin* (1870) 6 M.H.C. 26.

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CHAPTER XIII

PRE-EMPTION

228.

Special Acts

The law of pre-emption in some States is regulated by Special Act s, e.g., in the Punjab by the Punjab Pre-emption Act I of 1913,[17]which has since 1924 been extended with modifications to the North-West Frontier Province. It is regulated in Oudh by the Oudh Laws Act XVIII of 1876, and in Agra by the Agra Pre-emption Act XI of 1922.[18]These Act s apply to Mahomedans as well as non-Mahomedans, with the result that the rules of the Mahomedan law of pre-emption do not apply to Mahomedans in those places except on the footing of local custom.[19] By s. 3 of the Agra Act, however, there is a saving of the provisions of Mahomedan Law in certain cases where the vendor and the pre-emptor are both Mahomedans.

17 See *Bhau Ram v. Baij Nath* ('62) A.S.C. 1476 where the provision for the right of pre-emption based on vicinage was held unconstitutional.

18 See also: The Bhopal State Pre-emption Act, 1934; the Rewa State Pre-emption Act, 1946; The Berar Land Revenue Code (1928) Chap. XIV, s. 174.

19 Wilson's Digest of Anglo-Muhammadan Law, s. 353.

Mulla: Mahomedan law, Updated 20th edition/CHAPTER XIII PRE-EMPTION/229. Pre-emption among Hindus

CHAPTER XIII

PRE-EMPTION

229.

Pre-emption among Hindus

The right of pre-emption is recognized by *custom* among Hindus who are either natives of, or are domiciled in[20] Bihar,[21] Sylhet[22] and certain parts of Gujarat, such as Surat, Broach and Godhra,[23] and it is governed by the rules of the Mahomedan law of pre-emption except in so far as such rules are modified by such custom.[24]

Where the existence of any such custom is generally known and judicially recognized, it is not necessary to assert or prove it.[25]

Under the Mahomedan law, non-Mahomedans are as much entitled to exercise the right of pre-emption as Mahomedans; Baillie, 447. Therefore, during the Mahomedan rule in India, claims for pre-emption were entertained by the Courts of the country, whether they were preferred by or against Hindus. In this way, the Mahomedan law of pre-emption came to the customary law of Behar and Gujarat. The law of pre-emption as applied to Hindus in those places was the Hanafi law, the Mahomedan sovereigns of India being Sunnis of the Hanafi sect, and the same law is not applied to them in cases of preemption. But it is a necessary condition of the application of the Mahomedan law of preemption to Hindus in Behar and Gujarat that they should be either natives or, or domiciled in, those places. It is not enough that the party is a Hindu and owns immovable property in those places. Thus, in a Calcutta case the right of a pre-emption was denied to a Hindu who was a co-sharer of certain immovable property in Behar, but who was neither a native of, nor domiciled in, that place.[26]*See* notes to 230 below. As to summary of the law in Bombay Presidency, see the under-mentioned case.[27]

20 *Parsashth Nath v. Dhanai* (1905) 32 Cal. 988.

21 *Fakir Rawot v. Emambaksh* (1863) Beng. L.R. 35(Sup. Vol.) ; *Jadu Lai v. Janki Koer* (1912) 39 Cal. 915, 39 I.A. 101, 15 I.C. 659; *Ramautar Singh v. Brijkishore* ('33) A.P. 659, 149 I.C. 931; *Rajakishore Kuer v. Mohammad Qaiyum* (1942) 198 I.C. 890, ('42) A.P. 366; *Sheo Kumar v. Smt Sudama Devi* ('62) A.P. 125.

22 *Geerischandra Bhattacharaya v. Rabindranath Das* (1934) 61 Cal. 694, 156 I.C. 512, ('35) A.C. 17.

23 *Gordhandas v. Prankor* (1869) 6 B.H.C.A.C. 263 read with *Dahyabhai v. Chunilal* (1914) 38 Bom. 183, 185-188, 22 I.C. 289; *Jagjivan v. Kalidas* (1921) 45 Bom. 604, 60 I.C. 901, ('21) A.B. 188 [Surat - as to houses only, and not agricultural lands]; *Gokuldas v. Partab* (1916) 18 Bom. L.R. 693, 35 I.C. 871 [Godhra]; *Mahomed v. Narayan* (1916) 40 Bom. 358, 35 I.C 933 [not in Khandesh]; *Sitaram v. Sayad Sirajul* (1917) 41 Bom. 636, 649, 42 I.C. 32 [not in Kolaba]; *Motilal v. Harilal* (1920) 44 Bom. 696, 57 I.C. 590 [Ahmedabad]; *Ram Chand v. Goswami* (1923) 45 All. 501, 74 I.C. 379, ('23) A.A. 513 [Benares -- in respect of houses only, not agricultural lands].

24 *Chakauri v. Sindari* (1906) 28 All. 590; *Jai Kuar v. Heera Lal* (1874) 7 N.W.P. I; *Jagannath v. Inderpal* (1935) All. LJ. 108, 153 I.C 172, ('35) A.A. 236. *Narayan v. Karthiayani* ('62) A. Ker. 122. *Sheo Kumar v. Smt Sudama Devi supra* .

25 *Jadu Lal v. Janki Koer* (1908) 35 Cal. 575; 61 Cal. 694, *supra Audh Bihari Singh v. Gajadhar* ('54) A.S.C. 417.

26 *Parsashth Nath v. Dhanai* (1905) 32 Cal. 988.

27 *Hamedmiya v. Benjamin* (1929) 53 Bom. 525, 540- 542, 118 I.C. 548, ('29) A.B. 206.

CHAPTER XIII

PRE-EMPTION

230.

Pre-emption by contract

(1) Rights of pre-emption may be created by contract between the sharers in a village.[28]
(2) A Mahomedan vendor may agree with a Hindu purchaser that the Mahomedan law of pre-emption applying between the vendor and his co-sharer also a Mahomedan, should be applicable to the purchaser. Where such contract is entered into, and the vendor informs his co-sharer about it, and the co-sharer makes the &uot;demands&uot; as required by law (236), he is entitled to pre-emption against the purchaser, though the purchaser may be a Hindu.[29]

Introduction of the law of pre-emption into India

In *Digambar Singh v. Ahmad* ,[30] their Lordships of the Privy Council said:

> &uot;Pre-emption in village communities in British India had its origin in the Mahomedan law as to pre-emption and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of pre-emption grew up and were adopted among village communities. In some cases the sharers in a village adopted or followed the rules of the Mahomedan law of pre-emption, and in such cases the custom of the village follows the rules of the Mahomedan law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Mahomedan law of pre-emption and is peculiar to the village in its provision and its incidents. A custom of pre-emption was doubtless in all cases the result of agreement amongst the shareholders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Right of pre-emption have in some provinces been given by Act s of the Indian Legislature. Rights of pre-emption have also been created by contract between the sharers in a village. But in all cases the object is, as far as possible, to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption, when they exist, are valuable rights, and when they depend upon a custom or upon a contract, as the case may be, must, if disputed be proved.&uot;

28 *Digambar Singh v. Ahmad* (1915) 37 All. 129, 141, 42 I.A. 10, 18, 28 I.C. 24.

29 *Sitaram v. Syad Sirajul* (1917) 41 Bom. 636, 650-651, 42 I.C. 32.

30 (1915) 37 All. 129. 140-141, 42 I.A. 10, 18, 28 I.C. 34.

CHAPTER XIII

PRE-EMPTION

231.

Who may claim pre-emption

The following three classes of persons and no others, are entitled to claim pre-emption, namely:--

(1) a co-sharer in the property[31] [*shafi-i-sharik*];

A *mukarraridar* (lessee in perpetuity) holding under a co-sharer has no right to preempt as against another co-sharer[32];

(2) a participator in immunities and appendages, such as a right of way or a right to discharge water[33] [*shafi-i-khalit*]; and
(3) owners of adjoining immovable property[34] [*shafi-i-jar*], but *not* their tenants,[35] nor persons in possession of such property without any lawful title[36] [Baillie, 481]. A wakif or mutawalli is not entitled to pre-empt, as the wakf property does not vest in him.[37]

The first class excludes the second, and the second excludes the third. But when there are two or more pre-emptors belonging to the same class, they are entitled to equal share of the property in respect of which the right is claimed [Baillie, 500].

Exception.--The right of pre-emption on the third ground, viz., that of vicinage does not extend to estates of large magnitude, such as villages and zamindaris, but is confined to houses, gardens, and small parcels of land.[38] The right, however, may be claimed by a *co-sharer*.[39]

Constitutional validity of pre-emption.--It has been held by the High Courts of Rajasthan, Madhya Bharat and Hyderabad that pre-emption on the ground of *vicinage* (231(3) above) is void after 26th January 1950, as it imposes unreasonable restrictions on the rights guaranteed by Art. 19(l)(f) of the Constitution, but pre-emption as between co-sharers (*shafi-i-shrink*) or owners of dominant and servient tenements (*shafi-i-khalit*) is saved by Art. 19(5) of the Constitution.[40]

In *Mahfooz Ali Khan v. Mohammed Ahsan* and others,[41] after stating that the Mahomedan law of pre-emption would be unconstitutional if it violated fundamental rights to property, it was stated that the law entitling a *shafi-i-khalit* to pre-empt sale of property is a customary law and not a personal law of the Muslims and is unconstitutional under Art. 19(1)(f) of the constitution.[42]

Muslim Law is also an existing law and can be declared void if it is violative of Art. 19(1)(f). Babu Ram Verma's opinion to the contrary in his *Mahomedan Law in India and Pakistan* was rejected. Article 13(3)(a) includes &uot;custom or usage having in the territory of India the force of law&uot; and therefore, the customary law of pre-emption is law within the meaning of law in Art. 13. Reference of law of pre-emption as 'existing law' is not very apposite as that expression is specially defined in Art. 366(10) and that definition does not apply. The observation of the learned judge -- differently to 'existing law!'

&uot;The very fact that the Muslim law of pre-emption was applied in certain parts of the country to owners of property irrespective of their religious permission shows that it was not applied as the personal law to the Muslims but as a customary law of that local area.&uot;

It was further held in Hyderabad that where the right arose before the commencement of the Constitution but was not exercised until after the commencement, it could not be enforced.[43] Although the Bombay, Allahabad and Patna High Courts took a different view and upheld the constitutional validity of pre-emption by all the three clauses of persons mentioned above,[44] the Supreme Court has now approved the views of the other High Courts. It has held a statutory[45] or a customary[46] right or preemption based on vicinage to be unconstitutional but has upheld the validity of such a right based on co-ownership and on certain appendages, such as a common staircase or a common entrance.[47]

(a) *A*, who owns a piece of land, grants a building lease of the land to *B*. *B* builds a house on the land, and sells it to *C*. *A* is not entitled to pre-emption of the house, though the land on which it is built belongs to him, for he is not a co-sharer, nor a participator in the appendages of the house, nor an owner of adjoining property.[48]
(b) *A* owns a house which he sells to *B. M* owns a house towards the north of *A*'s house,

and is entitled to a right of way through that house. *N* owns a house towards the south of *A*'s house, separated from *A*'s house by a party wall, and having a right of support from that wall. Both *M* and *N* claim pre-emption of the house sold to *B*. Here *M* is a participator in the appendages, while *N* is merely a neighbour, for the right of collateral support is not an appendage of property. *M* is therefore entitled to pre-emption in preference to *N*.[49] It is immaterial that *M*'s right of way has not been perfected by prescription under the Easements Act. In such a matter the rules of Mahomedan law are to be applied, and that law does not prescribe any period which would give a person the right to enjoy an immunity, such as a right of way.[50]This view has been doubted in a subsequent case of the same High Court and it has been observed that the right of way should be a right which has accrued under the Easements Act .[51]

Note.--In the above illustration, the house owned by *M* is a dominant heritage, and the preempted house is a servient heritage, for *M* has a right of way through it. But *M* would not the less be a "participator in the appendages," if the pre-empted property was the dominant heritage and his property was the servient heritage;[52] and *M* would still be a "participator," if his house and the preempted house were both dominant tenements having a right of easement against a third property.[53]

(c) In *Jagdish Saran v. Bijraj Kishore,* [54] following the Supreme Court in *Bhauram v. Baijnath Singh* ,[55] it was held that the right to discharge water from roof through a common-spout was an appendage which could not exist in view of Art. 19(l)(f) of the Constitution. Similarly, the right to rest the beams on the defendant's wall constituted the plaintiff a *Shafi-i-jar* and not *Shafi-i-sharik*

Hedaya, 548-550; Baillie, 481, 484, 500.

(d) The custom of pre-emption is void under Art. 13 of the Constitution so far as it gives a right of pre-emption to a *Shafi-i-khalit* who is merely the owner of an easementary right in the property sought to be pre-empted.[56]

Right of pre-emption arises from ownership

The right of pre-emption cannot be resisted on the ground that the pre-emptor was not in possession of his own property at the date of the suit. It is *ownership*, and not possession, that gives rise to the right.[57] Therefore a mukarraridar under a co-sharer or a permanent tenant has no right or pre-emption,[58] while a birtdar who holds a rent-free grant has the right.[59]

It is a well settled rule of Muslim law that a right of pre-emption is conferred primarily on the co-sharer; secondly, on the persons who have easementary rights and thirdly, upon the adjoining owners of the immovable property. The provision specifically excludes the right of pre-emption of the tenants of adjoining owners. In the instant case, the plaintiff was a tenant of his wife who was a mortgagee of the suit property from the first defendant whereas the second defendant being the adjoining owner has got the right of pre-emption. The agreement of sale executed by the first defendant in favour of the plaintiff cannot defeat the very right of pre-emption of the second defendant, and therefore, the sale agreement of plaintiff cannot be enforced.[60]

Discussing the constitutionality of the law of pre-emption, it was said that the right of pre-emption on the ground of vicinage was unconstitutional and void because a mere right to easement is also not enough. However, a sharing in appendages, without which the property cannot be enjoyed, made the claim constitutional as it interfered with the pre-emptors right to hold, acquire and dispose of property and thus came under Article 19(1)(f). Such a claim was held valid.[61]

In *Atma Prakash v. State of Haryana* ,[62] the Apex Court held that claim of pre-emption on the ground of consanguinity is ultra vires the Constitution. While considering the constitutionality of s. 15(1)(c) of the Punjab Pre-emption Act, 1923 (as amended in 1960) which provided the right of pre-emption to the co-sharer or kinsfolk of a vendor, the Supreme Court held that the claim of pre-emption as the ground of consanguinity is a relic of feudal past and is totally irrelevant with the constitutional scheme. The Court further observed that the reason which justified pre-emption in the past, namely, the preservation of integrity of rural society, family unity and the agnatic theory of succession are totally irrelevant. The claim of possession by way of pre-emption on the ground that claimant had superior rights being father's brother's son of the owner, cannot be sustained.

Here again in *Krishna v. State of Haryana* ,[63] the Constitutional validity of s. 15(1)(b) of the Punjab Pre-emption Act, 1923 was challenged before the Court. Here, the Supreme Court held that the right of pre-emption to co-sharers (under this sub clause) is valid and is not violative of Arts. 14, 15 and 16 of the Constitution.

With the repeal of Article 19(1)(f) the position has altered and the application of these older cases must be carefully considered.[64]

A right of pre-emption imposes a restriction on the right of both vendor and vendee to acquire property and was, therefore, hit by Art. 19(1) of the Constitution of India . However, sub-clause (5) of the article permits reasonable restrictions. After considering several authorities the court held that the right of pre-emption by a servient tenement holder to pre-empt dominant tenement is not protected by sub-clause (5).

In *A Razzafue Sajansaheb v. Ibrahim Haji Mohammed Hussain* ,[65] the Apex Court has reiterated that pre-emption on the ground of vicinage is void and unconstitutional.

31 *Jadu Lal v. Janki Koer* (1912) 39 Cal. 915, 39 I.A. 101, 15 I.C. 659; *Syed Ebrahim v. Syed Khan* (1926 4 Rang. 13, 95 I.C. 83, ('23) A.R. 79 (co-heirs).

32 *Mussammat Bibi Salch v. Haji Amiruddin* (1929) 8 Pat. 251, 117 I.C. 865, ('26) A.P. 214.

33 *Karim v. Priyo Lal* (1905) 28 All. 127; *Shivshankar v. Laxman* (1943) 45 Bom. L.R. 78, ('43) A.B. 83.

34 *Aziz Ahmad v. Nazir Ahmad* (1928) 50 All. 257, 103 I.C. 897, ('27) A.A. 504; *Abdul Shakur v. Abdul Ghafur* (1910) 7 All. L.R. 641, 6 I.C. 358.

35 *Gooman Sing v. Tripool Sing* (1867) 8 W.R. 437.

36 *Beharee Ram v. Shoobhudra* (1868) 9 W.R. 455.

37 *Jivraj Kunwar v. Irfan Ali* ('52) A.A. 686.

38 *Mahomed Hossein v. Mohsin Ali* (1870) 6 B.L.R. 41, 50; *Abdul Rahim v. Kharag Singh* (1892) 15 All. 104; *Munno Lai v. Hajira Jan* (1910) 33 All. 28, 7 I.C. 404; *Imambakhsh Shah v. Muhammad Khan* (1954) Kar. 374, 223 I.C. 634, ('46) AS. 55; *Mahmood Hasan v. Bhikhari Lal* ('53) A.A. 705.

39 *Sitaram v. Sayad Sirajul* (1917) 41 Bom. 636, 652-653, 42 I.C. 32; *Jadu Lai v. Janki Koer* (1912) 39 Cal. 915, 39 I.A. 101, 15 I.C. 659 [Mahal]; *Said-ud-din v. Latif-un-nissa* (1922) 44 All. 114, 64 I.C. 456, ('22) A.A. 391 [Zemindari]; *Ladhi Bibi v. Masaddar Ali* ('49) A. Ass. 81.

40 *Punch Guja v. Amar Singh* ('54) A. Raj. 100(F.B.) *Shankerlal v. Poonamchand* ('54) A. Raj. 231; *Babulal v. Gowardhandas* ('54) A. Madh. Bh. 1(F.B.) ; *Moti Bai v. Kandkari Chanayya* ('54) A. Hyd. 161; *Mahfooz Ali Khan v. Mohammed Ahsan* A.I.R 1980 All. 5.

41 AI.R. 1980 All. 5.

42 *Mom Ram v. Baij Nath* (362) A. S.C. 1476.

43 *Rangnath v. Babu Rao* ('56) A. Hyd. 120.

44 *Bhimrao v. Patilbua* ('60) A.B. 552. *Sant Ram v. Labh Singh* ('62) A. All. 199; *Sheo Kumarw v. Smt Sudamc Devi*

('62) A.P. 125; *Nathuni Ram v. Gopinath* ('62) A.P. 226.

45 *Bhau Ram v. Bhij Nath* ('62) A.S.C. 1476; See also *Sawanath v. Faqir Chand* ('65) A. J&K 62.

46 *Sant Ram v. Labh Singh* ('65) A.S.C. 314. See also *Saliman Bibi v. Hafiz Mohd* ('64) A. All. 372.

47 *Bhau Ram v. Baij Nath* ('62) A.S.C. 1476. See also *Sewanath v. Fakir Chand* ('65) A. J&K 62.

48 *Pershadi Lal v. Irshad Ali* (1870) 2 N.W.P. 100.

49 See *Ranchoddas v. Jugaldas* (1899) 24 Bom. 114: *Karim v. Priyo Lal* (1905) 28 All. 127.

50 *Baldeo v. Badri Nath* (1909) 31 All. 519. 2 I.C. 458.

51 *Abdul Rahman v. Mohamed Ismail* (1947) All. LJ. 282, 227 I.C. 203, ('47) A.A. 85.

52 *Chand Khan v. Naimal Khan* (1869) 3 B.L.R.A.C. 296

53 *Mahatab Singh v. Ramtahal* (1868) 6 Beng. L.R. at p. 43.

54 ('72) A. All. 313.

55 1962 A.S.C. 1476.

56 *Mahboob Hasan v. Ram Bharosey* ('66) A.A 271.

57 *Sakina Bibi v. Amiran* (1888) 10 All. 472.

58 *Mt. Bibi Solcha v. Haji Amiruddin* (1929) 8 Pat. 251, 117, I.C. 865, ('79) A.P. 214; *Dashrathmal Chaganmal v. Bai Dhondubai* (1941) Bom. 460, 43 Bom. L.R 581, ('41) A.B. 262.

59 *Chariter v. Bhagwati* (1934) 152, I.C. 983, ('34) A.P. 596.

60 *Abdulaziz Mohammad Iasf Kothiwala v. Ismailbeg Kashimbeg Miraz,* AIR 2004 Kan 211.

61 *Rajendra Kumar v. Panneshwardas Mittal* A.I.R. 1981 All. 391.

62 (1986) 2 S.C.C. 249.

63 A.I.R. 1994 SC 2536.

64 *Phulchand v. Lata Neemchand* , A.I.R. 1978, All. 539.

65 (1998) 8 SCC 83.

Full ownership in land pre-empted

There must be also full ownership in the land pre-empted, and therefore the right of pre-emption does not arise on the sale of the leasehold interest in land.[66] If no right preemption can be claimed with respect to leasehold land, such a right cannot be claimed in respect of the house which stands on that land.[67]

66 *Baboo Ram Golam Singh v. Nursing Sahoy* (1876) 25 W.R. 43, (relied on in *Dashrathmal Chaganmal v. Bai Dhondubai*) *supra*; *Audh Bihari Lal v. Gajadhar* (1955) 1 S.C.R. 70, ('54) A.S.C. 417; *Rameshwar Lal Marwari v. Pandit Ramdeo Jha* ('57) A.P. 695.

67 *Nathuni Ram v. Gopinath* ('62) A.P. 226.

Pre-emptors of same class

When pre-emption is claimed by two or more persons on the, ground of participation in a right of way, all the pre-emptors have equal rights, although one of them may be a contiguous neighbour.[68] The reason is that the Mahomedan law does not recognize degrees of nearness in the same class or

pre-emptors.[69] But nearness may be recognized by custom.[70] The rule of the law of pre-emption which gives preference to a partner in the house over a partner in the mansion, and to a partner in the house over a partner in the party wall, even when they are co-sharers belonging to the same class has been held to be reasonable and therefore not hit by Art. 14 or Art. 19 of the Constitution.[71]

68 *Karim Baksh v. Chuda Bakhsh* (1894) 16 All. 247. See also *Bachan Singh v. Bijai Singh* (1926) 48 All. 221. 90 I.C. 238, ('26) A.A. 180.

69 *Said-ud-din v. Latif-un-uissa* (1922) 44 All. 114, 116-117, 64 I.C. 456, ('22) A.A. 391; *Nageshar v. Ram Harakh* (1924) 46 All. 370, 79 I.C. 417, ('24) A.A. 541; *Imambakhsh Shah v. Muhammadali Khan* (1945) Kar. 374, 223 I.C. 643, ('46) A.S. 55.

70 *Dhanraj v. Rameshwar* (1923) 46 All. 170, 78 I.C. 904, ('24) A.A. 227.

71 *Jagan Nath v. Radhey Shyam* : ('60) A. Raj. 75.

Vendee in the category of pre-emptors

The same rule applies if the vendee is himself in the category of pre-emptors. The property is in that case equally divided between the vendee and the pre-emptor.[72]

72 *Ramautar Singh v. Brijkishore* ('33) A.P. 653, 149 I.C. 931.

Tree with overhanging branches

The fact that the branches of a tree project over the land of a neighbour, does not give the owner of the tree any right as a *shafi-i-khalit* on a sale of that land.[73]

73 *Aziz Ahmad v. Nazir Ahmad* (1928) 50 All. 257, 103 I.C. 897, ('27) A.A. 504.

Right to draw water from water-course

Where the owner of lands have the right to draw water from a Government water course, they cannot claim the right of pre-emption, as *Shaft-i-Khalit*. This does not make them co-sharers in appendages or give them easement rights over the neighbour's land.

Easement of light and air

The Rajasthan High Court has held that the right of pre-emption as *Shaft-i-Khalit* cannot be claimed on the basis of the right to light and air; and that such right does not extend to easement other than a right of way and water.[74]

74 *Ladu Ram v. Kalyan Sahai* ('63) A. Raj. 195.

Villages and zemindaris

The reason why the right of pre-emption cannot be claimed when the contiguous estates are of large

magnitude is that the law of pre-emption &uot;was intended to prevent vexation to holders of *small* plots of land who might be annoyed by the introduction of a stranger among them&uot;. But this principle applies only when the right of pre-emption is claimed merely on the ground of *vicinage*. It does not apply where the right is claimed by a co-sharer.

Female

A female is not precluded from maintaining a suit for pre-emption, if she by law is entitled to inherit, even though it may be a widow's estate.[75] But a female entitled to maintenance only is not entitled to pre-empt[76]

75 *Ishar Devi v. Sheo Ram* (1924) 5 Lah. 435, 84 I.C. 484, ('25) A.L. 83.

76 *Karan Singh v. Muhammad* (1885) 7 All. 860; *Bhupal v. Mohan* (1897) 19 All. 324.

Sale by one of several co-sharers to another

See 235 below.

Shia law

By the Shia law the only persons entitled to the right of pre-emption are co-sharers; Baillie, II, 179; *Qurban v. Chote,* [77] and that too if the number of co-sharers does not exceed two.[78]

77 (1899) 22 All. 102.

78 *Abbas Ali v. Maya Ram* (1888) 12 All. 229; *Husain BakJish v. Muhfuz-ul-Haq* (1925) 47 All. 944, 48 I.C. 972, ('25) A.A. 559.

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CHAPTER XIII

PRE-EMPTION

232.

Sale alone gives rise to pre-emption

The right of pre-emption arises only out of a valid,[79] complete,[80] and *bona fide*[81] sale. It does not arise out of gift (*hiba*), *sadaqah* (171), wakf, inheritance, bequest,[82] or a lease'even though in perpetuity.[83] Nor does it arise out of a mortgage even though it may be by way of conditional sale[84]; but the right will accrue, if the mortgage is foreclosed.[85] An exchange of properties between two persons subject to an option to either of them to cancel the exchange and take back his property at any time during his life, stands on the same footing as a conditional sale; such an exchange does not extinguish the ownership in the property and does not give rise to the right of preemption. But if one of the parties dies without cancelling the exchange, the transaction will mature into two sales and will give rise to the right of preemption.[86] It has been held by the High Court of Allahabad that a transfer of property by a husband to his wife in lieu of dower is a sale, and is therefore subject to a claim for

pre-emption.[87] On the other hand, the Chief Court of Oudh has held that the transaction amounts to a *hiba-bil-ewaz*, and no claim for pre-emption can therefore arise.[88] The right of preemption arises not only out of a private sale, but also out of a sale by the Court or a receiver.[89]

Where there is no law governing the case, the Courts in India have acted according to justice, equity and good conscience. Section 37(2) of the Bengal, Agra and Assam Civil Courts Act, 1897 accepts this position in express language. Foreign decisions have been applied in appropriate cases in this country as supplying rules of justice, equity and good conscience, provided of course the circumstances relevant in this regard are similar. The right of pre-emption granted by s. 16(3) of the Act is similar in quality to that under Mahomedan Law, applicable to Bihar by custom, except that it can be claimed only by co-sharers or adjoining raiyats and the right is of one uniform class. In 227 of Mulla s principles of Mahomedan Law, it is stated that Mahomedan law of pre-emption is applied by Courts of India as a matter of justice, equity and good conscience (except in the Madras Presidency). In the circumstances, I am of the view that the rule laid down by Mahomedan Law should be applied to decide the present question which is not answered by the Act . In the Mahomedan Law, there are different classes of right of pre-emption and this aspect is irrelevant in the context of s. 16(3) as only one uniform class of right is envisaged by the section. However, when there are two or more pre-emptors belonging to the same class, they are entitled to equal shares of the property in respect of which the right is claimed (*see* Baillie, 500, and Mulla 231).[90]

It has however been held by the High Court of Allahabad that the right of pre-emption arises not only when an out-and-out sale has been completed, but also, when a complete contract of sale without any option to the vendor has been made.[91]

Explanation.--According to the Mahomedan law a sale is an exchange of property for property with the mutual consent of the parties, the exchange consisting in payment of price by the purchaser to the vendor and delivery of possession by the vendor to the purchaser. The execution of an instrument of sale is not necessary.[92]According to the Transfer of Property Act, 1882, s. 54, a sale of property of the value of Rs. 100 and upwards is not complete unless made by a registered instrument. It has been held by a Full Bench of the Allahabad High Court that, although the rules of the Mahomedan law of sale have been superseded by the provisions of the Transfer of Property Act the question whether a sale is complete so as to give rise to the right to pre-emption is to be determined by applying the Mahomedan law, and if a complete sale is effected under that law as where the price is paid and possession is delivered, the right of pre-emption will arise, though the sale may not be complete under the Transfer of Property Act.[93]On the other hand, some judges have expressed the opinion that the right of pre-emption does not arise until after registration as required by the Transfer of Property Act .[94] In *Jadu Lal v. Janki Koer,* [95] Brett, J., suggested that a solution of the problem was to be found in determining in each case what was the intention of the parties as to the date when the sale should be considered as complete. The rule suggested by Brett, J., when adopted by some judges in Calcutta[96] and Patna[97] and also by the High Court of Bombay in *Sitaram v. Sayad Sirajul.* [98] The decision of the Bombay Court in *Sitaram's* case was affirmed on appeal by the Judicial Committee. In the course of the judgment their Lordships of the Privy Council said: "you are to look at the intention of the parties (that is, the vendor and the vendee) in determining what system of law was to be taken as applying and what was to be taken to be the date of the sale with reference to which the ceremonies were performed".[1] In a case decided while Sitaram's case was under appeal the Bombay High Court followed the Full Bench decision of the Allahabad High Court.[2] In a later case the Calcutta High Court said that if there is nothing to indicate what the intention of the parties was, the right of pre-emption arises on registration.[3]

The Supreme Court has now held in *Radhakisan Laxminarayan v. Shridhar* [4]that the transfer of property where the Transfer of Property Act applies has to be under the provisions of that Act only and Mahomedan Law or any other personal law of transfer of property cannot override the statute. Therefore unless the title has passed in accordance with the Act, no right to enforce pre-emption arises.

The importance of the question now under consideration arises in this way. A Mahomedan is not entitled to pre-empt unless he makes the "demands" required by law (235). These demands should not be made before the sale is completed. They should be made after the sale is completed, and immediately after the pre-emptor hears of the sale, that is, a completed sale. Now a sale according to the Mahomedan law is completed by payment of the price by the purchaser to the vendor and by delivery of possession by the vendor to the purchaser. But a sale under the Transfer of Property Act is not complete unless made by a registered instrument. Hence the view taken by some Judges and not approved by the Supreme Court that the "demands" should be made after*registration* of the sale deed."

This principle in *Radhakisan Laxminarayan* case appears to have been confirmed by the Supreme Court in the subsequent case of *Ram Saran Lall v. Mst. Domini Kuer* ,[5]where it was held that when a sale under s. 54 of the Transfer of Property Act could only be made by a registered document, the*talab-i-mowasibat*was prematurely made when registration of the sale deed was not complete by being copied out in the records of the Registration Office as provided in s. 61 of the Registration Act .

A contention raised in this case that in view of s. 47 of the Registration Act a registered document operated from the time it would otherwise have operated and the sale was completed on the date of its execution, was rejected by the majority. But it is of interest to note the views on this point contained in the majority judgment which observes: "A contention that though the Muslim law of sale is superseded by the Transfer of Property Act and the Registration Act, but yet the provision contained in s. 47 of the Registration Act is inapplicable to determine when a sale effected by a registered instrument should be complete, could not be sustained on any principle of logic, or of course of any rule of interpretation of statutes"; ". the time when the sale becomes complete so as to entitle the pre-emptor to perform the*talabs*, should be determined by the application of the principle of intention laid down in s. 47 of the Registration Act which is as much a part of the positive law governing the right of pre-emption as the provision of s. 54 of the Transfer of Property Act which requires a registered instrument to effect a sale which gives rise to a right of pre-emption."

Another view in support of the principle of intention has been that unless this principle is followed, the vendor and vendee, with a view to defeat the pre-emptor may not execute and register a sale deed, and may complete the transaction by payment of price and delivery of possession so as to deprive the pre-emptor of the right of pre-emption. Hence the rule on the basis on 'intention suggested by Brett J., and approved by the Judicial Committee. [*That view has much to commend itself.*]

Following Ram Saran Lal v. Mst. Domini Kuer ,[6] the necessary demands in a pre-emption suit has to be made after the sale been completed not by execution or registration of the sale deed but by the sale deed having been copied out in the Sub Registrars' Books and it would be the date entered in that book which has to be considered as the date of sale.[7]

However, the Supreme Court has now held that the right of pre-emption is not one which is looked upon with great favour by the courts presumably for the reason that it is in derogation of the right of the owner to alienate his property. It is neither illegal nor fraudulent for parties to a transfer to avoid and defeat a claim for pre-emption by all legitimate means "The right of pre-emption is a weak right. the courts would not go out of their way to help the pre-emptor".[8]

In *Munnilal v. Bishwanath* ,[9] the case concerned parjoti (lease-hold) lands in the City of Banaras. The question was if they could be pre-empted. The plaintiff claimed that he owned a house and land to the south of the property sold, and was entitled to pre-empt by right of vicinage and appendages. The property to be pre-empted was a Khandar (ruins). He claimed a custom which was denied. It was also claimed that the right of pre-emption did not apply to lease-hold land, the Courts below had held the local custom proved and that it was co-extensive with Mahomedan Law. The Supreme Court however, held that it was not proved that the custom extended to parjoti lands. It held that Mahomedan Law applied the right of pre-emption only to full ownership in the land to be pre-empted and not to lease-hold rights. The following cases were cited with approval.[10]

Both vendor and pre-emptor must be full owners of their respective hereditaments and this applies whether the claim is by right of cosharership, vicinage or participation in amenities and appendages. The case of *Bhagwati Prasad v. Balgobind* ,[11]was distinguished as that case was decided under Oudh Laws Act .

A right of pre-emption does not arise on sale of lease-hold right and the pre-emptor must also be full owner to maintain it. The Court also approved of *Oudh Behari Singh v. Gajadhar Jaipuria* ,[12] which was also a case of *parjoti* lands in the same *mohalla* of the City of Banaras.

When there is a contract of sale and before the sale is complete, the vendor alone is not entitled to convey the property to a pre-emptor to the prejudice of the vendee and thus defeat the contract; the vendor and vendee must both agree for this to be done; though after the sale is completed, the vendee alone can surrender his rights.[13]

A agrees to sell his house to *B* in January 1918 for Rs. 300. On the 1st February 1918 *B* pays the purchase-money to *A*, and obtains possession of the house from *A* The sale-deed is registered on the 1st March 1918. The pre-emptor comes to know of the payment of price and delivery of possession on the 15th February 1918, but he does not make the demands (236) until the 2nd March 1918, being the date on which he first comes to know of the registration. Is he entitled to pre-emption? (1) No, according to the Allahabad High Court,[14]for the sale, according to that Court, became complete on payment of the price and delivery of possession, and the pre-emptor having failed to make the &uot;demands&uot; on the 15th February when he first came to know of it, the right of pre-emption is lost by delay. (2) According to the rule now settled by the Supreme Court, if the Transfer of Property Act applies, the sale is to be regarded as complete on*registration*. The pre-emptor is entitled to pre-emption, for he made the &uot;demands&uot; when he first came to know of the registration. In fact, if he had made the &uot;demands&uot; *before* registration they would have been premature, and he would not have been entitled to preemption unless he made the &uot;demands&uot; again immediately *after* he came to know of registration. (3) In accordance with the principle of &uot;intention&uot; previously followed in some cases' and commended in the minority judgment in *Ram Saran Lall's* case, the intention of the parties would be the sole guide. Therefore, if in the case put above, possession was not given and no part of the price was paid till registration, the intention of the parties would be taken to be that they did not regard the sale to be complete till registration, and the &uot;demands&uot; in such a case should be made immediately after the preemptor hears of the registration.[15] But if the contract of sale says, &uot;I have agreed to sell you my share for Rs. 29,000, Rs. 1,000 paid down, and the remainder payable in two quick instalments, and that a former deed of sale shall be executed and registered,&uot; and the agreement further contemplates a notice of the transaction to be given by the vendor of' his co-sharer on the same day, and provides that if the co-sharer elects to purchase the vendor's share, the vendor should immediately return the Rs. 1,000 to the purchaser, it would have been the date of the agreement which would be taken as the date of the sale and it is with reference to that date that the co-sharer (pre-emptor) would have been required to perform the necessary ceremonies.[16]

79 *Hedaya*, 560; Baillie, 475-477; *Najm-un-nissa v. Ajaib Ali* (1900) 22 All. 343 [where the price was not ascertained at the date of the contract].

80 *Hedaya*, 560; Baillie, 475-477.

81 *Parsashth Nath v. Dhanai* (1905) 32 Cal. 988. *Chinna Kanji v. Kesavan* ('66) A. Ker. 260 (a case relating to a court sale).

82 Baillie, 471.

83 *Dewanatulla v. Kazan Molla* (1887) 15 Cal. 184.

84 *Gurdial v. Teknarayan* (1865) B.L.R. Sup. Vol. 166.

85 *Batul Begam v. Mansur Ali* (1901) 24 All. 17.

86 *Muhammad Yunis v. Muhammad* (1931) 53 All. 169, 130 I.C. 295, ('31) A.A. 106.

87 *Fida Ali v. Muzaffar Ali* (1882) 5 All. 65; *Nathu v. Shadi* (1915) 37 All. 522, 29 I.C. 495, doubted by Ameer Ali, 4th ed., Vol. I. p. 713.

88 *Bashir Ahmad v. Musamat Zubaida* (1926) 1 Luck. 83, 93 I.C. 265, ('26) A.O. 186; *Chaudhri Talib Ali v. Musammat Kaniz* (1927) 2 Luck. 575, 102 I.C. 142, ('27) A.O. 204.

89 *Brij Narain v. Kedar Nath* (1923) 45 All. 186, 71 I.C. 836, ('23) A.A. 57. *Chinna Kunj v. Kesavan* ('66) A. Ker. 260.

90 *Basudev Choudhary v. State of Bihar* A.I.R. 1984 Pat. 178.

91 *Zamani Begam v. Khan Muhammad* (1924) 46 All. 142, 81 I.C. 586, ('24) A.A. 251, follg. *Begam v. Muhammad* (1894) 16 All. 344, 347(F.B.) .

92 *Hedaya*, 241; Macnaghten, 42; Baillie, 476; *Begam v. Muhammad* (1894) 16 All. 344, 346-348.

93 *Begam v. Muhammad* (1894) 16 All. 344 [F.B.]; *Najm-un-nissa v. Ajaib Ali* (1900) 22 All. 343; *Janki v. Girjadat* (1885) 7 All. 482 [F.B.].

94 Banerji, J., in (1894) 16 All. 344, 356 [F.B.] *supra*; Cardnuff, J. *Budhai v. Sonaullah* (1914) 41 Cal. 943, 949, 23 I.C. 385; Mullick J., in *Kkeyali v. Mullick* (1916) 1 Pat. LJ. 174, 177-178, 34 I.C. 210.

95 (1908) 35 Cal. 575, 599, affimd. in (1912) 39 Cal. 915, 39 I.A. 101, 15 I.C. 659.

96 Richardson, J., in (1914) 41 Cal. 943, 953, 23 I.C. 385, *supra*.

97 Roe, J., in (1916) 1 Pat. L.J. 174, 179, 34 I.C. 210, *supra*.

98 (1917) 41 Bom. 636, 651-652, 42 I.C. 32.

1 *Sitaram v. Jiaul Hasan* (1921) 45 Bom. 1056, 48 I.A. 475, 481, 64 I.C. 826, ('23) A.PC. 41.

2 *Abdullah v. Ismail* (1922) 46 Bom. 302, 64 I.C. 913, ('22) A.B. 124.

3 *Nareshchandra Dutta v. Gireeschandra Das* (1936) 62 Cal. 979, 160 I.C 730, ('36) A.C. 17.

4 ('60) A.S.C. 1368.

5 ('61) A.S.C. 1747.

6 1961 A.S.C. 1747.

7 *S.K. Mohd. Rafiq v. Khalilul Rehman* ('72) A.S.C. 21, 62.

8 *Radhakishan v. Shridhar* : ('60) A.S.C. 1368; *See* also: *Bishan Singh v. Khazab Singh* ('58) AS.C. 838).

9 ('68) A.S.C. 450.

10 *Babooram Golam Singh v. Nursing Sohoy* (1875) 25 Suth. W.R. 43, a case of mokurruree (permanent lease) land, *Phul Mohammad Khan v. Kazi Kutubbuddin* I.L.R. (1937) 16 Pat. 519 = ('37) A. Pat. 578 (mokurrurree and raiyati lands); *Dasrathlal Chagganlal v. Bai Dhondubai* I.L.R. 1941 Bom. 460 = ('41) A. Bom. 262; *Rameshwarlal v. Ramdeo Jha* ('57) A. Pat. 659 (raiyati lands).

11 ('33) A. Oudh 161.

12 ('55) A. All. 698.

13 *Qamruddin Naib v. Brijmohandas* ('62) A.M.P. 25.

14 *Begam v. Muhammad* (1894) 16 All. 344 [F.B.].

15 *Jadu Lal v. Janki Kocr* (1908) 35 Cal. 575; *Budhai v. Sonaullah* (1914) 41 Cal. 943, 950, 954, 23 I.C. 385.

16 *Sitaram v. Jiaul Hasan* (1921) 45 Bom. 1056, 48 I.A. 475, 64 I.C. 826, ('23) A.PC. 41.

Lease in perpetuity

A lease even though in perpetuity does not give rise to the right of pre-emption. The Allahabad High Court has, however, held that a transaction, though in form a lease, may in truth and substance be a sale, as where the property is of the value of Rs. 2,000 and a lease is given for 99 years under which

Rs. 1,950 are paid as premium and Rs. 1 is reserved as annual rent. In such a case the pre-emptor is entitled to pre-emption, though the transaction is in form of a lease. The Mahomedan law docs not recognize the device of dressing up a transaction of sale in the garb of a lease so as to defeat the right of preemption.[17] It is difficult to see how on the facts stated above, the lease could be regarded as a sale. (*see* 247 below)

The principle that a Court in determining whether a right of pre-emption exists should look to the real nature of the transaction is well established. A deed purporting to be a *sankalap* or gift to a guru but which is really a sale, gives rise to a right of pre-emption[18]; and so does an ostensible usufructuary mortgage which is really a sale.[19]The Oudh Laws Act gives a right of pre-emption on the sale of a proprietary or under-proprietary tenure and the Chief Court has held that a transaction described as a permanent lease by which a superior proprietor carves out under-proprietary rights heritable and transferable without reserving a right of re-entry amounts to a sale of an under-proprietary tenure and gives rise to a right of pre-emption.[20]Under the same Act a member of the village community is entitled to pre-empt and a lessee with heritable and transferable rights has been held to be a member of the village community and entitled to pre-empt.[21]

In *Kumar Gonsusab & Other v. Sri Mohammed Mijan* ,[22]the Supreme Court held that under s. 54 of the Transfer of Property Act, a contract for sale does not by itself create any interest in or charge on immovable property. Therefore, where the parties enter into mere agreement to sell, it creates no interest in the suit property in favour of the vendee and the proprietary title does not validly pass from the vendors to the vendee; until that is completed no right to enforce pre-emption arises. Thus in the instant case, the suit for pre-emption was brought on the basis of such an agreement was without any cause of act ion as there was no right of pre-emption on the respondents which could be enforced under the law.

In *Smt. Mattoo Devi v. Damodar Lal* ,[23] the main issue before the court was as to whether the plaintiffs after execution of the agreement to sell, expressed their inability to purchase the house and after the execution of the sale deed refused to purchase the house and therefore waived their right of pre-emption.

The Apex Court concurred with the Judgment of the High Court and held that obviously the burden of proof was on the defendants that the plaintiffs had waived their right of pre-emption. The Court further held that there was no evidence before it to hold that the plaintiffs had shown their inability to purchase the house or had refused to purchase the same. The defendants had failed to prove their case. Thus, the question of waiver of right of pre-emption by the pre-emptor does not arise at all.

Whether the demands were premature or had complied with the rules of Mahomedan law is a mixed question of law and fact which can only be decided on viewing the total evidence.[24]

17 *Muhammad v. Muhammad* (1918) 40 All. 322, 44 I.C. 227.

18 *Pandit Bhugwan Dutt v. Brij Bhukhan* (1935) 10 Luck. 289, 152 I.C. 666. ('35) AO. 27.

19 *Bhagwana v. Shadi* (1934) 16 Lah. 408, 155 I.C. 654, ('34) A.L, 878.

20 *Jagdeo Singh v. Ram Naresh Singh* (1935) 10 Luck. 392, 153 I.C. 334, ('35) A.O. 217.

21 *Bhagwati Prasad v. Balgovind* (1935) 8 Luck. 377, 142 I.C. 885, ('33) A.O. 161.

22 LNIND 2008 SC 1651

23 A.I.R. 2001 SC 2611.

24 *S.K. Mohd. Rafiq v. Khalilul Relunan* ('72) A.S.C. 2162.

Rights as between pre-emptor and vendee

Where there is a defect in the vendor's title, the pre-emptor cannot compel the vendee to make good the defect.[25]

25 *Motilal Gorilal v. Pampal Jogannath* ('57) A. Raj. 248.

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CHAPTER XIII

PRE-EMPTION

233.

Ground of pre-emption must continue until the decree is passed

The right in which pre-emption is claimed -- whether it be co-ownership, or participation in appendages, or vicinage -- must exist not only at the time of sale, but at the date of the suit for pre-emption,[26] and it must continue up to the time the decree is passed.[27] But it is not necessary that the right should be subsisting at the date of the execution of the decree[28] or at the date of the decree of the appellate Court.[29] The reason is that the crucial date in these cases is the date of the decree of the Court of first instance.[30] The pre-emptor must hold the land until the pre-emption matter is finally decided by the ultimate Court i.e., the Board of Revenue and that shall be the crucial date and not the date on which the order has been passed by the Land Reforms Deputy Collector. In *Bhagwan Das v. Chet Ram* ,[31] also it was held that the pre-emptor in order to succeed must have a right to pre-empt not only at the time of sale of the land by the landlord but also at the time of institution of the suit for pre-emption and also at the time of passing of the decree in the suit by the trial Court.[32]

Thus, if a plaintiff, who claims pre-emption as owner of a contiguous property, sells his property to another person *after institution of the suit*, he will not be entitled to a decree, for he does not then belong to any of the three classes of persons to whom the right of pre-emption is given by law: *see* 231 above. Similarly if a co-sharer or a pre-emptor of a superior class enforces his right while the suit is pending the plaintiff will not be entitled to a decree; but if the pre-emptor allows his right to become time-barred, a decree in favour of the plaintiff may be passed.[33] But once the decree is passed, the plaintiff does not forfeit the right of being put into possession of the pre-empted property in execution of the decree, although he may be alienated the property before execution or alienated it before the date of the decree of the appellate Court. It need hardly be mentioned that a plaintiff does not forefeit his right of pre-emption merely because he had on a previous occasion mortgaged his own share on which his right of pre-emption depends.[34]

A pre-emptor can be non-suited by the vendee acquiring at any time before his suit is decreed a right of pre-emption equal or superior to his own. Thus the vendee's status may improve by subsequent legislation.[35]

The right is lost by joinder of plaintiffs not entitled to pre-empt; 5.241. But see the full bench decision of the Punjab High Court in *Bachan Singh v. Bhupal Singh* ,[36](a case under the Punjab Pre-emption Act I of 1913) holding that where a person having no right of pre-emption is made a co-plaintiff by a pre-emptor, the latter's right is not forfeited.

26 *Janaki Prasad v. Ishar Das* (1899) 21 All. 374.

27 *Ram Gopal v. Piari Lal* (1899) 21 All. 441; *Tafazzul v. Than Singh* (1910) 32 All. 567, 6 I.C. 426; *Nuri Miran v. Ambica Singh* (1917) 44 Cal. 47, 34, I.C. 869; *Mohd Ismail v. Abdul Rashid* (1956) 1 All. 143(F.B.) ; *Sobh Nath v. Ambika Prasad* ('58) A.A. 419. *Satar Mohd v. Saraf-ud-din* ('62) A. J&K 79.

28 *Ram Sahai v. Gaya* (1884) 7 All. 107.

29 *Baldco Misir v. Ram Lagan* (1923) 45 All. 709. 77 I.C. 694, ('24) A.A. 82: *Umrao v. Lachman* (1924) 46 All. 321, 79 I.C. 217, ('24) A.A. 448.

30 (1923) 45 All. 709, 710, 77 I.C 694, ('24) A.A. 82, *supra*: *Haji Sultan v. Masitu* (1926) 48 All. 689, 96 I.C. 744, ('26) A.A. 749; *Sir Thakur Radhika v. Bohra Shiam* (1923) 45 All. 561, 74 I.C 382, ('23) A.A. 526, *Narayana v. Karthiayani* ('62) A. Ker. 122.

31 A.I.R. 1971 SC 369.

32 *Ishaque Hajam & others v. Additional Member, Board of Revenue* A.I.R. 1986 Pat. 53.

33 *Sheik Salamat Ali v. Nur Mahommed* (1934) 9 Luck. 475, 149 I.C. 258, ('34) A.O. 303.

34 *Ujagar Lal v. Jia Lal* (1896) 18 All. 382. See, however, *Kutina Bibi v. B.C. Dutta,* ('61) A. Ass. 1.

35 *Satar Mohd v. Saraf-ud-din, supra* ; *Nabir Ganai v. Mohd Ismail Ganai* ('60) A. J. & K. 112.

36 ('66) A. Punj. 36.

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CHAPTER XIII

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234.

Doubt as to whether buyer should be a Mahomedan

According to the Allahabad[37] and Patna[38] decisions, it is not necessary, to enforce the right of pre-emption, that the buyer should be a Mahomedan. According to the Calcutta[39] and Bombay[40] decisions, the buyer must be a Mahomedan except in the cases mentioned in 229 and 230. All the three Courts, however, have agreed that the seller and the pre-emptor should both be Mahomedans.[41]

There are no Madras decisions, because in Madras the law of pre-emption is not applied even between Mahomedans (227).

In Hyderabad State, pre-emption is neither a customary nor a territorial law, but is administered only as part of the personal law. Hence, where both the vendor and preemptor are Muslims, they will be governed by their personal law, and pre-emption will apply to them.[42]

The vendor should be a Mahomedan. Hence no right of pre-emption can be claimed by a Mahomedan when the vendor is a Hindu or a European, though the vendee may be a Mahomedan.

The pre-emptor also should be a Mahomedan, the reason being that if he is a Mahomedan and subsequently wants to sell the pre-empted property, he is bound to offer it to his Mahomedan neighbors or partners before he can sell it to a stranger. But a nonMahomedan is not subject to any such obligation, and he can sell it to any one he likes. The law of pre-emption contemplates both a right and an obligation, and if a nonMahomedan were allowed to pre-empt, it would be allowing him the right without the corresponding obligation. This is the principle underlying the decision of Allahabad High Court in *Qurban's* case,[43] where it was held that a Shia Mahomedan could not

maintain a claim for pre-emption based on the ground of *vicinage* when the vendor was a Sunni. The decision was based on the ground that by the Shia law a *neighbour* as such has no right of pre-emption, and that if he were allowed to pre-empt, he might sell his house to anyone he liked, and his Sunni neighbours could not successfully assert any right of pre-emption.

The vendee also, according to the Calcutta High Court, should be a Mahomedan. Hence a Mahomedan cannot obtain pre-emption of property sold by a Mahomedan to a Hindu. According to that decision, the right of pre-emption is not a right that attaches to the land, but is merely a personal right. If it were a right attaching to the *land*, it might be claimed, even against a Hindu or any other non-Mahomedan purchaser. &uot;We cannot,. in justice, equity and good conscience, decide that a Hindu purchaser in a district in which the custom of pre-emption does not prevail as amongst Hindus, is bound by the Mahomedan law, which is not his law, to give up what he has purchased to a Mahomedan pre-emptor.&uot; On the other hand, it has been held by the Allahabad High Court that it is not necessary that the vendee should be a Mahomedan and that pre-emption can therefore be claimed even against a Hindu purchaser. According to that Court, a Mahomedan owner of property is under an obligation imposed by the Mahomedan law to offer the property to his Mahomedan neighbours or partners before he can sell it to a stranger, and this is an incident of his property which attaches to it whether the vendee by a Mahomedan or a non-Mahomedan. The Bombay High Court has adopted the view taken by the High Court of Calcutta. According to the Calcutta and Bombay High Courts, the right of pre-emption may be enforced against a Hindu vendee in those cases only where the right is recognized by custom as stated in 229, or is created by contract as stated in 230. See however the decisions of the Supreme Court referred to in 226 to the effect that the right of pre-emption is an incident annexed to the property.

37 *Govind Dayal v. Inayatullah* (1885) 7 All. 775F.B. ; *Abbas Ali v. Maya Ram* (1888) 12 All. 229.

38 *Achutananda v. Biki* (1922) 1 Pat. 378, 69 I.C. 666, ('22) A.P. 601.

39 *Kudratulla v. Mahini Mohan* (1869) 4. Beng. L.R 134.

40 *Sitaram v. Sayad Sirajul* (1917) 41 Bom. 636, 649-650, 42 I.C 32; *Mahomed v. Narayan* (1916) 40 Bom. 358, 32 I.C. 933; *Hamedmiya v. Benjamin* (1929) 53 Bom. 525, 118 I.C. 548, ('29) A.B. 206 [buyer a Bene Israel].

41 *Dwarka Das v. Husain Bakhsh* (1878) 1 All. 564 (Hindu vendor); *Poomo Singh v. Harrychurn* (1872) 10 B.L.R. 117 (European vendor); *Qurban v. Chote* (1899) 22 All. 102 (Shia pre-emptor against Sunni vendor and Sunni vendee).

42 *Pasha Begum v. Syed S. Hasan* (1955) Hyd. 676.

43 (1899) 22 All. 102. *supra*.

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235.

Pre-emption in the case of a sale to a shafi

Where there are two or more *shafis* of the same class, and the sale is made by one of them to another, the other *shafis* are entitled to claim pre-emption of their share against the *shafi* purchaser.[44] Similarly, where the sale is made to a *shafi* and a stranger, the other *shafis* are entitled to claim pre-emption of their share against the *shafi*-purchaser and the stranger.[45]

(a) *A*, *B* and *C* are co-sharers in certain property. *A* sells his shares to *B*. *C* is entitled to claim pre-emption of one-half of the property.[46]

(b) A*, B*, *C* and *D* own each a house situate in a private lane common to all the four houses. *A* sells his house to *B*. Here 5, *C* and *D* are &uot;participators in the appendages of the house sold, the appendage being the right of way. *C* and *D* are each entitled to claim pre- emption of a third of the house.[47]

(c) *A*, *B* and *C* are co-sharers in certain property. *A* sells his share to *B* and *S*. *C* is entitled to claim pre-emption of one-half of the property sold.[48]

It was at one time held by the High Court of Calcutta,[49] that where there are several co-sharers, and one of them sells his share to another, none of the other co-sharers is entitled to claim pre-emption against the purchaser. The ground of the decision was thus stated by Garth, CJ.: &uot;The object of the rule (of pre-emption). is to prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a co-parcener or near neighbour. But it is obvious, that no such annoyance can result from a sale by one co-parcener to another.&uot; A different view was taken by the High Courts of Allahabad and Bombay, one of the grounds of the decisions being that the rule laid down in the *Hedaya*, that &uot;when there is a plurality of persons entitled to the privilege of *shufaa*, the right of all is equal,&uot; applies as much when the sale is made to a *shafi* as when it is made to a stranger. A special Bench of the Calcutta High Court has now taken the same view as that taken by the Allahabad and Bombay High Courts.[50]

If there is a clause in the partition deed that if any one of the co-sharers is to transfer his share, other sharers shall have the right to purchase is not an absolute restraint on alienation. It is only a partial restraint prohibiting the sharers from selling the properties to any person except the other sharers. The Madras High Court held that a pre-emptive right given under the document does not offend the provision of the Transfer of Property Act (s. 10), but it is only a partial restraint. Therefore the restraint on alienation to third parties under the deed is valid in law and the sale in favour of the transferee is not valid.[51]

44 *Amir Hasan v. Rahim Baksh* (1897) 19 All. 466; *Abdullah v. Amanaadlah* (1899) 21 All. 292; *Muhammad Yakub v. Kanahai Lal* (1922) 44 All. 83, 64 I.C. 673, ('22) A.A. 157, dissenting on the point from *Baldeo v. Badri Nath* (1909) 31 All. 519; *Zia-ud-din v. Abul* (1923) 45 All. 487, 77 I.C. 27, ('23) A.A. 520; *Nadir Husain v. Sadiq Hussain* (1925) 47 All. 324, 326, 86 I.C. ('25) A.A. 361; *Vuhaldas v. Jametram* (1920) 44 Bom. 887, 58 I.C. 279 [F.B.]; *Enatullah v. Kowsher Ali* (1927) 54 Cal. 266, 98 I.C. 220, ('26) A.C. 1153, overruling *Lalla Nowbutt Lall v. Lalla Jewan Lall* (1878) 4 Cal. 831; *Ramautar Singh v. Brij Kishore* ('33) A.P. 653, 149, I.C. 931; *Ladhi Bibi v. Masaddar Ali* ('49) A. Ass. 81; *Mahmood Hasan v. Bhikari Lal* ('23) A.A. 105, *Jagan Nath v. Radhey Shyam* (1960) Raj. 75.

45 *Saligram v. Raghubardyal* (1887) 15 Cal. 224.

46 *Enatullah v. Kowsher Ali* (1927) 54 Cal. 266, 98 I.C. 220, ('26) A.C. 1153.

47 *Amir Hasan v. Rahim Bakhsh* (1897) 19 All. 466.

48 *Saligram v. Raghubardyal* (1887) 15 Cal. 224.

49 (1878) 4 Cal. m, *supra*.

50 (1927) 54 Cal. 266, 98. I.C. 220, ('26) A.C 1153, *supra*.

51 *A. Ismail Khan v. Lalitha Devi,* (2007) 5 MLJ 1315 See also, *Atika Begum v. Haji A.A.M. Abdulla,* (2002) 2 MLJ 4.

CHAPTER XIII

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236.

Demands for pre-emption

No person is entitled to the right of pre-emption unless--

(1) he has declared his intention to assert the right immediately on receiving information of the sale. This formality is called *talabi-mowasibat* (literally, demand of jumping, that is, immediate demand): and unless

(2) he has with the least practicable delay affirmed the intention, referring expressly to the fact that the *talab-i-mowasibat* had already been made,[52] and has made a formal demand--

(a) either in the presence of the buyer, or the seller, or on the premises which arc the subject of sale,[53] and

(b) in the presence at least of two witnesses.[54] This formality is called *talab-i-ishhad* (demand with invocation of witnesses).[55]

See note (3) below.

Explanation I.--The *talab-i-mowasibat* should be made after the sale is completed. It is of no effect if it is made before the completion of the sale (232).

Explanation II--It is not necessary that the *talab-i-mowasibat* or *talab-iishhad* should be made by the pre-emptor in person. It is sufficient if it is made by a manager or a person previously authorized by the pre-emptor to make the demand.[56] When the pre-emptor is a minor, his *de facto* guardian may make a demand on his behalf.[57] A demand made by the father or brother of the pre-emptor is not sufficient, even if he has a right to preempt, unless he has been previously authorized to make the demand.[58] When the pre-emptor is at a distance the demand may be made by means of a letter.[59]

Explanation III.--If thc *talab-i-ishhad* is made in the presence of the buyer, it is not necessary that the buyer should then be actually in possession of the property in respect of which pre-emption is claimed.[60]

Explanation IV.--When two or more persons claim to pre-empt, each one of them should make the demands, unless one of them has also been authorized by the other to do so, and he makes the demands on their behalf also. If a suit is brought by several persons claiming to pre-empt, and only one of them has made the demand on his own behalf the suit will proceed as regards him, but it must be dismissed as to the rest.[61]

Where there are two or more buyers, and the *talab-i-ishhad* is not made in the presence of the vendor or on the property sought to be pre-empted, the demand must be made to all the buyers.[62] If it is made only to some of them, the shares of those buyers only can be pre-empted,[63](244).

Explanation V.--No particular formula is necessary either for the performance of *talab-i-mowasibt* or *talab-i-ishhad* so long as the claim is unequivocally asserted.[64]

Hedaya, 550, 551; Baillie, 487-490.

(1) The *talab-i-mowasibat* is spoken of as the first demand, and the *talab-i-ishhad* is the second demand. The third demand consists of the institution of the suit for preemption. The *talab-i-mowasibat* and the *talab-i-ishhad* are conditions precedent to the exercise of the right of pre-emption.[65] The *talab-i-ishhad* is as indispensable as the *talabi-mowasibat.*[66] It is stated in the *Hedaya* (p. 550) that &uot;the right to *shufaa* (pre-emption) is but a feeble right, as it is the disseizing of another of his property merely in order to prevent apprehended inconveniences&uot; (*see* notes to 235 above). Hence the formalities must be strictly observed, and there must be a clear proof of their

observance.[67] When a right of pre-emption is found to apply to non-Muslims, the Court may, as between Hindus, administer a modification thereof, but the preliminary forms of the law must be followed.[68] A petition by the pre-emptor to the sub-registrar praying that the registration of the sale-deed may be stayed cannot be treated as a *talab-i-mowasibat* there being no assertion of the right of pre-emption.[69] The *talab-i-mowasibat* should be made as soon as the fact of the sale is known to the claimant. A finding as to the promptness of the demand is a finding of fact which cannot be interfered with in second appeal.[70] Any unreasonable or unnecessary delay will be construed as an election not to pre-empt.[71] A delay of twelve hours was held in an Allahabad case to be too long.[72] So also a delay of twenty four hours was considered too long by the Nagpur High Court.[73] And it was held in a Calcutta case that where the pre-emptor, on hearing of the sale, "entered his house, opened his chest, took out Rs. 47.25 P." (evidently to tender the amount to the buyer), and then performed the *talab-i-mowasibat*, he was not entitled to claim pre-emption, for the delay was quite unnecessary[74] (238).

(2) It is not necessary to the validity of *talab-i-mowasibat* that it should be performed in the presence of witnesses. It is enough if the pre-emptor makes known his intention in some way. But it is of the essence of *talab-i-ishhad* that it should be performed before witnesses.[75] It is also necessary when the *talab-i-ishhad* is made that the pre-emptor should refer expressly to the fact of the *talab-i-mowasibat* having been previously made.[76]

There may be instances where separate *talab-i-mowasibat*, namely, the first demand, may not be necessary, as in the case where a person for the first time gets information about the sale by his co-sharer, and immediately on such information, gives out his intention to assert the right of pre-emption and demands the pre-emption standing upon the disputed property invoking witnesses. Thus the two demands of *talab-i-mowasibat* and *talab-i-ishhad* may be combined. Of course in that case it has got to be seen whether there was any occasion or opportunity for making the first demand of *talab-i-mowasibat* separately.[77]

(3) *Talab-i-ishhad.*--In *Ganga Prasad v. Ajudhia* ,[78] the High Court of Allahabad held that to constitute a valid *talab-i-ishhad* it was necessary that the witnesses should have been specifically called upon to bear witness to the demand being made. This was dissented from in two later Allahabad cases which held that the omission of this invocation addressed to the witnesses was not necessarily fatal.[79] But the Calcutta High Court approves *Ganga Prasad's* case and considers that the witnesses must be asked to witness the demand by such words as "by eye witnesses to this".[80] This reason of the judgment is that the enforcement of the right of pre-emption must be preceded by an observance of the preliminary forms prescribed by Mahomedan law.[81] The Patna High Court has recently held that the invocation of the witnesses to bear testimony to the demand in an essential element of *Talab-i-Ishhad.*[82] The property must be described sufficiently so as to be identifiable.[83] In a recent judgment[84] the Bombay High Court has, dissenting from *Pachimuddin Nayak v. Abdul Gaffar* and approving *Imam-ud-din v. Muhammad* held that it is not obligatory under the Mahomedan Law to utter the formula "be eye witnesses thereof. It is sufficient if the pre-emptor informs the witnesses of his right to pre-empt and the witnesses are taken to the purchaser for the purpose of attesting the Talab. It was further held that it was not necessary to tender the amount, and the demand would be valid if the pre-emptor expressed his desire to purchase the property at the same price as was paid by the purchaser, unless that price was not paid in good faith. The Patna High Court has held that though the *talab-i-ishhad* may be made by means of a letter or a messenger, this is permissible only when a person is unable to make the demand personally.[85]

(4) The *talab-i-ishhad* may be combined with the *talab-i-mowasibat*. Thus if at the time of *talab-i-mowasibat*, the pre-emptor has an opportunity of invoking witnesses *in the presence of the seller or the buyer or on the premises* to attest the *talab-i-mowasibat*, and witnesses are in fact invoked to attest it, it will suffice both the *talabs* (demands). This, however, is the only case in which the *talab-i-ishhad* may be combined with the

talab-i-mowasibat.[86] If under these circumstances a *talab-i-ishhad* is made subsequently, and there is no express reference to *talab-i-ishhad*, the right of pre-emption is not defeated, as the subsequent demand is superfluous.[87]

The *talab-i-mowasibat* may be made by using some such words as &uot;I do claim my *shufaa*&uot; (right of pre-emption): *Hedaya*, 551. The *talab-i-ishhad* may be made by the preemptor saying, &uot;such a person has bought such a house of which I am the *shaffee*; I have already claimed my privilege of *shufaa* and now again claim it: be ye therefore witness thereof: *Hedaya*, 551, But no particular form is necessary [*Hedaya*, 551]; what the law requires is that the demand must be to that effect and no more. If there are several purchasers, it is not necessary that the names of *all* the purchasers should be mentioned either at the time of the first or the second demand. Thus where a pre-emptor claimed the right of pre-emption against five purchasers, and form used was &uot;whereas Jagdeb Singh and others have purchased the property and I have claimed pre-emption, etc., and this was proclaimed in the presence of two of the purchasers and at the empty doors of the other three, it was held that the demand was properly made, and that there was nothing equivocal in the formulation of the claim.[88]

The Guwahati High Court in *Ajijur Rahman Barbhuiya v. Haji Moshaid Ali Laskar* [89] observed that it is well settled that the law relating to exercise of the right of pre-emption is of a highly technical nature. *Talab-i-mowasibat* and *talab-i-ishhad* are conditions precedent for the exercise of the right of pre-emption. The rules relating to aforesaid two talabs must be strictly complied with. Presence of the witnesses at the time of *talab-iishhad* is also important. It is for the pre-emptor to prove the fulfillment of the requirements to sustain his claim for pre-emption. However, once the pre-emptor succeeds in adducing satisfactory evidence in regard to fulfillment of the aforesaid talabs, his claim cannot be rejected on hyper technical interpretation of the formalities as on microscopic examination of the evidence to find some fault here and there. In any event, the court should examine the evidence and materials in judiciary keeping in view the practical and real state of affairs. The Court further held that when the Mahomedan Law has given such a right to a person, it should not be whitted away by insisting hyper-technical and unrealistically strict compliance of the formalities accompanied with its exercise. It must be remembered that formalities&uot; after all are only formalities intended to serve some ostensible purpose and once that purpose is served, these should not be allowed to be used to take away the legal right of a claimant.

(6) *Explanation I.--See* 232. *Expl.*, and notes thereto.

Shia law

Shia law of pre-emption is the same as the Hanafi law. It may be that according to Shia law the same degree of alacrity is not required for making a *talab* as in Hanafi law, but when *talab-i-ishhad* is made, a reference to *talab-i-mowasibat* is absolutely necessary, otherwise the *talab-i-ishhad* is defective in an essential particular.[90]

The requirements of Talabs in the area of former Jaipur State have become unnecessary after the notification dated the 7th April, 1927 published in the Jaipur Gazette dated the 15th April, 1927 and to this extent this notification has modified the customary right of Pre-emption as prevailing in the former Jaipur State in respect of 'Talabs'.[91]

52 *Rujjub Ali v. Chandi Churn* (1890) 17 Cal. 543F.B. ; *Mubarak Hussain v. Kaniz Bano* (1904) 27 All. 160; *Jadu Lal v. Janki Kocr* (1912) 39 Cal. 915. 923, 39 I.A. 101, 108, 15 I.C 659. affimg. (1908) 35 Cal. 575; *Sadiq Ali v. Abdul* (1923) 45 All. 290, 71 I.C 460, ('23) A.A. 251; *Medni Proshad v. Surcsh Chandra* (1943) al Pat. 795, 204 I.C 41, ('43) A.P. 96.

53 *Kulsum Bibi v. Faqir Muhammad* (1896) 18 All. 298; *Muhammad Usman v. Muhammad Abdul* (1912) 34 All. 1, 11 I.C 319. But sec *Sonaji v. Narhar* ('52) A. Hyd. 159. For the meaning of &uot;on the premises&uot; see *Akhtar Husain v. Hasmat Ali* (1951) All. L.J. 414, ('51) A.A. 713; *Mt. Nanhi v. Bunyadi Begam* ('54) A.A. 87.

54 *Jadu Singh v. Raj Kumar* (1870) 4 Beng. L.R. 171A.C, 13 W.R. 177; *Ramdular Misser v. Jhumack Lal Misser* (1872) 8 Beng. L.R. 455, 17 W.R. 265.

55 *Narayana v. Kartiayani* ('62) A. Ker. 122.

56 *Abadi Begam v. Imam Begum* (1877) 1 All. 521; *Ali Muhammad v. Muhammad* (1896) 18 All. 309; *Jadu Lal v. Janki Koer* (1912) 39 Cal. 915, 39 I.A. 101, 15 I.C. 659; *Harihar v. Sheo Prasad* (1884) 7 All. 41 [pre-emptor bound by acts and omissions of his agents]; *Shamsuddin v. Allauddin* (1931) All. L.J. 1083. 134 I.C 462, ('32) A.A. 138. [must be previously authorized].

57 *Sonabashi Kuer v. Ramdeo Singh* ('51) A.P. 521.

58 *Shamsuddin v. Aliauddin* (1931) All. L.J. 1083, 134 I.C 462, (&uot;32) A.A. 138.

59 *Syed Wajid v. Lata Hanuman* (1869) 4 Beng. L.R., A.C, 139; *Muhammad v. Muhammad* (1916) 38 All. 201. 33 I.C 349.

60 *Ali Muhammad v. Muhammad* (1896) 18 All. 309.

61 *Shamsuddin v. Allauddin* (1931) All. L.J. 1083, 134 I.C. 462, ('32) A.A. 138.

62 *Aliman v. Ali Hussain* (1923) 45 All. 449, 73 I.C, 1029, ('23) A.A. 355.

63 *Muhammad Askari v. Rahimtulla* (1927) 49 All. 716, 105 I.C. 771, ('27) A.A. 548.

64 *Jog Deb v. Mahomed* (1905) 32 Cal. 982; *Muhammad Nazir v. Makhdum* (1912) 34 All. 53, 11 I.C. 737.

65 *Deonandan Prashad v. Ramdiiari* (1917) 44 Cal. 675, 683, 44 I.A. 80, 82, 39 I.C. 958.

66 *Muhammad v. Madho Prasad* (1917) 39 All. 133, 35 I.C. 911.

67 *Jadu Sing v. Rajkumar* (1810) 4 B.L.R.A.C. 171; *Abdur Rasheed v. Mahomed Idris* (1946) 49 C.W.N. 761, 223 I.C. 496, ('46) A.C. 135; *Jaganath v. Ranchhod* ('50) A. MB 40.

68 *Audit Bihari Singh v. Gajadhar* (1955) 1 S.C.R. 70, ('54) A.S.C. 417.

69 *Kheyali v. Mullick* (1916) 1 Pat. LJ. 174, 34 I.C 210.

70 *Nareshchandra Dutta v. Gireeschandra Das* (1936) 62 Cal. 979, 160 I.C. 730, ('36) A.C. 17.

71 *Baijnath v. Ramdhari* (1908) 35. Cal. 402, 35 I.C. 60.

72 *Ali Muhammad v. Taj Muhammad* (1876) 1 All. 283.

73 *Abdul Gaffarklian v. Abdul Jikar* ('54) A.N. 113.

74 *Jarfan Khan v. Jabbar Meah* (1884) 10 Cal. 383.

75 *Ganga Prasad v. Ajudhia* (1905) 28 All. 24; *Pachumudin Nayek v. Abdul Gaffar* ('37) A.C. 283, 163 I.C. 480; *Shivshankar v. Laxman* (1943) 45 Bom. L.R. 78, ('43) A.B. 83.

76 *Mubarak Hussain v. Kaniz Bano* (1904) 27 All. 160; *Sadiq Ali v. Abdul* (1923) 45 All. 290, 71 I.C. 460, ('32) A.A. 251; *Chancier SekJiar v. Ram Prasad* (1950) 28 Pat 861, ('51) A.P. 93.

77 *Golam Kibria Molla v. Abdur Rouf Molla,* A.I.R. 1976 Cal. 205.

78 (1905) 28 All. 24, *supra*.

79 *Ahmad Hakim v. Muhammad* (1927) 49 All. 385, 100 I.C. 30, ('77) A.A. 289; *Imam-ud-din v. Muhamad,* (1930) 52 All. 1005, 133 I.C. 304, ('31) A.A. 736.

80 *Pachumuddin Nayak v. Abdul Gaffar* (1937) 42 CW.N. 300, ('37) A.C. 283, 163 I.C 480.

81 *Fakir Rawdt v. Emambaksh* (1863) Beng. L.R. Sup. Vol. 35; *Jadu Lal v. Janki Koer* (1912) 39 I.A. 101, 39 Cal. 915, 15 I.C. 659.

82 *Medni Proshad v. Suresh Chandra* (1943) 21 Pat. 795, 204 I.C 41, ('43) A.P. 96.

83 *Sonabashi Kuer v. Ramdeo Singh* ('51) A.P. 521; *Fakir Shaikh v. Syed Ali Shaikh* ('55) A.C. 349.

84 *Shivshankar v. Laxman* (1943) 45 Bom. L.R. 78 ('43) A.B. 83.

85 *Medni Proshad v. Suresh Chandra* (1943) 21 Pat. 795, 204 I.C 41, ('43) A.P. 96.

86 Baillie, 490; *Nathu v. Shadi* (1915) 37 All. 522, 29 I.C. 495; *Rajjub Ali v. Chundi Churn* (1890) 17 Cal. 543 [F.B.]; *Mahbooban v. Fatima Begum* ('52) A.A. 167; *Mohd Umar v. Amir Mohd.* ('58) A.M.P. 123.

87 *Abdul Majid v. Qamaruddin* (1945) All. 525, ('45) A.A. 375.

88 *Jog Deb v. Mahomed* (1905) 32 Cal. 982.

89 AIR 1991 Gau. 66.

90 *Ummi-ul-Nisa v. Fatima Begum* (1946) All. 491, 226 I.C 545, ('47) A.A. 89.

91 *Radha Ballabh Haldiya v. Pushalal Agarwal,* A.I.R. 1986 Raj. 88.

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CHAPTER XIII

PRE-EMPTION

237.

Transfer of property by purchaser after demands

When once a pre-emptor has made the "demands" required by law (236), a transfer by the purchaser of the property sought to be pre-empted will not affect the rights of the pre-emptor, and the pre-emptor is not bound to make fresh "demands" against the transferee.[92]

92 *Muhammad Abdul v. Muhammad* (1924) 46 All. 889, 79 I.C. 1053, ('24) A.A. 806.

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CHAPTER XIII

PRE-EMPTION

238.

Tender of price not essential

It is not necessary to the validity of a claim of pre-emption that the pre-emptor should tender the price at the time of the *talab-i-ishhad*(236); it is sufficient that he should then declare his readiness and willingness to pay the price stated in the deed of sale, or, if he has reasonable grounds to believe that the price named in the sale deed is fictitious, such sum as the Court determines to have been act ually paid by the buyer.[93]

Oudh Laws Act, 1876

Section 13 of this Act requires the Court to fix the fair market value if the price named in the sale deed is fictitious. But the price actually paid is treated as evidence of the market value.[94]

93 Baillie, 494; *Heera Lal v. Moorut Lal* (1869) 11 W.R 275; *Lajja Prasad v. Debi Prasad* (1880) 3 All. 236; *Nundo Pershad v. Gopal* (1884) 10 Cal. 1008; *Karim Baksh v. Khuda Baksh* (1894) 16 All. 247, 248. See *Jagat Singh v. Baldeo Prasad* (1921) 43 All. 137, 59 I.C. 679, ('21) A.A. 290 [sale to mortgagee].

94 *Lalloo Singh v. Jagjivan Prasad* (1936) 159 I.C. 609, ('36) A.O. 100.

Punjab Pre-emption Act, 1913

Section 25 of this Act requires the Court to determine the market value if the price was not fixed in good faith or paid. But if the price named in the sale deed has been paid, that is the price for pre-emption unless there is clear proof of a refund by the vendee to the vendor.[95]

95 *Ali Akbar v. Multan* (1936) 160 I.C. 452, ('36) A. Pesh. 12.

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CHAPTER XIII

PRE-EMPTION

239.

Death of pre-emptor

If the pre-emptor dies pending the suit for pre-emption, the suit may be continued by his legal representatives.

A sues *B* for pre-emption. *A* dies before obtaining a decree in the suit. According to the Hanafi law, the right to sue is extinguished and the suit cannot be prosecuted by *A*'s heirs.[1] According to the Shia and the Shafei law, the right to sue is not extinguished, and the suit may be continued by *A*'s heirs: Baillie, II, 190; *Hedaya*, 561. According to the Probate and Administration Act, 1881, s. 89 [now Indian Succession Act 39 of 1925, (s. 306), the right is not extinguished, and the suit may be continued by*A*'s legal representative, that is his *executor or administrator*. That Act applies to Mahomedans, and the effect of a Bombay decision is that whatever be the sect to which the parties belong, the rule applicable to cases of this kind is that laid down in the Act, that is to say, if A dies leaving a will, the suit may be continued by his executor, and if he dies intestate it may be continued by his heirs *on obtaining letters of administration.*[2]

1 Baillie, 505-506; *Muhammad Hussain v. Niamat-un-nissa* (1897) 20 All. 88; *Mohd Ismail v. Abdul Rashid* (1956) I All. 143.

2 *Sayyad Jiaul Hussain v. Sitaram* (1912) 36 Bom. 144, 12 I.C. 720 (Shefei); *Sitaram v. Sayad Sirajul* (1917) 41 Bom. 636, 653, 42 I.C 32, affd.' on app. to PC. in *Sitaram v. Jiaul Hasan* (1921) 45 Bom. 1056, 1061, 48 I.C 475, 479, 64 I.C 826, ('73) A.P.C. 41. See also Code of Civil Procedure,1908 O. 22, r. 1.

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CHAPTER XIII

PRE-EMPTION

240.

Right lost by acquiescence

The right of pre-emption is lost if the pre-emptor enters into a compromise with the buyer, or if he otherwise acquiesces in the sale.[3] But a mere offer by a pre-emptor to purchase from the buyer at the sale-price, made with the object of avoiding litigation does not amount to acquiescence.[4]

In *Indira Bai v. Nand Kishore* [5], the Supreme Court has held that the right of preemption is a weak right and it can be defeated by estoppel. Even in, Muslim Law, which is the genesis of this right, as it was unknown to Hindu Law and was brought in the wake of Mohammedan Rule, it is settled that the right of pre-emption is lost by estoppel and acquiescence. Estoppel is a rule of equity flowing out of fairness striking on behavior deficient in good faith. It operates as a check on spurious conduct by preventing the inducer from taking advantage and assailing forfeiture already accomplished. It is invoked and applied to aid the law in administration of justice. But for it great many injustice may have been perpetrated.

3 *Habib-un-nissa v. Barkal Ali* (1886) 8 All. 275; *Amir llaidar v. Ali Ahmad* (1925) 47 All. 635, 88 I.C. 234, ('75) A.A. 424 (minor); *Narayan das v. Jagan Nath* ('50) A. MB 85.

4 *Muhammad Nasir-ud-din v. Abdul Hasan* (1894) 16 All. 300; *Muhammad Yunus v. Muhammad Yunus* (1897) 19 All. 334.

5 A.I.R. 1991 SC 1055, (1990) 4 S.C.C. 668.

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PRE-EMPTION

241.

Right lost by joinder of plaintiffs not entitled to pre-empt

If a plaintiff who has a right of pre-emption joins with himself as co-plaintiff a person who has no such right he is not entitled to claim preemption, and the suit must be dismissed. But the right is not lost if he joins with himself as co-plaintiff a person who, but for his failure to make necessary demands (236), would have been entitled to pre-empt.[6]

6 *Dwarka Singh v. Shea Shankar* (1926) 48 All. 810, 98 I.C 1007, ('77) A.A. 168; *Mahanth Tokh Narayan v. Ram Rachhya* (1926) 5 Pat. 96, 90 I.C. 806, ('75) A.P. 743; *Narayana v. Kanhiayani* ('62) A. Ker 122.

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CHAPTER XIII

PRE-EMPTION

242.

Right not lost by refusal to buy before sale

As the right of preemption accrues *after* the completion of sale, it is not lost because *before* the completion of sale the property was offered to the pre-emptor and he refused to buy[7] (236, Expl. I). A *fortiori* it is not lost because he had previous notice of the sale and he made no offer to the seller to buy the property.[8]

7 *Abadi Begum v. Inam Begum* (1877) 1 All. 521; *Kanhai Lal v. Kalku Prasad* (1905) 27 All. 670.

8 *Muhammad Askari v. Rahmatullah* (1927) 49 All. 716, 105 I.C. 771, ('77) A.A. 548.

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CHAPTER XIII

PRE-EMPTION

243.

Right not lost by previous notice of sale

As the right of preemption arises *after* the completion of sale, it is not lost because the preemptor had notice that the property was for sale and he did not offer to purchase it[9] (236, Expl. I).

9 *Ibid*.

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CHAPTER XIII

PRE-EMPTION

244.

Sale to two or more persons

Where the property is sold to two or more persons, the pre-emptor may pre-empt the share of any of them[10] (236, Expl. IV).

The decision in the case cited, proceeded on the ground that the Mahomedan jurists regard each vendee as if he had entered into a separate transaction. It is however contrary to a line of decisions in Lahore[11] to the effect that the pre-emptor must take over the bargain in its entirety.

10 *Ibid*.

11 *Muhammad Shafi v. Allah Din* (1934) 153 I.C 128, ('34) A.L 429 and the cases there cited. See also: *Bishan Singh v. Khazan Singh* ('58) A.S.C. 838. See, however: *Mir Mohd v. Bhagwan Das* ('61) A. J&K 36.

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CHAPTER XIII

PRE-EMPTION

245.

Suit for pre-emption: what the claim must include

Where the property is sold to a single buyer, a person claiming to pre-empt must pre-empt the whole interest comprised in the transfer, to the buyer. A suit which does not ask for pre-emption of the whole of such interest is defective, and should not be entertained.[12]

The principle of denying the right of pre-emption except as to the whole of the property sold is that if the pre-emptor was allowed to split up the bargain; he would be at liberty to take the best portion of the property and leave the worst part of it with the vendee.[13]&uot;The right of pre-emption was never intended to confer such a capricious choice upon the preemptor&uot;.[14] But if the same sale deed embodies two transactions of sale, the pre-emptor may pre-empt the one and not the other.[15] Again if the sale includes properties which are not subject to pre-emption, the pre-emptor is entitled to exclude them and to pre-empt the rest.[16] Where the purchase himself sells part of the property to another, the pre-emptor is entitled to pre-emption in respect of that portion which remains with the purchaser.[17]

12 *Durga Prasad v. Munshi* (1884) 6 All. 423; *Dhola v. Khanum* (1935) 160 I.C. 576, ('35) A.L. 635.

13 *Sheobharos v. Jiach Rai* (1886) 8 All. 462.

14 *Durga Prasad v. Munshi* (1884) 6 All. 423, at p. 426.

15 *Abdul Karim v. Ghulam Nabi* (1934) 151 I.C. 367, ('34) A.L. 402.

16 *Zainab Bibi v. Umar Hayat Khan* (1936) All. LJ. 456, 161 I.C. 758 ('36) A.A. 732; *Mohmudi v. Mustaque Ali* (1958) All. LJ. 559.

17 *Ude Ram v. AtmaRam* (1924) 5 Lah. 80, 80 I.C. 960, ('24) A.L. 431.

Limitation

A suit to enforce the right of pre-emption must be instituted within one year from the date when the purchaser takes physical possession of the property, or where the subject of the sale does not admit of physical possession, when the instrument of sale is registered [Limitation Act, 1908 sch. I Art. 10]. If the subject of sale does not admit of physical possession and there is no registered instrument the suit will be governed not by Art. 10, but by Art. 120.[18] If the sale has been disguised as a usufructuary mortgage in order to defeat the right of pre-emption, limitation runs from the time when the fraud is discovered.[19]When the person entitled to preemption is a minor, the right may be claimed on his

behalf by his guardian, but the suit must be instituted within the aforesaid period, and the period of limitation will not be extended by reason of the pre-emptor's minority (Limitation Act, 1908, 8).*See*Arts. 97 and 113 of the Limitation Act of 1963.

18 *Batul Begum v. Mansur Ali* (1902) 21 All. 17; *Kaunsilla v. Gopal* (1906) All. W.N. 73.

19 *Bhagwana v. Shadi* (1934) 16 Lah. 408, 155 I.C. 654, ('34) A.L 878.

When pre-empted property vests in pre-emptor

*See*Code of Civil Procedure, 1908, O. 20, r. 14. Upon a pre-emption decree, the property and the right to mesne profits vest in the pre-emptor from the date when he pays the amount of the purchase price finally decreed; until that time, the original purchaser retains possession and is entitled to the rents and profits.[20]

20 *Deokinandan v. Sri Ram* (1889) 12 All. 234F.B. ; *Deonandan Proshad v. Ramdhari* (1917) 44 Cal. 675, 44 I.A. 80, 39 I.C. 958.

Decree in a suit for pre-emption

*See*Code of Civil Procedure, O. 20, r. 14.

Property subject to mortgage

If the property of which possession is decreed is subject to a mortgage, the pre-emptor takes it subject to the mortgage.[21] If the property is in the possession of the mortgagee, the decree should provide that his possession should not be disturbed until redemption of the mortgage.[22]

21 *Tejpal v. Girdhari Lal* (1908) 30 All. 130.

22 *Shamsuddin v. Allauddin* (1931) All. LJ. 1083, 134 I.C. 462, ('32) A.A. 138.

CHAPTER XIII

PRE-EMPTION

246.

Decree for pre-emption not transferable

A decree for preemption is not transferable so as to entitle the transferee to obtain possession of the property in suit in execution of the decree.[23]

23 *Ram Sahai v. Goya* (1884) 7 All. 107, 111; *Nadir Ali v. Wali* (1924) 5 Lah. 486, 85 I.C. 182, ('25) AL. 202; *Mehr Khan v. Ghulam* (1921) 2 Lah. 282, 64 I.C. 191, ('22) A.L. 300.

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CHAPTER XIII

PRE-EMPTION

247.

Legal device for evading pre-emption

When it is apprehended that a claim for pre-emption may be advanced by a neighbour, the vendor may sell the whole of his property excluding a portion, however small, immediately bordering on the neighbour's property, and thus defeat the neighbour's right of pre-emption.

Hedaya, 563; Baillie, 512 et seq. Fabrication is not one of the devices permissible under the Mahomedan law for defeating the right of pre-emption.[24](*see* notes to 232, &uot;Lease in perpetuity&uot;)

24 *Jadu Lal v. Janki Koer* (1908) 35 Cal. 575, affmd. in (1912) 39 Cal. 915, 39 I.A. 101, 15 I.C. 69.

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CHAPTER XIII

PRE-EMPTION

248.

Sect-law as governing pre-emption

(1) If both the vendor and pre-emptor are Sunnis, the right of pre-emption is to be determined according to the Sunni law, and if both the parties are Shias,[25] the right of pre-emption is governed by the Shia law.[26]
(2) If the vendor is a Sunni, and the pre-emptor is a Shia, the right of pre-emption is, according to the Allahabad and Hyderabad High Courts, governed by the Shia law, on the principle of reciprocity explained in the notes to 234 above.[27]
(3) If the vendor is a Shia, and the pre-emptor is a Sunni, then according to the Allahabad and Hyderabad High Courts, the right of preemption is governed by the Shia law[28]; but according to the Calcutta High Court, it is governed by the Sunni law.[29]
(4) The personal law of the buyer is immaterial in these cases.[30]

25 See *Gobind Dayal v. Inayatullah* (1885) 7 All. 775.

26 *Abbas Ali v. Maya Ram* (1888) 12 All. 229.

27 *Qurban v. Chote* (1889) 22 All. 102; *Pasha Begum v. Syed S. Hasan* (1955) Hyd. 676.

28 *Pir Khan v. Faiyaz* (1914) 36 All. 488, 25 I.C. 445; *Pasha Begum v. Syed S. Hasan (supra)* .

29 *Joy Deb v. Mahomed* (1905) 32 Cal. 982.

30 *Gobind Dayal v. Inayatullah* (1885) 7 All. 775; *Jog Deb v. Mahomed* (1905) 32 Cal. 982. But see *Kudratullah v. Mohini Mohan* (1869) 4 B.L.R. 134.

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CHAPTER XIII

PRE-EMPTION

249.

Points of difference between Sunni and Shia law of preemption

(1) According to the Shia law, no right of pre-emption exists in the case of property owned by *more than two* co-sharers.[31]
(2) The Shia law does not recognize the right of pre-emption on the ground of *vicinage,*[32] or on the ground of &uot;participation in the appendages.&uot;

Baillie, II, 175-179. *A*, a Sunni, sells his land to *B*. *A*'s neighbour *C*, who is a Shia, sues, *A* and *B* for pre-emption. According to the Allahabad High Court, the law to be applied, is the Shia law, and under that law, a neighbour as such has no right of preemption. *C* is not therefore entitled to pre-empt. But if we deny *C* the right to pre-empt by applying his own law [Shia law] to him it is but fair when *C* sells his own property; we should apply the same law so that if his neighbour is a Sunni and he claims the right of pre-emption on the ground of vicinage, we should not allow his Sunni neighbour the right of pre-emption. This is the line of reasoning followed by the Allahabad High Court in the cases referred to in 248, sub-s. (2) and (3). The tendency of the Calcutta High Court is to apply in all cases the Sunni law of pre-emption except perhaps in cases where both the vendor and pre-emptor are Shias. The reason given by that Court is that the law of preemption in force in this country is the Sunni law of pre-emption.

31 *Abbas Ali v. Maya Ram* (1888) 42 All. 229; *Hossain Baksh v. Mafuz-ul-haq* (1925) 47 All. 944, 88 I.C 972, ('25) A.A. 559.

32 *Qurban v. Chote* (1889) 22 All. 102.

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CHAPTER XIV

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

250.

Definition of marriage

Marriage (*nikah*) is defined to be a contract which has for its object the procreation and the legalizing of children.

Hedaya, 25; Baillie, 4.

Contract

Marriage according to the Mahomedan law is not a sacrament but a civil contract. All the rights and obligations it creates arise immediately and, are not dependent on any condition precedent such as the payment of dower by husband to a wife.[1]

The Rajasthan High Court has made a very sound observation in the instant case that unlike a Hindu Marriage, which is a sacrament, according to the Islamic Law, a marriage (&uot;*Nikah*&uot;) is a permanent and unconditional civil contract (which comes into immediate effect) made between two persons of opposite sexes with a view to mutual enjoyment and procreation and legalizing of children. One of the essential features of a valid marriage is the payment of &uot;mehr&uot; (dower). Although it is an obligation upon the husband, but the wife is well within her rights to relinquish the said dower. Since the concept of contract is the basis of marriage, the principles of a valid contract would be applicable to the relinquishment. Thus, the relinquishment should be made voluntarily. It should not be made by duress, fraud, misrepresentation, under influence or mistake. It should be made with free consent.[2]

For a very informative consideration of the concept of marriage and divorce, see the judgment of the Pakistan Supreme Court in *Khurshid Bibi v. Mohd Amin* .[3] In this case Justice S.A. Rahman who wrote the judgement says that &uot;among Muslims, marriage is not a sacrament, but is in the nature of civil contract. Such a contract undoubtedly, has spiritual and moral overtones and undertones but legally, in essence, it remains a contract between the parties..&uot; This judgment, does not say that marriage is purely, a civil contract, or for that matter, a civil contract. It merely regards to be in the nature of a civil contract.

In the opinion of the present editor the nature of a Muslim marriage should, apart from many similarities with a civil contract also be seen in the light of various Sunnah of the Prophet[4] and the right and obligations imposed by Almighty in the Holy Quran. If seen in that light, the institution of marriage is comprised of both worship (*ibadat*) and the worldly affairs (*Muamalat*). In this perspective, it is a civil contract in which free consent of both the parties is essential; on the accomplishment of it, however, the relationship of both the contracting parties is not determined as a pure civil contract, but is determined in combination with the religious connotation.[5]

1 *Abdul Kadir v. Salima* (1886) 8 All. 149.

2 *Hasina Bano v. Alam Noor* A.I.R. 2007 Raj 49.

3 P.L.D. 1967, S.C. 97.

4 Nikah, in certain circumstances, is an obligatory Sunnah (muwakkadah). If one is apprehensive of his committing adultery, inspite of his being capable of providing maintenance and paying dower to a woman, Nikah, for him is obligatory (wajib). He will be committing a sin if he does not contract marriage. (Nizam Burhanpuri,-Al-Shaykh: Fatawa Alamgiriyyah, Deoband, n.y.vol. II. p.1). One is apprehensive of transpressing the limits of God (Huquq Allah) in marriage, Nikah for him is abominable (Mukruh). According to the saying of the companions of the Prophet, Nikah has a preferences over superatogatory rituals i.e. Naff Prayers. (Al-Badai-al-Sanai, Cairo, vol. II, p. 229.

5 *Mahmad Usaf Abasbhai Bidiwale v. Harbanu Mansur Atar.* (1978) Mah. LJ. 26.

Zina

Zina means fornication or adultery. Sexual intercourse not permitted by the Mahomedan law is zina. The offspring of such intercourse is illegitimate, and cannot be legitimated by acknowledgment (344(2)).

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CHAPTER XIV

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

251.

Capacity for marriage

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

A Mahomedan girl of 15 years who has attained the age of puberty is competent to marry without the consent of her parents.[6]

Marriage under the Mahomedan Law is a civil contract. Hence it should attract all the incidents of contract as any other stipulated in the Contract Act . The provisions of s. 64 of the Contract Act, will be squarely applicable to a case such as the present one where the marriage has been rescinded unilaterally. The provisions of s. 64 of the Contract Act are clear in this behalf and require only that person to return the benefits under the Contract, at whose opinion the contract is rescinded *Mahmad Usaf Abasbhai Bidiwale v. Hurbanu Mansur Atar* .[7]

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

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

The same rule applies in the case of a Shafei girl who has attained puberty.[8]

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

Hedaya, 529; Baillie, 4 Note that the provisions of the Indian Majority Act, 1875, do not apply to matters relating to*marriage, dower, and divorce*. A Mahomedan wife who has attained puberty and is under eighteen years of age may file a suit for divorce without the appointment of a next friend.[9](*see* notes to 115 above)

With reference to a girl the Judicial Committee observed that the age of puberty in Mahomedan law is nine years.[10] Their Lordships were no doubt referring to the passage in the Hedaya that &uot;the earliest period of puberty with respect to a boy is twelve years and with respect to a girl is nine years.&uot;

Consent to marriage obtained by force or fraud

When consent to a marriage has been obtained by force or fraud, the marriage is invalid unless it is ratified.[11] Where consent to the marriage has not been obtained, consummation against the will of the woman will not validate the marriage.[12]

6 *Md. Idris v. State of Bihar* . 1980 Cri LJ. 764, [Nagendra Prasad Singh and Muneshwari Sahay, JJ.].

7 (1978) Maha. LJ. 26.

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

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

10 *Sadiq Ali Khan v. Jai Kishori* (1928) 30 Bom. L.R. 1346, 109 I.C. 387, ('28) A.P.C. 152.

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

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

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CHAPTER XIV

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

252.

Essentials of a marriage

It is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Mahomedans. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. Neither writing nor any religious ceremony is essential.[13]

Mahomedan Law--&uot;Mahomedan&uot; -- Who is -- Hindu convert -- If to perform rites or necessaries to become a Mahomedan.

Under Mahomedan Law or religion, there is no particular ceremony or ritual for conversion. Any person who professes Mahomedan religion and acknowledges that there is but one God and Mohammad is his prophet is a Mahomedan. It is not necessary that he should observe any particular rites or ceremonies or be an orthodox believer in the religion.[14]

For a description of the regular procedure for obtaining the consent of the girl and the usual form in which the proposal and acceptance is gone through where the women are in purdah see the undermentioned case.[15] But it was held by the Oudh Court that the proposal and acceptance need not be in any particular form. In this case there was evidence of the consent of the girl and that the husband had agreed to the dower and it was held that under the circumstances after the lapse of a long time after the marriage all the formalities required should be presumed to have been complied

with.[16] Similarly, where the person who performed the *nikah* was dead, the evidence of a witness was enough to prove the *nikah* and it was held that the exact words of offer and acceptance need not be proved.[17]

13 *Moung Kyi v. Mo Shwe Baw* (1929) 7 Rang. 777, 121 I.C 718, ('29) A.R. 341; *Jogu Bibi v. Mesal Shaikh* (1936) 63 Cal. 415, 164 I.C. 957, Pakistan: *Muhammad Zaman v. Naima Sultan* ('52) A. Pesh. 47. *See also*, *A. Abdul Rahim v. Julaiga Beevi,* (2001) 2 MLJ 822.

14 *Syed Amanullah Hussain v. Rajammae* (1977) 1 An. W.R. 123; (1976) 2 A.P.LJ. 323, [Alladi Kuppuswamy, J.].

15 *Mt. Ghulam Kurbd Bibi v. Mohammad Shaffi* ('40) A. Pesh. 2.

16 *Mt. Bashiran v. Mohammad Husain* (1941) 16 Luck. 615, (1941) O.W.N. 249, 193 I.C. 161, ('41) A.O. 284.

17 *Alamgir v. The State* (1956) 35 Pat. 93, 98-99.

Shafei school

The consent at marriage should be of the wife. The wali only communicates the wish of the bride. *Muhammad Ibrahim v. Ghulam Ahmed* ,[18] is not good law. An adult virgin of the Shafei school can giver herself in marriage through a wali and the marriage is not invalid because the father's consent was not obtained. The wali's powers emanate from the authority of the woman. She may choose a remote relative as wali in preference to a near one who is inimical to her interests. A marriage is not valid unless consented to be an adult girl -- Shafei and Maliki schools hold that the consent must be given through a wali.

Under Hanafi law, the woman can give consent with or without a *wali.*[19]

Hedaya, 25, 26; Baillie, 4, 5, 10, 14. The usual form of proposal is, &uot;I have married myself to you,&uot; and that of acceptance is, &uot;I have consented.&uot;

18 (1862) Bom. H.C.R. 236.

19 *Kummali Abubukker v. Vengatt Marakkar* ('70) A. Ker. 277.

Registration of marriages

As to registration of Mahomedan marriages, see the Kazi's Act, 1880, and Bengal Act I of 1876 read with Act VII of 1905.

Shia law

According to the Shia law the presence of witnesses is not necessary in any matter regarding marriage: Baillie, II 4.

Registration of marriage

Muslim Law does not require registration of a marriage as a requisite for a valid marriage. On the other hand, Muslim Law never prohibits registration of marriage. A Muslim marriage can be proved by direct evidence or in the absence of direct evidence, by establishing prolonged continuous colabition or acknowledgment' by the man of the paternity of the child or the acknowledgment that a particular

woman is his wife. In order to assure a proper mode of proof, Muslim in an area may device a process by which the proof of marriage may be made easier, namely, by registration by Jamath. In course of time, it develops into a custom, a valid custom which is not violative of the Personal Law. The custom would become invalid only if it is sought to be made mandatory and thus violative of the Personal Law. The Muslim Personal Law (Shariat) Application Act, 1937, does not abrogate any custom or usage as long as such custom or usage are not contrary to the Personal Law.

Once it is established that the Muslims in the area had developed it as a custom to have the marriage of willing persons to be registered, it assumes the character of a customary right and not a mere contractual right.[20]

20 *M. Jainoon v. M. Ammanullah Khan* and others (2000) 2 M.L.J. 714.

Nikah by phone, video conference and internet

Though the marriage under Muslim Law is generally presumed as a civil contract but as many a time, the matter of marriage (*nikah*) is more complex than a sale deed as the former involves an aspect of ibadat and requires two witnesses. The direct proposal of marriage and pronouncement of acceptance on internet, video conferencing and telephone is not very reliable. However, *nikah* will be valid in case an attorney is appointed for *nikah* proceedings on these electronic media and the two parties make proposal and pronounce consent before their witnesses on behalf of the attorney. In such an arrangement the witnesses should have been familiar with the person appointed as attorney or his name, with his father's name and residential address which is mentioned at the time of proposal and acceptance.[21]

21 Social Issues Decision of a Indian Ulema, p. 7 IFA publication.

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CHAPTER XIV

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

253.

Valid, irregular and void marriages

A marriage may be valid (*sahih*), or irregular (*fasid*), or void from the beginning (*batil*).

Irregular or invalid marriages

The term &uot;fasid&uot; is translated in Baillie's Digest as &uot;invalid,&uot; but as the word &uot;invalid&uot; in the English language also means &uot;void,&uot; &uot;irregular&uot; and has been substituted for &uot;invalid&uot; in conformity with the usage of modern writers on the subject. As to irregular marriages, *see* 254 to 259 and 263. (As to void marriages, *see* 260 to 262)

The Marriage of a Shafei virgin girl who has attained puberty if she is given in marriage in a proper form is valid.[22]

In *Amina v. Hasan Koya* ,[23] question of validity of marriage came up before the Supreme Court. In that case, at the time marriage the girl was running 5th months pregnancy. The Court held that at such stage of pregnancy, it was difficult to conceal the same and it cannot be believed that husband was not aware about the pregnancy at the time of marriage. With full knowledge of the pregnancy, he had entered into the marriage and therefore, he could not later on challenge the validity of the same.

Where a document was executed between the parties at the time of marriage that the wife became pregnant from the husband prior to the marriage, and the husband accepted the paternity of the child, and the wife delivered the child on the day of the marriage, the Court held that it would have been impossible to conceal the pregnancy at such an advanced stage, and it means that the husband entering the marriage with full knowledge of pregnancy cannot later challenge the validity of the same.[24]

22 *Muhammad Haji Kammu v. Ethiyamma* (1967) Kerala L.T. 913.

23 A.I.R. 2003 SCW 2496.

24 A.I.R. 2007 (NOC) Bom 658.

Mulla: Mahomedan law, Updated 20th edition/CHAPTER XIV MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS/254. Absence of witnesses

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MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

254.

Absence of witnesses

A marriage contracted without witnesses as required by 252 is irregular, but not void.

Baillie, 155. As to irregular marriages, *see also* 264 and 267 below.

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MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

255.

Number of wives

A Mahomedan may have as many as four wives at the same time but not more. If he marries a fifth

wife when he has already four, the marriage is not void, but merely irregular.[25]

Baillie, 30, 154 (fourth class); Ameer Ali, 5th ed., Vol. II, p. 280. As to irregular marriages, *see* 262 and 267.

25 *Shahulameeda v. Subaida Bebee* (1970) M.LJ. Cr. 562.

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256.

Plurality of husbands

It is not lawful for a Mahomedan woman to have more than one husband at the same time. A marriage with a woman, who has her husband alive and who has not been divorced by him, is void.[26]

A Mahomedan woman marrying again in the lifetime of her husband is liable to be punished under s. 494 of the Indian Penal Code .[27] The off-spring of such marriage is illegitimate[28] and cannot be legitimated by acknowledgment[29] (344(2)).

26 *Liaqat Ali v. Karim-un-nissa* (1893) 15 All. 396,398; *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114; 121, 48 Cal. 856, 60 I.C. 837; *Budansa v. Fatma Bi* (1914) 26 Mad. L.J. 260, 22 I.C. 697. In the matter of Ram Kumari (1891) 18 Cal. 264, 269; *Nandi v. The Crown* (1920) 1 Lah. 440, 59 I.C. 33; *Government of Bombay v. Ganga* (1880) 4 Bom. 330.

27 *In the matter of Ram Kumari*(1891) 18 Cal. 264; *Nandi v. The Crown* (1920) 1 Lah. 440; *Hamad v. Emperor* ('31) A.L. 194, 134 I.C. 589.

28 *Liaqat Ali v. Karim-un-nissa* (1893) 15 All. 396, 398; *Budansa v. Fatma Bi* (1914) 26 Mad. LJ. 260, 23 I.C. 679.

29 (1893)15 All. 396, *supra*.

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CHAPTER XIV

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

257.

Marriage with a woman undergoing iddat

(1) A marriage with a woman before completion of her *iddat* is irregular, not void. The

Lahore High Court at one time treated such marriages as void;[30] but in a later decision held that such a marriage is irregular and the children legitimate.[31]

(2) *Iddat.*--&uot;Iddat&uot; may be described as the period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death to remain in seclusion, and to abstain from marrying another husband. The abstinence is imposed to ascertain whether she is pregnant by the husband, so as to avoid confusion of the parentage. When the marriage is dissolved by divorce, the duration of the *iddat* if the woman is subject to menstruation, is three course; if she is not so subject, it is three lunar months. If the woman is pregnant at the time, the period terminates upon delivery. When the marriage is dissolved by *death*, the duration of the *iddat* is four months and ten days. If the woman is pregnant at the time, the *iddat* lasts for four months and ten days or until delivery, whichever period is longer.[32]

If the marriage is dissolved by *death*, the wife is bound to observe the *iddat* whether the marriage was consummated or not. If the marriage was dissolved by *divorce*, she is bound to observe the *iddat* only if the marriage was consummated, if there was no consummation, there is no *iddat*, and she is free to marry immediately.

The *iddat* of divorce commences from the date of the divorce; and that of death from the date of death. If information of divorce or of death does not reach the wife until after the expiration of the period of *iddat*, she is not bound to observe any *iddat* [Baillie, 357].

Hedaya, 128-129; Baillie, 38, 151, 352-358. As to *iddat* in the case of an irregular marriage, *see* 267 (2)(ii).

Marriage during iddat

H has four wives, *A*, *B*, *C* and *D*. He divorces *A after* consummation of the marriage with her. It is not permissible to *A* to marry another husband, nor to *H* to marry another wife, during *A*'s iddat. Nor is it permissible to *H*, if one of the other wives dies during *A*'s *iddat*, to marry *A*'s sister (263). But either party may marry, again after completion of *A*'s *iddat*, and *H* may, if he chooses, marry *A*'s sister. The primary object of *iddat*, is to impose a restraint on the marriage of the wife, but this involves a corresponding restraint on the marriage also of the husband to the extent mentioned above. It must, however, be remembered that a marriage before completion of the *iddat* is not void, but merely irregular. As to irregular marriages *see* 264 and 267.

30 *Jhandu v. Mst Hussain Bibi* (1923). 4 Lah. 192, 73 I.C. 590, ('23) A.L. 949; *Mt. Raro v. Bagfi Singh* (1935) 157 I.C 779, ('35) A.L. 23.

31 *Muhammad Hayat v. Muhammad Nawaz* (1935) 17 Lah. 48, 156 I.C. 40, ('35) A.L. 622.

32 *Jhandu v. Hussain Bibi* (1923) 4 Lah. 192.

Valid retirement

When the husband and wife are alone together under circumstances which present no legal, moral or physical impediment to marital intercourse, they are said to be in &uot;valid retirement&uot; (*khilwat-us-sahiha*). A valid retirement in the Sunni law has the same legal effect as act ual consummation as regards dower, [267, 336(2)], the establishment of paternity, the observance of *iddat* (257), a wife's maintenance during iddat (279), the bar of marriage with wife's sister (263), and the bar of marriage imposed by the rule in 255. But it has not the same effect as actual consummation as regards the bar of marriage with the wife's daughter (261), or the bar of re-marriage between divorcees [336(4)]. In both these cases there must have been act ual consummation as stated in 261

and 336 -- (5): Baillie, 98-101.

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CHAPTER XIV

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

258.

Marriage between a Sunni and Shia

A Sunni male may contract a valid marriage with a Shia female.[33] and a Shia male may contract a valid marriage with a Sunni female.[34]

The rights and obligations of the wife would be governed by the law to which she belonged at the time of her marriage. (*see* 32)

33 *Syud Gholam Hossein v. Musst. Setabah Begum* (1866) 6 W.R. 88; *Aziz Bano v. Muhammad* (1925) 47 All. 823, 89 I.C. 690, ('25) A.A. 720.

34 *Nasrat Hussain v. Hamidan* (1882) 4 All. 205.

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259.

Difference of religion

(1) A Mahomedan male may contract a valid marriage not only with a Mahomedan woman, but also with a *Kitabia*, that is, a Jewess or a Christian, but not with an idolatress or a fire-worshipper. A marriage, however, with an idolatress or a fire-worshipper, is not void, but merely irregular.[35]

(2) A Mahomedan woman cannot contract a valid marriage except with a Mahomedan. She cannot contract a valid marriage even with a *Kitabi*, that is, a Christian or a Jew. A marriage however, with a non-Muslim, whether he is a *Kitabi*, that is, a Christian or a Jew, or a non-*Kitabi*, that is, an idolator or a fire-worshipper, is irregular, not void.

Hedaya, 30; Baillie, 40-42, 151, 153.

Prof. A.A.A. Fyzee regards such a marriage as void. *See also* 264(3)(d) infra. In the opinion of the editor there is force in Prof. Fyzee's opinion. However, it will have to be judicially decided.

As to irregular marriages, *see* 264 and 267.

Under Muslim Law, marriage between a Muslim male and a Christian female is not void or illegal. The prohibition is only against a Muslim woman marrying a non-Muslim.

There is no difference between the case of a Muslim woman who after marriages renounces Muslim faith, and the case of a non- Muslim woman who embraces Islam, marries a Muslim and then commits apostasy. The same consequences must follow apostasy in both the cases. No doubt the marriage between a Muslim male and a Christian is not declared void under Muslim Law. But no exception is made in regard to the consequences of apostasy in such cases. It is nowhere laid down specifically that even after conversion of such a Muslim wife to Christian faith, the marriage would subsist. Merely because the marriage between a Muslim and a non-Muslim of Kitabia faith is not void, it does not necessarily follow that on the apostasy of one of the parties to the marriage, the marriage shall stand, not dissolved. Whether a Muslim wife was a Christian or Muslim prior to her marriage has no bearing on the question as to the consequence of the apostasy on one of the parties to the marriage. All the texts are uniform and all the scholars and commentators on Muslim law agree that in the case of apostasy of the wife, the marriage shall stand dissolved. No exception to this view has been stated. Whether she re-embraces her original faith or embraces a new faith, it is nonetheless an apostasy. Apostasy being acceptance of any other faith by a Muslim, the consequence of apostasy must be the same on the continuance of the marital relations of Muslims.

In the instant case, admittedly the third defendant embraced the Christian faith in the year 1952. i.e., prior to the extension of the Muslim of Dissolution Marriages Act, 1939. The marriage, therefore stood dissolved in that year and is not saved by that enactment. Consequently the third defendant's right to recover the dower due to her commenced in 1952. The suit instituted in 1968 was, therefore, barred by time, though, in fact, she was entitled to it.

In view of the provisions in the Caste Disabilities Removal Act, 1850, the Muslim woman's conversion to Christian faith does not deprive her of the right to claim a share in her husband's matruka, when she does not marry any one else.[36]

Marriage -- Validity -- Marriage of Muslim male with Christian female -- Validity. A marriage between a Muslim male and a Christian female is not invalid.[37]

In *Sarla Mudgal, President, Kalyani v. Union of India* ,[38] the Apex Court has held that a marriage which is in violation of any provision of law would be void in terms of the expression used under s. 494 of the IPC . So, a marriage between a Muslim and a non-Muslim spouse should be decided according to justice, equity and good conscience.

In *Lily Thomas, etc. v. Union of India* ,[39]the Supreme Court has held that change of religion does not dissolve the marriage performed under the Hindu Marriage Act or between two Hindus. A married Hindu contracting second marriage after professing Islam, despite his conversion would be guilty of offence punishable under s. 17 of the Hindu Marriage Act read with s. 494 of the IPC , because mere conversion does not automatically dissolve his first marriage.

It is a settled principle of law that to prove a conversion from one religion to another, two elements need to be satisfied. First, there has to be conversion and second, acceptance into the community to which the person has converted. It is obvious that the need of a conversion cannot be altogether done away with.[40]

Every person has a complete liberty to forsake his previous religion and to convert himself to another religion. There can be various reasons which can prompt a person to change his/her religion but, when one changes his religion, then such a change should come from one's heart based on his change of faith and his determination to embrace the new religion with complete faith, belief and

consciousness. Conversion from one religion to another religion in any case is a solemn, pious and noble act with far reaching consequences and it cannot be seen as an exercise undertaken by someone as a mere pretence to achieve some limited objective or purpose. Nobody can be seen to change his/her religion just to seek a membership of a library. There cannot be any divergence of opinion that in certain situations one of the parties to the marriage belonging to one religion can take a decision to embrace the religion of the other party but however such a conversion should not be undertaken merely to achieve the purpose of marriage, it should be done to embrace the new religion with a will and desire to completely follow the tenets of the new religion while simultaneously forsaking the tenets of the religion being professed by a person prior thereto.[41]

Therefore, regarding the purpose and objective of the conversion, the present editor[42] is also of the same opinion as expressed by the Court in the above case.[43]

35 *Ishan v. Panna Lal* (1928) 7 Pat. 6, 103 I.C. 430, ('28) A.P. 19.

36 *Kaneez Fatima v. Mrs. Angeal Cameron alias Siraj Sulthana* (1978) 2 A.P. LJ. 337 [Madhava Reddy and Narasinga Rao, JJ.].

37 *Kaneez Fatima v. Mrs. Angeal Cameron alias Siraj Sulthana* (1978) 2 A.P.L.J. 337 [Madhava Reddy and Narasinga Rao. JJ.].

38 AIR 1995 SC 1531.

39 2000 (5) JT (SC) 617.

40 *M. 'Chandra v. M. Thangamuthu & Anr* (2010) 9 SCC 712.

41 *Faheem Ahmad v. Maria @ Luxmi* LNIND 2011 DEL 494 (para 17). The revising editor of the 20th edition.

42 The revising editor of the 20th Edition.

43 See also *Kaneez Fatima v. Mrs. Angeal Cameron alias Siraj Sulthana* (1978) 2 A.P.LJ. 337.

Kitabi

Kitab means a book, that is, a book of revealed religion. *Kitabi* means a male who believes in Christianity or Judaism. *Kitabia* is a female who believes in either of these religions. The question whether a Buddhist woman can be regarded as a *Kitabia* arose in a case before the Privy Council, but it was not decided.[44]

44 *Abdool Razack v. Aga Mahomed Jaffer* (1893) 21 I.A. 56, 64-65, 21 Cal. 666, 674.

Indian Christian Marriage Act, 1872

In India, a marriage between a Mahomedan male and a Christian woman must be solemnized in accordance with the provisions of s. 5(4) of the Indian Christian Marriage Act, 1872 (XV of 1872), that is to say, by, or in the presence of, a Marriage Registrar appointed under the Act; any such marriage solemnized otherwise than in accordance with those provisions &uot;shall be void.&uot; But since a Mahomedan woman cannot contract a valid marriage with a Christian man, such a marriage, it would appear, cannot be solemnized under that Act . (*see* s. 88 of the Act)

The claim to the property of a *sirdar* was made by Nathoo as his daughter. The opposite parties contested the claim on the ground that she was illegitimate. Her mother Rukko was a Hindu. She became the concubine or the *sirdar*. Nathoo's case was that Rukko has become a Muslim and her name was changed to Asghari, and the marriage with her Hindu husband was automatically

dissolved. She then married the *sirdar*. In mutation proceedings the Director of Consolidation held in her favour. Although there was no proof of marriage, long cohabitation was held to have raised a presumption of marriage.[45]

45 Relying on *Government of Bombay v. Ganga* (1879) 4 Bern. 330; *Madras High Court v. Millard in re,* (1887) 10 Mad. 218 (a case of Roman Catholics); *Ramkumari*(1891) 18 Cal. 284 it was held that the marriage subsisted. *Mst. Nandi v. Crown* I.L.R. 1 Lah. 440, (1920 Lah. 379), Amir Ali Vol. II437 were cited. There can be no dissolution without a decree of Court. Reference was also made to *Sayeda Khatoon v. M. Obadiah* 49 C.W.N. 745 where it was held dissenting from *Musst. Ayesha Bibi v. Subodh Ch. Chakravarty* 49 C.W.N. 439, (1949 Cal. 436) that there is no automatic dissolution. However, if the husband had died the result might be different. (Case sent back.) *Ahmad Bux v. Smt. Nathoo* ('69) A. All. 75.

Shia law

In the Shia law, a marriage between a Muslim male and a non-Muslim female is unlawful and void; and so also is a marriage between a Muslim female and a non-Muslim male. But a Muslim male may contract a valid *muta* marriage (269) with a *Kitabia*. The Shias reckon fire-worhippers among *Kitabids*: Baillie, 29, 40.

The Sharai-ul-Islam (on which Baillie's Digest Vol. II is based) condemns such marriages.

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260.

Prohibition on the ground of consanguinity

A man is prohibited from marrying (1) his mother or his grandmother how high so ever; (2) his daughter or grand-daughter how low so ever; (3) his sister whether full, consanguine or uterine; (4) his niece or great niece how low so ever; and (5) his aunt or great aunt how high so ever, whether paternal or maternal. A marriage with a woman prohibited by reason of consanguinity is void.

Hedaya, 27.; Baillie, 24. As to void marriage, (*see* 264 and 266 below)

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261.

Prohibition on ground of affinity

A man is prohibited from marrying (1) his wife's mother or grandmother how high so ever; (2) his wife's daughter or grand-daughter how low so ever; (3) the wife of his father or paternal grandfather how high so ever; and (4) the wife of his son, of his son's son or daughter's son how low so ever. A marriage with a woman prohibited by reason of affinity is void.

In case (2), marriage with the wife's daughter or grand-daughter is prohibited only if the marriage with the wife was consummated.

Hedaya, 28; Baillie, 24-29, 154. As to void marriage, (*see* 264 and 266 below)

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262.

Prohibition on the ground of fosterage

Whoever is prohibited by consanguinity or affinity is prohibited by reason of fosterage except certain foster relations, such as sister's foster-mother, or fostersister's mother, or foster-son's sister, or foster-brother's sister, with any of whom a valid marriage may be contracted. A marriage prohibited by reason of fosterage is void.

Hedaya, 68, 69 Baillie, 30, 154, 194, 195. As to void marriages, (*see* 264 and 266 below)

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263.

Unlawful conjunction

A man may not have at the *same time* two wives who are so related to each other by consanguinity, affinity or fosterage, that if either of them had been a male, they could not have lawfully intermarried, as for instance, two sisters, or aunt and niece. The bar of unlawful conjunction renders a marriage irregular, not void.

Hedaya, 28, 29; Baillie, 31, 153.

Wife's sister

A man may not, as already stated, marry his wife's sister in his wife's lifetime. According to the

Calcutta High Court,[46] such a marriage is void, and the issue is illegitimate (266). According to the High Courts of Bombay[47] and Madras[48] and the Chief Court of Oudh,[49] such a marriage is merely irregular, and the issue is not illegitimate (267). The Calcutta decision, it is submitted, is not correct.

There is, of course, nothing to prevent a man from marrying his wife's sister *after* the death or divorce of the wife (Baillie, 33).

46 *Aizunnissa v. Karimunissa* (1895) 23 Cal. 130.

47 *Tajbi v. Mowla Khan* (1917) 41 Bom. 845, 39 I.C. 603.

48 *Rahiman Bibi v. Mahboob Bibi* (1938) Mad. 278, (1937) 2 M.LJ. 753, 176 I.C. 300, ('38) AM. 141.

49 *Musammat Kaniza v. Hasan* (1926) 1 Luck. 71, 92 I.C. 82, ('26) A.O. 231; *Taliamand v. Muhammad* (1931) 12 Lah. 52, 129 I.C. 12, ('30) A.L. 907.

Shia law

In Shia law, a man may marry his wife's aunt, but he cannot marry his wife's niece without the permission of the wife (that is, the aunt) (Baillie, II, 23).

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264.

Distinction between void and irregular marriages.--

(1) A marriage which is not valid may be either void or irregular.

(2) A void marriage is one which is unlawful in itself, the prohibition against the marriage being perpetual and absolute. Thus, a marriage with a woman prohibited by reason of consanguinity (260), affinity (261), or fosterage (262), is void, the prohibition against marriage with such a woman being perpetual and absolute.[50]

(3) An irregular marriage is one which is not unlawful in itself, but unlawful "for something else," as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses. Thus, the following marriages are irregular, namely--
   (a) a marriage contracted without witness (254);
   (b) a marriage with a fifth wife by a person having four wives (255);
   (c) a marriage with a woman undergoing *iddat* (257);
   (d) a marriage prohibited by reason of difference of religion (259);
   (e) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried (263).

   The reason why the aforesaid marriages are irregular, and not void, is that in cl. (a) the irregularity arises from an accidental circumstances; in cl. (b) the objection may be removed by the man divorcing one of his four wives; in cl. (c) the

impediment ceases on the expiration of the period *iddat*; in cl. (d) the objection may be removed by the wife becoming a convert to the Mussalman, Christian or Jewish religion, or the husband adopting the Moslem faith; and in cl (e) the objection may be removed by the man divorcing the wife who constitutes the obstacle; thus if a man who has already married one sister, marries another, he may divorce the first, and make the second lawful to himself.

Baillie, 150-555.

Shia law

The Shia law does not recognize the distinction between irregular and void marriages. According to that law, a marriage is either valid or void. Marriages that are irregular under the Sunni law are void under the Shia law.

50 Women within the prohibited degree are called Mooharim.

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265.

Effects of valid (sahih) marriage

A valid marriage confers upon the wife the right to dower, maintenance and residence in her husband's house, imposes on her the obligation to be faithful and obedient to him, to admit him to sexual intercourse, and to observe the *iddat*. It creates between the parties prohibited degrees of relation and reciprocal rights of inheritance.

Baillie, 13. It may be noted that a Mahomedan husband does not by marriage acquire any interest in his wife's property.[51]

51 *A v. B.* (1896) 21 Bom. 77, 84.

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266.

Effects of a void (batil) marriage

A void marriage is no marriage at all. It does not create any civil rights or obligations between the parties. The offspring of a void marriage are illegitimate.

Baillie, 156. The marriages referred to in 256 and 260 to 262 are *void*.

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267.

Effect of an irregular (fasid) marriage

(1) An irregular marriage may be terminated by either party, either before or after consummation, by words showing an intention to separate, as where either party says to the other &uot;I have relinquished you&uot;.[52] An irregular marriage has no legal effect before consummation.

(2) If consummation has taken place--

(i) the wife is entitled to dower, proper or specified, whichever is less (286, 289);

(ii) she is bound to observe the *iddat*, but the duration of the *iddat*, both on divorce and death, is three courses (see s. 257(2));

(iii) the issue of the marriage is legitimate.[53] But an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife [Baillie, 694, 701]. The Chief Court of Oudh has held that it does create such rights,[54] but the decision, it is submitted, is not correct.

Baillie, 156-158, 694, (*see* 254-259, 263 and 264)

In *Shamsudeen M. Illias v. Mohammed Salim* ,[55] the Kerala High Court got an opportunity to consider the following crucial questions--whether the marriage between a Muslim male and a Hindu female is void? Whether the child born in that relationship is legitimate, and if so, whether, the child will inherit the estate of the father?

The Court observed that as Mohammedan Law clearly distinguishes between a valid marriage (Sahih), void marriage (batil) and invalid/irregular marriage (fasid), it cannot be stated that a batil (void) marriage and a fasid (invalid/irregular) marriage is the same. The effect of a batil (void) marriage is that it is void and does not create any civil rights or obligations between the parties. So also, the offspring of a void marriage are illegitimate. Therefore, the marriage of a Hindu female with a Muslim male cannot be a void marriage but only a fasid marriage. When the offspring of a batil marriage is illegitimate, it is not the case of with a fasid marriage. The offspring of such a marriage is legitimate. Though the wife, if there was consummation, is entitled to get dower, is not entitled to inherit to the properties of the husband, and she has no case that after marriage she was

converted to Islam and under Mohammedan Law, even after consummation a fasid marriage does not create mutual rights of inheritances between the parties. But the child born in that marriage is legitimate just like the case of a valid marriage, and is entitled to inherit the property of the father.

52 *Mt. Bakh Bibi v. Quaim Din* ('34) A.L, 907, 154 I.C 677.

53 *Mt. Bakh Bibi v. Quaim Din* ('34) A.L. 907, 154 I.C. 677; *Muhammad Hayat v. Muhammad Nawaz* (1935) 17 Lah. 48, 156 I.C. 40, ('35) A.L. 622; *Rahiman Bibi v. Mahboob Bibi* (1938) Mad. 278, ('38) A.M. 141.

54 *Mohammad Shafi v. Raunaq Ali* ('28) A.O. 231, 107 I.C. 882.

55 A.I.R. 2008 Ker 58.

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268.

Presumption of marriage

Marriage will be presumed, in the absence of direct proof, from--

(a) prolonged and continual cohabitation as husband and wife[56]; or

(b) the fact of the acknowledgment by the man of the paternity of the child born to the woman, provided that the conditions of a valid acknowledgment mentioned in 344 below are fulfilled[57]; or,

(c) the fact of the acknowledgment by the man of the woman as his wife.[58]

The presumption does not apply if the conduct of the parties was inconsistent with the relation of husband and wife,[59] nor does it apply if the woman was admittedly a prostitute before she was brought to the man's house.[60] 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]

In *Abdool Razack v. Aga Mahomed* ,[62] their Lordships of the Privy Council said: &uot;In the next place, it was urged that every presumption ought to be made in favour of marriage when there had been a lengthened cohabitation, especially in a case where the alleged marriage took place so long ago that it must be difficult if not impossible to obtain a trustworthy account of what really occurred. There would be much force in this argument -- indeed, it would be almost irresistible -- if the conduct of the parties were shown to be compatible with the existence of the relation of husband and wife.&uot; It was held in that case that the conduct of the parties was incompatible with that relation, and their Lordships held that the presumption did not apply.

In *Ghazanfar v. Kaniz Fatima,* [63] their Lordships of the Privy Council said: &uot;The learned judges

fully recognized that prolonged cohabitation might give rise to a presumption of marriage, but that presumption is not necessarily a strong one, and their Lordships agree that it does not apply in the present case, for the mother before she was brought to the father's house was, according to the case on both sides, a prostitute.&uot;

56 *Khajah Hidayat v. Rai Jan* (1884) 3 M.I.A. 295, 317-318, 323 [marriage presumed]; *Mahomed Bauker v. Shurfoon-Nissa* (1860) 8 M.I.A. 136, 159 [marriage not presumed]; *Ashrufood Dowlah v. Hyder Hoseine* (1866) 11 M.I.A. 94, 115 [marriage not presumed); *Jariut-ool-Butool v. Hoseinec Begum* (1867) 11 M.I.A. 194, 209-210 [marriage not presumed); *Maung Kyi v. Ma Shwe Baw* (1929) 7 Rang. 777, 121 I.C. 718, ('29) A.R. 341 [marriage presumed); *Masitun-Nissa v. Pathani* (1904) 26 All. 295 [marriage not presumed); *Abdul Halim v. Saadat Ali* ('29) A.O. 126, 112, I.C. 596, [marriage presumed); *Hasan Ali Mirja v. Mashratali Mirja* (1935) 62 Cal. L.J. 428, 157 I.C. 1091, ('35) A.C. 572 [extension of muta marriage presumed]; *Ma Khatoon v. Ma Mys* (1936) 165 I.C. 232, ('36) A.R. 448; *Mahomed Amin v. Vakil Ahmed* ('52) A.SC. 358.

57 *Immabandi v. Mutsadi* (1918) 45 I.A. 73, 81-82, 45 Cal. 878, 889-890, 47 I.C. 513; *Habibur Rahman v. Atlaf Ali* (1921) 48 I.A. 114, 120-121, 48 Cal. 856, 60 I.C. 837, ('22) A.P.C. 159, *Mohamed Amin v. Vakil Ahmed* ('52) A.SC. 358.

58 *Mt. Bashiram v. Mohammad Hussain* (1941) 16 Luck. 615, (1941) O.W.N. 249, (1931) I.C. 161, ('41) A.O. 284; *Mahomed Amin v. Vakil Ahmed* ('52) A.S.C. 358.

59 *Abdool Razack v. Aga Mahomed* (1893) 21 I.A. 56, 65, 21 Cal. 666, 674; *Fateh Mohammad v. Abdul Rahman* (1931) 12 Lah. 396, 134 I.C. 590, ('31) A.L. 223 [where the mad had refused to acknowledge the woman as his wife and her child as his child).

60 *Ghazanfar v. Kaniz Fatima* (1910) 37 I.A. 105, 109, 32 All. 345, 350, 6 I.C. 674; *Jariut-ool- Butool v. Huseinee Begum* (1876) 11 M.I.A. 194. In *Irshad Ali v. Musammat Kariman* (1918) 20 Bom. L.R. 790, 46 I.C. 217. ('17) A.P.C. 169, the woman was a prostitute, but there was a writing evidencing the marriage and the marriage was held proved.

61 *Mohabat Ali v. Mohamad Ibrahim* A.I.R. 1929 PC 135, 10 Lah. 725, 117 I.C. 17.

62 (1893) 21 I.A. 56, 65, 21 Cal. 666, 674; See also *Fattna Binit v. Administraior-General* (1949) 2 Mad. L.J. 484, ('49) A.P.C. 254.

63 (1910) 37 I.A. 105, 109, 32 All. 345, 350, 6 I.C. 674.

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269.

Muta marriage

(1) The Shia law recognizes two kinds of marriage, namely (1) permanent, and (2) *muta* or temporary.

(2) A Shia of the male sex may contract a *muta* marriage with a woman professing the Mahomedan, Christian or Jewish religion, or even with a woman who is a fire-worshipper, but not with a woman following any other religion. But a Shia woman may not contract a *muta* marriage with a non-Moslem.[64]

(3) It is essential to the validity of a *muta* marriage that (1) the period of cohabitation should be fixed, and this may be a day, a month, a year or a term of years,[65] and that (2) some dower should be specified.[66] When the term and the dower have been fixed, the contract is valid. If the term is fixed, but the dower is not specified, the contract is void.

But if the dower is specified, and the term is not fixed, the contract, though void as a *muta*, may operate as a &uot;permanent&uot; marriage.[67]

(4) The following are the incidents of a *muta* marriage:

(a) a *muta* marriage does not create mutual rights of inheritance between the man and the woman, but children conceived while it exists are legitimate and capable of inheriting from both parents[68];

(b) where the cohabitation of a man and a woman commences in a *muta* marriage, but there is no evidence as to the term for which the marriage was contracted and the cohabitation continues, the proper inference would, in default of evidence to the contrary, be that the *muta* continued during the whole period of cohabitation, and that children conceived during that period were legitimate and capable of inheriting from their father[69];

(c) even if there is evidence of the term for which the *muta* marriage was fixed and cohabitation continues after the expiry of that term, the inference is that the term was extended for the whole period of the cohabitation and that the children conceived during the extended term are legitimate[70];

(d) a *muta* marriage is dissolved ipso facto by the expiry of the term. No right of divorce is recognized in the case of a *muta* marriage, but the husband may at his will put an end to the contract of marriage by &uot;making a gift of the term&uot; (*hiba-i-muddai*) to the wife, even before the expiration of the fixed term[71];

(e) if a *muta* marriage is not consummated, the woman is entitled to half the dower. If the marriage is consummated, she is entitled to full dower, even though the husband may put an end to the contract by giving away the unexpired portion of the term. If the woman leaves her husband before the expiry of the term, the husband is entitled to deduct a proportionate part of the dower;[72]

(f) a woman married in the *muta* form is not entitled to maintenance under the Shia law.[73]But it has been held that she is entitled to maintenance as a wife under the provisions of s. 488 of the Criminal Procedure Code .[74]

Under the Shia law, a marriage between a Muslim and a non-Muslim is unlawful and void, but a valid *muta* marriage can be contracted with a *Kitabia*, which includes a Christian or a Jew, but not a Hindu. *Muta* marriage is a temporary marriage as distinguished from the ordinary permanent marriage. A Shia of the male sex may contract a *muta* marriage with a woman professing Mahomedan, Christian or Jewish religion or even with a woman who is a fire-worshipper, but not with a woman following any other religion. It is essential to the validity of a *muta* marriage that the period of cohabitation should be fixed, though such period may even be as short as day, and some dower should be specified. A *muta* marriage does not create mutual rights of inheritance between the husband and the wife but the children conceived are legitimate and capable of inheriting from both the parents. It is dissolved *ipso facto* upon the expiry of the term.[75]

The Sunni law does not recognize *muta* marriages at all: Baillie, 18.

Marriages may be established by direct proof or by indirect proof, i.e., by presumption drawn from certain factors. It may be presumed from prolonged cohabitation combined with other circumstances or from acknowledgment of legitimacy in favour of a child or the fact of the acknowledgment by the man of the woman as his wife. It is true that the presumption does not apply if the conduct of the parties is inconsistent with the relationship of husband and wife.[76]

The expression &uot;permanent&uot; in sub-s. (1) is used in contradistinction to &uot;temporary&uot;. No Mahomedan marriage, either among Sunnis or Shias, is permanent in the sense in which a Christian or a Parsi marriage is, for the husband may divorce the wife at any time he likes.

64 Baillie, II, 29, 40.

65 Baillie, II, 42.

66 Baillie, 11, 41.

67 Baillie, II, 42-43; Queriy, Vol. 1, pp. 689, 693; *Shazada Qanum v. Fakher Jung* ('53) A. Hyd. 6 (a muta for life is also a permanent marriage).

68 Baillie, II, 44; *Shoharat Singh v. Jafri Bibi* (1915) 17 Bom. L.R. 13, 24 I.C. 499 [P.C].

69 (1915) 17 Bom. L.R 13, 24 I.C. 499, *supra* [the cohabitation in this case was for 10 years].

70 *Hasan Ali Mirja v. Nushrat Ali Mirja* (1935) 62 Cal. LJ. 428, 157 I.C. 1091, ('35) A.C. 572; *Mt Sarwar Ara Begum v. Nawab Bahadur Ali Khan* (1935) 10 Luck. 577, 153 I.C. 803, ('35) A.O. 152.

71 Baillie, II, 43; *Mohamed Abid v. Ludden* (1887) 14 Cal. 276.

72 Baillie, II, 41; (1887) 14 Cal. 276, 284-285, *supra*.

73 Baillie, II, 97.

74 *Luddun v. Mirza Kamar* (1882) 8 Cal. 736. This decision is of doubtful authority because, as stated in *Sharaya-ul-Islam*, &uot;the name of a wife does not in reality apply to a woman contracted in *Moota*&uot;; Baillie; II, 344.

75 *Syed Amanullah Hussain v. Rajamma* (1977) 1 An. W.R. 123; (1976) 2 A.P.L.J. 323.

76 *Syed Amanullah Hussain v. Rajamma* (1977) 1 An. W.R. 123: (1976) 2 A.P.L.J. 323.

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270.

Marriage of minors

A boy or a girl who has not attained puberty (in this Part called a minor), is not competent to enter into a contract of marriage, but he or she may be contracted in marriage by his or her guardian.

A boy or a girl who has attained puberty is at liberty to marry anyone he or she, likes, and the guardian has no right to interfere if the match be equal; Macnaghten, p. 58, ss. 14-16. (*see* 251 above)

If the bride is a minor she cannot appoint an agent or vakil to enter into the contract of marriage on her behalf.[77] The consent must be given by her legal guardian.[78](271)

77 *Shaft Ullah v. Emperor* (1934) All. LJ. 387, 150 I.C. 139, ('34) A.A. 589.

78 *Jogu Bibi v. Mesel Shaikh* (1936) 63 Cal L.J. 415, 164 I.C. 957.

CHAPTER XIV

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

271.

Guardianship in marriage (jabar)

The right to contract a minor in marriage belongs successively to the (1) father, (2) paternal grandfather how high so ever, and (3) brother and other male relations on the father's side in the order of inheritance enumerated in the Table of Residuaries. In default of paternal relations, the right devolves upon the mother, maternal uncle or aunt and other maternal relations within the prohibited degrees. In default of maternal kindred, it devolves upon the ruling authority.

Hedaya, 36-39

A Single Judge of the Allahabad High Court held that the marriage of a minor contracted by a remoter guardian when a nearer one was present and available and when the latter did not consent or subsequently ratify the marriage, was void; and the consummation would not validate such a marriage.[79]

It is submitted that want of objection on the part of the brother was perhaps tantamount to consent.

In *Mohd. Nihal v. State* ,[80]a Muslim male of 22 years of age married a Muslim girl whose age was the cause of controversy, both factual and forensic. Act ually, the brother-in-law of the bride, had acted as her guardian (wali) even though the father and mother of the girl were alive. In the affidavit submitted by the husband, the age of the wife was shown as 19 years and his age as 22 years. The mother of the wife filed an FIR and refused to hand over the custody of the wife to the husband.

The Delhi High Court observed that under Muslim Law the marriage of a girl who has not attained puberty is nevertheless legitimate provided it has the consent of her guardian (wali). In such cases, however, the wife has the option to repudiate the marriage when she reaches puberty.

The Court further observed that the father, and in his absence the paternal grandfather, could perform the rights, duties and obligation of a wali. This important function cannot be performed by a brother-in-law. Medical tests, however, unequivocally, indicated that the wife was not 19 years of age.

Thus the Court held that the marriage of a Muslim minor woman, who has not attained puberty, without the consent of her wali is completely void. Further, irrespective of her consent, during life time of the father no other relative is competent to function as the wali.

The fact that a guardian has been appointed by the Court of the person of a minor does not take away the power of the guardian to dispose of the minor in marriage. But the minor being in such a case, a ward of the Court, the guardian for the marriage should not dispose of the minor in marriage without the sanction of the Court to the proposed marriage.[81]

It is a settled principle of Islamic Law that once the girl becomes major, she has absolute right to contract the marriage and this right cannot be exercised by any one including the father of the girl. It is only in the case of minority of the girl that 'wali jayaz' can contract her marriage.[82]

79 *Ayub Hassan v. Mst. Akktari* ('63) A. All. 525.

80 (2008) 4 Crimes 650, (2008) 17 ILR 1385(Del) .

81 *Monijan v. District Judge, Birblum* (1914) 42 Cal. 351, 25 I.C. 229.

82 *Abdul Ahad v. Mt Shah Begum and Ors,* A.I.R. 1997 J.&K. 22.

Apostasy of guardian for marriage

It is doubtful whether the right to dispose of a minor in marriage is lost by the apostasy of the guardian from the Mahomedan faith. Under the Mahomedan law, an apostate has no right to contract a minor in marriage (*Hedaya*, 392). It is enacted, however, by Act XXI of 1850, that no law or usage shall inflict on any person who renounces his religion any "forfeiture of rights or property" and it was accordingly held by the High Court of Bengal in *Muchoo v. Arzoon* [83] that a Hindu father is not deprived of his right to the custody of his children and to direct their education by reason of his conversion to Christianity. In a subsequent case, however, decided by the same High Court, but without any reference to *Muchoo's* case, it was held that a Mahomedan, who had become a convert to Judaism, was disqualified by reason of his apostasy from disposing of his daughter in marriage.[84]*Muchoo's* case was followed by the Chief Court of the Punjab,[85] in a case of conversion of a Mahomedan father to Christianity. In a Bombay case, it was held, following *Muchoo's* case, that a Hindu convert to Mahomedanism is not disqualified from giving his son in adoption to a Hindu.[86]It is submitted that the power to contract a minor in marriage is a "right" within the meaning of the above Act, and that the decision in *Muchoo's* case is correct. But the Court may in its discretion deal with each case on its own merits.

83 (1866) 5 W.R. 235.

84 *In the matter of Mahin Bibi* (1S74) 13 BLR. 160.

85 *Gul Muhammad v. Mussammat Wazir* (1901) 36 Punj. Rec. 191.

86 *Shamsingh v. Santabai* (1901) 25 Bom. 551.

Shia law

The only guardians for marriage recognized by the Shia law are the father and the paternal grandfather how high so ever; Baillie, II, 6. (*see* notes to 274)

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272.

Marriage brought about by father or grandfather

When a minor has been contracted in marriage by the father or father's father, the contract of marriage is valid and binding, and it cannot be annulled by the minor on attaining puberty. But where a

father or father's father has acted fraudulently or negligently, as where the minor or a lunatic, or the contract is to the manifest disadvantage of the minor, the contract is voidable at the option of the minor on attaining puberty.[87]

Hedaya 37; Baillie, 50; Ammer Ali, 5th ed., Vol. II, p. 370.

It has been held by the High Court of Allahabad that a Shia girl given in marriage by her father to a Sunni husband has an option of repudiation on attaining puberty unless it has been ratified by consummation or otherwise, the reason given being that it would be contrary to all rules of equity or justice to force such a marriage on her if on attaining puberty she considers the marriage to be repugnant to her religious sentiments.[88] Following this case, a single judge of the Chief Court of Karachi held that the wife was entitled to repudiate the marriage where the husband had been convicted for theft and was under trial on a charge of enticing or taking away or detaining with criminal intent a married woman.[89]

87 *Aziz Bono v. Muhammad* (1925) 47 All. 823, 838- 839, 89 I.C. 690. ('25) A.A. 720.

88 *Aziz Bono v. Muhammad* (1925) 47 All. 823, 89 I.C. 690, ('25) A.A. 720; *Sibt Ahmed v. Amina Khatun* (1928) 50 All. 733, 113 I.C. 434, ('29) A.A. 18.

89 *Zubeda Begum v. Vazir Mahomed* (1940) 190 I.C. 94, ('40) A.S. 145.

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CHAPTER XIV

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

273.

Repudiation under the Dissolution of Muslim Marriages Act, 1939

By the Dissolution of Muslim Marriages Act, 1939, all restriction on the option of puberty in the case of a minor girl whose marriage has been arranged by a father or grandfather has been abolished, and under s. 2(vii) of the Act a wife is entitled to the dissolution of her marriage if she proves the following facts, namely, (1) the marriage has not been consummated, (2) the marriage took place before she attained the age of 15 years, and(3) she has repudiated the marriage before attaining the age of 18 years.[90] The High Court of Lahore[91] has decided that a decree of Court is not necessary to invalidate the marriage which has been repudiated by the wife, but the High Court of Madhya Pradesh has held that a decree of the Court is necessary.[92]

Proof of age

The question of age is a question of fact and even if a birth-certificate is not produced, age may be proved from other evidence.[93]

90 Dissolution of Muslim Marriages Act, 1939, s. 2(vii);*Zubeda Begum v. Vazir Mahomed* (1940) 190 IC. 94, ('40) A.S. 145.

91 *Muhammad Baksh v. The Crown* ('50) A.L. 133, (1950) Lah. 227, ('50) P. Lah. 203.

92 *Pirmahomed v. State of Madhya Pradesh* ('60) A.MP. 24.

93 *Mt. Razki v. Muhib Dur Muhammad* (1946) Kar. 246, 231 I.C. 413, ('47) A.S. 102.

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MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

274.

Marriage brought about by other guardians: Option of puberty

When a marriage is contracted for a minor by any guardian other than the father or father's father, the minor has the option to repudiate the marriage on attaining puberty.[94] This is technically called the &uot;option of puberty&uot; (*khyar-ul-bulugh*).

The right of repudiating the marriage is lost, in the case of a female, if after attaining puberty and after being informed of the marriage and of her right to repudiate it, she does not repudiate without unreasonable delay.[95]The Dissolution of Muslim Marriages Act, 1939, however, gives her the right to repudiate the marriage before attaining the age of eighteen years, provided that the marriage has been been consummated. But in the case of a male, the right continues until he has ratified the marriage either expressly or impliedly as by payment of dower or by cohabitation.

Hedaya, 38; Baillie, 50-52; Macnaghten, p. 58, s. 18. Consummation consented to by the wife before the exercise of the option: Baillie, 51. But consummation does not validate a marriage which is void.[96]

Filing a suit for dissolution is evidence of the fact that she has exercised her right of repudiation.[97]

Shia law

According to the Shia law, a marriage brought about by a person other than a father or grandfather is wholly ineffective until it is ratified by the minor on attaining puberty.[98](*see* notes to 271, *Shia law*)

Consent has been shown to be withheld:

(1) Suit--by institution of suit for dissolution.

(2) If marriage not consummated by marrying again.[1]

(3) By serving a notice.

94 *Mahomed Shariff v. Khuda Baksh* (1936) 164 I.C. 713, ('36) A.L. 683; *Abdul Karim v. Amino Bai* (1935) 59 Bom. 426, 37 Bom. L.R. 398, 157 I.C. 694, ('35) A.B. 308; *Jay Gunnesa Bibi v. Mohammad Ali Biswas* (1938) 1 Cal. 139, 174 I.C. 632, ('38) A.C. 71; *Ahmad Husain v. Amir Banu* (1939) 185 I.C. 837, ('40) A.A. 63. *Nizamuddin v. Huseni* ('60) A.M.P. 212.

95 *Bismillah v. Nur Muhammad* (1922) 44 All. 61, 63 I.C. 702, ('22) A.A. 155; *Rahmat Ali v. Mst. Allah* (1930) 11 Lah. 172, ('79) A.L. 827; *Mst. Mukhan v. Haidar* ('32) A.L. 449, 137 I.C. 739; *Mt. Aishan v. Jodha Ram* (1938) 40 P.L.R 305, 178 I.C. 732, ('38) A.L. 719; *Ayesha v. Mohammad Yunus* (1938) PW.N. 656, 177, I.C. 514, ('38) A.P. 604.

96 *Abdul Kasem v. Jamila KJiatun Bibi* (1940) Cal. 401, 44 C.W.N. 352, 188 I.C. 490, ('40) A.C. 251; *Mt. Ahmed-un-nisa Begum v. Ali Akbar Shah* (1942) 199 I.C. 531 ('42) A. Pesh. 19.

97 *Ayesha v. Mohammad Yunus* (1938) P.W.N. 656, 177 I.C. 514, ('38) A.P. 604.

98 *Mulka Jehan v. Mohamed* (1873) LR. I.A. Sup. Vol. 192, 26 W.R. 26.

1 Following *Muhammad v. Emp.* 140 I.C. 617.

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275.

Effect of repudiation

The mere exercise of the option of repudiation does not operate as a dissolution of the marriage. The repudiation must be confirmed by the Court. Until then the marriage subsists, and if either party to the marriage dies, the other will inherit from him or from her, as the case may be.

Hedaya, 37, 38; Baillie, 50.

The woman may herself bring a suit for declaration that she has exercised her opinion and repudiated the marriage. Or she may plead the repudiation in defence to her husband's suit against her for restitution of conjugal rights, and the Court may in that suit declare that the marriage has been repudiated.[2] No such declaration, however, can be made, if she has permitted sexual intercourse with her after the exercise of the option.

Confirmed by the Court

It is not clear that any order of the Court is necessary. The Calcutta High Court has held that no decree is required to confirm the repudiation, but that an order of the Judge is necessary to impress on the act a judicial imprimature, and the Madhya Pradesh High Court has approved the Calcutta view.[3] In a Lahore case, the girl repudiated her marriage in an application to the Deputy Commissioner and then remarried. It was held that the marriage was not bigamous although the repudiation had not been confirmed by a Court.[4]In later decisions of the Lahore High Court (now in Pakistan) it has been held that exercise of the option of puberty puts an end to the marriage without the aid of any Court. In Pakistan it has been held that the Court does not dissolve the marriage by its own act but merely recognises the termination of the marriage.[5] The Allahabad High Court has even said that a remarriage is in itself an exercise of the option.[6]-- but the observation is obiter as the Court had held that the first marriage was invalid.

2 *Badal Aurat v. Queen-Empress* (1891) 19 Cal. 79; *Batoolan v. Zahoor,* ('52) A. MB 30; *Nizamuddin v. Huseni* ('60) A.M.P. 212.

3 *Mafizuddin Mandal v. Rahima Bibi* (1933) 58 Cal. L.J. 73, 37 Cal. W.N. 1043, 149 I.C. 1028, ('34) A.C. 104; *Pirmahomed v. State of M.P.* ('60) A.M.P. 24.

4 *Ghulam Muhammad v. The Crown* (1933) 140 I.C. 617, ('33) A.L. 88.

5 *Mumi v. Habib Khan* (1956) Lah. 1461.

6 *Shaft Ullah v. Emperor* (1934) Ail. LJ. 387, 150 I.C 139, ('34) A.A. 589.

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MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

276.

Marriage of lunatics

The provisions of 270 to 275, relating to the marriage of minors, apply to the marriage of lunatics, with this difference that the option is to be exercised when the lunatic recovers his or her reason.

Baillie, 50-54.

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CHAPTER XIV

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

B.--

MAINTENANCE OF WIVES

277.

Husband's duty to maintain his wife

The husband is bound to maintain his wife (unless she is too young for matrimonial intercourse),[7] so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain a wife who refuses herself to him,[8] or is otherwise disobedient,[9] unless the refusal or disobedience is justified by nonpayment of prompt dower,[10] or she leaves the husband's house on account of his cruelty.[11]

The mere decree for restitution of conjugal rights does not automatically bar the wife from claiming maintenance but that it is only a piece of evidence to be taken into account by the Magistrate in

determining the wife's entitlement to maintenance.[12]

7 Baillie, 441.

8 Baillie, 442; *Mahomed Ali v. Mt. Ghulam Fatima* (1935) 160 I.C. 365, ('35) A.L. 902.

9 *A. v. B.* (1896) 21 Bom. 77, at p. 82; *Mt. Khatijan v. Abdullah* (1942) Kar. 535, ('43) A.S. 65.

10 Baillie, 442; *Najiman Nissa v. Serajuddin* (1946) 228 I.C. 198, ('46) A.P.

11 *Amir Mohammad v. Mst. Bushra* ('56) A. Raj. 102.

12 *Syed Ghulam Sajjad v. Parveen Fatima* (1980) 2 An W.R. 335, [Ramachandra Raju. J].

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B.--

MAINTENANCE OF WIVES

278.

Order for maintenance

If the husband neglects or refuses to maintain his wife without any lawful cause, the wife may sue him for maintenance, but she is not entitled to a decree for *past*maintenance, unless the claim is based on a specific agreement. Or, she may apply for an order of maintenance under the provisions of the Code of Criminal Procedure, 1908, s. 488, in which case the court may order the husband to make a monthly allowance in the whole for her maintenance not exceeding five hundred rupees.[13]

If the wife exercises her right under Mahomedan law and refuses to live with her husband on the ground of non-payment of prompt dower, she cannot enforce her right on to maintenance under s. 488 of the Code of Criminal Procedure .[14] If the husband has married another wife, or keeps a mistress, the wife may refuse to live with her husband and still claim maintenance.[15] Where the suit is for maintenance, interim maintenance will be refused.[16]

The law has been altered by the Code of Criminal Procedure, 1974, (*see infra*).

Shafei law

According to the Shafei school, the wife is entitled to *past* maintenance though there may be no agreement in respect thereof.[17]

Cherummel Abdulla v. Povvalora Katheesa .[18]

As regards the first question, there is no controversy that the plaintiffs are entitled to past maintenance, as they belong to the Shafi sect.[19]

There is a difference between the Hanafi law and Shafi law on this point. This is point out in Hectaya (Hamilton, Vol. I, page 398). The relevant passage is:

> &uot;Shafi says that the maintenance is in all circumstances to be considered as a debt upon the husband in conformity with his tenant that it is not a gratuity but a return, wherefore it cannot drop like demands of the former description.&uot;

In Tohfatal Mierhaj, an authoritative commentary on the Mirhaj by Shahabuddin Ahmad Ibu Hayanul Hailini who flourished in the 16th century, it is stated that the maintenance is a debt on her husband even if it was not decreed by the Kazee. These views have got reflected in Tyabji's Principles of Muhammadan Law.[20]

In the instant case, the question before the Allahabad High Court was whether a divorced wife was debarred to recover arrears of maintenance from her divorced husband under the Act of 1986. The High Court held that the legislation came into force on 1986 and is not retrospective in operation. It does not invalidate the order decided prior to its enforcement. Since the application was not pending for the arrears of maintenance when the Act came into force and as such a decree for arrears of maintenance cannot be passed.[21]

13 Rs. 500 was substituted for Rs. 100 by the Code of Criminal Procedure (Amendment) Act, 1955, (XXVI of 1955).

14 *Muhammad Azizullah v. Abdul Halim* (1935) 154 I.C. 561, ('35) A.O. 285. Pakistan: *Mushaf Husain Shah v, Hamida Begum*(1957) 2 W.P. 113. ('57) A. Lah. 220.

15 See proviso to sub-sec. (3) of sec. 488 of the Code of Criminal Procedure as amended by Act IX of 1949, and*Badruddin v. Aisha Begum* (1957) All. LJ. 300.

16 *Mahomed Abdul Rehman v. Tajunnissa* ('52) A.M. 420.

17 *Mohammad Haji v. Kalimabi* (1918) 41 Mad. 211, 42 I.C. 517.

18 A.I.R. 1984 Kerala 94.

19 See *Mahamed Haji v. Kalimabi,* ILR 41 Mad 211, A.I.R. 1981 Mad 722.

20 All these aspects have been discussed in the Madras decision, ILR 41 Mad 211, A.I.R. 1918 Mad 722*supra. E.V. Kunhimariam v. Ooramveettil Mammu,* A.I.R. 1985 Kerala 239.

21 *Gaizuddin Khan v. Haseena Begum* (1990) 2 DMC 140, LNIND 1990 All. 20.

CHAPTER XIV

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

B.--

MAINTENANCE OF WIVES

279.

Maintenance on divorce

(1) After divorce, the wife is entitled to maintenance during the period of *iddat*[22] (257). If the divorce is not

communicated to her until after the expiry of that period, she is entitled to maintenance until she is informed of the divorce.[23]

(2) A widow is not entitled to maintenance during the period of *iddat* consequent upon her husband's death.[24]

According to Hanafi School, a woman who is divorced is entitled to receive her maintenance allowance from her husband during *iddat* period, whether she is divorced revocably or irrevocably. Imam Shafi, however, holds that she is entitled to maintenance only if she has been revocably divorced. There is, however, a consensus of opinion that she is not entitled to maintenance if she is undergoing 'iddat' on death of her husband.

The law relating to maintenance of wife on divorce revolves around the following verses of Holy Quran--

(i) &uot;Lodge them (the divorced women) where you dwell, according to your means, and do not harm them so as to straiten them (that they be obliged to leave your house). And if they are pregnant, then spend on them till they lay down their burden. Then if they give suck to the children for you, give them their due payment, and let each of you accept the advice of the other in a just way. But if they make difficulties for one another, then some other woman may give suck for him. (LXV : 6).

(ii) &uot;Let the man of means spend according to his means; and the man whose resources are restricted, let him spend according to what Allah has given him.&uot; (LXV : 7).

(iii) &uot;And for divorced women, maintenance (should be provided) on reasonable (scale). This is a duty on the pious.&uot; (11:241).

A Muslim divorced wife filed an application under s. 125 for maintenance on her behalf and that of her daughter. The husband alleged that he had sent a letter to the wife making a conditional offer of divorce and had fixed a limit for a reply but the wife did not care to answer. He further alleged that he had sent his brother and one of his friends, to the father's house of the wife with who she was residing, to persuade her to come and live with her husband but the wife declined the request and stated that she would not claim maintenance. The alleged representation by the brother and friend of the husband was not set out in the written statement. Not a word was put to the wife and her father on this point in cross-examination. Though the brother of the husband said about the relinquishment the friend of the husband did not say a word about it.

Held that, the solitary evidence of the brother who was an interested witness could not be accepted.

Held further that, wife's silence to her husband's letters would not amount to acceptance of the terms and conditions contained in those letters and it could not be inferred that by her silence the wife had relinquished her right to claim maintenance.[25]

The Plaintiff was married to the defendant on May 17, 1950. A son was born to the marriage and thereafter the husband neglected the wife and refused to maintain her on the plea (held to be false) that he had divorced her on the night of the wedding. The trial Court, on being moved by the wife, granted a decree for maintenance to both mother and son.

The husband had served notices on May 12, 1960 and July 16, 1960 stating that he

had divorced the wife on the night of the wedding. Following the view of the Allahabad High Court in *Asmatullah v. Mst. Khatunnissa,* [26] based on a principle stated by Macnaghten, the date of the divorce, in the face of the wife's denial, was held to be the date of the notice. Mahomedan Law gives not only the right to the husband to pronounce an oral divorce but also to do so by notice. When such a notice is given it amounts to a divorce.

She is then entitled to maintenance during the period of *iddat* (q.v.), in this case from May 12, 1960. She was held not entitled to past maintenance unless there was a specific agreement.[27]

Order of maintenance under the Criminal Procedure Code, 1908, Section 488

Where an order is made for the maintenance of a wife under s. 488 of the Criminal Procedure Code (278) and the wife is afterwards divorced, the order ceases to operate on the expiration of the period of*iddat.*[28] The result is that a Mahomedan may defeat an order made against him under s. 488 by divorcing his wife immediately after the order is made. His obligation to maintain his wife will cease in that case on the completion of her *iddat*. A divorced wife is entitled to sue in the place where she normally resides for her dower, maintenance or return of her jewels and clothes.[29]

Once the husband divorces the wife or the wife obtains a divorce from her husband she becomes entitled to claim maintenance from her ex-husband, provided, she is unable to maintain herself and the husband has neglected to maintain her. Her right to claim maintenance would come to an end only if she remarries or lives in adultery or if she voluntarily surrenders her right to maintenance. In the instant case none of these eventualities has come to pass. The story of voluntary surrender has been found untenable. There is nothing in Chap. IX to warrant the inference that the ground of divorce or the previous conduct of either spouse are to be looked into and the wife is to be held entitled to a right to maintenance only if she was not guilty of any faulty conduct. Hence, a consideration of the previous conduct of the divorced wife is wholly irrelevant in a case under s. 125 of the Code of Criminal Procedure .[30]

It was contended that the wife had agreed to relinquish her right to maintenance allowance and, therefore, she was not entitled to claim maintenance allowance in view of the provisions of s. 127 (3)(c) of the Code, But no settlement of claim which does not have the special statutory right of the divorce under s. 125 can operate to mitigate that claim. The aforesaid contention, has to be repelled as having no merit in fact of law.[31]

Where to an application for maintenance under s. 488 by a Mahomedan wife the husband filed a written statement to the effect that he had already divorced the wife about 30 years ago, the statement, even if the fact of such divorce was not proved, was held to operate as a declaration of divorce from the date of the written statement and the wife entitled only to a maintenance for a period of *iddat* from that date *Chandbi v. Bandesha* .[32]

See also, *Shaikh Mil v. Sarfunissa* (N. P. Singh J.).[33]

In a case in which the wife refused the husband's offer to maintain her, it was held that this might not be sufficient to deny divorce under s. 2(ii) of the Dissolution of Muslim Marriage Act but the duty of the husband to maintain her ceased since the wife refused to be looked after by her husband.[34]

In a petition by a Mahomedan wife for maintenance under s. 488 of the Criminal Procedure Code of 1898,

the husband filed a written statement that he had divorced her. It was held that the divorce operated from the date of the statement and the wife was given maintenance for 3 months and 10 days.[35]

Under s. 125 of the Code of Criminal Procedure, 1974 maintenance is claimable by a wife who is divorced. It is not necessary that the divorce should have taken place*after* the coming into force of the new Act . At present right in respect of a past event, enforceable through a new statute does not make the law operate retrospectively since under sub-s. (2) the allowance is payable from the date of the order or from the date of the application for maintenance. This law is both remedial and beneficial and the Courts must suppress the mischief and advance the remedy.[36]

However, it was held in another case before the new Act that maintenance was payable to the wife only during the period of Iddat, but the children were entitled to maintenance.[37]

Even if Muslim law entitles the divorced wife to maintenance only till the end of the period of Iddat, s. 125 CrPC (1974) entitles her to maintenance so long as she does not marry again.[38]

No doubt, if a party had not pleaded a particular case, it could not be allowed to lead evidence and further, evidence on such a non-pleaded point-cannot be looked into. But these strict rules of pleading and proof which are applicable to civil matters, should not be extended to cases under s. 125 of the Code of Criminal Procedure . This section contains a beneficial socio-economic provision for the assistance of unprovided for and discarded wives and children and, therefore, this provision is to be construed liberally so far as the question of taking up a plea in the application is concerned. If no plea is taken up in the application and no evidence is led to prove that the wife is unable to maintain herself, her claim for maintenance may be negatived but where the parties have joined issue on this important point at the time of enquiry and have led evidence, then the technical contention that the plea was not taken up in the application, should not be allowed to prevail. Clause (a) of sub-s (1) of s. 125 of the Code of Criminal Procedure clearly says that a wife who is unable to maintain herself can claim maintenance allow-ance from her husband if some other conditions are also fulfilled. It does not specifically lay down that this plea must be raised by the wife in the application. A party is not to be taken by surprise and it is for this reason that it is necessary and desirable that the plea sought to be relied upon is set out in the application. However, a case where the plea was not mentioned in the application but was raised at the time of enquiry and the parties joined issue on it and led evidence, it cannot be said that the other party (here the husband was taken by surprise or was prejudiced in his defence).[39]

It is true that the Explanation (b) to s. 125(1) enlarges the scope of the term wife for the purpose of Chap. IX. But that does not create any jural relationship between a divorced woman and her erstwhile husband.

Evidently the object of the Explanation is to obviate repeated reference to the wife as well as the wife who has been divorced in appropriate places in the relevant sections. The operation of the Explanation is only to read the term wife in Chap IX as referring to wife as well as a divorced woman who has not remarried, if such reference would not be inappropriate. Though a divorced woman may be understood by the term wife by reason of the Explanation the person who was her husband prior to such divorce will not be comprised within the term 'husband'. Section 125(4) refers to the right of the wife to receive an allowance from her husband. If the definition has not the effect of treating the person who is really not a husband as the husband, then sub-s. (4) will not be applicable to the case of a divorced woman. There are other indications in sub-s. (4) which make the sub-section inapplicable to a divorced woman. A woman whose marital tie does not subsist cannot be guilty of adultery much less can she be said to be living in adultery. She may live a promiscuous life. But that would not render her guilty of adultery for adultery is a term that denotes an offence against the institution of marriage. The inclusive definition of the term 'wife' will not be sufficient to read promiscuous or immoral living of a divorced woman as of one Irving in adultery.[40]

Sub-section (4) of s. 125 conceives retusal to live with the husband without sufficient reason as sufficient justification for refusing maintenance. This presupposes a right and an obligation to live with the husband. Such a right and an obligation cannot be assumed in the case of a divorced woman nor can a

corresponding obligation in the erstwhile husband to keep the woman in his house be assumed. If so such a ground available for refusing allowance contemplated in s. 125(4) becomes inapplicable to the case of a divorced woman.

So is the case with the provision that if the husband and wife are living separately by mutual consent the wife shall not be entitled to receive the allowance. No question of mutual consent would arise in the case of parties to a marriage which is dissolved. That clause is also evidently inapplicable to the case of a divorced woman.[41]

22 *Hedaya*, 145; Baillie, 450; *Musammat Marian v. Kadir Bakhsh* ('79) AO. 527.

23 *Rashid Ahmad v. Anisa Khatun* (1932) 59 I.A. 21, 27, 54 All. 46, 52, 135 I.C. 762, ('32) A.P.C. 25; *Ahmad Kasim v. Khatun Bibi* (1932) 59 Cal. 833, 846-847, 141 I.C. 689. ('33) A.C. 27. See also; *Munnisa Begum v. Noore Mohd* ('65) A.An. r. 231.

24 *Aga Mahomed Jaffer v. Koolsom Beebee* (1897) 25 Cal. 9.

25 *Syed Mukhtar Ahmad v. Smt. Moonis Fatima,* (1981) All. LJ. 785, [R. B. Lai, J.].

26 ('39) A. All. 592.

27 *Mohammad Ali v. Fareedunnissa Begum* ('70) A. A.P. 298; *Imam Saheb v. Hajju Bee* (1970) 1 An. W.R. 138.

28 *In re Abdul Ali*(1883) 7 Bom. 180; *In the matter of Din Muhammad*(1882) 5 All. 226; *Shah Abu v. Ulfat Bibi* (1896) 19 All. 50; *Ahmad Kasim v. Khatun Bibi* (1932) 59 Cal. 833, 847, 141 I.C. 689, ('33) A.C. 27; *Mohd Shamsuddin v. Noor Jehan Begum* (1955) Hyd. 418, ('55) A. Hyd. 144, (1955) Cr. L.J. 950; *Ahmad Giri v. Mst. Begha* ('55) A. J. & K. 1. (1955) Cr. L.J. 1067; *Shamshuddin v. Zamna Bibi* 1962, (2) Cr. LJ. 124.

29 *Tusliman Bibi v. Abdul Latif* (1936) 63 Cal. 726. 161 I.C. 427, ('36) A.C. 97; *Mahomed Ibrahim v. Jaithoon Bivi* (1951) 1 Mad. L.J. 449, ('51) A.M. 831. See also: *Enamul Haque v. Bibi Taimunissa* ('67) A.P. 344 (Declaration of divorce operative frorii date of filing written statement in proceedings for maintenance).

30 *Syed Mukhtar Ahmad v. Smt. Moonis Fatma* (1981) 18 A.C.C. 224, [R. B. Lai. J. (H.C.)].

31 1979 Cri. LJ. 151(S.C) . Followed *Syed Mukhtar Ahmad v. Smt. Moonis Fatima.* (1981) 18 A.C.C. 224, [R.B. Lai, J. (H.C.)].

32 ('61) A.B. 121.

33 1977 83 Crim. LJ. 43.

34 *Aboobacker Haji v. Mamu Koya* (1971) K.L.T. 663*A. Yusuf v. Sowramma* '71 A. Ker. 261.

35 *Mohd. Haneefa v. Pathummal Beevi* (1972) K.L.T. 512.

36 *K. Raza Khan v. Mumtaza Khatoon* (1976) 1 An. W.R. 1.

37 *Ali Mohammad v. Mst. Rehmani Meo* (1972) 74 P.L.R. 869.

38 *K. Raza Khan v. Mumtaza Khatoon* (1976) 1 An. W.R. 1.

39 *Syed Mukhtar Ahmad v. Smt. Moonis Fatma* (1981) 18 ACQ 224 [R. B. Lai, J. (H.C)].

40 1976 Ker LT 87, overruled.

41 *Mariyumma v. Mohd. Ibrahim,* A.I.R. 1978 Ker. 231.

CHAPTER XIV

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL

RIGHTS

B.--

MAINTENANCE OF WIVES

280.

Agreement for future maintenance

An ante-nuptial agreement between a Mahomedan and his prospective wife, entered into with the object of securing the wife against ill-treatment and of ensuring her suitable maintenance in the event of ill-treatment, is not void as being against public policy.[42] Similarly, an agreement between a Mahomedan and his first wife, made after his marriage with a second wife, providing for a certain maintenance for her if she could not in future get on with the second wife, is not void on the ground of public policy.[43] Similarly, an agreement by a Mahomedan with his second wife that he would allow her to live in her parents' house and pay her maintenance is not against public policy.[44](*see*281(3) and 321). It has been held in Bombay that an agreement for future separation between husband and wife is void as being against public policy under the Indian Contract Act, 1872, s. 23 An agreement, therefore, which provides for a certain maintenance to be given to the wife in the event of a future separation between them, is also void.[45] If the marriage is dissolved by divorce, the wife is entitled to maintenance for the period mentioned in 279, and not for life, unless the agreement provides that it is for life.[46]

Excursus

The right to maintenance after the period of *iddat*came to be considered under sections 125 to 127 of the Code of Criminal Procedure . A large number of cases arose particularly in the seventies and eighties. They culminated in the case of*Mohd. Ahmed Khan v. Shah Bano Begum* .[47] Cases before it may be briefly mentioned here. This list is not intended to be exhaustive and is only illustrative. The reason for not mentioning or discussing other cases will be stated at the end.

In *Bai Tahira v. Ali Hussain* ,[48]the Court was not called upon to decide whether divorced muslim women could be brought within ss. 125-127 of the Code of Criminal Procedure. The case turned entirely on neglect and non-payment of maintenance. The husband denied it on the basis of certain dealings between the parties. The claim for maintenance was upheld.

This case and the next that followed it[49] were approved later but one statement in the former at page 365 in the context of s. 127(3)(b) was disapproved. A short passage may well be quoted here. It was observed that:

> &uot;payment of Mahr money, as a customary discharge is within the cognisance of that provision.&uot; was incorrect because &uot;. Mahr, not being payable on divorce does not fall within that provision.&uot;

In neither of these two earlier cases was the question whether s s. 125 to 127 of the would govern a Muslim divorced wife', notwithstanding the widened definition of 'wife' to include a 'divorced wife'. This question fell to be considered by a Bench of 5 Judges in the *Shah Bano* case, as it is called.

The following cases may also be seen.[50]

(a) *Jagdish Chandra v. Smt. Somwati* ,[51](although a case between Hindu parties, the reasoning was the same as in cases involving Mahomedans).

(b) *Syed Mukhtar Ahmed v. Smt. Moonis Fatma* .[52]

(c) *Aijaz Ahmed Lalri v. Smt. Shahjehan Begum* .[53]*Cherummal Abdulla v. Poovalora Kathessa* .[54](But see the comments of Mr. Danial Latifi in the Annual Survey of Indian Law (ILI) vol. XX page 307.) The last case which followed the case of *Mohd. Ahmad Khan v. Shah Bano Begum* is *Begum Subranu alias Saira Banu v. A. M. Abdul Ghafoor* .[55]

The leading case, on this topic of course, is *Mohd. Ahmad Khan v. Shah Bano* ,[56] where the five Judge Bench of the Supreme Court held that a Muslim husband having sufficient means must provide maintenance to his divorced wife who is unable to maintain herself. Such a wife is also entitled to refuse to live with her husband and claim maintenance because he has contracted another marriage within the limit of four wives.

The Court rejected the contention of the husband that s. 125 of Cr.PC. providing maintenance of divorce wife who is unable to maintain herself is inapplicable to Muslims. It was held that the religion professed by a spouse or the spouses has no place in the scheme of s. 125Cr. P.C, which is a measure of social justice founded on an individual's obligation to the society, to prevent vagrancy and destitution. The Court further held that the term 'wife' includes a divorced Muslim woman also, so long as she has not remarried. The Court also rejected the plea that maintenance is payable only till the period prescribed under muslim personal law, during which she should abstain from sexual intercourse and other luxuries. It further held that the ability of the husband to maintain her divorced wife till the expiration of '*Iddat*', period extends only in case the wife is able to maintain herself. Chief Justice Chandrachud gave his own interpretation of the Quranic verses and held that these Ayats of Holy Quran clearly impose an obligation to provide maintenance to the divorced wife.

A great controversy raged and Parliament passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 (10 of 1986). The text of that Act is to be found at the end.[57]As the learned author (Dr. Tahir Mahmood) has correctly pointed out the provisions of s s. 125-127 continue to apply but provision is made for the husband and the divorced wife to opt out of the provisions of the new Act and consent to be governed by the provisions of the Criminal Procedure Code . This, they must do on the first hearing of the application under s. 3 of the new Act, by affidavit or other declaration in writing either jointly or separately. Thus the two sets of provisions are on the Statute book. Under the new Act the children or the parents or other relatives (in that order) may be ordered to pay maintenance, and failing all of them, the State Waqf Board may be ordered to pay maintenance.

The contention that deferred dower is a payment by the husband as the divorce of the wife, hence such payment under personal law excludes the payment of any maintenance by the husband to the wife was also rejected. It was held that under s. 127(3) (b) CrPC mahr (dower) is an amount which the wife is entitled to receive from the husband in consideration of the marriage.[58]

After the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, there are plethora of cases decided by various High Courts and the Supreme Court and it would not be possible to discuss all these cases. Only cases, where some new points arose, have been chosen and discussed below.

First controversy that arose after the enactment of the Act of 1986 was whether s. 125,Cr.P.C. would be applicable to the case of a Muslim divorced wife claiming maintenance from her former husband. Section 3 of the Act provides that the husband is liable to maintain his wife only during the period of*iddat*. After that under s. 4 of the Act, the liability to pay maintenance to a divorced woman, if she is, unable to maintain herself after the period of *iddat*, is devolved upon the relatives and if the relatives are not available then on the Wakf Board. Section 5 of the Act provides that the husband and wife would be governed by s 125-128

of CrPC, only if they exercise their option in the manner stated therein. It is therefore, argued that the claim of maintenance by the divorced Muslim woman would still be governed by the provisions of s. 125 CrPC .

In another case the Division Bench of Rajasthan High Court held that the Act of 1986 does not contain any saving clause for the right created in an order passed in favour of a divorced Muslim women. The Act has completely obliterated the right of such woman to get maintenance. The repeal without saving such right means that such a woman had never acquired such right and that right now cannot be enforced under s. 125(3) of the Code.[59]

There are conflicting decisions of various High Courts on the question of applicability of s. 125 of the Code to the claim of maintenance made by a divorced Muslim wife.

In *Md. Yunus v. Bibi Phenkani* ,[60]the question before the Court was--whether the right of maintenance of a divorced wife under Muslim law under s. 125 of the Cr.P.C. still subsists even after the passing of the Act of 1986. The Court held that s. 3(1)(a) of the Act, 1986 has limited the right of a divorced woman to get maintenance for the period of*iddat* only. Thus the right to get maintenance from her husband, given under s. 125 of the Code until she remarries has been impliedly repealed. Now the case of a divorced Muslim woman is governed by the provision of s. 3(1)(a) of the Act of 1986.

The Kerala High Court in *Abdul Gafoor v. A.U. Pathumma* [61]held that order for enhancement of maintenance cannot be passed under s. 127 of the Code after the enactment of the Act of 1986. The Court further held that even though ss. 125-127 of the Code have not been repealed by the Act of 1986, it cannot be said that the Act of 1986 has supplemented, widened or enshrined the contents of rights ensuring to the wife under the Code.

On the other hand, there are many cases where contrary view was taken by the High Courts. In *A.A. Abdulla v. A.B. Mohmuna Saiyad Bhai* ,[62] the Gujarat High Court held that a divorced Muslim woman is entitled to maintenance after contemplating her future needs and the maintenance is not limited only upto *iddat* period. The phrase used in s. 3(1)(a) of the Act of 1986 is "reasonable and fair provision and maintenance to be made and paid to her" indicates that the legislature intended to see that the Muslim divorced woman gets sufficient means of livelihood after the divorce and that she does not become destitute or is not thrown on the street without a roof over her head and without any means of sustaining herself and her children. It was further held by the Court that the word "within" under s. 3(1)(a) cannot be read as 'for' or 'during'. Therefore, the husband is under obligation for making reasonable and fair provision and maintenance to the wife for a period after iddat.

The Chandigarh High Court has held that the order of maintenance under s. 125 of the code is not affected by coming into force of the Act of 1986. This was held primarily on the basis that there is no provision in the Act of 1986 to the effect that "notwithstanding anything contained in ss. 125 to 128 of the Code, maintenance of Muslim woman shall be governed by the provision of the Act 1986." The provisions of the s s. 125 to 128 have been superceded only to the extent that there is a provision in the Act of 1986 on matters covered under Chapter IX of the Code .[63]

In another case, the question before the Karnataka High Court was whether divorce subsequent to the filing of application for maintenance disqualify the wife from claiming maintenance or whether divorced wife loses her right to claim maintenance after coming into force of the Act . The Court reiterated once again the Act of 1986 gives option to the divorced wife to declare her preference to be governed by s s. 125 to 128Cr.P.C. The Magistrate disposing of the case without making parties such option amounts to serious infirmity and vitiate the order. Therefore, merely on the basis that the Act has come into force it cannot be held that the divorced wife loses her right to claim maintenance under s. 125Cr.P.C. The provisions incorporated in s. 5 of the Act are important provisions which give option to the wife and her former husband to declare by affidavit or any other declaration in writing in such form as may be prescribed, to give their preference as to which provision of law they would like to be governed.[64]

In *M. Alavi v. T.V. Safia* ,[65] the point for consideration before the Kerala High Court was whether a woman

who has already been divorced by her husband can claim maintenance even if she is in a sexual relationship with other person. The Court through Justice K.G. Bala Krishna has observed that provisions of the Act of 1986 do not say that divorced woman would not be entitled to get the relief if she had been living in adultery. It is not possible to read something into that Act which is not there. It is corollary to the general rule of literal construction that nothing is to be added or taken away from a Statute unless there are strong grounds to justify the inference that the Legislature intended something which it omitted to state. It is not proper to refuse maintenance to a divorced wife on the ground that it is an unjust burden on a person to maintain a woman leading an adulterous life.

The Court further observed that the term 'wife' used under s. 125(4) CrPC would only mean a woman whose marriage relationship is in existence. A divorced woman will not come within the amplitude of s. 125(4) of the Code of Criminal Procedure .

42 *Muhammad Muin-ud-din v. Jamal* (1921) 43 All. 650, 63 I.C 883, ('21) A.A. 152; *Musammat Hamidanv. Muhammad* ('32) A.L. 65, 133 I.C. 886.

43 *Mansur v. Azizul* (1928) 3 Luck. 603, 109 I.C. 812, ('28) A.O. 303.

44 *Mt. Sakina Faruq v. Shamshad Khan* (1936) 165 I.C. 937, ('36) A. Pesh. 195. In addition to the cases in footnotes (z), (a) and (b); See also: *Nizamul Haque v. Begum Noorjahan,* ('66) A.C. 465.

45 *Bai Fatma v. Alimahomed* (1913) 37 Bom. 280, 17 I.C. 946. But see: *Mohd Zaman v. Irshadi Begum* ; P.LD. 1967 Lah. 1104 where this case is dissented from.

46 *Muhammad Muin-ud-din v. Jamal* (1921) 43 All. 650, 63 I.C. 883, ('21) A.A. 152 [stipulation for maintenance for life]; *Ahmad Kasim v. Khatun Bibi* (1932) 59 Cal. 833, 854, 141 I.C. 689, ('33) A.C. 27 [no stipulation for maintenance for life]; *Mydeen Beevi v. Mydeen Rowther* ('51) A.M. 992 (stipulation for maintenance for life.

47 A.I.R. 1985 S.C. 945.

48 AI.R. 1979 S.C. 362.

49 *Fuzulunbi v. K Khader Vali* A.I.R. 1980 S.C. 1730.

50 *Zohra Khatoon v. Mohammed Ibrahim* A.I.R. 1981 S.C. 1243.

51 1981 AW.C. 574.

52 1981 All. L.J. 785.

53 1982 Cr. L.J. 1022(All) .

54 1983 KL.T. 544.

55 A.I.R. 1987 SC 1103.

56 AIR 1985 SC 945.

57 A fairly accurate summary of the Act (omitting the asides of the Author) is to be found in the Islamic and Comparative Law Quarterly Vol. VI (June & Sept.) 1986 pp 159-179.

58 *Mst. Zohra Khatoon v. Mohd. Ibrahim* A.I.R. 1986 SC 587.

59 (1988) 1 Raj LR 104, see *Rizwana Begum v. Motiullah* 1989 Cr. L.J. (NOC) 155 (Oris).

60 (1987) 2 Crimes 241.

61 (1989) Cr.L.J. 1224(Ker) .

62 A.I.R. 1988 Guj 141, see also A.I.R. 1990 All 182.

63 *Hazran v. Abdul Rehman* (1989) Cr.L.J. 1519.

64 *Syed Kareem v. Zarina Bee* LNIND 1991 Kant 502.

65 AIR 1993 Ker 21.

Reasonable and fair provision and maintenance

The division bench of Kerala High Court[66] got an opportunity to discuss the meaning of '*reasonable and fair provision*' and its distinction with maintenance. The court observed that the Legislature has deliberately used the two expressions 'provision' and 'maintenance' with the intention of expressing two different things or ideals departing from the view expressed by the Supreme Court in *Shah Bano* case,[67]that the distinction between the above two expressions 'provision' and 'maintenance' is a distinction without difference. Parliament has, while enacting s. 3(1)(a) of the Act, accepted the traditional view that right to maintenance ceases after the expiration of the iddat. Following talaq only after declaring and protecting the right of divorced woman to get a fair and reasonable provision being made for her livelihood during the post *iddat* period also from her husband and that too within the period of iddat. The Apex Court in Shah Bano Case has already declared that there is a continuing liability on the part of the Muslim husband to pay maintenance of his divorced wife till his remarriage or death under s. 125 of CrPC in case the wife is not having means for her livelihood.

A section of the Muslim community disagreed with the interpretation of continued liability by the Supreme Court. There was absolutely no dispute regarding the liability of the husband to pay maintenance during *iddat* period. From the statement of object and reasons, it is evident that the Parliament has enacted the new legislation in the background of Shah Bano's case, partly to contain the disagreement against the continued liability imposed by the said decision, on Muslim husbands and also to protect the rights of the divorced Muslim women who may not be having the necessary means of livelihood after the period of *iddat*. Thus, the Parliament has only substituted the continued liability declared by the Supreme Court (s. 125 of CrPC), with the liability to make a fair and reasonable provision for the livelihood of the divorced wife in case she is not having sufficient means of livelihood within the period of *iddat* itself (s. 3(1)(a), Act of 1986)) as a condition to free the husband from all his liabilities to the divorced wife on the expiry of the *iddat* period. This seems to be the scheme envisaged by the Parliament while enacting the Act.

It is difficult to think that Parliament has, by enacting the Act of 1986, completely has taken away the right of Muslim divorced women under s. 125 of the Code without making any provision as a compensating measure. On making a fair and reasonable provision for livelihood of the needy divorced wife and paying her maintenance for the *iddat* period, the husband was enabled to put an end to all his liabilities resulting from the divorce by the provision of the Act and to that extent it was certainly a benefit or advantage confered by the Act on the Muslim husbands who wanted to divorce their wifes.

The fact that provision has been made to make a fair and reasonable provision for the future livelihood alone can be a justification for denying the rights of a needy divorced Muslim women to have the benefit of the provisions contained in s. 125 of the Code of Criminal Procedure . This in view of the court seems to be the real intention of the legislature in making the provision in s. 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act. If the intention of the legislature was to restore the liability of the husband to its pristine form unconditionally, there was no necessity to incorporate the words 'reasonable and fair provisions' in addition to the 'maintenance' in s. 3(1)(a) of the Act . Taking note of the fact that it is an enactment intended to protect the rights of a divorced Muslim woman, an interpretation which would advance the objects and reasons*viz*., protecting the rights of divorced women alone can be justifiably accepted.

Thus, the only reasonable way in which the provision can be understood is that the husband is made liable to make a reasonable and fair provision apart from paying maintenance to her for the *iddat* period both within the period of iddat. The words 'within the period of iddat' seem to have been used to indicate the time within which the provision and maintenance have to be made and paid and not to indicate the duration for which they have to be made and paid. The words 'within the period of iddat' cannot also be taken as having the meaning ' for the period of iddat'. The Court, thus, held that under s. 3(1)(a), a divorced Muslim women is entitled to get a fair and reasonable provision for her livelihood after the period of *iddat* apart from her right to get maintenance during the period of *iddat*.

The full Bench of Bombay High Court in *Karim Abdul Rehman Shaikh v. Shehnaz Karim Shaikh* ,[68]got opportunity to dissect the Muslim Women (Protection of Rights on Divorce) Act, 1986 from every aspect. The Court nicely summarised the answers of the questions posed before it.

Q1. Whether the Muslim husband's liability under s. 3(a) of the Act of 1986 to make a reasonable and fair provision and pay maintenance is only restricted to the *iddat* period or whether it extends beyond the *iddat* period?

Ans. The husband's liability to pay maintenance to a divorced wife ceases the moment *iddat* period gets over. He has to pay maintenance to her within the *iddat* period for the *iddat* period. But he has to make reasonable and fair provision for her within *iddat* period, which should take care of her for the rest of her life or till she incurs any disability under the Muslim Women Act. While deciding the amount regard will be had to the needs of the divorced women, the standard of life enjoyed by her during her marriage and the means of her former husband and the like circumstances.

Q2. Whether the Muslim Women Act has the effect of invalidating the orders/ Judgments passed under s. 125 of the Code *i.e.*, whether the Muslim Women Act operates retrospectively so as to divest parties of the vested rights?

Ans. The orders passed under s. 125 of the Code prior to the enactment of the Muslim Women Act are not nullified by reason of the coming into force of the Muslim Women Act. Such orders are binding on both sides and can be executed under s. 128 of the Code. The Muslim Women Act does not divest the divorced woman of the right to get maintenance under s. 125 of the Code vested in her by reason of orders of a competent Court passed prior to its coming into force.

Q3. Whether after the commencement of the Muslim Women Act, a Muslim divorced wife can apply for maintenance by invoking the provisions of Chapter IX of the Code ?

Ans. After the commencement of the Muslim Women Act, a Muslim divorced wife cannot apply for maintenance under the provisions of chapter IX of the Code. It is only under s. 5 of the Muslim Women Act by agreement can the husband and the divorced wife approach a Magistrate under Chap IX of the Code .

Q4. Whether the Family Court has jurisdiction to try application of the Muslim divorced women for maintenance after coming into force of the Muslim Women Act ?

Ans. After coming into force of the Muslim Women Act, a Muslim woman can apply under ss. 3 and 4 of the said Act only to Magistrate of the first class having jurisdiction under the Code. The Family Court cannot deal with such applications.

Danial Latifi v. Union of India .[69]

Though the Muslim Women's Act, 1986 had been tested by different High Courts from every angle but the Supreme Court has finally confirmed the constitutional validity of the Act and made also clear certain other points relating to maintenance of a divorced wife under Muslim Personal Law.

Basically the petitioners in the instant case challenged the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 under which s. 125 of CrPC , was made inapplicable to divorced Muslim women. The petitioners primarily submitted that:

(a) section 125 CrPC was enacted as a matter of public policy, in order to provide a quick summary remedy to persons unable to maintain themselves; that the provision reflected the

moral stance of law and ought not to have been entangled with religion and religion based personal laws;

(b) section 125 CrPC also furthers the concept of social justice embodied in Art. 21 of the Constitution of India ; hence excluding divorced Muslim women from its protection is a discrimination against them;

(c) the inevitable effect of the Act is to nullify the law declared by the Supreme Court in *Shah Bano* Case,[70] which is most improper;

(d) the Act is un-islamic and also has the potential to suffocate Muslim women and to undermine the basic secular character of the Constitution; and

(e) the Act is violative of Article 14 and 21 of the Constitution of India .

On behalf of the Union of India, it was submitted that the need for giving effect to a community's personal law was a legitimate basis for discrimination. If the legislature can apply a particular provision as a matter of policy, it can also withdraw such application and substitute another in its place. The policy of s. 125 CrPC , is not to create a right of maintenance beyond the preview of personal law. The Act has been enacted to overcome the ratio of *Shah Bano* decision.

On behalf of the All India Muslim Personal Law Board it was submitted that the object of the Act was to undo the effect of *Shah Bano* Case; in that case the Supreme Court had attempted the hazardous task of interpreting an unfamiliar language connected to religious tenets, which was not a safe course to pursue; that the term &uot;mata&uot; had been wrongly interpreted in *Shah Bano* case. The purpose of the Act was to avoid vagarancy, but at the same time it aimed to prevent the husband from being penalised; that the term 'maintenance' and 'provisions' as used in s. 3(1)(a) had the same meaning; that provision of s. 4 of the Act where adequate for taking care of any possibility of vagarancy; that according to Muslim social ethos, a divorced Muslim women was not at all dependant on her former husband because society provided a wider safety net. The Islamic Sharia Board presented more detailed submissions regarding the term 'mata' and as to why the views of certain Muslim authors, proposing that Muslim Law obliges a man to pay maintenance to his former wife beyond the *iddat* period, ought not to be accepted.

The Supreme Court decided to consider on the constitutional validity of the Act and upholding the same, held:

In interpreting the provisions where matrimonial relationship is involved, the social conditions prevalent in society have to be considered. In Indian society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Indian society is male dominated, both economically and socially and woman are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up all her other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life-a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, there can be no answer as to how a woman can be compensated so far as emotional fracture or loss of investment is concerned. It is a small solace to say that such a woman should be compensated in terms of money towards here livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions

and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as their heirs who were likely to inherit the property from her or the Wakf Boards. Such an approach appears to be a kind of distortion of the social facts. Solution to such societal problem of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faiths or beliefs or national, sectarian, racial or communal constraints.

The Court further observed that the purpose of the Muslim Women (Protection of Rights on Divorce) Act, 1986 appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of iddat. However a careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. Parliaments seem to intend that the divorced woman gets sufficient means of livelihood after the divorce, and therefore, the word "provision" indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her clothes and other articles.

The contention that the expression "within" in s. 3(1)(a) should be read as "during" or "for" cannot be accepted because words cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that on or before the expiration of the *iddat* period, the husband is bound to make and pay maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in s. 3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the *iddat* period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

While upholding the validity of the Act, the Supreme Court in the case of *Danial Latifi v. Union of India* decided:

> "(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the *iddat* period must be made by the husband within the *iddat* period in terms of s. 3(1)(4) of the Act.
>
> (2) Liability of Muslim husband to his divorced wife arising under s. 3(1)(a) of the Act to pay maintenance is not confined to *iddat* period.
>
> (3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after *iddat* period can proceed as provided under s. 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 "> 15 21 and 21 of the Constitution of India ."

A typical question arose before the Kerala High Court that is where a divorced woman, not undergoing *iddat* because of non-consummation of marriage, is entitled to claim maintenance from her husband. The Court held that, a divorced woman is, whether marriage consummated or not, entitled to claim maintenance during *iddat* apart from future maintenance, dower and the other statutory dues.[71]

Once again the Kerala High Court was confronted with a question whether a divorced Muslim woman was entitled to get, under s. 3 of the Muslim Women Act, 1986, any payment from her former husband exclusively for *iddat* period, towards her expenses or maintenance over and above &uot;provision and maintenance&uot; to be made and paid under the Act? The Court held that the statute had laid down reasonable and fair provision, and maintenance during iddat. Thus the husband is not liable to pay any additional amount exclusively, for *iddat* period for her divorced wife.[72]

In another case, the Court held that a remarried Muslim divorced woman is not entitled to claim maintenance from her former husband because fresh resources has opened for her after remarriage and she does not remain a destitute.[73]

In *V. Bapputty@Muhammed v. Shahida* , the Court held that the safe and practically pragmatic rule is that in every case where the woman act ually remarries, the amount paid by way of fair and reasonable provision under s. 3(1)(a) of the Act, 1986, by her former husband must be held to be sufficient provision for her till remarriage only and not till the end of her life. When she remarries, the subsequent husband cannot be heard to contend that the former husband has already made provision for the wife till the end of her life.[74]

In *K.A. Abdul Jaleal v. T.A. Shahida* [75] the question before the Supreme Court was-- whether the Family Court has jurisdiction to adjudicate upon any question relating to the properties? The Court held that the Family Court was set up for the settlement of family disputes. The reason for enactment of the said Act was to set up a Court which would deal with disputes concerning the family by adopting an approach radically different from that adopted in ordinary civil proceedings. Thus the jurisdiction of the family Court extends, *inter alia*, in relation to properties of spouses or of either of them which would clearly mean that the properties claimed by the parties there to as a spouse of other, irrespective of the claim whether property is claimed during the substance of the marriage or otherwise.

In *Iqbal Bano v. State of U.P.* [76] the Supreme Court held that the Muslim Women Act, 1986 applies only to divorced Muslim woman and the view that no Muslim women can maintain a petition under s. 125 CrPC after the enactment of the Muslim Women Act, 1986 is not tenable. The Court further reiterated that a mere plea that there was a divorce 30 years back by uttering the '*talaq*' thrice taken in the written statement, cannot be treated as sufficient in law as proof of evidence.

Where the divorced woman unable to maintain herself and has no relative as mentioned in sub-s. 4(1) of the Act of 1986, or any one of them have not enough means to pay maintenance, the Magistrate may by order direct the State Wakf Board to pay such maintenance as determined by s. 4 itself.[77]

The Allahabad High Court in *Shahid Jamil Ansari v. State of U.P.* has in unequivocal terms answered the following two questions, namely--firstly, whether a divorced Muslim Woman can claim maintenance from her former husband under s. 125 of CrPC ? The Court held that a divorced Muslim woman cannot claim maintenance from her former husband under s. 125 and her remedy to claim maintenance etc., is only under 1986 Act, which is complete code in itself on the matter of maintenance etc. for a divorced Muslim woman. Second question was, whether interim maintenance can be granted under the proviso to s. 126 of CrPC in the proceedings under s. 125 of To this, the Court held that interim maintenance is to be paid to divorced Muslim women and the same may later be adjusted in the amount fair and reasonable provision and maintenance till the issue of divorce is finally decided.

In *Shabana Bano v. Imran Khan* ,[78] the basic and foremost question that arose for consideration was whether a Muslim divorced wife would be entitled to receive the amount of maintenance from her husband under s. 125 of the CrPC , and if yes, then through which forum.

The Supreme Court ones again reiterated that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband even beyond the period of iddat, as long as she does not marry, under s. 125 of CrPC . Thus being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.

The Court further observed that after careful perusal of s s. 4 and 5 of the Muslim Women Act, 1986 and ss. 7 and 20 of the Family Court Act, it is crystal clear that the provisions of the Family Court Act shall have overriding effect on all other enactment in force dealing with the issue. Thus it is quite discernible that a Family Court, established under the Family Court Act, shall exclusively have Jurisdiction to adjudicate upon the application filed under s. 125 of CrPC .

The contention that deferred dower is a payment by the husband on the divorce of the wife, hence such payment under personal law excludes the payment of any maintenance by the husband to the wife was also rejected. It was held that under s. 127(3) (b) of CrPC mahr (dower) is an amount which the wife is entitled to receive from the husband in consideration of the marriage.[79]

66 *Kunhammed Haji v. Amira* [1995]1 MLJ (Cri) 617.

67 A.I.R. 1985 SC 945.

68 LNIND 2000 Bom. 423, 2000 CrLJ 3560, 2000 All MR (Cri) 1249, See also, *Hyder Khan v. Mehrunnissa* LNIND Ker. 228; *Motiar Rahman v. Sabina Khatun* (1994) 1 Cal LT 265, (1998) 98 CWN 763, LNIND 1993 Cal. 382; *Noorun-Nisha v. Maqsood Ahmad* LNIND 1994 M.P. 353; *Shamsunnisa Begum v. G. Subban Basha* LNIND 1994 AP 202; *Sirazuddin Ahmed Saheb Bagwan v. Khatija Sirajuddin Bagwan* (1996) 2 Mah LJ 942, (1996) 3 BCR 756, LNIND 1995 Bom. 732; *Saber Ali v. Sahmim Banu* 1996 CrLJ 2791, (1996) 3 All (Cri) R 251, LNIND 1996 Cal. 60, (1997) 2 MLJ 464, LNIND 1998 MP 15, *Tabassum Shaikh v. Shoikh S.J. Shaikh* A.I.R. 2000 Bom. 1, (1999) 4 All MR 395, LNIND 1999 Bom. 769; *Madayi Khyrunneesa v. Kuniyachari Alavi* LNIND 2000 Ker 559; *Nagoor Mohamed Farooq v. Mavada Roashan Jahan* LNIND 2000 Kant 458.

69 *Danial Latifi v. Union of India* (2001) 7 SCC 740 See also, LNIND 2001 AP 650.

70 (1985) 2 SCC 556.

71 *T.K. Moidu Haji v. Konnapator Kandy Mariyam* LNIND 2006 KER 307.

72 *C.A. Majeed v. Afira* LNIND 2010 KER 277.

73 *Abdul Hamee v. Fousiya* LNIND 2004 KER 535.

74 LNIND 2007 KER 55.

75 (2003) 2 MLJ 202(SC) .

76 (2007) 6 SCC 785. See also *Musarat Jahan v. State of Bihar* A.I.R. 2008 Pat 69, (2008) 1 PLJR 836. See, *Samul Hafua Molla v State of West Bengal* LNIND 2007 Cal. 500, *Ameensab v. Shanshad* LNIND 2006 KANT 681, *H Sirajuddin v. Shaziya* LNIND 2003 KANT 112; *Rasiya v. State of Kerala* LNIND 2002 KER 75; *S. Abdul Salam v. S. Gousiya Bi and Ors.* LNIND 2007 AP 451.

77 *Tripura Board of Wakf v. Ayasha Bibi* A.I.R. 2008 Gau 10. See also, *Secretary T.N. Wakf Board v. Syed Fatima Nachi* A.I.R. 1999 SC 2423.

78 *Shabana Bano v. Imran Khan* A.I.R. 2010 SC 305, See, *Hashim Huzursab Sayeed v Goribi Hashim Sayeed* 2009 (111) Bom. L.R. 812, LNIND 2009 Aug. 35; *Syed Younus v Jabeen* 2008 (28) Crim. CC 271, LNIND 2008 Aug. 228(Bom) .

79 *Mst. Zohra Khatoon v. Mohd. Ibrahim* A.I.R. 1986 SC 587.

CHAPTER XIV

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

C.--

JUDICIAL PROCEEDINGS

281.

Suit for restitution of conjugal rights

(1) Where a wife without lawful cause ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights.[80]

Under the Mahomedan Law, a wife would not be entitled successfully to defend a suit for restitution of conjugal rights on the basis of a simple fact that the husband has another wife. Even if such a defence is raised, the suit will be decreed. Thus, the position is that a decree for restitution of conjugal rights can be passed even though the husband has another wife. But the matter is quite different when one has to consider the provisions of s. 125 of the Criminal Procedure Code . The explanation of sub-s. (3) makes it abundantly clear that if the husband had contracted a marriage with another woman, then that itself would be a just ground for his wife for refusal to live with him. Consequently when a claim for maintenance under s. 125 of the Criminal Procedure Code, is made, the fact of the husband having the second wife will be relevant for the purpose of deciding as to whether the wife has a just ground to live separately from the husband. However, this very fact would not always be relevant while deciding the claim for restitution of conjugal rights. In this background, it will not be correct to contend that the existence of the decree for restitution of conjugal rights in favour of the husband, would be a good reply in each and every case to the claim for maintenance under s. 125 of the CrPC . The net result therefore is that in view of the explanation of sub-s. (3) of s. 125, the wife would be having a just ground to refuse to live with her husband if he has another wife. But the same will not always be the position if the matter is being fought out in a suit for restitution of conjugal rights. Under these circumstances the husband would not be entitled to resist the claim for maintenance under s. 125, simply because there is a decree for restitution of conjugal rights.[81]

The husband is not entitled to a decree if the marriage, though consummated, was an irregular marriage during the period of *iddat,*[82] not if the marriage took place during the minority of the wife and has been validly repudiated.[83](*see* 272 and 273)

In an earlier appeal, it was held by Ghose CJ. and Masud Hasan J. that *Khana Damad* was not entitled to bring a suit for restitution of conjugal rights as custom imposed on him the obligation to stay in the house of the bride's father and he could not compel his wife to leave it and reside with him elsewhere. On the case being referred to a Full Bench, it was ruled that if the wife refused to live with the husband in her own house and to perform her marital obligations, the husband was entitled to a decree.

A second point arose whether in a case, an agreement between the husband and wife by which the husband gave a right to the wife to divorce him on certain conditions was invalid, as opposed to public policy. It was so held.[84]

Mahomedan Law -- Marriage Suit by Husband for restitution of conjugal rights -- Husband taking a second wife -- Right to relief.

The decision in a suit for restitution of conjugal rights does not entirely depend upon the right of the husband. The Court should also consider whether it would make it inequitable for it to compel the wife to live with her husband.

Where it was found that the suit instituted by the husband for restitution of conjugal rights was not *bona fide* and the plaintiff had taken a second wife during the pendency of the suit; held., the husband was

disentitled to a decree for restitution of conjugal rights, 11 M.I.A. 551.[85]

The *Khana Damad* custom abrogates the right of the husband to enforce the wife to live outside the wife's parents' house.[86]

(The earlier Division Bench Case limited in operation by the Full Bench but not overruled.) The husband can, however, enforce his rights if he lives in the house of his wife's parents.

Where a suit was filed for setting aside '*talaqnama*' and for a decree of restitution of conjugal right, the Gauhati High Court has held that concededly, both the parties are living separately since 1996 and that the purpose and object of marriage between the husband and wife has been rendered frustrated. The marriage, in all practical sense, is dead. On overall consideration of the fact situation, it appears that there is no chance of marriage being retrieved and it is, therefore, better to bring it on end. The Court further held that there was no cogent or plausible reason to dislodge the '*talaqnama*' and accordingly the same was accepted.[87]

In the instant case, the question before the Nagpur High Court was--In a suit for restitution of conjugal rights, whether wife is entitled to claim interim maintenance. It was held that in a suit cognizable under s. 9 of CPC , the power to grant interim maintenance is available to Civil Court. The same power is also available to Family Court. Here, though the parties were Mohammedan, the maintainability of proceedings was not in dispute and hence till the entitlement to final relief remained pending for adjudication, case before the Family Court was not for recovery of maintenance; it has jurisdiction and power to award interim maintenance to the wife during restitution proceedings.[88]

(2) *Cruelty.*--Cruelty, when it is of such a character as to render it unsafe for the wife to return to her husband's dominion, is a valid defence to such a suit. "It may be, too, that gross failure by the husband of the performance of the obligation, which the marriage contract imposes on him (265) for the benefit of the wife, might, if properly provide, afford good grounds for refusing to him the assistance of the Court".[89]

The Allahabad High Court has held that the circumstances in which a Mahomedan takes a second wife are relevant and material in deciding whether his conduct in taking a second wife was in itself an act of cruelty to the first; and that the onus is on the husband who takes a second wife to explain his action and prove that his taking a second wife involved no insult or cruelty to the first.[90]

Restitution of conjugal rights is not to be lightly ordered.[91]

When the wife has a reasonable apprehension that her life is unsafe, she should not be compelled to live with her husband. In a husband's suit for restitution of conjugal rights wife's evidence regarding cruelty does not require corroboration.

(The above is supported by Rayden on Divorce 10th Edition, p. 167 and Halsbury Laws of England.) It is, however submitted that cruelty is required to be proved as a fact like every other fact. The passages relied upon in the case do not obviate the need for corroboration, if such other evidence is readily available. All that can be said is that Courts lean in favour of the wife's testimony if it is cogent and not successfully rebutted.

(3) *Agreement enabling wife to live separate from the husband*--An agreement entered into before the marriage by which it is provided that the wife should be at liberty to live with her parents after marriage is void, and does not afford an answer to a suit for restitution of conjugal rights.[92] Similarly, an agreement, entered into after marriage between a husband and wife who were for some time before the date of the agreement living separate from each other, providing that they should resume cohabitation, but that if the wife should be unable to agree with the husband, *she should be free to leave him*, is void, and it is not a defence to the husband's suit for restitution[93]: (*see* 280 and 322). But an agreement to allow a second wife to live in a separate house and to give her a maintenance allowance has been enforced.[94]

(4) *Non-payment of prompt dower and restitution of conjugal rights.--* (*see* 293).

(5) *False charge of adultery by husband against wife.*--A false charge of adultery by a husband against his wife is a good ground for refusing a decree for restitution of conjugal rights.[95]But if the charge is true, and it was made at a time when the wife was act ually living in adultery, it is no ground for refusing a decree for restitution of conjugal rights.[1](*see* 333).

(6) *Expulsion of husband from caste.*--In a Bombay case, where the parties belonged to the Mussalman Kharwa community of Broach, the High Court refused to pass a decree for restitution of conjugal rights against the wife, on the ground that the husband having been expelled from the caste, the wife was not bound to live with him.[2]

80 *Moonshee Buzloor Ruhecm v. Shumsoonnissa Begum* (1867) 11 M.I A. 551.

81 1966 Cr.LJ. 131(Bom.), Rel. on; (1948) 49 Cr.LJ. 757(Cal.) A.I.R 1952 All. 616 (2) and 1975 Cr.LJ. 137(Raj.) Distinguished. *Hafijjabi A. Aziz v. Abdul Aziz Kadirkha* 1983 Cr.LJ. 931(Bom.), [Gadgil J.].

82 *Mt. Bakh Bibi v. Quaitn Din* ('34) A.L. 907, 154 I.C. 677.

83 *Mt. Bhawan v. Gaman* (1934) 146 I.C. 292, ('34) A.L. 77; *Abdul Karim v. Amina Bai* (1936) 59 Bom. 426. 157 I.C. 694, ('35) A.B. 308.

84 *Jani v. Md. Khan* ('70) AJ. & K. 154.

85 I.L.R. 55 All. 743 and A.I.R. 1960 All. 684, Rel on. *Raj Mohammed v. Saeeda Amina Begum* (1976) 1 Kar. LJ. 427: A.I.R. 1976 Kara. 200, [Venkataramiah, J.].

86 *Mrs. Jani v. Mohd. Khan* ('71) AJ. & K. 40.

87 *Nazurul Islam v. Mustt Sajeda Begum,* A.I.R. 2006 Gau 159.

88 *Mohammed Anis-Ul-Haf v. Asma Anjum* LNIND 2010 NGP 369. See also, *Samaun Khan v. Roshni Parveen* (2010) ADJ 282(All), LNIND 2010 All. 481.

89 *Moonshee Buzloor Ruhcan v. Shumsoonnissa Begum* (1867) 11 M.I.A. 551, 615; *Meheralty v. Sokerkhanoobai* (1905) 7 Bom. L.R. 602, 608; *Husaini Begum v. Muhammad* (1907) 29 All. 222; *Hamid Hussain v. Kubra Begam* (1918) 40 All. 332: 44 I.C. 728; *Genu Meah v. Begummah Bibi* ('33) A.R 322; *Sofia Begum v. Zaheer Hasan* (1947) All. LJ. 157, 230 I.C. 239, ('47) A.A. 16; *Wali Mohd v. Taj Bano* (1960) A.P. 293.

90 *ltwari v. Asghari,* ('60) A All. 684.

91 *Shakila Banu v. Gulam Mustafa* ('71) A Bom. 166.

92 *Abdul v. Hussenbi* (1904) 6 Bom. L.R. 728; *Itnan Ali v. Arfatunnessa* (1913) 18 Cal. W.N. 693, 21 I.C. 87; *Fatima Bibi v. Nur Muhammad* (1920) 1 Lah. 597, 60 I.C. 88. See; *Mohd Zaman v. Irshad Begum* , P.L.D. 1967, Lah. 1104; (Agreement enabling wife to live separately from the husband and to provide her maintenance if he took a second wife not void; bad conduct or gross neglect good defences to suit for restitution; husband failing to provide maintenance on taking second wife not entitled to decree for restitution. *Fatima Bibi v. Nur Muhammad* (1920) 1 Lah. 597 dissented from).

93 *Meherally v. Sakerkhanoobai* (1905) 7 Bom. L.R. 602.

94 *Mt. Sakina Faruq v. Shamshad Khan* (1936) 165 I.C. 937, ('36) A. Pesh. 195.

95 *Musammat Maqboolan v. Ramzan* (1927) 2 Luck. 482, 101 I.C. 261, ('27) A.O. 154; *Jaum Beebe v. Beparee* (1865) 3 W.R. 93.

1 *Jamiruddin v. Sahara* (1927) 54 Cal. 363, 101 I.C. 60, ('27) A.C. 579.

2 *Bai Jina v. Kharwa Jina* (1907) 31 Bom. 366.

CHAPTER XIV

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

C.--

JUDICIAL PROCEEDINGS

282.

Suit for jactitation of marriage

A suit will lie between Mahomedans in India for jactitation of a marriage.[3]

Jactitation is a false pretence of being married to another. &uot;There can be no doubt that unless a man is entitled by means of the Civil Courts to put to silence a woman who falsely claims to be his wife, the man and others may suffer considerable hardship and his heirs may be harassed by false claims after his death".[4]

3 *Mir Azmat Ali v. Mahmud-ul-nissa* (1897) 20 All. 96.

4 (1897) 20 All. 96, 97, *supra*.

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CHAPTER XIV

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

C.--

JUDICIAL PROCEEDINGS

283.

Suit for breach of promise to marry

In a suit by a Mahomedan for damages for breach of promise to marry, the plaintiff is not entitled to damages peculiar to an action for breach of promise of marriage under the English law, but to a return merely of presents of money, ornaments, clothes and other things.[5]

5 *Abdul Razak v. Mahomed* (1918) 42 Bom. 499, 38 I.C. 771; Macnaghten 250. See also *Mahomed Abid Ali v. Ludden* (1887) 14 Cal. 276 [muta marriage].

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MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS

C.--

JUDICIAL PROCEEDINGS

284.

Suit for enticing away a wife

A Mahomedan husband can maintain a suit for damages against a person who persuades or entices his wife to live apart from him.[6]

6 *Muhammad Ibrahim v. Gulam Ahmed* (1864) 1 Bom. H.C.R. 236; *Abdul Karim v. Amino Bai* (1935) 59 Bom. 426, 37 Bom. L.R. 398, 157 I.C 694 ('35) A.B. 308,

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CHAPTER XV

DOWER

285.

Dower defined

Mahr or dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage.

See Baillie, 91.

Consideration

The word consideration is not used in the sense in which the word is used in the Contract Act . Under Mahomedan law, dower is an obligation imposed upon the husband as a mark of respect to the wife.[1] Mahmood, J., in *Abdul Kadir v. Salima* [2] said that it had been compared to the price in a contract of sale because marriage is a civil contract and sale is a typical contract to which Mahomedan jurists are accustomed to refer by way of analogy. If dower were the bride price, a post-nuptial agreement to pay dower would be void for want of consideration, but such an agreement is valid and enforceable.[3]

The Court describing the Mahomedan marriage as a contract with dower as consideration, held that the transaction was 'in the nature of a *hiba-bil-ewaz*'. It is submitted that the application of the doctrine of *hiba-bil-ewaz* was not quite appropriate. *Hiba-bil-ewaz* contemplates two gifts and it is difficult to think that there was a 'gift' from the wife as '*ewaz*' for the dower.[4]

Amount paid by a Mahomedan, in connection with daughter's marriage, to the prospective bridegroom, for purchase of property in joint names of daughter and would-be son-in-law, held &uot;Not Dowry&uot; within s. 2 of the Dowry Prohibition Act (28 of 1961), ss. 2 and 3 -- &uot;Dowry.&uot;[5]

1 Baillie, Vol. I, p. 91; *Abdul Kadir v. Salima* (1886) 8 All. 149; *Mt. Fatima Bibi v. Lal Din* ('37) A.L. 345, 171 I.C. 421.

2 (1886) 8 All. 149*supra*.

3 *Mt. Fatima Bibi v. Lal Din, supra* ; *Jahuran Bibi v. Soleman Khan* (1934) 58 Cal. L.J. 251, 149 I.C. 1150, ('34) A.C. 210.

4 *H.M. Mondal v. D.R. Bibi* ('71) A. Cal. 162.

5 *Kunju Moideen v. Sayeed Mohammed* A.I.R. 1986 Ker. 48.

CHAPTER XV

DOWER

286.

Specified dower

The husband may settle any amount he likes by way of dower upon his wife, though it may be beyond his means, and though nothing may be left to his heirs after payment of the amount. But he cannot in any case settle less than ten *dirhams.*[6]

(2) Where a claim is made under a contract of dower, the Court should, unless it is otherwise provided by any legislative enactment, award the entire sum provided in the contract.[7]

Specified dower is an incident of a valid marriage only, but not in an irregular marriage. In the event of an irregular marriage contract, when the penetration has taken place, specified dower or the proper dower, whichever is less, shall become due on the man. In an irregular marriage, proper and not specified dower becomes due because of the co-habitation, not on account of marriage contract itself.[8]

Hedaya, 44; Baillie, 92.

Dirham.--The money value of 10 *dirhams* is between three and four rupees.[9]

'Dower is often high among Mahomedans, to prevent the husband from divorcing his wife, in which case he would have to pay the amount stipulated'[10] and the mere fact that the amount stipulated is excessive or beyond the means of the husband is no defence to the wife's claim.[11] If the husband transfers a field to his wife as dower, she is entitled as against him to a decree for possession. If there are other sharers in the field, they are not necessary parties to her suit and the decree does not affect their rights.[12] Where there is one agreement in private for payment of real amount and another inflated amount is announced for payment in public for the glorification of the bridegroom and his family, then if there is evidence, the dower agreed in the private agreement should be allowed. (Doctrine of *As Sunnat*, applied).

6 See *Mohammad Shahabuddin v. Mt. Umator Rasool* ('60) A.P. 511.

7 *Sugra Bibi v. Masuma Bibi* (1877) 2 All. 573F.B. ; *Banoo Begum v. Mir. Anu Ali* (1907) 9 Bom. L.R. 188; *Basir Ali v. Hafiz* (1909) 13 Cal. W.N. 153, 4 I.C. 462.

8 *Tanzil-ur-Rahman*, A Code of Muslim Personal Law, Vol 1, p. 222.

9 *Asma Bibi v. Abdul Samad* (1909) 32 All. 167, 5 I.C. 411.

10 *Zakeri Begum v. Sakina Begum* (1892) 19 I.A. 157, 165, 19 Cal. 689. See also: *Mohd Bashir v. Walayat Begum* , P.L.D. 1967 Lah. 391.

11 *Mahomed Sultan Begum v. Sarajuddin Ahmed* (1936) 161 I.C. 300, ('36) A.L. 183; *A.M. Md. Ebrahim v. Ma Mar & Anr.* (1939) Rang. 383, 179 I.C. 47. ('39) A.R. 28.

12 *Mt. Gulbano v. Akbar Khalid* (1936) 164 I.C. 329, ('36) A. Pesh. 178. *See Nasir Ahmad Khan v. Asmat Jehan Begum* , P.L.D. 1967, Pesh. 328.

&uot;Unless it is otherwise provided by any legislative enactment&uot;

Under the Oudh Laws Act, 1876, s. 5, the Court is not to award the amount of dower stipulated in the contract of marriage, but only such sum as &uot;shall be*reasonable* with reference to the means of the husband and the status of the wife&uot;.[13] In *Zakeri Begum v. Sakina Begum,* [14] the Privy Council held that the Act does not apply to a case in which a Mahomedan, residing *outside* Oudh, marries in Oudh a woman residing in Oudh.

13 *Abdul Rahaman v. Inayati Bibi* ('31) A.O. 63, 130 I.C. 113.

14 (1892) 19 I.A. 157, 19 Cal. 689; *Rukia Begam v. Muhammad* (1910) 32 All. 477, 6 I.C. 568.

Shia law

Under the Shia law, there is no fixed legal minimum for dower (Baillie, II, 67, 68).

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CHAPTER XV

DOWER

287.

Dower may be fixed after marriage

The amount of dower may be fixed either before or at the time of marriage or after marriage[15]; and can be increased after marriage.[16]

15 *Kumar-un-nissa v. Husaini Bibi* (1880) 3 All. 266F.B. ; *Bashir Ahmad v. Zubaida* (1926) 1 Luck. 83, 92 I.C. 265, ('26) A.O. 186; *Musammat Amino Bibi v. Muhammad* (1929) 4 Luck. 343, 114 I.C. 504, ('29) A.O. 520.

16 *Jahuran Bibi v. Soleman Khan* (1933) 58 Cal. LJ. 251, 149 I.C. 1150, ('34) A.C. 210; *Mt. Nasiban Bi v. Mt. Iqbal Begum* ('35) A.L. 816, 160 I.C. 805; *Chan Pir v. Fakar Shah* (1940) 189 I.C. 725, ('40) A.L. 104; *Rukiaya Begum v. Radha Kishen* (1944) All. 325, ('44) A.A. 214.

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CHAPTER XV

DOWER

288.

Contract of dower may be made by father

A contract of dower made by a father on behalf of his minor son is binding on the son. Such a contract may be made even after marriage, provided the son was then a minor.[17] Among Sunnis, the father does not, by entering into such a contract, become personally liable for the dower debt, nor is he liable for it merely because he consents to the marriage.[18] But by a decision of the Judicial Committee, the rule is otherwise among Shias when the minor son has no means of his own.[19]

See Baillie, II, 80.

A person who guarantees the payment of dower by the husband is liable to the wife as surety.[20]

"Minor" in this section means one who has not attained puberty.[21]

17 *Basir Ali v. Hafiz* (1909) 13 Cal. W.N. 153, 4 I.C. 462.

18 *Muhammad Siddiq v. Shahab-ud-din* (1927) 49 All. 557, 100 I.C. 636, ('27) A.A. 364.

19 *Sabir Husain v. Farzand Khan* ('38) A.P.C. 80, reversing (1934) 56 All. 401, 151 I.C. 304, ('34) A.A. 52.

20 *Mt. Fatima Bibi v. Lal Din* ('37) A.L. 345, 171 I.C. 421.

21 *Mozharul v. Abdul* ('25) A.C. 322, 80 I.C. 914.

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CHAPTER XV

DOWER

289.

"Proper" dower

If the amount of dower is not fixed (286), the wife is entitled to 'proper' dower (*mahr-i-misl*), even if the marriage was contracted on the express condition that she should not claim any dower. In determining what is "proper" dower, regard is to be had to the amount of dower settled upon other female members of her father's family such as her father's sisters.

Hedaya, 45, 53; Baillie, 92, 95. The Judicial Committee has said that "Dower is an essential incident under the Mussalman law to the status of marriage; to such an extent is this so that when it is unspecified at the time the marriage is contracted the law declares that it must be adjudged on definite principles".[22]

The criterion for determining "proper dower" is the social position of the woman's family, wealth of the husband, the wife's personal qualification, the circumstances or time and condition of society, and the husband's status. Where an excessive dower is promised but proved to be only for show or where no dower is proved to have been fixed at marriage, "proper dower" should be paid. Where a dower, excessive in respect of the means of the husband, is promised in earnest, the

Court cannot reduced it to a reasonable figure except on proof of custom to the contrary (52 PLR 1912).[23]

There is no difference among jurists on the point that a marriage contract, without mentioning dower, is valid. Similarly, a marriage contract, even with denial to pay dower is also valid. For, Allah has said, &uot;There is no blame on you if *ye* divorce woman before consummation or the fixation of their dower&uot;.[24] It may be inferred from this verse that divorcing the wife, contracting into marriage in which no dower is fixed, is no sin.

Shia law

The proper dower under the Shia law should not exceed 500 *dirhams* (Baillie, II, 71). As to *dirham*, *see* notes to sec. 286.

22 *Hamira Bibi v. Zubaida Bibi* (1916) 43 I.A. 294, 300, 38 All. 581, 36 I.C. 87, ('16) A.P.C. 46.

23 Tanzil-ur-Rahman, A code of Muslim Personal Law, op. cit., p. 223.

24 *Ibid*, 224, (II : 236).

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CHAPTER XV

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289A.

Confirmation of dower

The dower becomes confirmed:

(a) by consummation of the marriage; or

(b) by a valid retirement (*khilwat-e-sahiha*); or

(c) by the death of either the husband or the wife.

Baillie, 96.

The whole of the dower does not become payable merely on marriage contract. Indeed, the whole of the dower becomes payable after valid retirement. The Hanafis and Malikis agree on this. In support of their view, the Sunni Jurists have narrated the following Hadiths (traditions).

The Prophet Mohammad (PBUH) is stated to have said, The person who removes the veil of a woman and looks at her, the whole of the dower becomes due on him, whether the act of penetration takes place or not.[25]

According to Sunni Jurists, valid retirement is equal to cohabitation, but under Shia law it is not equivalent to cohabitation.

Shia law

The right to dower is established by consummation or by death of either party, but not by &uot;valid retirement&uot;. (Baillie II, 73,74).

25 Ubaydullah B. Masud, Shar al-Wigayah, Delhi Vol. II, p. 37.

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CHAPTER XV

DOWER

290.

&uot;Prompt&uot; and &uot;deferred&uot; dower

(1) The amount of dower is usually split into two parts, one called &uot;prompt,&uot; which is payable on demand, and the other called &uot;deferred,&uot; which is payable on dissolution of marriage by death or divorce. (*see* 336(2))

The prompt portion of the dower may be realised by the wife at any time before or after consummation.[26] Dower which is not paid at once may for that reason be described as deferred dower but if it is postponed until demanded by the wife, it is in law prompt dower.[27] But &uot;deferred&uot; dower does not become &uot;prompt&uot; merely because the wife demands it.[28]

(2) Where it is not settled at the time of marriage whether the dower is to be prompt or deferred, then according to the Shia law, the rule is to regard the whole as prompt[29] but according to the Sunni law, the rule is to regard part as prompt and part as deferred, the proportion referable to each class being regulated by custom, and, in the absence of custom, by the status of the parties and the amount of the dower settled.[30] The Madras High Court, however, has taken the view that whether the parties are Shias or Sunnis, dower must be presumed to be prompt unless payment of the whole or any part of the dower is expressly postponed &uot;at least in the Madras Presidency, whatever the nature of the decisions in other provinces may be&uot;.[31] It is not clear whether, in a case in which no specific portion of the dower has been fixed as prompt, the Court has the power, under the Sunni law, to award the *whole* amount as prompt. The High Court of Bombay has held that the Court has such power.[32]

Baillie, 92, In *Eidan v. Mazhar Husain,* [33] the Court fixed *one-fifth* of a dower of R s. 5,000 as &uot;prompt,&uot; the wife having been a prostitute. In *Taufik-un-nissa v. Ghulam Kambar* [34], the Court held that a third of the dower of Rs. 51,000 was reasonable as &uot;prompt&uot;; and the same proportion was fixed in *Fatma Bibi v. Sadruddin* .[35] In *Nasiruddin Shah v. Mt. Amatul Mughni Begum,* [36] it was held that in absence of any custom, the presumption is that it is half and half. In all these cases, the parties were Sunnis and the marriage contract was silent as to whether the dower was to be prompt or deferred.

It is true that under the Mahomedan Law, Mehr or dower means a sum of money or other property which the wife is entitled to receive from the husband in consideration of her marriage. However, the expression 'consideration' is not to be understood in the sense in which the word is used in the Contract Act. In effect, dower is an obligation imposed upon a husband as mark of respect for the

wife. Normally, the extent of such obligation is determined by the contract entered into between the husband and wife either before or at the time of marriage. It may be fixed even after the marriage has taken place. If the amount of dower is not fixed or the marriage has been performed on the express condition that the wife will not claim any dower, the wife is even then entitled to receive proper dower (mehr-i-misi) from her husband. The wife can refuse to live with her husband and admit him to sexual intercourse so long as the prompt dower is not paid to her.[37]We are, therefore, unable to agree with the trial court that the right to claim prompt dower does not precede cohabitation and comes into existence along with it. Where there has been an agreement between the parties at the time of their marriage with regard to the amount of dower payable by the husband, the amount becomes recoverable under the agreement. The agreement between the husband and wife for payment of dower undoubtedly is part of the cause of act ion for maintaining a suit for its recovery and the place where such agreement was entered into would be a place where a part of the cause of action for such suit arises.[38]

On the other hand, deferred dower becomes payable only when the marriage is dissolved by death or divorce.[39]

26 *Rehana Khatun v. Iqtidar Uddin* (1943) All. L.J. 98, ('43) A.A. 184.

27 *Mahadev Lal v. Bibi Maniran* (1933) 12 Pat. 297, 145 I.C. 2I3, ('33) A.P. 281.

28 *Manihar Bibi v. Rakha Singh* ('54) A. Manipur 1.

29 *Mirza Bedar Bukht v. Mirza Khurrum Bukht* (1873) 19 W.R. 315(P.C) ; *Masthan Sahib v. Assan Bibi* (1899) 23 Mad. 371F.B.

30 *Eidan v. Mazhar Husain* (1877) 1 All. 483; *Taufik-un-nissa v. Ghulam Kambar* (1877) 1 All. 506; *Umda Begum v. Muhammadi Begum* (1910) 33 All. 291, 9 I.C. 200; *Muhammad v. Saghir-un-nissa* (1919) 41 All. 562, 50 I.C. 740; *Mussammat Bibi v. Sheikh Muhammad* (1929) 8 Pat. 645, 117 I.C. 207, ('29) A.P. 207; *Mangal Rai v. Mt. Sakina Begum* (1934) All. LJ. 64, 49 I.C. 1211, ('34) A.A. 441; *Fatma Bibi v. Sadruddin* (1865) 2 B.H.C. 291; *Rehana Khatun v. Iqtidar Uddin* , *supra*; *Nasirud-din Shah v. Amatul Mughni* (1947) Lah. 565, ('48) A.L. 135 (F.B.).

31 *Sheikh Muhammad v. Ayesha Beebie* (1938) Mad. 609, (1937) 2 M.LJ. 779, 172 I.C. 708, ('38) A.M. 107; *Musthan Sahib v. Assan Bibi* (1900) 23 Mad. 371, 10 M.LJ. 123(F.B.) considered and relied on.

32 *Husseinkhan v. Gulab Khatun* (1911) 35 Bom. 386, 11 I.C. 558.

33 (1877) 1 All. 483.

34 (1877) 1 All. 560.

35 (1865) 2 Bom. H.C. 291.

36 (1948) Lahore 135(F.B.) .

37 (Baillies Digest of Mahomedan Law, pages 124-125).

38 *Smt. Nasara Begum v. Rejwan Ali,* A.I.R. 1980 All 118 [H.N. Seth and V.K. Mehrotra, JJ].

39 *T.K. Abdulla v. Subaida & others* LNIND 2006 KER 417.

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CHAPTER XV

DOWER

291.

Remission of dower by wife

The wife may remit the dower or any part thereof in favour of the husband or his heirs. Such a remission is valid, though made without consideration.[40](Baillie, 553)

But the remission must have been made with free consent. A remission made by a wife when she is in great mental distress owing to her husband's death is not one made with free consent and is not binding on her.[41] The High Courts of Madras[42] and Patna[43]have held that a remission made by a wife who has not attained majority under the Indian Majority Act, 1875, is invalid, though she may have attained majority by Mahomedan law. The High Court of Allahabad has dissented from this view of the law and held that since the Indian Majority Act (s. 2) does not affect the capacity of any person "to act in the matter of marriage or dower," a Mahomedan girl who has attained puberty is competent to relinquish her dower, though she may not have attained the age of majority (18 years) within the meaning of the Indian Majority Act .[44] The Allahabad view is correct. A stipulation in a contract of dower that the wife should not be competent to remit her dower without the consent of her relations, is valid.[45]

40 *Jyani Begam v. Umrav Begam* (1908) 32 Bom. 612.

41 *Nurannessa v. Khaje Mahomed* (1920) 47 Cal. 537, 56 I.C. 8; *Hasnumiya Dadamiya v. Halimunnissa Hafizulla* (1942) 44 Bom. L.R. 126, ('42) A.B. 128.

42 *Ali Dhunimsa v. Mahommad* (1918) 41 Mad. 1026 44 I.C. 293.

43 *Najmunissa v. Serajuddin Ahmed* (1938) 17 Pat. 303, 180 I.C. 208 ('39) A.P. 133.

44 *Qasim Husain v. Bibi Kaniz* (1932) 54 All. 806, 139 I.C. 371, ('32) A.A. 694.

45 *Mt. Khadija Begum v. Nisar Ahmed* ('36) A.L. 887.

CHAPTER XV

DOWER

292.

Suit for dower and limitation

If the dower is not paid, the wife, and, after her death, her heirs, may sue for it. The period of limitation for a suit to recover "prompt" dower is three years from the date when the dower is demanded and refused, or, where during the continuance of the marriage no such demand has been made, when the marriage is dissolved by death or divorce (Limitation Act, 1908, Sch. I, Art. 103). The period of limitation for a suit to recover "deferred" dower is three years from the date when the marriage is dissolved by death or divorce (*ibid*., Art. 104). Where, however, prompt dower has not been fixed, a demand and refusal is not a condition precedent for filing a suit for its recovery.[46](*see*however, the Limitation Act of 1963)

Limitation for "prompt" dower runs from the time when the dower is demanded and refused, but both demand and refusal must be unambiguous.[47]

Limitation for "deferred" dower does not run against the widow during the period she is in lawful possession of her husband's property under a claim for her dower.[48]

It is not necessary to go into the question about the date on which the plaintiff was divorced by the defendant in view of the fact that s. 29(3) of the Limitation Act provides that save as otherwise provided in any law for the time being in force with respect of marriage and divorce, nothing in this Act

shall apply to any suit or proceeding under any such law. Neither of the two Courts below have adverted to this aspect of the matter nor was it raised in the arguments before this Court; but it cuts at the very root of the defendant's case and it cannot be said that the present suit for dower was barred by limitation inasmuch as the claim for dower being one under Muslim Law of Marriage and Divorce, the Limitation Act, 1963, cannot be said to be applicable to the present suit. In the Indian Limitation Act, 1908; the exception was only in respect of the proceedings under the Indian Divorce Act and there were specific Arts. 103 and 104, which prescribed the limitation for a suit for recovery of dower. There are no corresponding Articles prescribing limitation for a suit for dower in the schedule to the Limitation Act, 1963, and in view of the express provisions of s. 29(3), it must be held that nothing in the Limitation Act can bar the suit.[49]

Where a wife is divorced by a writing, time under Arts. 103 and 104 of the Limitation Act begins to run only from the date of communication of the writing to the wife.[50]The wife has the right to bring an act ion for the recovery of prompt dower both before and after consummation of marriage. The consummation has not the effect of converting prompt dower into deferred dower.[51]

The starting point of limitation for a suit for recovery of dower debt is the date of the knowledge of the divorce by the wife. (*See*, however, the Limitation Act, 1963)

In criminal proceedings for maintenance, the husband took the plea that he had already divorced the wife. The plea also contained the words of divorce. It was held that even if the earlier divorce was not proved, the plea and the words of divorce in the written statement in the criminal case operated as a divorce and time would run from that date or at any rate from the date the written statement came to the knowledge of the wife.[52]

46 *Muhammad Taqi Khan v. Farmoodi Begum* (1941) All. 326(1941) A.L.J. 118, 195 I.C. 353, ('41) A.A. 181.

47 *Mt. Atmul Rasul v. Karim Bakhsh* (1933) 142 I.C. 833, ('33) A. Pesh. 31.

48 *Hamidullah Khan v. Najjo* (1911) 38 All. 568, 10 I.C. 282.

49 *Ahmadi Bibi v. Muhamed Mabood* (1979) 5 A.L.R. 474; AI.R. 1979. All. 374 [Deoki Nandan, J.].

50 *Bure Khan v. Mt. Khadim Bibi* (1941) 198 I.C. 326, ('41) A.L. 166.

51 *Muhammad Taqi Khan v. Farmoodi Begum* (1941) All. 326, (1941) A.L.J. 118, 195 I.C. 353, ('41) A.A. 181; *Mt. Pukhraj Begum v. Hidayat Ali Shah* (1938) 178 I.C. 182, ('38) A. Pesh. 72.

52 *Ahmad Ali Khan v. Asganinnisa Begam* (1968) 1 Andh. L.T. 236.

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CHAPTER XV

DOWER

293.

Non-payment of prompt dower and restitution of conjugal rights

The wife may refuse to live with her husband and admit him to sexual intercourse so long as the prompt dower is not paid (Baillie, 125). If the husband sues her for restitution of conjugal rights *before* sexual intercourse takes place, non-payment of the dower is a complete defence to the suit, and the suit will be dismissed. If the suit is brought *after* sexual intercourse has taken place with her free consent, the proper decree to pass is not a decree of dismissal, but a decree for restitution conditional

on payment of prompt dower.[53]

Under the Mahomedan Law, mahr or dower is a sum of money or other property payable to the wife in consideration of her marriage; but &uot;consideration&uot; does not mean the same thing as under the Contract Act, 1872. It is an obligation imposed upon the husband as a mark of respect for the wife.[54] The right to claim prompt dower proceeds co-habitation and cannot be said to come into existence along with co-habitation. The wife can refuse to live with the husband and admit him to sexual intercourse so long as prompt dower remains unpaid.[55]

Debitor non praesumitur donare

The maxim means that a debtor is not presumed to give, that is, to make a gift. The maxim, however, has no application as between husband and wife. Thus, where a Mahomedan paid various sums of money from time to time to his wife, and there was no evidence that the payments were allocated to the dower debt, it was held that the payments could not be treated as having been made in satisfaction of the debt, and that the wife was entitled to recover the full amount of her dower.[56]

53 *Abdul Kadir v. Salima* (1886) 8 All. 149; *Kunhi v. Moidin,* (1888) 11 Mad. 327; *Bai Hansa v. Abdullah* (1905) 30 Bom. 122; *Hamiddunnessa v. Zohiruddin* (1890) 17 Cal. 670; *Anis Begum v. Muhammad Istafa* (1933) 55 All. 743, 148 I.C. 26, ('33) A.A. 634; *Bashiran Bi v. Abdul Wahab Khan* (1941) 188 I.C. 130. *Rabia Khatoon v. Mukhtar Ahmed* ('66) A.A. 548.

54 *Kulsumbi v. Abdul Kadir* (1921) 45 Bom. 151, 59 I.C. 433, ('21) A.B. 205.

55 *Smt. Nasra Begum v. Rejwan Ali* (1979) A.W.C. 722 [Seth and Malhotra, JJ.].

56 *Mohammad Sadiq v. Fakhir Jahan* (1932) 59 I.A: 1, 6 Luck. 556, 136 I.C. 385, ('32) A.P.C. 13.

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CHAPTER XV

DOWER

294.

Liability of heirs for dower debt

The heirs of a deceased Mahomedan are *not personally* liable for the dower debt. As in the case of other debts due from the deceased, so in the case of a dower debt, each heir is liable for the debt to the extent only of a share of the debt proportionate to his share of the estate (43).[57] Where the widow, therefore, is in possession of her husband's property under a claim for her dower (296), the other heirs of her husband are severally entitled to recover their respective shares upon payment of quota of the dower debt proportionate to those shares.[58]

A Mahomedan dies leaving a widow, a son, and two daughters. The widow is entitled to a dower debt of Rs. 3,200. The widow's share in the estate is 1/8 and she is liable to contribute Rs. 1/8 x 3,200 = Rs. 400. The son's share is 7/16, and he is liable to pay Rs. 7/16 x 3,200 = Rs. 1,400, and if the widow is in possession, he is entitled to recover his share on payment of Rs. 1,400. The share of each daughter is 7/32, and she is liable to pay Rs. 7/32 x 3,200 = Rs. 700, and if the widow is in possession, she is entitled to recover her share on payment of Rs. 700.

57 *Imperial Bank, Gaya v. Bibi Sayeedan* ('60) A.P. 132.

58 *Hamira Bibi, v. Zubaida Bibi* (1916) 43 I.A. 294, 38 All. 581, 36 I.C. 87.

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CHAPTER XV

DOWER

295.

Dower is a debt, but an unsecured debt

(1) The dower ranks as a debt, and the widow is entitled, along with other creditors of her deceased husband, to have it satisfied on his death, out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that she has a right of retention to the extent mentioned in 296 below.[59] She is not entitled to any charge on her husband's property, though such a charge may be created by *agreement.*[60]

Under the Mahomedan Law, if the dower is not paid, the wife and after her death, her heirs can claim the dower, and the period of limitation for a suit to recover prompt dower is three years from the date when the dower is demanded and refused or when the marriage is dissolved by death or divorce, and the period of limitation to recover deferred dower is three years from the date when the marriage is dissolved by death or divorce. Section 296 provides that the claim for dower does not entitle the wife to a charge on any specific property of her deceased husband. But when she is in possession of the property of the deceased husband without any force or fraud in lieu of her dower, she is entitled to retain the possession of the property until the dower is satisfied and this right is as against the heirs of her husband and against the creditors of her husband. A widow, with the express or implied consent of the other heirs of her husband, obtains possession of the whole or any part of his estates in satisfaction of or as security of her dower, is entitled to retain such possession till her dower is paid. The possession must be lawful and should not have been acquired by fraud or by force. If the widow is inducted into possession either by consent or otherwise except by force or fraud, she is entitled to retain the possession in lieu of dower payable to her and the limitation of three years from the date of the death of the husband does not operate in event of possession of the property by the widow. In the instant case, the third defendant is in possession of a portion of the house and in that event she is entitled to retain possession until the dower claim is satisfied. Therefore, the claim for dower by the third defendant is not barred by limitation.[61]

(2) *Whether a charge for a dower debt may be created by a decree.*-- There is no doubt that it is within the competence of a Court to create a charge by its decree for a dower debt, so that if such a charge is created, and the decree has not been appealed against and has become final, effect will be given to the charge; in other words, a decree creating a charge is not a nullity for want of jurisdiction.[62] But though it is not beyond the power of a Court to pass a decree creating a charge, it will not ordinarily do so. To pass such a decree is to give the dower debt a priority over other debts due from the deceased. The proper decree to make is *simple money decree*; and no charge is created merely because the decree directs execution by sale of properties mentioned.[63] If a decree is passed creating a charge, the proper course for the Appellate Court is to set it aside to that extent.[64]

(3) *Alienation by heir before payment of dower debt.*--The right of an heir to alienate his own share as stated in 42(1) above, is not affected by the fact that the dower debt has not

been paid. But if the widow is in possession in lieu of the dower at the date of alienation, the alienation will be subject to her right to retain possession.[65]

The dower debt stands on the same footing as an ordinary debt. An heir, therefore, may alienate his own share before payment of the dower debt just as he can alienate it before payment of any other unsecured debt, as to pass a good title to the alienee.

59 *Beebee Bachun v. Sheikh Hamid* (1871) 14 M.I.A. 377. 383-384; *Hamira Bibi v. Zubaida Bibi* (1916) 43 I.A. 294, 301. 38 All. 581, 36 I.C. 87; *Mt. Saibanbi v. Kazi Muhammudalli* (1941) Nag. 164. (1940) N.L.J.647, 192 I.C. 286, ('41) A.N. 8; *Muniram v. Mukhtar Begam* (1940) A.L.J. 789, ('40) A.A. 521; *Kapore Chand v. Kidar Nissa* ('53) A.S.C. 413; *Shaikh Salma v. Md. Abdul Kadar* ('61) A. Andh. Pr. 428.

60 *Ameer-oon-Nissa v. Mooradoon-Nissa* (1855) 6 M.I.A. 211.

61 *Syed Yusuf Akbar Hussaini v. Syed Mirtuza Akbar Hussaini* (1983) 1 An. W.R. 273 [Raghuvir and Rama Rao, JJ.).

62 *Qasim Husain v. Habibur Rahman* (1929) 56 I.A. 254, 258, 8 Pat. 926, 31 Bom. L.R. 879, 117 I.C. 10, ('29) A.P.C. 174; *Mahomed Wajid v. Tayyaban* (1878) 5 I.A. 211, 223-224, 4 Cal. 402.

63 *Mt. Ahmadi Begum v. Abdullah* (1934) 151 I.C. 1013, ('34) A.O. 437.

64 *Abdul Rahman v. Inayati Bibi* ('31) A.O. 63, 130 I.C. 113.

65 *Bazayet Hossein v. Doolichand* (1878) 5 I.A. 211, 4 Cal. 402.

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CHAPTER XV

DOWER

296.

Widow's right to retain possession of husband's estate in lieu of dower

(1) The widow's claim for dower does not entitle her to a charge on any specific property of her deceased husband (295). But when she is *in possession* of the property of her deceased husband, having, "lawfully and without force or fraud" obtained such possession "in lieu of her dower" (that is on the ground of her claim for her dower, to satisfy her claim out of the rents and profits and with a liability to account for the balance), she is entitled as against the other heirs of her husband[66] and as against the creditors of her husband[67]*to retain that possession until* her dower is satisfied. The right to retain possession is extinguished on payment of her dower debt. This right is sometimes called a "lien", but it is not a lien in the strict sense of the term.

There is a conflict of opinion whether it is necessary, to entitle the widow to retain possession of her husband's property, that the possession should have been obtained by her not only "lawfully and without force or fraud," but also "with the express or implied consent of the husband or his other heirs." The High Courts of Madras[68] and Bombay[69] have held that no such consent is necessary. The High Court of Calcutta[70] and Patna[71] have held that it is. In the two earlier cases, the High Court of Allahabad had held that such consent was necessary;[72] in later cases it has held that no such consent is necessary.[73] In a recent case, however, it has again held that such consent is necessary.[74] When mutation of names in the Record of Rights is effected by the widow with the knowledge of the heirs, they may be deemed to have consented.[75]

(2) A widow, who has not obtained possession of her husband's estate in lieu of her dower, cannot exclude the other heirs of her husband from possession. They are entitled to joint possession with her, and if they claim such possession, she is not entitled to say, "I will *now* go into possession." Her only right is to *retain* possession of what she has before they obtained possession.[76]

If a widow has been in possession of her husband's property in his lifetime and continues in possession after his death, the presumption is that her possession has been lawfully obtained and is in lieu of dower[77] and it is not necessary that the widow should have entered possession upon a claim for her dower.[78] But if the husband has been in possession and the widow takes possession after the death and falsely claims that her dower has been increased, she has no right to retainer.[79] Nor is she entitled to a retainer on the mere ground of permissive occupation.[80] Where a wife pleaded possession of property in lieu of dower since marriage with the plaintiff's son, and a Kabinnama (marriage agreement in writing) supported her plea, it was held, negativing the possession of the plaintiff, that the property was given as dower.[81]

66 *Beebee Bachun v. Sheikh Hamid* (1871) 14 M.I.A, 377; *Maina Bibi. v. Chaudhri Vakil* (1925) 52 I.A. 145, 149-150, 47 All. 250; 254-255, 86 I.C. 179, ('25) A.P.C. 63; *Jahuran Bibi v. Soleman Khan* (1933) 58 Cal. L.J. 251. 149 I.C. 1150, ('34) A.C. 210: *Mt. Nawab Begum v. Hussain Ali Khan* (1937) 18 Lah. 649, ('37) A.L. 738.

67 *Mt. Ghafooran v. Ram Chandra Das* ('34) A.A. 168; *Kulsum Bibi v. Shiam Sunder Lal* (1936) All. L.J. 1027, 164 I.C. 515, ('36) A.A. 600.

68 *Bceju Bee v. Syed Moorthija* (1920) 43 Mad. 214, 53 I.C. 905.

69 *Hasnumiya Dadamiya v. Halimunissa Hafizulla* (1942) 44 Bom. L.R. 126, ('42) A.B. 128.

70 *Sabur Bibi v. Ismail* (1924) 51 Cal. 124, 80 I.C. 294, ('24) A.C. 508, dissenting from *Shaebjan v. Ansaruddin* (1911) 38 Cal. 475, 9 I.C. 1031.

71 *Mohammad Zobair v. Mt. Bibi Sahidan* (1941) Pat. 798, 197 I.C. 241, ('42) A.P. 210.

72 *Amanat-un-nissa v. Bashir-un-nissa* (1894) 17 All. 77; *Muhammad Karim-Ullah v. Amani Begum* (1894) 17 All. 93.

73 *Ramzan Ali v. Asghari Begam* (1910)32 All. 563, 56, 6 I.C. 405; *Muhammad Shoaib v. Zaib Jahan* (1928) 50 All. 423, ('27) A.A. 850; *Imtiaz Begum v. Abdul Karim* (1931) 53 All.31, 128 I.C. 760, ('30) A.A. 881; *Zamin Ali v. Aziz-un-nissa* (1933) 55 All. 139, 144 I.C. 433, ('33) A.A. 329.

74 *Mt. Izhar Fatma Bibi v. Mt. Ansar Bibi* (1939) A.L.J. 642, 182 I.C. 801. ('39) A.A. 348.

75 *Abdul Wahab v. Mustaq Ahmad* (1944) All. 68, 211 I.C. 475, ('44) A.A. 68.

76 *Tahir-un-nissa v. Naqwab Hasan* (1914) 36 All. 558, 24 I.C. 938.

77 *Abdul Sattar v. Mt. Aqida Bibi* (1927) 100 I.C. 599, ('27) A.A. 319; *Fahiman v. Balaqi* (1935) 10 Luck. 440, 153 I.C. 93, ('35) A.O. 68; *Jahuran Bibi v. Soleman Khan* (1934) 58 Cal. L.J. 251, 149 I.C. 1150, ('34) A.C. 10.

78 *Mirvahedali v. Rashidbeg* (1951) Bern. 169, 52 Bom. L.R. 884, ('51) A.B. 22.

79 *Jahuran Bibi v. Soleman Khan, supra* .

80 *Mt. Sampatia Bibi v. Mir Mahboob Ali* (1936) All. L.J. 911, 164 I.C. 290, ('36) A.A. 528.

81 *H. M. Mondal v. D. R. Bibi* ('71) A. Cal. 162.

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CHAPTER XV

DOWER

297.

Right of retention not analogous to a mortgage

The position of a widow claiming to retain possession of her husband's property until her dower debt is paid is essentially different from that of a mortgagee (usufructuary or other) to whom the owner pledges his property to secure repayment of a debt. There is no real or true analogy between the two.[82](*see* 296(2))

[*A* died leaving a widow and a sister. Some time after *A*'s death, the widow applied to the Collector to have the entire estate of *A* registered in her name, alleging that she had been in possession of the lands as an heir *and also an account of her dower*. The application was opposed by the sister, but the properties were registered in the widow's name. After ten years, the sister brought a suit against the widow to recover her share (three-fourths) in the estate of *A*. The widow contended that she was entitled to remain in possession of the estate until the dower debt was paid. It was held by the Privy Council that the widow was entitled to retain possession until her dower was satisfied].[83]

Having obtained possession lawfully and without force or fraud

In *Bebee Bachun's* case cited in the above illustration, their Lordships of the Privy Council at p. 384 said:

> &uot;The appellant (widow) having obtained actual and lawful possession of the estate under a claim to hold them as lien for her dower, their Lordships are of opinion, that she is entitled to retain that possession until her dower is satisfied . It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in the case of *Ahmed Hossein v. Mussamut Khodeja* .[84] Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, *of which she had lawfully and without force or fraud, obtained possession*, until her debt is satisfied, with the liability to account, to those entitled to the Property, subject to the claim for the profits received.&uot;

2. The conflict referred to in the second paragraph of 296(1) arose from the judgment of the Privy Council in a later case, *Hamira Bibi v. Zubaida Bibi.* [85] In that case, their Lordships said:--

> &uot;But the dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, *with the express or implied consent of the husband, or his other heirs*, obtains possession of the whole or part of his estate, to satisfy her claim with the rents . . . accruing therefrom, she is entitled to retain such possession until it is satisfied, this is called the widow's lien for dower, and this is the only creditor's lien of the Mussalman law which has received recognition in the British Indian Courts and at this Board.&uot;

3. The Madras High Court holds that the observations of their Lordships of the Privy Council in the clause printed in italics above were *obiter dicta*. The Calcutta High Court holds, dissenting from the Madras High Court, that their Lordships were, in the above passage, defining the nature of the widow's dower debt and her right to retain possession of her husband's property and that the observations were not *obiter*. It is noticeable that there is no suggestion as to the consent of the husband or her heirs in the judgment of the Privy Council in the subsequent case of *Maina Bibi v. Chaudhri Vakil Ahmad.* [86] It was argued in that case that the position of a widow in possession of her husband's estate was analogous to that of a mortgagee in possession. But this argument was not

accepted by their Lordships. Their Lordships observed that &uot;in the case of a mortgage the Mortgagee takes and retains possession under an agreement or arrangement made between him and the mortgagor,&uot; but in the case of a Mahomedan widow who obtains possession under a claim for her dower &uot;neither the possession of the property nor the right to retain that possession when acquired is conferred upon the widow by the *agreement or bounty of her deceased husband*. The possession of the property being once peaceable and lawfully acquired, the right of the widow to retain it, till her dower is paid, is conferred upon her by the Mahomedan law&uot;.

82 *Maina Bibi v. Chaudhri Vakir* (1925) 52 I.A. 145, 151, 47 All. 250, 256, 86 I.C. 579, ('25) A.P.C. 63.

83 *Bebee Bachun v. Sheikh Hamid* (1871) 14 M.I.A. 377.

84 (1868) 10 W.R. 369.

85 (1916) 43 I.A. 294, 301, 38 All. 581, 588, 36 I.C. 87.

86 (1924) 52 I.A. 145, 150-151, 47 All. 250, 255-256, 86 I.C. 578. ('25) A.P.C. 63.

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CHAPTER XV

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298.

Right of retention gives no title

The right to hold possession does not give the widow any *title* to the property.[87] It enables her only to *retain possession* of the property of which she has obtained possession (296), and, if she is dispossessed, to sue for recovery of possession (303). The *title* to the Property is in the *heirs* including, of course, the widow. But her right to hold Possession has nothing to do with the interest which she has *as an heir* in the Property. An an heir she has the rights and remedies of an *heir.*[88]

If the widow is inducted into possession of husband's estate either by consent or otherwise except by force or fraud she is entitled to retain the possession in lieu of dower payable to her and the limitation of 3 years from the date of the death of the husband does not operate in the event of possession of the property by the widow.[89]

87 *Abdul Wahab v. Mustaq Ahmad* (1944) All. 68, 211 I.C. 475 ('44) A.A. 68.

88 See *Mashal Singh v. Ahmad Husain* (1928) 50 All. 86, 103 I.C. 363, ('25) A.A. 534.

89 *Syed Yousuf Akbar Hussaini v. Syed Murtuza Akbar Hussaini,* A.I.R. 1983 A.P. 225.

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CHAPTER XV

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299.

No right of retention during continuance or marriage

The right of retention arises for the first time on the husband's death, unless the marriage is dissolved by divorce, in which case it arises on divorce.[90]

It follows from this that if a creditor of the husband obtains a decree against him, and the husband's property is sold in execution in his lifetime, the wife has no right of retention against a purchaser in execution of the decree, and she must deliver possession to him.

90 *Narayana v. Biyari* (1922) 45 Mad. 103, 69 I.C. 977, ('23) A.M. 57; *Abdul Rahman v. Inayati Bibi* ('31) A.O. 63, 130 I.C. 113. See also *Ameer Ammal v. Sankaranarayanan* (1900) 25 Mad. 658: *Aisa Khatun v. Amarendra Nath* (1940) 44 C.W.N. 586, 191 I.C. 783, ('40) A.C 578.

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CHAPTER XV

DOWER

300.

Liability of widow in possession to account

A widow in possession of her husband's estate in lieu of dower is bound to account to the other heirs of her husband for the rents and profits received by her out of the estate.[91] But she is entitled in that case to compensation for forbearing to enforce her right to the dower debt; this compensation is allowed in the form of interest on the dower debt.[92] The widow, however, may agree to give up her right to compensation.[93]

91 *Debee Bachun v. Sheikh Hamid* (1871) 14 M.I.A. 377, 384; *Shaikh Salma v. Md Abdul Kadar.* ('61) A. An. Pr. 428.

92 *Hamira Bibi v. Zubaida Bibi* (1916) 43 I.A. 294, 38 All. 581, 36 I.C. 87, affirming, (1910) 33 All. 182, 7 I.C. 497 [Interest allowed at 6 per cent per annum]; *Woomatool v. Meerunanissa* (1868) 9 W.R. 318; *Sahebjan v. Ansaruddin* (1911) 38 Cal. 475, 480, 481, 9 I.C. 1031; *Nawasi Begam v. Dilafroz* (1926) 48 All. 803, 98 I.C. 978, ('26) A.A. 39 [awarding of interest discretionary]; *Shankar Dass v. Mahbub Jan* ('42) A. Pesh. 92.

93 *Ram Prasad v. Bibi Khodaijatul* (1944) 213 I.C. 306, ('44) A.P. 163.

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CHAPTER XV

DOWER

301.

No right to alienate property to satisfy dower debt

(1) The right of a widow to retain possession of her husband's property under a claim for her dower does not carry with it the right to alienate the property by sale, mortgage, gift or otherwise.[94] If she alienates the property, the alienation is valid to the extent of her own share; it does not affect the shares of the other heirs of her husband.

(2) If besides alienating the property, she delivers possession thereof to the alienee, the other heirs become entitled to recover immediate possession of their shares unconditionally, that is, without payment of their proportionate share of the dower debt. The widow is not entitled, on the alienation being set aside, to be restored back to possession; by giving up possession of the property, she lost her right to hold possession thereof. Whether she also loses her right to recover the dower debt is an open question.[95]

(3) If the widow alienates the property, but does not deliver possession thereof to the alienee, as where she executes a mortgage without possession, the other heirs are entitled to a declaration that the mortgage does not bind their shares, but they are not entitled to immediate and unconditional possession thereof.

If the widow sells or makes a gift of the property, the sale or gift is valid to the extent of her own share in the property. It has been said in some cases that the sale or gift is void altogether so as not to take effect to the extent even of the widow's share,[96] but there is nothing in the judgments in those cases to justify that view.

This section relates to the effect of an alienation and of delivery of possession by the widow to the alienee of the property itself. The next section relates to the effect of a transfer by her of her *right of retention.* (*see* ill. (b) to 302)

94 *Chuli Bibi v. Shams-un-nissa* (1894) 17 All. 19 [mortgage]; *Maina Bibi v. Chudliri Vakil* (1925) 52 I.A. 145, 47 All. 250, 86 I.C. 579, ('25) A.P.C. 63 affing. (1919) 41 All. 538, 51 I.C. 242 [gift]; *Beeju Bee v. Syed Moorthija* (1920) 43 Mad. 214. 238, 53 I.C. 905 [sale]; *Musammat Sitaram v. Ganesh* (1927) 2 Luck. 553, 101 I.C. 714, ('28) A.O. 209; *Fahiman v. Bulaqi* (1935) 10 Luck. 440, 153 I.C. 93, ('35) A.O. 68; *Ram Prasad v. Bibi Khodaijatul* (1944) 213 I.C. 306, ('44) A.C. 163; *AbdulSamad v. Alimuddin* (1944) 22 Pat. 750, ('44) A.P. 174.

95 *Maina Bibi v. Chaudhri Vakil* (1925) 52 I.A. 145, 47 All. 250, 86 I.C. 579, ('25) A.P.C. 63 [suit by heirs to recover their own shares]; *Musammat Sitaram v. Ganesh* (1927) 2 Luck. 553, 101 I.C. 714, ('28) A.O. 209 [suit by heirs to recover their own shares],

96 *Chuli Bibi v. Shams-un-nissa* (1894) 17 All. 19; *Mussammat Bibi v. Mussammat Bibi* (1923) 2 Pat. 84, 70 I.C. 32, 23 A.P. 33; In *Abdul Samad v. Alimuddin* (1944) 22 Pat. 750. ('44) A.P. 174, it was held that the widow's share in the property passed to the transferee.

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CHAPTER XV

DOWER

302.

Where right of retention is heritable and transferable

(1) There is a conflict of opinion whether the widow's right to hold possession is transferable and heritable. One view is that the right is a *personal* right, and it cannot therefore be transferred by sale, gift or otherwise[1] nor can it pass to her heirs on her death.[2] The other view is that the right to hold possession is *property*. But is the right both heritable

and transferable? It has been held in some cases that it is heritable, without expressing any opinion whether it is also transferable.[3] In other cases, it has been held that it is not transferable and heritable.[4] If it is transferable, can it be transferred without transferring also the dower debt? Here again there is a difference of opinion, In some cases it has been held that the right to hold possession cannot be severed from the dower debt and transferred as a separate interest.[5] In other cases, it has been held that it can be so transferred.[6] But a transfer merely of the dower debt does not pass to the transferee the right to hold possession.[7] In *Maina Bibi v. Chaudhri Vakil,* [8] the Privy Council expressed a doubt whether a widow can transfer either the dower debt or the right to hold possession. All that can now be said with certainty is that the right to hold possession is heritable. Though it cannot be said with certainty whether it is also transferable, the High Courts of Bombay and Mysore are in favour of the view that it is also transferable[9] but the Patna High Court has held that it is not transferable.[10]

(2) Assuming that a widow can transfer her dower debt and her right to hold possession till that debt is paid, a deed executed by her, which fails to effect a transfer of the *ownership* with which it purports to deal, cannot operate to transfer the dower debt and the right to hold possession.[11]

Illustrations

(a) A Mahomedan dies leaving a widow, a daughter, and his father. The widow is in lawful possession of her husband's property in lieu of her dower. The widow dies leaving the daughter as her only heir. The daughter is entitled to retain possession of the property. The father is not entitled to possession of his share until he pays his proportionate share of the dower debt. But if the widow herself has not obtained possession in her lifetime, the daughter as her heir is not entitled to go into possession.[12]

(b) Upon the death of her husband, a Mahomedan widow retains possession of her husband's property in lieu of her dower. When the widow herself dies leaving a sister and the husband's heirs secure possession, the sister cannot succeed in a suit to obtain possession from them. As the widow herself has no right to obtain possession which she could enforce, the sister cannot have a better right.[13]

(c) A Mahomedan dies leaving a widow and a brother. The widow is in lawful possession of her husband's property in lieu of her dower. The brother is not entitled to possession of his share until he pays his proportionate share of the dower debt (305). The dower debt remains unsatisfied, and the widow sells the whole property to satisfy the debt, and delivers possession thereof to the purchaser. The sale-deed does not purport or attempt to transfer the dower debt or the right to hold possession to the purchaser, assuming that they could be transferred. What is the effect of the sale? The sale passes to the purchaser only the widow's share and the right to the possession of that share (301). What is the effect of the delivery of possession to the purchaser? The effect is that the brother, who was not entitled, before delivery of possession, to possession of his share until he paid his share of the dower debt, becomes entitled to immediate possession of his share without paying his share of the debt (*see* 294). The purchaser is not entitled to retain possession of the brother's share until the brother pays his share of the dower debt; the reason is that the deed does not purport to transfer to him either the dower debt or the right to hold possession. Nor is the widow entitled to have the possession

restored back to her, for by giving up possession, she lost her right to hold possession. The purchaser has his remedy of the price paid by him, against the widow. Whether the widow is entitled to recover the dower debt out of the other properties of her husband, is an open question. Probably she is.

The heirs or legal representatives are entitled to sue for the dower debt.[14]

1 *Muzaffar Ali v. Parbati* (1907) 29 All. 640; see *Mohammad Zobair v. Mt. Bibi Sahidan* (1941) Pat. 798, 197 I.C. 241, ('42) A.P. 210.

2 *Hadi Ali v. Akbar Ali* (1898) 20 All. 262.

3 *Azizullah v. Ahmad* (1885) 7 All. 353; *Majidmian v. Bibisaheb* (1916) 40 Bom. 34, 30 I.C. 870; *Janbi Bibi v. Abbas Ali* (1941) N.L.J. 181, 195 I.C. 706, ('41) A.N. 167; *Abdul Wahab v. Mustaq Ahmad* (1944) All. 68, 211 I.C. 475, ('44) A.A. 36.

4 *Ali Baksh v. Allahabad* (1910) 32 All. 551, 561, 6 I.C. 376; *Amir Hasan v. Mohammad* (1932) 54 All. 499, 136 I.C. 833, ('32) A.A. 345; *Abdulla v. Shams-ul-Haq* (1921) 43 All. 127, 131. 58 I.C. 833 ('21) A.A. 262; *Beeju Bee v. Syed Moorthija* (1920) 43 Mad. 214, 237, 53 I.C. 905; *Majidmiyan v. Bibisaheb* (1916) 40 Bom. 34, 47-49, 30 I.C. 870; *Mussammat Bibi v. Musammat Bibi* (1923) 2 Pat. 84, 70 I.C. 312, ('23) A.P. 33; *Mussammat Sogia v. Mussammat Kitaban* (1928) 7 Pat. 141, 107 I.C. 319, ('28) A.P. 224; *Sheikh Abdur Rahman v. Sheikh Wali* (1923) 2 Pat. 75, 68 I.C. 601, ('23) A.P. 72; *Ramija Bibi v. Sharafi Bibi* (1943) 1 M.L.J. 332, 209 I.C. 104, ('43) A.M. 561; *Hussain v. Rahim Khan* ('54) A. Mys. 24.

5 *Ali Baksh v. Allahabad* (1910) 32 All. 551, 557, 6 I.C. 376; *Amir Hasan v. Mohammad* (1932) 54 All. 499, 136 I.C. 833, ('32) A.A. 345; *Sheikh Abdur Rahman v. Sheikh Wali* (1923) 2 Pat. 75, 68 I.C. 601, ('23) A.P. 72; *Nosh Ali v. Shamsunnissa Bibi* (1939) All. 322(1939) A.L.J. 138, 183 I.C. 379, ('39) A.A. 319; *Mohitan v. Zubera* ('54) A. Pat. 17.

6 *Abdulla v. Shams-ul-Haq* (1921) 43 All. 127, 131, 58 I.C. 833, ('21) A.A. 262; *Mussammat Bibi v. Mussammat Bibi* (1923) 2 Pat. 84, 70 I.C. 312, ('23) A.P. 33; *Mussammat Sogia v. Mussammat Kitaban* (1928) 7 Pat. 141, 107 I.C. 319, ('28) A.P. 224,

7 *Amir Hasan v. Mohammad* (1932) 54 All. 499, 136 I.C. 833, ('32) A.A. 345.

8 (1925) 52 I.A. 145, 159. 47 All. 250, 262, 86 I.C. 579, ('25) A.P.C. 63.

9 *Cooverbhai v. Hayatbi* (1943) 45 Bom. L.R. 730; *Hussain v. Rahim Khan* ('54) A. Mys. 24.

10 *Zobair Ahmad v. Jainandan Prasad* ('60) A.P. 147.

11 *Maina Bibi v. Chaudhri Vakil* (1925) 52 I.A. 145, 47 All. 250; 86 I.C. 579 ('25) A.P.C. 63; *Musammat Sitaram v. Ganesh* (1927) 2 Luck. 553. 101 I.C. 714, ('28) A.O. 209; see *Mohammad Zobair v. Mt Bibi Sahidan* (1941) Pat. 798, 197 I.C. 241, ('42) A.P. 210; *Aminuddin v. Ramkhelawan* (1949) 27 Pat. 218, ('49) A.P. 427.

12 *Tahir-un-nissa v. Nawab Hasan* (1914) 36 All. 558, 24 I.C. 938.

13 *Zaibunnissa v. Nazim Hasan* ('62) A. All. 197.

14 A.I.R. 1960 Pat. 147. Distinguished *Md. Janudid Haque v. Md. Zubair Haider.* A.I.R. 1981 Pat. 345 [S. Narain J.].

Mulla: Mahomedan law, Updated 20th edition/CHAPTER XV DOWER/303. Suit for possession by widow who is dispossessed

CHAPTER XV

DOWER

303.

Suit for possession by widow who is dispossessed

If a widow who is in possession of her husband's property under a claim for her dower, is wrongfully

deprived of her possession, she may bring a suit for recovery of possession.[15] If the property is immovable, the suit must be brought within six months from the date of dispossession[16](Limitation Act, 1908, Sch. I, Art. 3). If it is movable, it must be brought within three years from the date on which she first learns in whose possession it is (*Ibid*., Art. 48). (*see*the Limitation Act, 1963 for corresponding Articles)

The widow's right to sue for possession has nothing to do with her right to hold possession. It is the ordinary right of a person who, though he has no title to the property (298), is entitled to sue for possession, if he is wrongfully dispossessed. In the case of immovable property, such right is given by the Specific Relief Act, 1877, s. 9. In the case of movables, the right to sue is a common law right.

15 *Majidmian v. Bibisaheb* (1916) 40 Bom. 34, 49-50, 30 I.C. 870 [suit by a widow and heirs of a deceased co- widow] *Azizullah v. Ahmad* (1885) 7 All. 353 [suit by heirs of a deceased widow).

16 *Mashal Singh v. Ahmad Husain* (1928) 50 All. 86, 103 I.C. 363, ('27) A.A. 534.

Mulla: Mahomedan law, Updated 20th edition/CHAPTER XV DOWER/304. Widow's possession no bar to a suit for dower

CHAPTER XV

DOWER

304.

Widow's possession no bar to a suit for dower

(1) The fact that a widow is in possession of her husband's property under a claim of her dower, is no bar to a suit by her against the other heirs of her husband to recover the dower debt. But she must in such a suit offer to give up possession of the property.[17] She cannot both retain possession and have a decree for her dower debt. (2) If she sues for part only of the dower debt, she cannot afterwards sue for the balance of the debt.[18](*see*the Code of Civil Procedure, 1908, O. 2, r. 2.)

It has been held by the Calcutta High Court[19] that if the widow is in possession of her husband's property under a claim for her dower, the proper course for her to follow is to bring an administration suit in which the property can be placed in the hands of the Court, an account be taken of the profits received by her and of the interest due to her on the dower debt, and appropriate directions given for the satisfaction of her claim by sale of the assets or otherwise.

17 *Ghulam Ali v. Sagir-ul-nissa* (1901) 23 All. 432. No reference was made to this case in *Mohitan v. Zubera* ('54) A.P. 47, in which it was held that the widow need not offer to give up possession of the property.

18 *Kaniz Fatima v. Ram Nanda* (1923) 45 All. 384, 73 I.C. 977, ('23) A.A. 331.

19 *Mirza Mohammad v. Shazadi Wahida* (1914) 19 C.W.N. 502, 28 I.C. 191. See also *Davuthammal v. Pasari* ('25) A.M. 1064, 86 I.C. 367.

Mulla: Mahomedan law, Updated 20th edition/CHAPTER XV DOWER/305. Suit by heirs for their shares and res judicata

CHAPTER XV

DOWER

305.

Suit by heirs for their shares and res judicata

Where in a suit against the widow by the other heirs of her husband for recovery of their shares a decree is passed for possession conditional upon their paying their proportionate amount of the dower debt within a specified time and the decree provides that if the plaintiffs fail to pay the decretal amount within that time the suit should be dismissed, and the suit is eventually dismissed for non-payment, the dismissal does not operate as *res judicata* so as to bar a subsequent suit by the same plaintiffs against the widow for possession of the same property based upon the ground that the dower debt has since been satisfied from the income of the property. The non-fulfilment of the condition attached to the decree extinguishes only the right to recover *immediate* possession. It does not extinguish the proprietary interest of the heirs of their right to recover possession when the dower debt is satisfied *at some future time* either by the plaintiffs or out of the profits of the property. The effect of dismissal is simply to relegate the parties to the position in which they were before the first suit was brought.[20] A decree obtained against the heirs of a deceased cannot be executed against the property in the possession of the widow for her dower, but the decree can be executed against that property as soon as the widow has given possession of the property to the heirs.[21]

20 *Maina Bibi v. Chaudhri Vakil* (1925) 52 I.A. 145, 47 All. 250, 86 I.C. 579, ('25) A.P.C. 63; *Nawasi Begum v. Dilafroz* (1926) 48 All. 803, 98 I.C. 987, ('27) A.A. 39.

21 *Aminuddin v. Ramkhelawan* (1949) 27 Pat. 218 ('49) A.P. 427.

Mulla: Mahomedan law, Updated 20th edition/CHAPTER XV DOWER/306. Kharchi-i-pandan

CHAPTER XV

DOWER

306.

Kharchi-i-pandan

Kharchi-i-pandan literally means betel box expenses and is a personal allowance to the wife customary among Mahomedan families of rank. The allowance is also called an allowance for mewa khori.[22] Mewa Khori literally means "eating fruit". When the parties are minors the contract is made between the respective parents, and in such a case the wife as beneficiary is entitled to enforce it.[23]

22 *Sikandar Ara v. Hasan Ara* (1936) 165 I.C. 70, ('36) A.O. 196.

23 *Khwaja Muhammad v. Husaini Begum* (1910) 37 I.A. 152, 32 All. 410, 7 I.C. 237; *Muhammad Ali v. Fatima* (1930) 11 Lah. 85, 119 I.C. 486, ('29) A.L. 660; *Sajjad Ali Khan v. Badshah Begum* (1936) 164 I.C. 823, ('36) A.O. 385.

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CHAPTER XVI

DIVORCE

A.--

DIVORCE BY HUSBAND

307.

Different forms of divorce

The contract of marriage under the Mahomedan law may be dissolved in any one of the following ways: (1) by the husband at his will, without the intervention of a Court; (2) by mutual consent of the husband and wife, without the intervention of a Court; (3) by a judicial decree at the suit of the husband or wife. The wife cannot divorce herself from her husband without his consent, except under a contract whether made before or after marriage (314), but she may, in some cases, obtain a divorce by judicial decree (328-334).

When the divorce proceeds from the husband, it is called talak (308-315); when it is effected by mutual consent, it is called khula (319) or mubara'at (320) according to the terms of the contract between the parties.

Shafei law

For the grounds on which a wife may divorce her husband under Shafei law, *see Mohammad Kannu v. Kasim Beevi* .[1]

1 ('54) A. Trav.-Cochin 219.

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CHAPTER XVI

DIVORCE

A.--

DIVORCE BY HUSBAND

308.

Divorce by talak

Any Mahomedan of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause.[2]

Macnaghten, p. 59; *Hedaya*, 75, Baillie, 208-209.

2 *Ahmad Kasim v. Khatun Bibi* (1932) 59 Cal. 833, 141 I.C. 689, ('33) A.C. 27. *Sessions Judge Mcdak v. Hajju Bibi,* (1970) 1 And. W.R. 138.

CHAPTER XVI

DIVORCE

A.--

DIVORCE BY HUSBAND

309.

Contingent Divorce

A divorce may be pronounced so as to take effect on the happening of a future event. In an Allahabad case the husband agreed to pay his wife maintenance within a specified time and in default the writing to operate as a divorce. It was held that on the husband's default the writing took effect as a valid divorce.[3]

Baillie, 218.

When the divorce takes place on the happening of a contingency, the husband can delegate to the wife his own right of pronouncing divorce. Payment is also enforceable, if there is an agreement to that effect.[4]

Shia law

Contingent divorce is not recognized by Shia law, Baillie, II, pp 114-115.

In an Assam case[5] the husband agreed as follows: &uot;If Khatun Maimuna due to any ill-feeling resides at her father's place for a period of 90 days, and if I fail to bring her back to my own house by persuasion within the said period of 90 days and to live with me, then on the completion of the said 90 days, my 1, 2, 3 talak bain (words) upon you will be effective and she will be able to take another husband after the period of iddat.&uot; It was held on the merits that the contingency mentioned in the document had not occurred and the wife's suit for a declaration that she was divorced was dismissed. It was observed, however, that the above document amounted to an authority conferred by the husband on the wife, and that it was for the wife to pronounce talak either to the husband or in the presence of witnesses. It is submitted that no authority was conferred by the husband to pronounce talak, but it was a case of a talak pronounced by the husband to be effective on a certain contingency.

A divorce pronounced by the husband in a quarrel over the visits of the wife to a lady friend that she would be divorced if she went to the friend again was held not operative, because the wife did not go after the pronouncement.[6]

3 *Bachchoo v. Bismillah* (1936) All. L.J. 302, 163 I.C. 228, ('36) A.A. 387.

4 *Mohd. Khan v. Shahunali* ('72) A. J. & K. 8. *See* also *Buffatan Bibi v. Sheikh Abdul Salim* ('50) A. Cal. 304.

5 *Mirjan Ali v. Maimuna Bibi* (1949) 53 C.W.N. 302, ('49) A. Ass. 14.

6 *Bilquees Begum v. Manzoor Ahmad* P.L.D. 1962 (W.P.) Karachi 491.

CHAPTER XVI

DIVORCE

A.--

DIVORCE BY HUSBAND

310.

Talak may be oral or in writing

a talak may be effected (1) orally (by spoken words) or (2) by a written document called a talaknama.[7]

(1) *Oral Talak.*--No particular form of words is prescribed for effecting a talak. If the words are express (*saheeh*) or well understood as implying divorce no proof of intention is required. If the words are ambiguous (*kinayat*), the intention must be proved.[8] It is not necessary that the talak should be pronounced in the presence of the wife or even addressed to her.[9] In a Calcutta case the husband merely pronounced the word &uot;talak&uot; before a family council and this was held to be invalid as the wife was not named.[10] This case was cited with approval by the Judicial Committee in a case where the talak was valid though pronounced in the wife's absence, as the wife was named.[11] The Madras High Court has also held that the words should refer to the wife.[12] The talak pronounced in the absence of the wife takes effect though not communicated to her, but for purposes of dower it is not necessary that it should come to her knowledge[13]; and her alimony may continue till she is informed of the divorce.[14] As the divorce becomes effective for purposes of dower only when communicated to the wife, limitation under Art. 104 for the wife's suit for deferred dower runs from the time when the divorce comes to her notice,[15]under the Act of 1908. (*see*also the Limitation Act, 1963)

Shia law

Baillie, II, pp. 113-115.

7 See *Ma Mi v. Kallandcr Ammal* (1927) 54 I.A. 61, 5 Rang. 18, 100 I.C. 1, ('77) A.PC. 15 *affirming* 2 Rang. 400.

8 *Ma Mi v. Kallandcr Ammal, supra* ; *Asha Bibi v. Kadir* (1909) 33 Mad. 22, 3 I.C. 730; *Wahid Khan v. Zainab Bibi* (1914) 36 All. 458, 25 I.C. 387; *Ibrahim v. Syed Bibi* (1888) 12 Mad. 63.

9 *Ma Mi v. Kallandcr Ammal, supra* ; *Ahmad Kasim v. Khatun Bibi* (1932) 59 Cal. 833, 141 I.C. 689, ('33) A.C. 27; *Fulchand v. Nazib Ali* (1909) 36 Cal. 184, 1 I.C. 740; *Sarabai v. Rabiabai* (1905) 30 Bom. 536 (obiter).

10 *Furzund Hussein v. Janu Bibee* (1878) 4 Cal. 588.

11 *Rashid Ahmad v. Anisa Khatoon* (1932) 59 I.A. 21, 54 All. 46, 135 I.C. 762, ('32) A.PC. 25.

12 *Asha Bibi v. Kadir, supra* .

13 *Fulchand v. Nazib Ali, supra* .

14 *Ma Mi v. Kallandar Ammal, supra* ; *Abdul Khader v. Azeeza Bee* (1944) 1 M.L.J. 17, 214 I.C. 38, ('44) A.M. 227.

15 *Kathiyumma v. Urathel Marakkar* (1931) 133 I.C. 375, ('31) A.M. 647.

Words of divorce

The words of divorce must indicate an intention to dissolve the marriage. If they are express (*saheeh*), e.g., &uot;Thou are *divorced*,&uot; &uot;I have *divorced thee*,&uot; or &uot;I divorce my wife for ever and render her *haram* from me&uot;,[16] they clearly indicate an intention to dissolve the marriage and no proof of intention is necessary. But if they are ambiguous (*kinayat*), *e.g.*, &uot;Thou art my cousin, the daughter of my uncle, if thou goest&uot;,[17] or &uot;I give up all relations and would have no connection of any sort with you&uot;,[18] the intention must be proved.

Pronouncement of the word talak in the presence of the wife or when the knowledge of such pronouncement comes to the knowledge of the wife, results in the dissolution of the marriage. The intention of the husband is inconsequential.[19]

If a man says to his wife that she has been divorced yesterday or earlier, it leads to a divorce between them, even if there be no proof of a divorce on the previous day or earlier.

Statement by husband in pleadings filed in answer to petition for maintenance by wife that he had already divorced petitioner (wife) long ago -- Effect of--Operates. *See*Criminal Procedure Code, 1973 (2 of 1974), s. 125 (l)(a);(1975) 1 A.P.L.J. 20.

Wife shall be treated to have been divorced on the date on which statement to that effect was made by husband in his plaint.[20]

16 *Rashid Ahmad v. Anisa Khatun* (1932) 59 I.A. 21.

17 *Hamid Ali v. Imtiazan* (1878) 2 All. 71.

18 *Wajid Ali v. Jafar Husain* (1932) 7 Luck. 430, 136 I.C. 209, ('32) A.O. 34.

19 *Ghansi Bibi v. Ghulam Dastagir* (1968) 1 Mys. LJ. 566.

20 *Smt. Ajmerylussan v. Moin Ahmad* (1983) All. L.J. 1332.

Shia Law

A divorce must be pronounced orally in the presence of competent witnesses and a talak communicated in writing is not valid unless husband is incapable of pronouncing it orally. (Obiter) Under Hanafi Law a talak is valid whether oral or in writing.[21]

Under Shia Law divorce must be pronounced only in Arabic and that too in a specific form. It is not however necessary that the husband himself must be knowing Arabic. He can engage the services of an agent who knows Arabic to pronounce the same on his behalf. It is only if nobody knowing Arabic is available that in specific circumstances it may be pronounced in any other language.

This is an established principle of Shia Law that pronouncement of talak (divorce) must be uttered orally in the presence and hearing of two male witnesses who are Muslims and of approved probity. It is not however necessary nor has it been provided anywhere in text of Shia Law that the divorce must be pronounced in the presence of 'Imam'. The only mandatory requirement for a valid divorce is that it must be orally pronounced in Arabic in the presence and hearing of two 'Aadil' witnesses.[22]

In proceedings initiated by the wife for maintenance, the husband raised a plea of divorce. It was held that the plea by itself was sufficient to terminate the marriage and that wife was entitled to maintenance for the period of *iddat* only and not for earlier period unless the circumstances justified it.[23]

A written Statement setting up a divorce filed by the husband amounts to a divorce. (Hanafi Law:

conditions, mode and time of taking effect of a divorce set out.)[24]

(*see* in connection with maintenance the case summarised in 279)

(2) *Talak in writing.*--A talaknama may only be the record of the fact of an oral talak[25]; or it may be the deed by which the divorce is effected. The deed may be executed in the presence of the kazi[26] or of the wife's father[27] or of other witnesses.[28] The deed is said to be in the customary form if it is properly superscribed and addressed so as to show the name of the writer and the person addressed. If it is not so superscribed and addressed it is said to be in unusual form. If it is in customary form it is called "manifest" provided that it can be easily read and comprehended. If the deed is in customary form and manifest the intention to divorce is presumed.

Otherwise the intention to divorce must be proved. In the undernoted case[29] the talaknamas were held to be customary and manifest and so operative without proof of intention. On the other hand if the deed is in the form of a declaration not addressed to the wife or any other person, it is not in customary form and is not effective if there was no intention to divorce.[30] If the talaknama is customary and manifest it takes effect immediately (313) even though it has not been brought to the knowledge of the wife.[31] In a Bombay case the talaknama was communicated to the wife within a reasonable time and the Court observed that this was sufficient.[32] This, however, was not a finding that communication within a reasonable time is necessary and the talaknama operated from the date of execution. But as in the case of an oral talak, communication may be necessary for certain purposes connected with dower, maintenance and her right to pledge her husband's credit for means of subsistence.[33] If an acknowledgment of divorce is made by the husband, the divorce will be held to take effect at least from the date upon which the acknowledgment is made.[34]

21 *Sattur Sheikh v. Mst. Sahdunnissa* (1969) A.L.J. 415.

22 *Dilshada Masood v. Gh. Mustaffa* . 1986 J&K 80.

23 *Chunnoo Khan v. State,* (1967) All. W.R. 217(H.C.) .

24 *Manoli Pathayi v. Moideen* (1968) M.L.J. Cr. 660(Kerala) . *Mohammad Ali v. Fareedunnissa Begum* A ('70) A.P. 298.

25 See *Rashid Ahmed v. Anisa Khatun* (1932) 59 I.A. 21, 54 All. 46, ('32) A.PC. 25.

26 *Sarabai v. Rabiabai* (1905) 30 Bom. 537.

27 *Waj Bibee v. Azmut Ali* (1868) 8 W.R. 23.

28 *Rajasahcb, In re*(1920) 44 Bom. 44, 54 I.C. 573; *Ahmad Kasim v. Khatoon Bibi* (1932) 59 Cal. 833.

29 *Sarabai v. Rabiabai* 30 Bom. 537, *Mahomed Ishaq v. Mt. Sairan* (1936) 163 I.C.953, ('36) A.L.611.

30 *Rasul Baklish v. Mt. Bholan* (1932) 13 Lah. 780, 138 I.C. 134, ('32) A.L. 498.

31 *Ahmad Kasim v. Khatoon Bibi* (1932) 59 Cal. 833, 141 I.C. 689, ('33) A.C. 27; *Rajasaheb, In re*(1920) 44 Bom. 44, 54 I.C. 573; *Mahomed Ishaq v. Mt. Sairan* (1936) 163 I.C. 953. ('36) A.L. 611.

32 *Rajasaheb, In re*(1920) 44 Bom. 44, 54 I.C. 573.

33 *Ahmed Kasim v. Khatoon Bibi* (1932) 59 Cal. 833, 141 I.C. 869, ("33) A.C. 27. Sec Also: *Chandbi v. Bandcsha* ('61,) A.B. 121.

34 *Asmat Ullah v. Khatun-un-nisa* (1939) All. 763. (1939) A L.J. 804. 184 I.C. 517, ('39) A.A. 592.

Shia law

A *talak* under the Shia law must be pronounced orally in the presence of two competent witnesses: Baillie, II, 117. A *talak* communicated in writing is not valid, unless the husband is physically incapable of pronouncing it orally: Baillie, II, 113-114.

Writled divorce is exceptional.[35]

35 *Ali Nawaz v. Mohd. Yusuf* P.L.D. 1963 S.C. 51.

CHAPTER XVI

DIVORCE

A.--

DIVORCE BY HUSBAND

311.

Different modes of talak

A talak may be effected in any of the following ways:--

(1) *Talak ahsan.*--This consists of a *single* pronouncement of divorce made during a *tuhr* (period between menstruations) followed by abstinence from sexual intercourse for the period of *iddat* (257).

When the marriage has not been consummated, a talak in the *ahsan* form may be pronounced even if the wife is in her menstruation.

Where the wife has passed the age of periods of menstruation the requirement of a declaration during a *tuhr* is inapplicable; furthermore, this requirement only applies to a oral divorce and not a divorce in writing.[36]

Talak Ahsan is based on the following verses of Holy Quran : &uot;and the divorced woman should keep themselves in waiting for three courses.&uot; (II : 228).

&uot;And those of your woman who despair of menstruation, if you have a doubt, their prescribed time is three months, and of those too, who have not had their courses.&uot; (LXV : 4).

(2) *Talak hasan.*--This consists of three pronouncements made during *successive tuhrs*, no intercourse taking place during any of the three *tuhrs*.

The first pronouncement should be made during a *tuhr*, the second during the *next tuhr*, and the third during the *succeeding tuhr*.

Talak hasan is based on the following Quranic injunctions:

&uot;Divorce may be pronounced twice, then keep them in good fellowship or let (them) go kindness.&uot; (II : 229).

&uot;So if he (the husband) divorces her [third time] she shall not be lawful to him afterward until she marries another person.&uot; (II : 230).

(3) *Talak-ul-bidaat or talak-i-badai.*--This consists of
(i) three pronouncements made during a single tuhr either in one sentence, *e.g.*, &uot;I divorce thee *thrice*,--or in separate sentences e.g., &uot;I divorce thee, I divorce thee,

I divorce thee&uot;[37] or,

(ii) a *single* pronouncement made during a *tuhr* clearly indicating an intention *irrevocably* to dissolve the marriage,[38]*e.g.*, &uot;I divorce thee irrevocably.&uot;

Hedaya, 72, 73, 83; Baillie, 206, 207, 226.

Talak-us-sunnat and talak-ul-biddat

The Hanafis recognized two kinds of *talak*, namely, (1) *talak-us-sunnat*, that is, *talak* according to the rules laid down in the *sunnat* (traditions) of the Prophet: and (2) *talak-ulbidaat*, that is, new or irregular *talak*. *Talak-ul-biddat* was introduced by the Omeyyade monarchs in the second century of the Mahomedan era. *Talak-ul-sunnat* is of two kinds, namely, (1) *ahsan*, that is, most proper, and (2) *hasan*, that is, proper. The *talak-ul-biddat* or heretical divorce is good in law, though bad in theology, and it is the most common and prevalent mode of divorce in this country,[39] including Oudh.[40] In the case of *talak ahsan* and *talak hasan*, the husband has an opportunity of reconsidering his decision, for the *talak* in both these cases does not become absolute until a certain period has elapsed (312), and the husband has the option to revoke it before then. But the *talak-ul-bidaat* becomes irrevocable immediately it is pronounced (312). The essential feature of a *talak-ul-bidaat* is its irrevocability. One of tests of irrevocability is the repetition *three times* of the formula of divorce *within one tuhr*. But the triple repetition is not a necessary condition of *talak-ul-bidaat*, and the intention to render a *talak*-irrevocable may be expressed even by a *single* declaration. Thus if a man says: &uot;I have divorced you by a *talak-ul-bain* (irrevocable divorce)&uot;, the *talak* is *talak-ul-bidaat* or *talak-i-badai* and it will take effect immediately it is pronounced, though it may be pronounced but once. Here the use of the expression &uot;*bain*&uot;-(irrevocable) manifests of itself the intention to effect an irrevocable divorce.

The Allahabad High Court in *Rahmtullah v. State of UP* ,[41] has given a new meaning and new direction to the law of *talak*. Justice Tilhari observed:

> &uot;*talak-ul-biddat* or *talak-i-bidai*, that is giving an irrevocable divorce at once or at one sitting or by pronouncing it in a tuhr once in an irrevocable form, without allowing the period of waiting for reconciliation or without allowing the will of Allah to bring about re union, by removing difference or cause of differences and helping the two in solving their differences, runs counter to the mandate of the Holy Quran and has been regarded as by all under *Islam-Sunnat*, to be sinful.&uot;

The court further observed that the mode of *talak* giving unbridled power to the husband, cannot be deemed operative, and creating as same has the effect of perpetuating discrimination on the ground of sex male authoritarianism. The need of the time is that codified law of Muslim marriage and divorce should be enacted keeping, pace with the aspiration of the Constitution.

The above observation of the court was the 'obiter dicta' of the judgment but it helped in mobilising public opinion.

The present editor is also in agreement with the view that the divorce must be preceeded among Muslims by an attempt of reconciliation between the husband and the wife by two mediators, one chosen by the wife from her family and the other by the husband from his side. A Mohammedan husband cannot divorce his wife at his whim or caprice i.e. divorce must be for a reasonable cause, and it must be preceded by a pre-divorce conference to arrive at a settlement. Even if there is any reasonable cause for the divorce, yet there must be evidence to show that there was an attempt for a settlement prior to the divorce and when there was no such attempt prior to divorce to arrive at a settlement by mediators, then there cannot be a valid divorce under Mahomedan Law.[42]

Now the Supreme Court of India has put a seal on the true law (relating to triple divorce) under Islam. In *Shamim Ara v. State of UP & Another* ,[43]the couple married in 1968 according to Muslim Shariat Law. Four sons were born out of the wedlock. In 1979, the wife filed an application under s. 125Cr. P.C. complaining for desertion and cruelty on the part of the husband with her. The learned presiding Judge of the Family Court at Allahabad refused to grant any maintenance to the wife on the ground that she was already divorced by the husband and hence not entitled to any maintenance. However, maintenance at the rate of Rs. 150/ per month was allowed to a minor son.

The husband in his reply (written statement) to the application under s. 125 Cr.PC denied all averments made in the application. The husband, by way of additional pleas, pleaded that he had already divorced his wife in 1987 and since then the parties had ceased to be spouses. He also claimed that he had purchased a house and delivered it to the wife in lieu of *mehar*(dower), and therefore he is protected from giving maintenance to the wife under the Muslim Women (Protection of Rights on Divorce) Act, 1986.

The wife preferred a revision before the High Court which held that the divorce which was alleged to have been given by the husband to the wife was not given in her presence and therefore the same cannot be said to have been communicated to the wife. But the communication would stand completed in 1990 with the filing of the written statement by the husband in the present case. The High Court, therefore, concluded that the wife was entitled to claim maintenance (from 1988 to 1990) where after her entitlement to have maintenance from husband shall cease.

The appellant (wife) filed an appeal by special leave before the Supreme Court. The singular issue arising for decision was whether the appellant (wife) could be said to have been divorced and the said divorce communicated to her so as to become effective from 1990, the date of filing of the written statement by the respondent (husband) in these proceedings.

After going through various authorities on Muslim Law and cases decided by various High Courts, the Supreme Court reiterated the following statement of Justice Iyer.[44]

> &uot;It is a popular fallacy that a Muslim male enjoys under the Quranic Law an unbridled authority to liquidate the marriage. The whole Quran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient to him, if they namely, women) obey you, then do not seek a way against them (IV : 34). The Islamic law gives to the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce either in the eye of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger, for the curse of God, said the prophet, rests on him who repudiates his wife capriciously.&uot;

The Apex Court further observed that the *talak* 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 . a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating *talak* on the date of the delivery of the copy of the written statement to the wife. The husband has to prove by adducing evidence the pronouncement of *talak*.

Thus the court held that in the instant case, neither the marriage between the parties stands dissolved nor does the liability of the husband to pay maintenance comes to an end on that date.

Present editor[45] is also in agreement with the Supreme Court findings that the correct law of divorce as ordained by Holy Quran is that *talak* must be for reasonable cause; and it must be preceded by an attempt of reconciliation between the husband and the wife by two arbitrators. Thus factum of divorce is required to be proved by the husband, including the conditions precedent there. A mere plea taken by the husband in his written statement at an earlier date shall not amount to dissolution of marriage under Muslim Personal Law. If the husband relies upon *rajai (biddat)* form of *talak* given at an earlier occasion, he is required to prove the factum by leading evidence before the court.[46] Recently, the High Courts of Kerala

and Bombay have reiterated the Judgment given by Apex Court in *Shamim Ara v. State of UP,* [47] and held that mere pronouncement of *talak* by the husband or merely declaring his intentions or his acts of having pronounced talak is not sufficient and does not meet the requirements of law. In every such exercise of right to talak the husband is required to satisfy the pre conditions of arbitration for reconciliation and reasons for talak. Conveying his intentions to divorce the wife are not adequate to meet the requirements of talak in the eyes of law. All the stages of conveying the reasons for divorce, appointments of arbitrators, the arbitrators resorting to conciliation proceedings so as to bring reconciliation between the parties and the failure of such proceedings or a situation where it was impossible for the marriage to continue are required to be proved as conditions precedent for the husband's right to give *talak* to his wife. Mere statement made in writing before the court, in any form, or in oral depositions regarding the *talak* having been pronounced sometimes in the past is not sufficient to hold that the husband has divorced his wife and such a divorce is in keeping with the dictates of Islam.[48]

36 *Chandbi v.' Bandcsha (supra)*.

37 *In re Abdul Ali*(1883) 7 Bom. 180; *Amir-ud-din v. Khatun Bibi* (1917) 39 All. 371. 39 I.C. 513.

38 *Sarabhai v. Rabiabai* (1905) 30 Bom. 537; *Sheikh Fazlur v. Musammat Aisha* (1929) 8 Pat. 690, 115 I.C. 546. ('29) A.P. 81.

39 *Amir-ud-din v. Khatun Bibi* (1917) 39 All. 371, 375, 39 I.C. 513.

40 *Sheikh Fazlur v. Musammat Aisha* (1929) 8 Pal. 690, 115 I.C. 546, ('29) A.P. 81.

41 1994 (iz) Lucknow Civil Division p. 463. The revising editor of the 20th Edition.

42 *Zulakha Begum Alias Rahmathunnisa Begum v. Abdul Rahim* LNIND, 2000 KANT 16.

43 A.I.R. 2002 SC 619.

44 Justice Khalid in *Mohammad Hanifa v. Pathummal Bibi* 1972 KLT 512, Justice Balarul Islam in *Sri Jiauddin Ahmad v. Mrs. Anwara Begum* (1981) 1 GLR 358; *Mst. Rukia Khatun v. Abdul Khalifus Laskar* (1981) 1 GLR 375), the Supreme Court cited with approval the following para of Justice *V. R. Krishna Iyer* in *A. Yousuf Rawther v. Sowramma* A.I.R. 1971 Ker. 261.

45 The revising editor of the 20th edition.

46 *Farida Bano v. Kamruddin* LNIND 2005 MP 675, see, also, *A.S. Parveen Akhtar v. Union of India,* 2003 (1) LW 370, see, *Mohd. Idris v. Nigar Sultana* LNIND 2002 MP 467, *Dagdu* s/o *Chotu Pathan v. Rahimbi Dagdu Pathan* & others LNIND 2002 Aug 81, *Anwar Ali Haider v. Sakina Bibi* , LNIND 2005, Cal. 255.

47 A.I.R. 2002 SC 619.

48 *Dilshad Begum Ahmadkhan Pathan v. Ahmadkhan Hanif Khan Pathan & Anothers* LNIND 2007 61, *Kunhimohammed Kutty v. Ayishakutti* LNIND 2010 Ker 203, *Shameem Baij v. Najmunnisa Begum & others* LNIND 2006 Aug 193.

Talak-ul-bidaat and tuhr

The High Court of Patna has expressed the opinion relying on a passage on p. 74 of the *Hedaya*, that a *talak-ul-bidaat* effected by a triple pronouncement is valid even if it is pronounced when the wife is in her menstruation.[49]

49 *Sheikh Fazlur v. Musammat Aishu* (1929) 8 Pat. 690, 115 P.C. 546, ('29) A.P. 81.

Shia law

The Shia lawyers do not recognize the validity of *talak-ul-bidaat*. Baillie II 118.[50]

50 See, *Ali Nawaz v. Mohd. Yusuf* P.L.D. 1963 S.C. 51.

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DIVORCE

A.--

DIVORCE BY HUSBAND

312.

When talak becomes irrevocable

(1) A talak in the *ahsan* mode (311(1)) becomes irrevocable and complete on the expiration of the period of iddat (251).
(2) a *talak* in the *hasan* mode (311(2)) becomes irrevocable and complete on the third pronouncement, irrespective of the *iddat*.
(3) A talak in the *badai* mode (311(3)) becomes irrevocable immediately it is pronounced, irrespective of the *iddat.*[51] As the talak becomes irrevocable at once, it is called *talak-i-bain*, that is, irrevocable talak.

A *talak rajai* can be revoked by conduct before it becomes irrevocable. The talak becomes irrevocable and complete on the expiration of the period of *iddat*. It is wrong to contend that the only manner of revocation of such a talak is either by resumption of sexual intercourse or by pronouncement of specific words of revocation in the presence of two witnesses.

The period of *iddat* prescribed by Muslim law is 90 days. In the instant case the suit was filed by the wife seeking declaration that she was divorced even before the period of *iddat* has expired. On the facts alleged in the plaint, it is obvious that the defendant had by his conduct revoked the talak within a week of giving it when he personally went to fetch the plaintiff, and by expressly stating before two muslims that he had revoked the talak.[52]

Hedaya, 72-73; Baillie, 206-207, 226.

Until a talak becomes irrevocable, the husband has the option to revoke it which may be done either expressly, or impliedly by resuming sexual inter-course.

Hedaya, 103-104; Baillie, 287-288.

As to the right to contract another marriage after divorce *see* 336(1). As to remarriage of divorced couples, *see* 336(5).

51 *Rashid Ahmad v. Anisa Khatun* (1932) 59 I.A. 21, 27, 54 All. 46, 52, 135 I.C. 762, ('32) A.PC. 25. (The Privy Council relied upon Sir R. K. Wilson's Digest of Anglo-Muhammadan Law. 5th ed. p. 136 where the law is summarised).

52 *Smt. Murium v. Mohammad Shamsi Alam,* A.I.R. 1979 All. 257 [Deoki Nandan, J].

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DIVORCE

A.--

DIVORCE BY HUSBAND

313.

When talak in writing becomes irrevocable

In the absence of words showing a different intention, a divorce in writing operates as an irrevocable divorce (talak-i-bain), and takes effect immediately on its execution.[53]

Baillie, 234,

In a Bombay case,[54] a Hanafi Mahomedan appeared before the Kazi of Bombay and executed a *talaknama*, which ran as follows: &uot;As on account of some disagreement between us there has arisen some ill-feeling, I, the declarant, appear personally before the Kazi of my free will, and divorce Sarabai, my wife by *nika*, by one *bain-talak* (irrevocable divorce), and renounce her from the state of being my wife.&uot; In the course of his judgment, Batchelor, J., said: &uot;To my mind this *talaknama* is decisive; it described the divorce as *talak-ul-bain* and emphatically declares that all rights and liabilities between Adam and plaintiff as husband and wife have ceased and determined. There is ample authority in the books for the view that such a writing, even though not communicated to the wife, effects an irrevocable (that is merely the English rendering of *bain*) divorce *as from the date of the document*.&uot; The deed was not in customary form because it was not addressed to the wife (310(2)), but the learned Judge appears to have thought it was, because it was in a form in common use. The question of intention was however immaterial as the intention to divorce appeared from the facts of the case.[55]

But the writing may show an intention to the contrary. Thus if the writing says, &uot;when this my letter reaches thee, then thou art repudiated,&uot; the &uot;talak does not take effect until the act ual receipt of the letter: Baillie, 234. Similarly, if the writing says, &uot;I have divorced thee on the 15th September 1913, and the period of the third divorce will expire on the 15th November 1913,&uot; the talak contemplated by the husband is a *talak hasan* (311(2)), and there is no divorce unless two more pronouncements are made.[56]

A letter by the husband to his wife containing *talak* pronouncement cannot be treated as *talak-i-bain* unless it is proved by the husband that there was conciliation attempt or that the *talak* pronouncement was attested by the persons from both the family or from both the Jamath or to show that three *talak* were pronounced through the said letter.[57]

In a petition for maintenance a husband pleaded that he had divorced his wife. It was held that the divorce operated from the date, but the wife would be entitled to maintenance under s. 488 CrPC or s. 125 of the (1974).[58]

Where the husband in an application to the Kazi said that he had divorced his wife by *talak-ul-bain* and the Kazi recorded his statement, it amounts to an irrevocable divorce and the wife cannot inherit.[59]

A plea of divorce in the written pleadings amounts to a valid divorce at least with effect from the date of the statement.[60]

53 Baillie, 233; *Sarabai v. Rabiabai* (1905) 30 Bom. 537; *Mt. Hayat Kharun v. Abdulla Khan* ('37) A.L. 270.

54 (1905) 30 Bom. 537, 546, *supra*.

55 See the criticism in *Rasul-Bakhsh v. Mt. Bholan* (1932) 13 Lah. 780, 138 I.C. 134, (&uot;32) A.L. 498.

56 *Ghulam Mohv-ud-din v. Khizar Hussein* (1929) 10 Lah. 470, 114 I.C. 74, ('29) A.L. 6.

57 *M. Shahul Hamid v. Salima and others* LNIND 2002 Mad. 1291.

58 *Umar Hyat Khan v. Mahboobunnissa* (1975) M.L.J. Cr. 570.

59 *Mst. Sakha Bi v. Sheikh Gulla* ('73) A.M.P. 207.

60 *Syed Jamaluddin v. Valian Bibi* (1975) 2 A.P.L.J. 20.

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CHAPTER XVI

DIVORCE

A.--

DIVORCE BY HUSBAND

314.

(1) **Delegation of power to divorce**

Although the power to give divorce belongs primarily to the husband, he may delegate the power to the wife or to a third person, either absolutely or conditionally, and either for a particular period or permanently. The person to whom the power is thus delegated may then pronounce the divorce accordingly. A temporary delegation of the power is irrevocable, but a permanent delegation may be revoked.

Talak by tafweez (delegation of power)

The husband may in *person* repudiate his wife, or he may delegate the power of repudiating her to a third party, or even to the wife; Baillie, 238; (the Shia law is the same: Baillie, II, 109) such a delegation of power is called *tafweez*. "When a man has said to his wife, 'repudiate thyself she can repudiate herself at the meeting, and he cannot divest her of the power." Baillie, 254. '"But if there is no reference to his pleasure, it is an appointment of agency which is not restricted to the meeting, and may be revoked." Baillie, 254. "When a man has said to his wife, 'choose thyself today,' or 'this month,' or 'a month,' or 'a year,' she may exercise the option at any lime within the given period"; Baillie, 242.

The power to give divorce which primarily belongs to the husband may be delegated to the wife either absolutely, or conditionally. In the instant case, even though the Kabinnama bears signature of both the spouses, the groom of his own will bound himself with the condition that his wife would be in a position to give *talak exparte* and at her will. Such a stipulation, even-though contained in an instrument signed by both the spouses, cannot be regarded as a bilateral delegation of the power to give talak. Thus the husband had unilaterally delegated to the wife a power to divorce unconditionally and since it is not prohibited by the personal law of the parties, it was quite open to her to divorce herself at her will. Therefore, the wife was very much a divorced woman when she dissolved her marriage by virtue of authority delegated to her and executed a divorce deed before Muslim Marriage Registrar and Kazi and it cannot be said that the marriage was still subsisting as no specified contingencies had taken place.[61]

61 *Mangila Bibi v. Noor Hussain* A.I.R. 1992 Cal. 92.

(2) Stipulation by wife for right of divorce.--

An agreement made, whether before or after marriage, by which it is provided that the wife should be at liberty to divorce herself in specified contingencies is valid, if the conditions are of a reasonable nature and are not opposed to the policy of the Mahomedan law. When such an agreement is made, the wife may, at any time after the happening of any of the contingencies, repudiate herself in the exercise of the power, and a divorce will then take effect to the same extent as if a *talak* has been pronounced by the husband.[62] The power so delegated to the wife is not revocable, and she may exercise it even after the institution of a suit against her for restitution of conjugal rights.[63]Baillie, 19.[(a) *A* enters into an agreement before his marriage with *B*, by which it is provided that *A* should pay *B* Rs. 400 for her dower on demand, that he should not beat or ill-treat her, that he should allow *B* to be taken to her father's house four times a year, and that if he committed a breach of any of the conditions, *B* should have the power of divorcing herself from *A.* Some time after the marriage *B* divorces herself from *A* alleging cruelty and nonpayment of dower. *A* then sues *B* for restitution of conjugal rights. Here the conditions are all of a reasonable nature, and they are not opposed to the policy of the Mahomedan law. The divorce is therefore valid, and *A* is not entitled to restitution of conjugal rights.][64]The agreement in the above case may be supported on the doctrine of *tafweez*, which is an essential part of the Mahomedan law of divorce. It is a case of repudiation by the wife under an authority from the husband, in other words, as a talak by *tafweez*. Such a divorce, though it is in form a divorce of the husband *by the wife*, operates *in law as a talak* of the wife *by the husband*.[(b) An agreement between husband and wife by which the husband authorizes the wife to divorce herself from him in the event of his marrying a second wife without her consent is valid.[65] A single judge of the Calcutta High Court has held that such an agreement may be arrived at by the guardians where the parties to the marriage are minors.[66]]

62 *Hamidoola v. Faizunnissa* (1882) 8 Cal. 327; *Ayatunnessa Beebe v. Karam Ali* (1909) 36 Cal. 23; *Maharam Ali v. Aycsa Khatun* (1915) 199 Cal. W.N. 1226, 31 I.C. 562; *Sainuddin v. Latifannessa Bibi* (1919) 46 Cal. 141, 48 I.C. 609 (agreement after marriage): *Mahomed Yasin v. Mumtaz Begum* (1936) 161 I.C. 701, ('36) A.L. 716; *Suroj Mia v. Abdul Majid* ('53) A. Tripura 6; *Safiuddin Sekh v. Mst. Soneka Bibi* (1955) Assam 1, ('55) A. Ass. 153, 59 C.W.N. 139; *Aziz v. Mst. Naro* ('55) Al IP. 32.

63 (1919) 46 Cal. 141, 48 I.C. 609, *supra*.

64 *Hamidoolla v. Faizunnissa* (1882) 8 Cal. 327.

65 *Maharam Ali v. Ayesa Khatun* (1915) 19 Cal. W.N. 1226, 31 I.C. 562; *Sadiya Begum v. Ata Ullah* (1933) 144. I.C. 497, ('33) A.L. 885; *Badarannissa v. Mafittala* (1871) 7 Beng. L.R. 442.

66 *Marfatali Mirja v. Jabcdanncssa Bibi* (1941) 1 Cal. 401, 45 C.W.N. 910, 197 I.C. 326 ('41) A.C. 657.

At any time after the happening of the contingency

Where a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, then if her husband does marry again, she is not bound to exercise her option at the very first moment she heard the news. The wrong done to her is a continuing one, and she has a continuing right to exercise the power.[67]

The mere happening of the event under which the wife would be entitled to exercise the right does not *ipso facto* dissolve the marriage. She must actually exercise the power.[68]

67 *Ayatutmessa Bcbbc v. Karam Ali* (1909) 36 Cal. 25, 1 I.C. 513.

68 *Aziz v. Mst. Nam* ('55) A. H.P. 32.

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A.--

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315.

Talak under compulsion

If the words of divorce used by the husband are &uot;express&uot; (310), the divorce is valid even if it was pronounced under compulsion,[69] or in a state of voluntary intoxication, or to satisfy his father or some one else.[70]

Hedaya, 75, 76; Baillie, 208-210.

Shia law

A divorce pronounced in the circumstances stated in this section is invalid under the Shia law: Baillie, II, 108.

69 *Ibrahim v. Enayctur* (1869) 4 Bang. L.R. A.C. 13.

70 *Rashid Ahmad v. Anisa Khatun* (1932) 59 I.A. 21, 27, 54 All. 46, 52-53, 135 I.C. 762, ('32) A.P.C. 25.

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A.--

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316.

Talak when marriage solemnized in England according to English law

A civil marriage, solemnized at a Registrar's office in London between a Mahomedan domiciled in India and an English woman domiciled in England, cannot be dissolved by the husband handing to the wife a *talaknama* [writing of divorcement (313)], although that would be an appropriate mode of effecting the dissolution of a Mahomedan marriage under Mahomedan law.[71]

The reason .is that such a marriage is a Christian marriage by which is meant the voluntary *union for life of one man and one woman* to the exclusion of all others; it is not a marriage in the Mahomedan sense which can be dissolved in Mahomedan manner. A Mahomedan marriage, being a polygamous marriage, is not, for certain purposes of English law, regarded as a marriage. But this reason ceases to apply when the wife becomes a convert to Islam. The Bombay High Court has held that a civil marriage in Scotland between a Christian woman subsequently converted to Mahomedanism and a Mahomedan domiciled in India can be dissolved by *talak*. This is on the ground that the rights and liabilities arising out of the marriage contract are governed by the *lex domicili.*[72]

71 *Rex v. Hammersmith, Superintendent Registrar of Marriages* [1917] 1 K.B. 634.

72 *Khambatta v. Khambatta* (1935) 59 Bom. 278, 36 Bom. L.R. 1021, 154 I.C. 1075, ('35) A.B. 5 affirming 36 Bom. L.R. 11, 149 I.C. 1232, ('34) A.B. 93. Cf. *Hyde v. Hyde* (1866) 1 P. & D. 130 and *In re Bethell*(1886) 38 CD. 220 and *Nachinson v. Nachinson* (1930) P. 85 & 217.

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A.--

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317.

Ila

Divorce by *Ila* is a species of constructive divorce which is effected by abstinence from sexual intercourse for the period of not less than four months pursuant to a vow. According to Shafei law, the fulfilment of such a vow does not *per se* operate as a divorce, but gives the wife the right to demand a judicial divorce.

Baillie, 296-304; *Hedaya*, 109. See the opening passages of Sura XXXIII and Sura LVIII of the Koran and Sale's notes thereon in his translation.

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318.

Zihar

Zihar is a form of inchoate divorce. If the husband compares his wife to his mother or any other female within prohibited degrees the wife has a right to refuse herself to him until he has performed penance. In

default of expiation by penance the wife has the right to apply for a judicial divorce. Cases of *zihar* are unknown in India and it has been doubted by text book writers whether the wife's right under zihar would be enforced by Courts in India. But the law of *zihar* has now received statutory recognition in s. 2 of the Shariat Act, 1937.

Hedaya, 117 & 602; Baillie, Book III, Chap. 9.

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A.--

DIVORCE BY HUSBAND

319.

Khula and mubara'at

(1) A marriage may be dissolved not only by talak, which is the arbitrary act of the husband, but also by agreement between the husband and wife. A dissolution of marriage by agreement may take the form of *khula* or *mubara* 'at.

(2) &uot;A divorce by *khoola* is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of the bargain are matters of arrangement between the husband and wife, and the wife may, as the consideration, release her *dyn-mahr* (dower) and other rights, or make any other agreement for the benefit of the husband&uot;.[73] Failure on the part of the wife to pay the consideration for the divorce does not invalidate the divorce,[74] though the husband may sue the wife for it.

A *khula* divorce is effected by an offer from the wife to compensate the husband if he releases her from her marital rights, and acceptance by the husband of the offer. Once the offer is accepted, it operates as a single irrevocable divorce (*talak-i-bain*) (311(3), 312), and its operation is not postponed until execution of the *khulanama* (deed of *khula*).[75]

(3) A *mubara'at* divorce like *khula*, is a dissolution of marriage by agreement, but there is a difference between the origin of the two. When the aversion is on the side of the wife, and she desires a separation, the transaction is called *khula*. When the aversion is mutual, and both the sides desire a separation, the transaction is called *mubara'at*. The offer in a *mubara'at* divorce may proceed from the wife, or it may proceed from the husband, but once it is accepted, the dissolution is complete, and it operates as a *talak-i-bain* as in the case of khula.

(4) As a *talak*, so in *khula* and *mubara'at*, the wife is bound to observe the *iddat*, as stated in 257 above.[76]

Hedaya, 112-116; Baillie, 305-308. &uot;Khoola means to put off, as a man is said to *khoola* his garment when he puts it off. In law it is the laying down by a husband of his right and authority over his wife for an exchange,&uot; Baillie. 306; *Hedaya*, 112, *Mubara'at* means mutual release: Baillie, 306; *Hedaya*, 116.

A muslim marriage may be dissolved by pronouncing talak. It may also be dissolved by an agreement between the husband and wife. When it is the latter it is known as khula.[77]

73 *Monshee Buzul-ul-Raheem v. Luteefutoon-Nissa* (1861) 8 M.I.A. 379, 395; *Saddan v. Faiz Bakhsh* (1920) 1 Lah. 402, 55 I.C. 184; *Umar Bibi v. Mohammad Din* (1944) Lah. 542, 220 I.C. 9, ('45) A.L. 51.

74 (1861) 8 M.I.A. 379, 397-398, *supra*.

75 (1861) 8 M.I.A. 379, 396, *supra*.

76 *Ibid*.

77 *Ghansi Bibi v. Ghulam Dastagir* (1968) 1 Mys. LJ. 566.

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320.

Effect of khula and mubara'at divorce

Unless it is otherwise provided by the contract, a divorce effected by *khula* or *mubara* 'at operates as a release by the wife of her dower, but it does not affect the liability of the husband to maintain her during her *iddat*, or to maintain his children by her.

Baillie, 306-307; *Hedaya*, 116.

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A.--

DIVORCE BY HUSBAND

321.

Apostasy from Islam

(1) Before the Dissolution of Muslim Marriages Act, 1939, apostasy from Islam of either party to a marriage operated as a complete and immediate dissolution of the marriage.[78]

(2) Under s. 4 of the Dissolution of Muslim Marriages Act, 1939, however, mere renunciation of Islam by a married woman or her conversion to any other religion cannot by itself operate to dissolve her marriage but she may sue for dissolution of any of the grounds mentioned in s. 2 of the Act. Under this Act, therefore, the decisions mentioned below are no longer good law.[79]

(3) Section 4 only applies to the case of apostasy from Islam of a married Muslim woman, and

apostasy of the Muslim husband would still operate as a complete and immediate dissolution of the marriage[80].

(4) The provisions of s. 4, however, do not apply to a woman converted to Islam from some other faith, who re-embraces her former faith. In such a case, the law as it stood before the Dissolution of Muslim Marriages Act, 1939, will apply, and the conversion will operate as a dissolution of the marriage.[81]

(5) Apostasy from Islam of the husband operates as a complete and immediate dissolution of the marriage.

A Mahomedan husband becomes a convert to Christianity. The wife then marries another man before the expiration of the period of iddat (257). Is she guilty of bigamy under s. 494 of the Indian Penal Code ? No, because apostasy operates as an*immediate* dissolution of marriage.[82] As to conversion to Mahomedanism, *see* 19 above.

Right of inheritance not effected by apostasy

Change of religion does not affect rights of inheritance or other rights: see Act XXI of 1850.

78 *Amin Beg v. Saman* (1910) 33 All. 90, 7 I.C. 342; *Mt. Sardaran v. Allah Baksh* ('34) A.L. 976; *Sardar Mohammad v. Mt. Maryam Bibi* (1936) 165 I.C. 383, ('36) A.L. 666; *Iqbal Ali v. Mt. Halima* (1939) All. 296, (1939) A.LJ. 65; *Resham Bibi v. Khuda Bakhsh* (1938) Lah. 277, 40 P.L.R. 722, ('38) A.L. 482; *Sarwar Yar Khan v. Jawahar Devi* 1964 (1) Andh. W.R. 60.

79 Sec. 4 and first proviso, Dissolution of Muslim Marriages Act, 1939.

80 Sec. 4 and first proviso, Dissolution of Muslim Marriages Act, 1939.

81 Sec. 4 and first proviso, Dissolution of Muslim Marriages Act, 1939.

82 Sec. 4, proviso 2, Dissolution of Muslim Marriages Act, 1939.*Abdul Ghani v. Azizul Huq* (1912) 39 Cal. 409, 14 I.C. 641; *Karon Singh v. Emperor* (1933) All. LJ. 733, 145 I.C. 156, ('33) A.A. 433.

CHAPTER XVI

DIVORCE

A.--

DIVORCE BY HUSBAND

322.

Agreement for future separation

The High Court of Bombay has held that an agreement between a Mahomedan husband and wife

which provides for *future* separation in the event of disagreement between them is void as being against public policy.[83](*see* 280 and 281(3)).

The Bombay decision was founded on s. 23 of the Indian Contract Act, 1872, which says that an agreement against public policy is void. But this decision is of doubtful authority.[84] If a Mahomedan wife can lawfully stipulate for a divorce as stated in 314, there is no reason why she cannot stipulate for *future* separation, at all events if the separation is to be for a justifiable cause. Such a stipulation can hardly be

said to be against the policy of the Mahomedan law.

An ante-nuptial agreement that in case a *Khana Damad* does not live in the wife's parents' house, he should refund the marriage expenses is not opposed to public policy. Violation of the agreement may result in divorce between husband and wife. This is based on a custom of *Khanadamadi* obtaining in the Kashmir valley.[85]

83 *Bai Fatima v. Alimahomed* (1913) 37 Bom. 280, 17 I.C. 946.

84 *Safiuddin Sekh v. Mst. Soneka Bibi* (1955) Ass. 1, ('55) A. Ass. 153, 59 C.W.N. 139.

85 *Mohd. Khan v. Shahmali* ('72) A. J.&K. 8.

CHAPTER XVI

DIVORCE

B.--

JUDICIAL DIVORCE AT SUIT OF WIFE

323.

The Dissolution of Muslim Marriages Act, VIII of 1939

The Dissolution of Muslim Marriages Act was passed in order to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie. The Act came into force on the 17th March, 1939, and lays down the following grounds of divorce: (1) the whereabouts of the husband are unknown for a period of four years (*see* 324); (2) failure of the husband to provide for the maintenance of the wife for a period of two years (*see* 325); (3) sentence of imprisonment on husband for a period of seven years (*see* 326); (4) failure without reasonable cause to perform marital obligations (*see* 327); (5) importance of husband (*see* 328); (6) insanity of husband (*see* 329); (7) repudiation of marriage by wife (*see* 330 and 273); (8) cruelty of husband (*see* 331); and (9) any other grounds recognized by Muslim law (*see* 332). Section 4 of the Act deals with the effect of apostasy from Islam of a married Muslim woman (*see* 213). It is submitted that the grounds are independent of each other, and on proof of any one of them, a decree for dissolution of marriage can be made.

According to the preamble of the Act, it is a consolidating Act. In one case,[86]it has been assumed that the Act is a declaratory one, but this at most would apply to s. 2 of the Act. But even as to s. 2, it is submitted that the Act is not wholly declaratory. The statement of objects and reasons for the Bill shows that there is no provision in the Hanafi Law enabling a married Muslim woman to obtain a decree dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and "under other circumstances". "The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India." It is further stated that the Courts hesitate to apply the Maliki Law (which provides for dissolution in such circumstances) although the Hanafi jurists have clearly laid down that in cases of hardship under the Hanafi Law the principle of the Maliki Law may be applied.

Whatever the position may be, in cases dealt with in s. 2, there can be no doubt that the principle of a marriage being dissolved on account of the apostasy of a married woman has not been unknown to the Muslim jurists[87] and this principle has been recognized and given effect to by the decisions of the Courts for more than 70 years. Although, therefore, the preamble states that s. 4 was enacted &uot;to remove doubts as to the effect of renunciation of Islam by a married Muslim woman on her marriage tie,&uot; the section effects a material alteration in the law on the point and can hardly be described as declaratory in its nature.

The question then is whether the Act can be said to be retrospective in its operation. This question arose in three cases decided by the Lahore High Court since the Act came into force and were, curiously enough, cases decided by single judges of the same Court under s. 4 of the Act. In the first of these cases[88]a wife sued for a declaration that her marriage with the defendant had come to an end on account of her Conversion to Christianity. The suit was instituted on the 31st August, 1938, and decreed by the trial Court on the 28th November 1938. The first appellate Court reversed the decision on the 28th June, 1939, and dismissed the suit. In the meantime Act VIII of 1939 came into force on the 17th March, 1939. The High Court in second appeal confirmed the decision but on the ground that the case was governed by the Act which operated retrospectively. In the later two cases, it was held that the Act could not be applied retrospectively.[89] In *Mt. Rashid Bibi v. Tufail Muhammad* , the Court seems to have held that the statute as regards s. 4 at least was not declaratory and that the law on the point was different before the Act. In both the later decisions it was pointed out that the language used by the Legislature, namely, &uot;the renunciation of Islam . . . shall not by itself operate to dissolve her marriage&uot; would appear to apply only to renunciations or conversions which might take place after the Act came into force.

In *Sarwar Yar Khan v. Jawahar Devi* ,[90] a Division Bench of the Andhra Pradesh High Court has disapproved the view taken in *Fazal Begum v. Hakim Ali* and following the two later Lahore cases, has held that the Act has no retrospective operation.

It is a general principle that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require that construction. Except in special cases, a new Act ought to be construed so as to interfere as little as possible with vested rights, and where the words admit of another construction, they should not be so construed as to impose disabilities not existing at the passing of the Act. What the consequences of giving a retrospective effect to s. 4 would be it is easy to imagine and is pointed out in the cases noted below[91]. It is submitted that the language used in s. 4 is clear and suggests that it was not intended to interfere with rights acquired under the existing law. It is therefore submitted that the decision in *Fazal Begum v. Hakim Ali* is wrong and the view taken in two later Lahore cases and the Andhra Pradesh case represents the correct position.

The learned judge who decided *Rabian Bivi v. Gulam Ali* [92] has held that the provisions of s. 2(ii) may be given retrospective effect.[93]

In a suit by a Mahomedan girl, claiming to exercise her option for a declaration that her marriage with the defendant stood repudiated and dissolved, it was held that although the suit was not filed under Act III of 1939, &uot;the Act must be taken to indicate the general principles of justice, equity and good conscience applicable&uot; and as Mahomedan Law is administered in Sind as a matter of justice, equity and good conscience, there was no reason why the plaintiff should be required to file a fresh suit and therefore the declaration sought was granted.[94]

A Muslim woman cannot repudiate her marriage outside the Act of 1939.[95]

86 *Fazal Begum v. Hakim Ali* ('41) A.L. 22.

87 Baillie, Digest of Shia law, p. 29; Hedayah (Grady, p. 66); Tagore Lectures Vol II p. 347; *Mt. Rashid Bibi v. Tufail Muhammad* ('41) A.L. 291; Wilson's Digest referred to in *Mt. Rabian Bibi v. Gulam Ali* ('41) A.L. 292.

88 *Fazal Begum v. Hakim Ali* ('41) A.L. 22.

89 *Rashid Bibi v. Tufail Muhammad* ('41) A.L. 291; *Rabian Bibi v. Gulam Ali* ('41) A.L. 292.

90 1964 (1) Aridh. W.R. 60.

91 *Rashid Bibi v. Tufail Muhammad* ('41) A.L. 291; *Rabian Bibi v. Gulam Ali* ('41) A.L. 292.

92 *Rashid Bibi v. Tufail Muhammad* ('41) A.L. 291; *Rabian Bibi v. Gulam Ali* ('41) A.L. 292.

93 *Manak Khan v. Mt. Mulkhan Bano* ('41) A.L. 167.

94 *Zubeda Begum v. Vazir Mahomed* ('40) A.S. 145 (decision of a single judge).

95 *K.C. Moyin v. Nafeesa* ('73) A. Ker. 176.

Arbitration

In a suit for dissolution of marriage, the questions at issue cannot be referred to arbitration or decided under the Indian Oaths Act, for it is for the Court to decide the case on the evidence.[96]

96 *Abdul Ghani v. Sardar Begum* (1945) 221 I.C. 610, ('45) A.L. 183.

Part B States

The Dissolution of Muslim Marriages Act did not extend to Part B States with the result that the law of divorce was different in those States from that which prevailed in Part A States.[97]

97 *Mohammad Kami v. Kasim Beevi* ('54) A. Tray.- Coch. 219.

CHAPTER XVI

DIVORCE

B.--

JUDICIAL DIVORCE AT SUIT OF WIFE

324.

Absence of husband

The wife is entitled to obtain a decree for the dissolution of her marriage if the whereabouts of the husband have not been known for a period of four years; but a decree passed on this ground will not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court must set aside the decree.[98] In such a suit.

(a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint,
(b) notice of the suit shall be served on such persons, and

(c) such persons shall have the right to be heard in the suit.

The paternal uncle and brother of the husband, if any, must be cited as party even if he or they are not heirs.[99]

98 Section 2(i) read with proviso (b) of the Dissolution of Muslim Marriages Act, 1939.

99 Section 3, Dissolution of Muslim Marriages Act, 1939.

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CHAPTER XVI

DIVORCE

B.--

JUDICIAL DIVORCE AT SUIT OF WIFE

325.

Failure to provide maintenance

The wife is entitled to obtain a decree for the dissolution of her marriage if the husband has neglected or has failed to provide for her maintenance for a period of two years.[100]

Failure to maintain

Failure to maintain the wife need not be wilful. Even if the failure to provide for her maintenance is due to poverty, failing health, loss of work, imprisonment or to any other cause, the wife would be entitled to divorce. Mere inability of the husband to maintain his wife is no longer a ground for refusing a divorce[1] and it is absolutely immaterial whether the failure to maintain is due to poverty, failing health, loss of work, imprisonment or any other cause whatsoever[2] unless, it is submitted, her conduct has been such as to disentitle her to maintenance under the Mahomedan Law.[3]In 1942 it was held by the Chief Court of Sind that the Act was not intended to abrogate the general law applicable to Mahomedans, and "the husband cannot be said to have neglected or failed to provide maintenance for his wife unless under the general Mahomedan Law he was under an obligation to maintain her". The wife's suit for divorce was dismissed as it was found that she was neither faithful nor obedient to her husband.[4] So also was the wife's suit dismissed, where the wife, who lived separately, was not ready and willing to perform her part of marital duties.[5] Where the wife has not been paid her prompt dower she is entitled to stay away from her husband, and the husband is bound to maintain her. If he does not maintain her for a period of two years, the wife is entitled to divorce.[6]

The provisions of the 1939 Act must be construed in a reasonable manner, which is one of the basic rules of interpretation. A wife, who by her own act or conduct, disentitles herself for maintenance cannot yet be allowed to take advantage of her own conduct and claim dissolution. The words "failed to provide" do imply a duty to provide. If there is no such duty to provide, it cannot be said that the husband has failed to provide maintenance to his wife. Suppose a wife is of an immoral character, or she deliberately and against the wishes of her husband lives away from him without giving him her company which she is bound to, the husband cannot still be compelled to provide for her maintenance. The husband cannot be compelled to go on providing maintenance to enable the wife to lead an immoral life. It

is true that if a marriage breaks down, there must be an outlet; but, it cannot equally be forgotten that the dissolution of a Muslim marriage at the instance of the wife is governed by the provisions of the Act, and the words occurring in the enactment have to be given their ordinary and reasonable meaning nor are there any compelling reasons to place a highly restrictive meaning upon the said clause. The words &uot;without reasonable cause&uot; must be deemed to be implicit in clause (ii), and also the absence of these words therein cannot, in my opinion, make any difference. Moreover, a reading of the several clauses in s. 2 shows that a right is given to a Muslim woman to obtain the dissolution of her marriage where her husband is guilty of one or the other things mentioned in the several clauses, *viz.*, that, his whereabouts have not been known for a period of four years; that, he has been sentenced to imprisonment for a period of seven years or upwards; that; he has failed to perform his marital obligations for a period of three years without any reasonable cause, that, he was impotent at the time of the marriage and continues to be so, and so on and so forth. In this scheme it would not be appropriate to introduce a ground which entitles the wife to divorce, even though the husband's conduct is totally blameless and where the conduct of the wife herself is blame worthy.[7]

Under 2nd proviso to s. 488(3) of the Code of Criminal Procedure, a wife refusing to live with her husband on account of his marrying again, is not deprived of her maintenance under the first sub-section of the section. The section makes no difference between parties governed by monogamy and those among whom polygamy is permissible. No question of hardship under the personal law arises. The husband can only file a suit to get the order set aside.[8]

A contrary view has been expressed in *Abdulla Khan v. Chandni Bi,* [9] and in *Munnawarbai v. Sabir Mohammad* [10]1970 M.P.L.J. (Notes) 23, but is open to doubt.[11]

In the undermentioned case[12]the plaintiff brought a suit for dissolution of her marriage with the defendant on the grounds mentioned in s. 2(ii), 2(vii)(a) and (f). The facts as to the first of these grounds were that since her marriage in 1925 the plaintiff lived with the defendant for about a month and then left him on account of continued ill-treatment. A reconciliation between the husband and the wife was effected as the result of which the plaintiff went back to the defendant but had to leave him again after a few days, since when she lived with her father. In 1928 she filed a suit for maintenance in which it was held that the defendant had neglected to maintain her and a decree against him was passed but no past maintenance was allowed. In 1936 the plaintiff applied to a Magistrate for an order against the defendant for payment of a monthly allowance under s. 488 of the Criminal Procedure Code . The Magistrate held that the defendant had neglected to maintain her for many years and she had sufficient grounds for refusing to live with him and passed an order against the defendant for payment of Rs. 10 per month by way of a monthly allowance. Thereafter payments were made by the defendant to the plaintiff, though irregularly and sometimes only after the issue of distress warrants. It was held by a single judge of the Chief Court of Sind that although it could not be said that during the two years immediately preceding the suit the defendant had not maintained the plaintiff, &uot;in the circumstances of the case&uot; the plaintiff was not debarred from relying on s. 2(ii) of the Act, in respect of the earlier period of 10 years as a good ground for the dissolution of the marriage. It is submitted that the decision is not correct and it has been dissented from by a Judge of the same Court.[13]

In *Veeran Sayvu Ravuthar v. Beevathumma,* [14] the Kerala High Court has held that even a Muslim wife residing in her own family house and away from her husband, is entitled to claim divorce on the ground under s. 2(ii) of the Dissolution of Muslim Marriage Act, 1939, that her husband has neglected or has failed to provide for her maintenance for a period of two years.

Where the grievance of the wife was that the husband was not maintaining her and two minor children, though he was legally and morally bound to do so. This amounted to cruelty and continued neglect of the wife by the husband. The relationship of the parties hit a rock bottom to such an extent that the wife was left with no option, but to file the present suit for divorce, for dissolution of her marriage with the husband under the Dissolution of Muslim Marriage Act, 1939. The prayer clause read as follows:

&uot;that this Hon'ble Court be pleased to order and decree that the marriage solemnized in Mumbai between the plaintiff and the defendant on or about 24th Dec 1985 be dissolved with immediate effect.&uot;

The Bombay High Court under the circumstances passed an order for dissolution of marriage and held that though there is no provision in the Dissolution of Muslim Marriage Act, 1939 for obtaining divorce by consent of both the parties, but by not refuting the allegations made by the wife in the plaint with respect to cruelty and neglect and by filling consent terms *inter alia*for the maintenance of the children, the husband has sort of submitted to the decree and is deemed to have accepted all the allegations made against him and therefore, the decree is act ually deemed to have been passed under s. 2(ii) of the Dissolution of Muslim Marriage Act, 1939.

100 Section 2(ii), Dissolution of Muslim Marriages Act, 1939.

1 *Manak Khan v. Mt. Mulkhan* ('41) A.L. 167.

2 *Satagunj v. Rahmat Oil* (1945) Kar. 327, 224 I.C. 6, ('46) A.S. 48.

3 Approved in *Kunju Ismail v. Md. Kedeja Unuma* (1959) A. Ker. 151.

4 *Mt. Khatijan v. Abdulla* (1942) Kar. 535, ('43) A.S. 65.

5 *Mt. Imat-ul-Hafiz v. Talib Hussain* ('45) A.L. 56; *Jamila Khatun v. Kasim Ali* ('51) A.N. 375.

6 *Najiman Nissa v. Serajuddin* (1946) 228 I.C. 198, ('46) A.P. 467.

7 *Ahmed Abdul Qadeer v. Raffat Banu* A.I.R. 1978, A.P. 417.

8 See also: *Syed Ahmad v. N.P. Taj Begum* ('58) A. Mys. 128 and *Kandasami v. Nachmmal* ('63) A. Mad. 263.

9 ('56) A. Bhopal 71.

10 *Mohamed Hanifa v. Mariam Bi* ('69) A. Mad. 414. See also *Rabia Khatoon v. Mukhtar Ahmed* ('66) A.A. 548.

11 *See*the Criminal Procedure Code 1974; as the law has been amended.

12 *Asambai v. Umer* ('41) A.S. 23.

13 *Satgunj v. Rahmat Dil* (1945) Kar. 327, 224 IC. 6, (&uot;46) A.S. 48. *Jamiluddin* P.L.D. 1960. (W.P.) Karachi 663.

14 LNIND 2002 Ker. 201.

Maintenance

According to Mahomedan Law maintenance signifies all those things which are necessary to the support of life, such as food, clothes and lodging. *Hedaya*, 392. The maintenance contemplated is proviso of food, raiment and lodging adequate for the wife taking into consideration the husband's station in life. Half-hearted and illusory attempts to provide maintenance is not maintenance contemplated by the Act.[15]

15 *Satgunj v. Rahmat Dil* (1945) Kar. 327, 224 I.C. 6, ('46) A.S. 48.

Failure to maintain rich wife

The Judicial Commissioner's Court of Peshawar[16]has held that the Act makes no distinction between a poor and a rich wife. If, therefore, a husband has failed to maintain his wife, for a period of two years, even though she has independent means, she is entitled to dissolution of marriage.

16 *Said Ahmad v. Sultan Bibi* ('43) A. Pesh. 73.

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DIVORCE

B.--

JUDICIAL DIVORCE AT SUIT OF WIFE

326.

Imprisonment of husband

The wife is entitled to obtain a decree for the dissolution of her marriage if the husband has been sentenced to imprisonment for a period of seven years or upwards, but no decree can be passed on this ground until the sentence has become final.[17]

17 Section 2(iii) read with proviso (a) Dissolution of Muslim Marriages Act, 1939.

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B.--

JUDICIAL DIVORCE AT SUIT OF WIFE

327.

Failure to perform marital obligations

The wife is entitled to obtain a decree for the dissolution of her marriage if the husband has failed to perform without reasonable cause his marital obligations for a period of three years.[18]

18 Section 2(iv), Dissolution of Muslim Marriages Act, 1939;*Said Ahmad v. Sultan Bibi* (1943) A. Pesh. 73.

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DIVORCE

B.--

JUDICIAL DIVORCE AT SUIT OF WIFE

328.

Impotence of husband

The wife is entitled to obtain a decree for the dissolution of her marriage if the husband was impotent at the time of the marriage and continues to be so; but before passing a decree on this ground the Court is bound, on application by the husband, to make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree can be passed on the ground of his impotence.[19]

Alteration in the law

The Act has altered the law and procedure applicable to suits for dissolution of marriage on the ground of the husband's impotence in the following respects: (1) It is no longer necessary for the wife to prove that she did not know of her husband's impotence at the time of the marriage. (2) It is no longer necessary for the Court to adjourn the suit for one year in order to ascertain if the husband has ceased to be impotent, unless the husband applies for an order to that effect. If no such application is made by the husband after the wife has proved that the husband was impotent at the time of the marriage and continued to be so, then the Court must pass a decree for dissolution forthwith. (3) It is no longer necessary for the wife to prove after the year of probation that the husband is still impotent. Under the Act it is for the husband to prove within the period of one year that he has ceased to be impotent. The potency, of course, must be in regard to his wife.[20]

The earlier decisions[21] on these points are no longer good law.

19 Sec. (2) (v) read with proviso (c) Dissolution of Muslim Marriages Act, 1939.

20 *Muhammad Ibrahim v. Altafan* 83 I.C 27, ('25) A.A. 24.

21 *Muhammad Ibrahim v. Altafan* 83 I.C. 27, ('25) A.A. 24: *A v. B.* (1896) 21 Bom. 77; *Vadake Vitil v. Odakel* (1881) 3 Mad. 347 & *Mt. Fatima v. Jalal Din* (1936) 163 I.C. 751, ('36) A.L. 510; *Badar Din v. Mt. Allah Rakhi* ('37) A.L. 383.

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DIVORCE

B.--

JUDICIAL DIVORCE AT SUIT OF WIFE

329.

Insanity of husband

The wife may obtain a decree for the dissolution of her marriage if the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease.[22]

22 Section 2(vi), Dissolution of Muslim Marriages Act, 1939.

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B.--

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330.

Repudiation of marriage by wife

(*see* 273)

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B.--

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331.

Cruelty of husband

The wife is entitled to a decree for the dissolution of her marriage if the husband treats her with cruelty, that is to say,

(a) habitually assaults her or makes her life miserable by cruelty or conduct even if such conduct does not amount to physical ill-treatment,

In *Shahina Praveen v. Mohd. Shakeel* ,[23] it was held that --

Immediately after the marriage of the parties, the plaintiff started maltreating the defendant.

. The plaintiff used to give beating and treated the defendant with cruelty during her stay with him.

. The institution of the criminal cases against her and her relations further amounts to cruelty raising a

reasonable apprehension in her mind that in case she is forced to join her husband, her life will be in danger.

[Even before the Act cruelty was considered a sufficient ground for granting divorce[24] but incompatibility of character was not[25]] or

Where the wife has reasonable apprehension arising from the conduct of the husband that she is likely to be physically harmed due to persistent demands of dowry from her husband's parents or relations such an apprehension also would be manifestly a reasonable justification for the wife's refusal to live with her husband.[26]

(b) associates with women of evil repute or leads an infamous life, or
(c) attempts to force her to lead an immoral life, or
(d) disposes of her property or prevents her exercising her legal rights over it, or
(e) obstructs her in the observance of her religious profession or practice, or,
(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran.[27]

The opinion has been expressed by the Chief Court of Sind that only a very gross failure to render to the wife her just rights could be considered in the Court of law as a ground for dissolution,[28] but where a husband has gone out of India leaving two wives in India, and he provides maintenance for one and not for the other, that amounts to inequality of treatment and the case falls under this clause.[29]

Disposal of property--sub-clause (d)

In a Lahore case[30]it was observed that this clause was not happily worded. &uot;It is not easy to say&uot; observed Abdul Rahman J., &uot;whether it was only meant to convey a person who had been in the habit of selling his wife's property of his own selfish ends or also covers the single act of a person who sells or assigns his wife's property of any value, however, insignificant, and not for his own advantage, but say, for the purpose of procuring medicine for his ailing wife when he did not have the means to buy it himself out of his own money. Nor am I sure that the Legislature was not intending to provide for cases when a person gets rid of the whole or substantial portion of a wife's belongings, but also for cases where a husband happens to dispose of a ring, say of Rs. 3 in value. I should interpret the word &uot;property&uot; in the sense of a substantial portion of a wife's property and its disposal in the sense of getting rid of that property not for the wife's benefit but for the selfish ends of the husband not with the object of the meeting a pressing need but more in the sense of waste and this also when done with the object of depriving the wife of her property and not with her consent or for things in and from which her consent might have been reasonably or legitimately presumed, implied or inferred.&uot; In this particular case the wife's ornament was sold by the husband with her consent and it was held that the case did not fall within sub-clause (d). It is submitted that sub-clause (d) should be read with the opening words of s. 2(viii) and the disposal by the husband of the wife's property must be of such a nature as to amount to cruelty to the wife. This is a question of fact in each case.

23 A.I.R. 1987 Del. 210.

24 *Kadir v. Kolenan Bibi* (1935) 62 Cal. 1088, 163 I.C. 188.

25 *Mt. Mustafa v. Mirza Khan* ('33) A.O. 15.

26 *Sirajmohamedkhan Janmohamad Khan v. Hafizunnisa Yasin Khan* . AJ.R. 1981 S.C. 1972 : 1981 Cr. LJ. 1430(S.C.) [S. Murtaza Fazl Ali and A. P. Sen. JJ.]

27 Section 2 (viii), Dissolution of Muslim Marriages Act, 1939.*Mt. Resham Bibi v. Mohd Shaft, supra* ; (husband taking second wife not in itself sufficient cruelty to first wife). S. 2 (ix) Courts in Pakistan occupy position akin to Qazi and are competent to effect divorce on any ground under the Muslim Law. *Khurshid Bibi v. Mohd Amin* . (S.C.) *supra*.

28 *Asmabai v. Umer* ('41) A.S. 23.

29 *Mt. Vmat ul-Hafiz v. Talib Hussein* ('45) A.L. 56.

30 *Zubaida Begum v. Sardar Shah* (1943) 210 I.C. 587; ('43) A.L. 310.

More than one wife

Where the husband solemnized a second marriage within five months of separation from first wife and was having a child from second wife, this amounted to mental cruelty. The fact that husband was willing to cohabit with first wife while continuing second marriage is no reason to deny divorce to the first wife on the ground of mental cruelty. The court further observed that though bigamy is permitted as per Muslim Law under exceptional circumstances but such circumstances also have to be taken note of. As at present, such circumstances do not exist. Not only that, even to have a second wife, certain conditions have to be satisfied by the husband including the financial capacity, the physical capacity and capability of treating more than one wife without discrimination and to give both of them equal conveniences and considerations in life. Even if the husband contends that he can treat both the wives equitably and without discrimination, it is a human impossibility.[31]

Moreover, if during the subsistence of a valid marriage the husband had remarried another, necessarily, that will be a mental cruelty towards the first wife, even though that is not the cruelty alleged in the petition. Merely because the husband was willing to cohabit with the first wife while continuing the second marriage, there was no reason to court out the wife, denying her a decree for dissolution of marriage.

Even if the husband contends that he can equitably treat both the wives without discrimination, it is a human impossibility. If the wife is not willing to be a co-wife with another, she cannot in such circumstances, be compelled to live with the husband.[32]

31 *K. Muhamma Hatheef v. Nishath* A.I.R. 2004 Ker 22

32 *Abdurrahiman v. Khairunnissa* LNIND, 2010 Ker 145.

CHAPTER XVI

DIVORCE

B.--

JUDICIAL DIVORCE AT SUIT OF WIFE

332.

Grounds of dissolution recognised by Mahomedan Law

The wife is entitled to a decree for the dissolution of her marriage on any other ground which is recognised as valid for the dissolution of marriages under Muslim law.[33] Incompatibility of temperaments and hatred of the wife for her husband are not recognised by Muslim law as grounds of divorce.[34] Where the wife sues for dissolution on the ground *li'an* (*see* 333) the marriage cannot be dissolved if the husband *bona fide* retracts the charge of adultery.[35]

Section 2 of the Shariat Act expressly refers to *ila* (*see* 317), *zihar* (*see* 318), *Khula* and *mubara'at* (*see*

319). Sub-clause (ix) of sec. 2 of the Dissolution of Muslim Marriages Act is sufficiently wide to cover all grounds recognised by the Muslim law entitling a wife to divorce including the contractual right of divorce known as*talak by tafweez* (*see* 314). Courts are entitled to grant divorce on grounds recognised by Shariat, regardless of the fact that those grounds were not recognised by Courts previous to the passing of the Act.[36]

(Inequality)

The doctrine kafat requires that there should not be any marked disparity between the social status of the husband and the wife, and provides for the dissolution of ill-assorted unions, (Baillie, 62-74; Baillie, II, 32 ff.).

33 Sec. 2 (ix) of the Dissolution of Muslim Marriages Act, 1939.

34 *Umar Bibi v. Mohammad Din* (1944) Lah. 542, 220 I.C. 9, ('45) A.L. 51.

35 *Tufail Ahmed v. Jamda Khatun* (1962) A.A. 570.

36 *Umar Bibi v. Mohammad Din* (1944) Lah. 542. 220 I.C. 9, ('45) A.L. 51.

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DIVORCE

B.--

JUDICIAL DIVORCE AT SUIT OF WIFE

333.

Li'an or imprecation

(1) The wife is entitled to sue for a divorce on the ground that her husband has falsely charged her with adultery. She must file a regular suit for dissolution of her marriage as a mere application to the Court is not the proper procedure.[37] If the charge is proved to be false, she is entitled to a decree, but not if it is proved to be true.[38] No such suit will lie if the marriage was irregular (Baillie, 337).

(*see* also *Noorjelian Bibi v. Mohd. Kasim Ali* .[39])

(2) *No separation until decree.*--A charge of adultery does not of itself terminate the marriage. The marriage continues until the decree is passed.[40]

(3) *Retraction of charge.*--The effect of the decisions, excluding what are merely *obiter dicta*, would appear to be that a retraction of the charge by the husband at or before the commencement of the hearing disentitles the wife to a decree,[41] but she is entitled to a decree if the retraction is made after the close of the evidence,[42] or of the trial.[43] The High Court of Bombay has expressed the opinion that retraction &uot;has no place in the procedure in British Courts.[44]

Li'an or imprecation

Li'an is testimony confirmed by oath and accompanied with imprecation. Under the pure Mahomedan law, if a man charges his wife with adultery, he may be called upon, on the application of the wife, either to retract the charge or to confirm it by oath coupled with an imprecation in these terms: &uot;The curse of God be upon him if he was a liar when he cast at her the charge of adultery.&uot; The wife must then be called upon either to admit the truth of the imputation, or to deny it on oath coupled with an imprecation in these terms: &uot;The wrath of God be upon me if he be a true speaker in the charge of adultery which he has cast upon me.&uot; If she takes the oath, the Kazi, must believe her, and pronounce a separation between the parties. The husband had to be given every opportunity to retract the charge as the offence of making a false accusation of adultery was severely punishable.[45]But now there is no obligation on the Courts in India to give the husband an opportunity to retract the charge. The original rules were, mere rules of evidence, and they have been superseded by the Indian Evidence Act, 1872. As to special oaths under the Indian Oaths Act, 1873,*see* ss. 8, 9 and 11 of the Act and the under mentioned case.[46]

37 *Kabil Gazi v. Madari Bibi* (1933) 57 Cal. L.J. 106, 145 I.C. 828, ('33) A.C. 630; *Ayesha Bibi v. Abdul Gam* (1934) 59 Cal. L.J. 466.

38 *Zafar Husain v. Ummai-ur-Rahman* (1919) 41 All. 278, 49 I.C. 256; *Khatijabi v. Umarsahcb* (1928) 52 Bom. 295, 110 I.C. 131, ('28) A.B. 285.

39 1977 Cal. 90.

40 *Jaun Becbee v. Bcparee* (1865) 3 W.R. 93; *Khatijabi v. Umarsaheb* (1928) 52 Bom. 295, 110 I.C 131, ('28) A.B. 285.

41 *Musammat Faklre Jahan v. Muhammad* (1929) 4 Luck. 168. 114 I.C. 314, ('29) A.O. 16. See also: *Tufail Ahmad v. Jamila Kiiatun* ('62) A.A.570 (D.B.) which doubts the correctness of the earlier decision in *Kaloo v. Mt. Imaman* ('49) A.A. 445.

42 *Rahima Bibi v. Fazil* (1926) 48 All. 834, 98 I.C. 573, ('27) A.A. 56; *Shamsunnessa Khatun v. Mir Abdul Manaf* (1940) 1 Cal. 97, 70 C.LJ. 289, 186 I.C. 604, ('40) A.C. 95.

43 *Ahmed v. Bai Fatma* (1931) 55 Bom. 160, 128 I.C. 909, ('31) A.B. 76 where the husband asked for an opportunity to withdraw the charge for the first time in the first appeal.

44 (1931) 55 Bom. 160, 162, 128 I.C. 909, ('31) A.B. 76, *supra*. But see *Mahomedali M.E. Querashi v. Hazrabai* (1955) Bom. 464, 57 Bom. L.R. 215, ('55) A.B. 265.

45 See Encyclopaedia of Islam, vol. iii, p. 24, article entitled &uot;*Li'an*&uot;.

46 *Khatijabi v. Umarsahcb* (1928) 52 Bom. 295, 110 I.C. 131, ('28) A.B. 285.

Nature of retraction

The retraction must be honest and straightforward. A statement in the following terms &uot;the petitioner withdraws the charge made by him against his wife in proceedings under s. 498Indian Penal Code under 240 of Mulla's Mahomedan Law,&uot; does not amount to an expression of the withdrawal of the accusation of adultery and to a vindication of the honour of the wife.[47]

47 *Banno Begum v. Inayat Husain* (1948) 229 I.C. 220, ('48) A.A. 34.

Where wife has not attained majority

A wife who has attained puberty is entitled to sue under this section without a Guardian though she may not have attained majority as defined in the Indian Majority Act, 1875.[48]

As to restitution of conjugal rights where a charge of adultery has been made, *see* 281(4).

48 *Ahmed v. Bai Fauna* (1931) 55 Bom. 160, 128 I.C. 909, ('31) A.B. 76.

Shia law

Dissolution of *li'an* is not available to a minor or insane or deaf and dumb person. Baillie, II, 155.

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CHAPTER XVI

DIVORCE

B.--

JUDICIAL DIVORCE AT SUIT OF WIFE

334.

Judicial divorce on other grounds

According to old authorities the wife was not entitled to a judicial divorce on any other ground such as the conjugal infidelity of the husband or his inability to maintain her (Baillie, 443) or cruelty. But the Calcutta High Court has held that cruelty and desertion arc grounds for divorce.[49] Incompatebility of temperament is not a ground for divorce.[50]Section 5 of the Shariat Act empowers the District Judge to give a divorce on the wife's petition. (*see* 6, *supra*)

&uot;Under the Mahomedan law a wife has no absolute right to obtain divorce. She has that right only under certain specific contingencies and conditions&uot;.[51] As to cruelty as an answer to the husband's suit for restitution of conjugal rights, (*see* 281(2)).

49 *Kadir v. Kolcman Bibi* (1935) 62 Cal. 1088, 39 Cal. W.N. 896. 61 Cal. L.J. 342, 163 I.C. 188.

50 *Mustafa Begum v. Mirza Kazim Raza Khun* (1933) 8 Luck. 204, 142 I.C 46, ('33) A.O. 15.

51 *Muhammad Ibrahim v. Altafan* (1925) 47 All. 243, 249, 83 I.C. 27, ('75) A.A. 24, 26.

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CHAPTER XVI

DIVORCE

B.--

JUDICIAL DIVORCE AT SUIT OF WIFE

335.

Wife's cost in proceedings for divorce

The rule of English law which makes the husband in divorce proceedings liable *prima facie* for the wife's cost, except when she is possessed of sufficient separate property, does not apply to divorce proceedings between Mahomedans.[52]

The English rule is founded upon the doctrine of the Common Law according to which the husband becomes entitled upon marriage to the whole of the wife's personal property and to the income of her real property. Under the Mahomedan law, however, the husband does not by marriage acquire any interest in the property of the wife and there is no reason, therefore, to apply the rule of English law to proceedings for dissolution of marriage between Mahomedans.

52 *A. v. B.* (1896) 21 Bom. 77.

CHAPTER XVI

DIVORCE

C--

EFFECTS OF DIVORCE

336.

Rights and obligations of parties in divorce

The following rights and obligations arise on the completion of a divorce, whatever may be the mode of divorce:--

(1) *Right to contract another marriage.*--If the marriage was consummated, the wife may marry another husband after the completion of her *iddat*; if the marriage was not consummated, she is free to marry immediately.

If the marriage was consummated, the husband had four wives at the date of divorce including the divorced wife, he may marry another wife after completion of the *iddat* of the divorced wife.

Hedaya, 128,32; Baillie, 350-351,34-35. As to iddat, *see* 257 and notes. As to maintenance during iddat, *see* 279. If the marriage was not consummated there is no iddat of divorce (257).

(2) *Dower becomes immediately payable.*--If the marriage was consummated, the wife is entitled to immediate payment of the whole of the unpaid dower, both prompt and deferred.

If the marriage was not consummated, and the amount of dower was specified in the contract, she is entitled to half that amount.[53] If no amount was specified; all that she is entitled to is a present of three articles of dress.

Hedaya, 44-45; Baillie, 96-97.

Where a marriage is dissolved upon the apostasy of the wife, she is entitled to the whole of the dower if the consummation of the marriage has taken place.[54]

Nothing contained in the Dissolution of Muslim Marriages Act, 1939, affects any right which a married

woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.[55]

(3) *Mutual rights of inheritance ceases.*--Either party is entitled to inherit from the other until the divorce becomes irrevocable (312).

Immediately the divorce becomes irrevocable, mutual rights of inheritance ceases, except where the divorce was pronounced during the husband's death-illness (135), in which case the *wife's* right to inherit continues until the expiry of her *iddat*, unless she was repudiated at her own request.[56]

Baillie, 279, 280, 282; *Hedaya*, 99-100.

1. The point of time when the rights of inheritance cease is the point of time when the divorce becomes irrevocable. In a *talak* in the *ahsan* mode that point of time is the expiry of the *iddat* [312(1)]. In a *talak* in the badai mode, it is the moment when the *talak* is pronounced [312(3)].
2. It is obvious from what has been stated above that in the case of a *talak* in the *hasan* mode, and a *talak* in the *badai* mode,[57] the rights of inheritance cease immediately the *talak* becomes irrevocable, though the death, whether of the husband or wife, may occur before the expiry of the *iddat*. To this, however, there is an exception in favour of the wife. It is this that if the repudiation was made during the husband's death-illness, and he dies before the expiry of the iddat, the wife is entitled to inherit from him, the reason being that a repudiation by a man in his last illness is nothing but a device to defeat the wife's right of inheritance. But the husband is not entitled to inherit from his wife if she dies before the expiry of the *iddat*, for he, and not she, was responsible for &uot;the rupture of conjugal rights.&uot; These observations do not apply to a *talak* in the *hasan* mode, for the rights of inheritance in that case continue until the expiry of the *iddat*, and it makes no difference whether the repudiation was made in health or in death-illness.
3. There is no right of inheritance in any case *after* the expiry of the *iddat*.

(4) *Cohabitation becomes unlawful.*--Sexual intercourse between the divorced couple is unlawful after the divorce has become irrevocable. The offspring of such an intercourse is illegitimate [ill. (a) to sub-sec. (5)], and cannot be legitimated by acknowledgment,[58](342). But the parties may remarry as stated in sub-sec. (5) below.

(5) *Remarriage of divorced couple.*--

(i) Where the husband has repudiated his wife by three pronouncements [311(2)) and 311(3)(i)], it is not lawful for him to marry her again until she has married another man, and the latter has divorced her or died after actual consummation of the marriage. The presumption of marriage arising from an acknowledgment of legitimacy (267) does not apply to a remarriage between divorced persons unless it is established that the bar to remarriage created by the divorce was removed by proving an intermediate marriage and a subsequent divorce after act ual consummation[59] [ill.(a)]. Even if a remarriage between the divorced persons is proved, the marriage is not valid unless it is established that the bar to remarriage was removed, the mere fact that the parties have remarried does not raise any presumption as to the fulfilment of the above conditions[60] [ill. (b)]. A marriage without fulfilment of the above conditions is irregular, not void (Baillie, 151).

(ii) In all other cases, the divorced parties may remarry as if there had been no divorce either during the *iddat* or after its completion.

(a) A Hanafi Mahomedan repudiates his wife by three pronouncements in the same breath in these terms: &uot;I divorce you, I divorce you, I divorce you&uot; (31l(2)(i)). The parties afterwards live together, and five children are born to them, whom the father acknowledges as legitimate. After his death the children claim their share of his estate as his heirs. It is not proved that there was a re-marriage between the parties but the Court is asked to presume it from the acknowledgment of legitimacy. An acknowledgment of legitimacy, no doubt, raises a presumption of marriage but that is only when there is no legal bar to the marriage. There is such a bar in this case created by the divorce and

it can only be removed by proving that their mother had after the divorce married another man and the latter had died or divorced her after actual consummation of the marriage. If these facts are not proved, remarriage cannot be presumed, and the children cannot be held to be legitimate, and their claim must fail.[61]

(b) A Hanafi Mahomedan repudiates his wife by three pronouncements made during successive *tuhrs* (311(2)). He then marries her again. It is not proved that there was any intermediate marriage, but the Court is asked to presume it from the fact of the remarriage. No such presumption, however can be drawn from the mere fact of remarriage, and the remarriage is irregular. As to the consequences of an irregular marriage, *see* 206 above.

(c) A Hanafi Mahomedan divorces his wife by a *talak* in writing executed on the 25th September 1927. Such a divorce takes effect immediately on execution of the deed (313). After the divorce the parties resume cohabitation but the husband again divorces his wife by oral *talak* on the 30th October 1932. There was no intermediate marriage or remarriage. The resumption of cohabitation did not restore the relationship of husband and wife. The oral divorce was meaningless formality. The wife's suit for dower instituted more than three years after 25th September 1927 was time-barred.[62]

Baillie, 592-293; *Hedaya*, 107-108.

A remarriage with thrice repudiated wife without fulfilling the conditions mentioned above is irregular, and not void. The reason for it is that the obstacle to the marriage can be removed &uot;by consummation with a second husband, and expiration of her iddat&uot;: Baillie, 151.

As to &uot;actual&uot; consummation, *see* note to 257. &uot;Valid retirement&uot; has not the same effect for this purpose.

In *Mrs Sabah Adnan Sami Khan v. Adnan Sami Khan* ,[63] the Bombay High Court has held that merely because *talak* in the *ahsan* mode or khula become irrevocable does not necessarily mean that the rigours of irrevocable *talak* by triple pronouncement are applicable and *Halala* is mandatory. Irrevocable *talak* in the sense that the former husband and wife cannot resume a legitimate marital relationship unless they contract a fresh *nikah* with a fresh *mehr*. There is a clear distinction between the *talak* by single pronouncement and the *talak* by triple pronouncement. It is only in case of triple *talak*, re-marriage with the same husband is legal and valid if *Halala* is observed. In case of a *talak* in the *ahsan* mode *Halala* is not mandatory. Thus, even if it is accepted that the *talak* under the divorce agreement between the husband and wife (Khula) was *talak-ibain*, it cannot be stated that *Halala* was mandatory.

53 *Tajbi v. Nattar Sherif* (1940) 2 M.L.J. 345,(1940) M.W.N. 864, 191 I.C. 728, ('40) A.M. 888.

54 *A.M. Md. Ebrahim v. Ma Ma & anr.* (1939) Rang. 383, 179 I.C. 47, ('39) A.R. 28.

55 Section 5 of the Dissolution of Muslim Marriages Act, 1939.

56 See *Sarabai v. Rabiabai* (1905) 30 Bom. 537, 547-548.

57 (1905) 30 Bom. 537, 556-557, *supra*.

58 *Rashid Ahmad v. Anisa Khatun* (1932) 59 I.A. 21, 27, 28, 54 All. 46, 53-54, 135 I.C. 762, ('32) A.P.C. 20.

59 *Rashid Ahmad v. Anisa Khatun* (1932) 59 I.A. 21, 27, 28, 54 All. 46, 53-54, 135 I.C. 762, ('32) A.P.C. 25.

60 *Akhtaroon-nissa v. Sharintoollah* (1867) 7 W.R. 268.

61 *Rashid Ahmad v. Anisa Khatim* (1932) 59 I.A. 21, 54 All. 46, 135 I.C. 762, ('32) A.P.C. 25.

62 *Hayat Khatun v. Ahdulla Khan* ('37) A.L. 270.

63 A.I.R. 2010 Bom 109.

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CHAPTER XVII

PARENTAGE -- LEGITIMACY AND ACKNOWLEDGMENT

A.--

ESTABLISHMENT OF PARENTAGE

337.

Paternity and maternity

Parentage is the relation of parents to their children. Paternity is the legal relation between father and child. Maternity is the legal relationship between mother and child. These legal relations give rise to certain rights and liabilities as regards inheritance, guardianship, and maintenance.

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CHAPTER XVII

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A.--

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338.

Maternity how established

The maternity of a child is established in the woman who gives birth to the child, irrespective of the lawfulness of her connection with the begetter.

Baillie, 391.

As regards maternity, it is immaterial whether the child is an offspring of marriage or an offspring of *zina*, that is, fornication or adultery. The maternity of the child in either case is established in the woman who actually gives birth to the child. But paternity is not established unless the child was the offspring of marriage. Thus, if a man commits *zina* with a woman, and a child is born, it is considered to be the child of its mother only and inherits from her and her relations (85). But the man is not considered to be the *father* of the child, for paternity is established only by marriage, nor is the child *in law* the child of the man; it is *illegitimate* and not entitled to inherit from him.

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PARENTAGE -- LEGITIMACY AND ACKNOWLEDGMENT

A.--

ESTABLISHMENT OF PARENTAGE

339.

Paternity how established

(1) The paternity of a child can only be established by marriage between its parents. The marriage may be valid (*sahih*), or irregular (*fasid*), but it must not be void (*batil*).

Marriage may be established by direct proof. If there be no direct proof, it may be established by indirect proof, that is, by presumption drawn from certain facts. It may be presumed from prolonged cohabitation combined with other circumstances (268), or from an acknowledgment of legitimacy in favour of a child.

(2) When the paternity of a child is established, its legitimacy is also established.

Baillie, 391, 400-402; Shama Churun Sirkar's Tagore Lectures, 1873, s. CCCXV.

The main pivot in cases of paternity and legitimacy is marriage. It is also in the case of an acknowledgment. This appears clearly from the following passage in the judgment of the Privy Council in *Habibur Rahman v. Altaf Ali* [1]:--

&uot;By the Mahomedan law a son to be legitimate must be the offspring of a man and his wife or of a man and his slave; any other offspring is the offspring of *zina*, that is illicit connection, and cannot be legitimate. The term &uot;wife&uot; necessarily connotes marriage; but as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof may be available, but if there be no such, indirect proof may suffice. *Now one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son*.&uot;

Acknowledgment of prolonged cohabitation as husband and wife raises a mere presumption. So, where evidence has been led that there was no marriage at all when the children were begotten, the issue cannot possibly be legitimated by acknowledgment.[2]

In *C.G. Amanulla Khan v Anwar Khan* ,[3] the Karnataka High Court held that the mere fact that the plaintiff was described as son of the said alleged father in a certain sale deed, would not necessarily lead to presumption that he was acknowledged as the legitimate son, particularly when the material on record clearly shows that he was fostered and brought up by the said alleged father. As a foster son, the plaintiff in the instant case, was not entitled to claim any share in the suit schedule property.

In *Gautam Kundu v State West Bengal* ,[4]the petitioner in the instant case disputed the paternity of the child and requested the Court for blood group test of the child to prove that he was not the father of the child. According to him, if that could be established, he would not be liable to pay maintenance. The concerned High Court while dismissing the revision held that s. 112 of the Indian Evidence Act says where during the continuance of a valid marriage if a child is born, that is a conclusive proof about the legitimacy. Thus, s. 112 constitutes a stumbling block in the way of the petitioner getting his paternity disproved by blood group test. It further observed that the English law permitting blood test for determining the paternity and legitimacy could not be applied in India in view of s. 112 of the Evidence

Act. It must, therefore, be concluded that s. 112 read with s. 4 of the said Act debars the evidence except in cases of non-access for disproving the presumption of legitimacy and paternity.

The Supreme Court observed that blood tests cannot show positively that any man is father, but they can show positively that a given man could or could not be the father. It is obviously the latter aspect that proves more valuable in determining paternity. The Court further observed:--

1. That courts in India cannot order blood test as a matter of course;
2. Wherever applications are made for such prayers in order to have roving injury, the prayer for blood test cannot be entertained.
3. There must be strong prime facie case in that the husband must establish non-access in order to dispel the presumption arising under s. 112 of the Evidence Act.
4. The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
5. No one can be compelled to give sample of blood for analysis.

1 (1921) 48 I.A. 114, 120, 48 Cal. 856, 60 I.C. 837, ('22) A.P.C. 159.

2 *Razia Begum v. Sahebzadi Anwar Begum* ('58) A. A.P. 195.

3 A.I.R. 2004 Kar 22.

4 A.I.R. 1993 SC 2295.

CHAPTER XVII

PARENTAGE -- LEGITIMACY AND ACKNOWLEDGMENT

A.--

ESTABLISHMENT OF PARENTAGE

340.

Legitimacy: when conclusively presumed

The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage has no access to each other at any time when he could have been begotten.

This is s. 112 of the Indian Evidence Act, 1872. The question whether s. 112 of the Evidence Act supersedes the rules of Mahomedan law as to legitimacy was left open in an Allahabad case.[5] The High Court of Allahabad has since held that the section supersedes Mahomedan law, and that it applies to Mahomedans.[6] The same view has been taken in Lahore.[7] The Chief Court of Oudh has held that even if s. 112 applied to Mahomedans, it cannot be applicable to an irregular (*fasid*) marriage, as such a marriage is not a &uot;valid&uot; marriage within the meaning of the section. &uot;Valid&uot; in the view of that

Court, means &uot;flawless&uot;.[8]The marriage in the Oudh case was an irregular marriage, being a marriage with the wife's sister (263). Where a married woman was driven out by the husband within a few days after the marriage, on the ground of her concealed pregnancy, and a child was born to her within about four months after her being driven out, it was held that no presumption under s. 112 of the Evidence Act could be raised, as there was no valid marriage.[9]

Presumption of legitimacy under the Mahomedan law

The rules of Mahomedan law may now be stated (Baillie, 392-393,396-397). They are as follows:--

1. A child born within less than 6 months after marriage is illegitimate.

2. A child born after 6 months from the date of marriage is presumed to be legitimate, unless putative father disclaims the child by *li'an* (333).

The fact of premature birth does not *per se* lead to the inference that the infant is illegitimate. In this connection see also the comments of Denial Latifi in Annual Survey of Indian Law.[10]

See also *Smt. Dukhtar Jahan v. Mohd. Farooq* .[11]

3. A child born within 2 years after the termination of the marriage is presumed to be legitimate, unless disclaimed by *li'an* (s. 333). This is the rule of Hanafi law. According to the Shafei and Maliki law, the period is 4 years. According to the Shia law, it is 10 months.

Points of difference between the two systems.--

(1) *In the contrast with rule 1.*--Under s. 112 a child born even a day after marriage is legitimate, unless the parents had no access to each other at any time at which it could have been begotten.

(2) A child born after 6 months from the date of marriage, but within 280 days of the termination of the marriage is legitimate under either system, subject to *li'an* in the one case, and proof of non-access in the other.

(3) A child born between 280 days and 2 years after the termination of the marriage is legitimate by the Hanafi law, subject to *li'an*. Under the Evidence Act, however, the case will be governed by s. 114 which provides that &uot;the Court may presume the existence of any fact which it thinks likely to have happened, *regard being had to the common course of natural events*.&uot; In a Calcutta case[12]before the passing of the Evidence Act, the Court declined to follow this part of the rule of Mahomedan law in the case of a child born 19 months after the date of divorce, on the ground that to hold that such a child was legitimate 'would be contrary to the course of nature and impossible.&uot;

5 *Muhammad Allahdad v. Muhammad Ismail* (1880) 10 All. 289, 339.

6 *Sibt Muhammad v. Muhammad* (1926) 48 All. 625, 96 I.C. 582, ('26) A.A. 589; See *Ismail Ahmed Peepadi v. Momin Bibi* (1941) 193 I.C. 209, ('41) A.P.C. 11.

7 *Mt. Rahim Bibi v. Chiragh Din* ('30) A.L. 97, 120 I.C. 495; *Ghulam Mohy-ud-Din v. Khizar* (1929) 10 Lah. 470, 114 I.C. 74, ('29) A.L. 6.

8 *Musammat Kaniza v. Hasan* (1926) 1 Luck, 71, 92 I.C. 82, ('26) A.O. 231.

9 *Abdul Rahemankutty v. Aisha Beevi* ('60) A. Ker. 101.

10 (ILI, New Delhi) for 1987 at page 313.

11 1987 (1) SCC 624.

12 *Ashraf Ali v. Ashad Ali* (1871) 16 W.R. 260.

CHAPTER XVII

PARENTAGE -- LEGITIMACY AND ACKNOWLEDGMENT

A.--

ESTABLISHMENT OF PARENTAGE

341.

Legitimacy presumed from presumptive marriage

The legitimacy of a child may be presumed for circumstances from which a marriage itself between its parents may be presumed (268).

Marriages may be established by direct proof or by indirect proof, i.e., by presumption drawn from certain factors. It may be presumed from prolonged cohabitation combined with other circumstances or from acknowledgment of legitimacy in favour of a child or the fact of the &uot;acknowledgment&uot; by the man of the woman as his wife. It is true that the presumption does not apply if the conduct of the parties is inconsistent with the relationship of husband and wife. But if there is no impediment for a lawful marriage, such presumption will be raised by the aforesaid circumstances.[13]

A child born in wedlock cannot be bastardised except on clear proof of non-access.[14]

In *Mahomed Banker v. Shurfoon Nissa* [15] the Privy Council said: &uot;The legitimacy or legitimation of a child of Muhammedan parents may properly be presumed or inferred from circumstances without proof or at least with any direct proof, either of a marriage between the parents, or of any formal act of legitimation.&uot;[16] A statement by a deceased father that he was married to the mother is evidence of marriage from which the legitimacy of the child may be presumed.[17]

13 *Syed Amanullah Hussain v. Rajamma* (1977) 1. Ann. W.R., 123; (1976) 2 A.P. LJ. 323.

14 *Mohd. Haneefa v. Pathummal Beevi* (1972) K.L.T. 512.

15 (I860) 8 M.I.A. 136.159; *Ma Kliatoon v. Ma Mya* (1936) 165 I.C. 232, ('36) A.R. 448.

16 See to the same effect, Ameer Ali, 5th ed., Vol. ii, 213 seq.

17 *Zamin Ali v. Aziz-un-nissa* (1933) 55 All. 139, 144 I.C. 433, ('33) A.A. 329.

CHAPTER XVII

PARENTAGE -- LEGITIMACY AND ACKNOWLEDGMENT

B.--

ACKNOWLEDGMENT OF PATERNITY

342.

Acknowledgment of legitimacy

(1) &uot;Where the paternity of a child, that is, his legitimate descent from his father cannot be proved by establishing a marriage between his parents at the time of his conception or birth, the Mahomedan law recognizes acknowledgment' as a method whereby such marriage and legitimate descent can be established as a matter of substantive law for purposes of inheritance.&uot;

&uot;The Muhammadan law of acknowledgment of parentage with its legitimating effect has no reference whatsoever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible (as in the case of an incestuous intercourse or an adulterous connection), or by reason of marriage necessary to render the child legitimate being *disproved*. The doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is *not proved* in the sense of the law as distinguished from *disproved*. In other words, the doctrine applies only to cases of uncertainty as to legitimacy, and in such cases acknowledgment has its effect, but that effect always proceeds upon the assumption of a lawful union between the parents of the acknowledged child&uot;.[18] In short, the doctrine applies only to cases where either the fact or the exact time of the alleged marriage is a matter of uncertainty, that is, neither *proved* nor *disproved.*[19] Stated in another form, the doctrine is &uot;limited to cases of *uncertainty* of legitimate descent, and proceeds entirely upon an assumption of legitimacy and the establishment of such legitimacy by the force of such acknowledgment&uot;.[20]

The plaintiff was the son of '*K*' through his wife '*B*'. The defendants were the sons of '*K*' through another wife '*H*'. As per Exhibit A-l the marriage between 'K' and 'H' was on 3rd January, 1921 and as per the birth extracts exhibits A-2 and A-3, the defendants were born prior to the marriage between '*K*' and '*H*'. The plaintiff had filed a suit for a declaration that the defendants were not the legitimate sons of his father and to restrain them from interfering with the plaintiffs management and administration of Saint Veliyullah Thaikkal. The trial Court held that the defendants were legitimate sons as there was a valid acknowledgment. However, on appeal, the lower appellate Court held that there was no marriage between '*K*' and '*H*' at the time of the birth of the defendants and therefore they could not be made legitimate by acknowledgment of their legitimacy by the father. The 1st defendant preferred a second appeal.

Held: As there was no marriage between the plaintiffs father and the defendant's mother; prior to their birth as evidence by Exhibits A-2 and A-3, they could not be held to be the legitimate sons of the plaintiff father by relying on the doctrine of acknowledgment. A child born of &uot;zina&uot; could not be made legitimate by acknowledgment. Similarly the defendants who were born before the date of their mother's marriage with the plaintiff's could not be held to be legitimate sons of the plaintiff's father by relying on the

doctrine of acknowledgment.

The Mahomedan law of acknowledgment of paternity could be invoked only when the factum of marriage or the exact time of marriage had not been proved. The doctrine of acknowledgment is based on the assumption of a lawful union between the parents of the acknowledged child. The doctrine, however, is not applicable where the lawful union between the parents of the child is not possible as in the case of incestuous intercourse or an adulterous connection. The doctrine is also not applicable where the marriage necessary to render a child legitimate is disproved.[21]

Where paternity of a child cannot be proved by establishing a marriage between the parents, Mahomedan Law recognises &uot;acknowledgment&uot; as a method whereby such marriage and legitimate descent can be established as a matter of substantive law for purposes of inheritance. This doctrine does not apply to a case where illegitimacy of the child is proved and established either because the lawful union between the parents of the child is impossible or the marriage itself being disproved. The doctrine applies only to a case where the fact of marriage is not proved, as distinguished from disproved. In other words it applies to cases of uncertainty. The acknowledgment may be express or implied. It may be presumed from the fact that the person was habitually and openly treating another as his legitimate child. The acknowledgment must be made in such a way the acknowledger meant to accept the other not only as his child but as his legitimate child. The ages of the parties must be such as to admit of the acknowledger being father of the person acknowledged. The person acknowledged must not be the offspring of *zina*, that is adultery, incest or fornication. The person acknowledged must not be known to be the child of another man. The acknowledgment must not have been repudiated by the person acknowledged. If these conditions are satisfied, the acknowledgment raises a presumption of marriage also. In other words, the marriage also would be held to be proved and the legitimacy established.[22]

Where it is proved that the Child was born prior to marriage.--Principle held not applicable.[23]

(2) The acknowledged child may be a son or a daughter.[24]

Baillie, 406; *Hedaya*, 439: The doctrine of acknowledgment is not a mere rule of evidence, but is part of the substantive law of inheritance. Hence the conditions under which it will take effect must be determined with reference to Mahomedan Jurisprudence.[25]

The leading case on the subject is *Muhammad Allahdad v. Muhammad Ismail* ,[26] a case which has been followed by Courts throughout India and approved by the Privy Council. The passages cited in this section are from the judgment of Mahmood, J. The law was thus stated by the Privy Council in *Sadik Husain v. Hashim Ali.* [27]&uot;No statement made by one man that *another (proved to be illegitimate)* is his son can make the other legitimate, but *where no proof of that kind has been given*, such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement, provided his legitimacy is possible&uot; (345).

18 *Muhammad Allahdad v. Muhammad Ismail* (1888) 10 All. 289, 330, 334-335; *Musst. Bibee Fazilatunnessa v. Musst. Bibee Kamarunncssa* (1905) 9 C.W.N. 352; *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 48 Cal. 856, 60 I.C. 837, ('22) A.P.C. 159 [marriage disproved]; *Sadik Husain v. Hashim Ali* (1916) 43 I.A. 212, 38 All. 627, 36 I.C. 104; *Ihsan v. Panna Lal* (1928) 7 Pat. 6, 103 I.C. 430, ('28) A.P. 19; *Muhammad Shafiqullah v. Nuhullah* (1926) 48 All. 58, 88 I.C. 954, ('26) A.A. 48; *Agha Muhammad v. Zohra Begam* (1928) 3 Luck. 199, 1Q5 I.C. 490, ('28) A.O. 562: *Firoz Din v. Nawab Khan* (1928) 9 Lah. 224, 109 I.C. 779, ('28) A.L. 224 [marriage disproved] *Ibrahim v. Mubarak* (1920) 1 Lah. 229, 56 I.C. 923; *Usmanmiya v. Valli Mahomed* (1916) 40 Bom. 28, 30 I.C. 904; *Mohabbat Ali v. Mahomed Ibrahim* (1929) 56 I.A. 201, 10 Lah. 725, 117 I.C. 17, ('29) A.P.C. 135; *Mahabub Nissa v. Mahomed Yusuff* ('50) A. Hyd. 41.

19 *Muhammad Allahdad v. Mahommad Ismail* (1888) 10 All. 289, 334; *Roshanbai v. Suleman* (1944) 46 Bom. L.R. 328 ('44) A.B. 213; *Tyebhoy Essofalli Thinga v. Collector of Ahmedabad* (1943) 45 Bom. L.R. 1055, 212 I.C. 372, ('44) A.B. 91; *Rafiqa Begam v.Aisha Begam*(1944) 221 I.C. 598, ('44) A.A. 598.

20 (1888)10 All. 289, 337, *supra*.

21 *Mohammed Mian Sahib v. Ali Khan Sahib* (1981) 1 M.LJ. 402 [P. Venugopal, J.].

22 *Syed Amanullah Hussain v. Rajamma* (1977) 1 An. W.R. 123: (1976) 2 A.P. LJ. 323 [Alladi Kuppuswamy, J.].

23 *Mohamed Khan Sahib v. Ali Khan Sahib,* (1981) 94 Mad. L.W. 97: (1981) 1 M.LJ. 402: A.I.R. 1981 Mad. 209 [Venugopal, J.].

24 See *Dhan Bibi v. Lalon Bibi* (1900) 27 Cal. 801.

25 (1888) 10 All. 289, *supra*.

26 (1888) 10 All. 289.

27 (1916) 43 I.A. 212, 234, 38 All. 627, 661, 361 I.C. 104.

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CHAPTER XVII

PARENTAGE -- LEGITIMACY AND ACKNOWLEDGMENT

B.--

ACKNOWLEDGMENT OF PATERNITY

343.

Acknowledgment may be express or implied

An acknowledgment need not be express. It may be presumed from the fact that one person has habitually and openly treated another as his child, that is, as a *legitimate* child.[28]

In *Muhammad Azmat v. Lalli Begum,* [29] their Lordships of the Privy Council said: "It has been decided in several cases that there need not be proof of an express acknowledgment, but that an acknowledgment of children by a Mahomedan as his sons may be inferred from his having openly treated them as such."

In a case in which the question was whether a boy was born naturally or was '*parvarda*' (i.e. brought up in the family), the following observations were made:

"Where there is a valid acknowledgment of legitimacy in favour of a claimant, then the marriage will be held to have been proved and his legitimacy established unless the marriage between the parents is in dispute. Until the claimant establishes his acknowledgment, the onus is on him to prove the marriage. But once he establishes his acknowledgment, the onus shifts on those who deny the marriage to negative it."[30]

28 *Muhammad Azmat v. Lalli Begum* (1831) 9 I.A. 8, 18, 8 Cal. 422; *Khajah Hidayat v. Rai Jan Khanun* (1844) 3 M.I.A. 295, 323 (consecutive course of treatment]; *Mahomed Bauker v. Shurfoon Nissa* (1860) 8 M.I.A. 136, 158-159; *Ashrufood Dowlah v. Hyder Hossein Khan* (1866) 11 M.I.A. 94, 116; *Sadekat Hosein v.Mahomed Yusuf*(1883) 10 Cal. 663, 11 I.A. 31; *Abdool Razak v. Aga Mahomed Jaffer* (1893) 21 Cal. 666, 21 I.A. 56; *Masit-un-nissa v. Pathani* (1904) 26 All. 295; *Musst. Bibee Fazilatunnessa v. Musst Bibee Kamarunnessa* (1905) 9 C.W.N. 352.

29 (1881) 9 I.A. 8, 18, 8 Cal. 422.

30 *Mohammad Yusuf v. Mahboobunnissa Begum* (1971) 1 A.W.R. 97.

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CHAPTER XVII

PARENTAGE -- LEGITIMACY AND ACKNOWLEDGMENT

B.--

ACKNOWLEDGMENT OF PATERNITY

344.

Conditions of valid acknowledgment

In order to render an acknowledgment valid and effective the following conditions must be fulfilled:--

(1) the acknowledgment must be not merely of sonship, but must be made in such a way that it shows that an acknowledger meant to accept the other not only as his son, but as his *legitimate* son[31];

(2) the ages of the parties must be such as to admit of the acknowledger being the father of the person acknowledged;[32]

(3) the person acknowledged must not be the offspring of *zina*, that is, adultery, incest or fornication,[33] as he would be if his mother could not possibly have been the lawful wife of the acknowledger at any time when he could have been begotten, as where the mother was at that time the wife of another man[34] or had been divorced by the acknowledger and the legal bar to remarriage had not been removed[35] or was within prohibited degrees of the acknowledger.[36] If the marriage is *disproved*, the issue would be the issue of fornication.[37]

(4) the person acknowledged must not be known to be the child of another man.[38]

(5) the acknowledgment must not have been repudiated by the person acknowledged.[39]

The above conditions apply whether the acknowledged child is a son or a daughter (342(2)).

Hedaya, 439; Baillie, 408. A synopsis of the above conditions will be found in the Privy Council case of *Habibur Rahman v. Altaf Ali.* [40] Difference between legitimacy and legitimatisation pointed out.[41]

Acknowledgment and burden of proof

As marriage among Mahomedans may be constituted without any ceremonial, direct proof of marriage is not always available. Where direct proof is not available, indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son. This acknowledgment must be not merely of sonship, but of *legitimate* sonship. Further, it must not be impossible upon the fact of it as stated in the present section. If the conditions stated in the section are satisfied, the acknowledgment has more than a mere evidentiary value. "It raises a *presumption of marriage*--a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not *juris et de jure*, it is, like every other presumption of fact, capable of being set aside by contrary proof. The result is that a claimant son who has in his favour a good acknowledgment of legitimacy is in this position: The marriage will be held proved and his legitimacy established unless the marriage is *disproved*. Until the claimant establishes his acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in

fact&uot;.[42] See *Mohammad Yusuf v. Mabboobunnissa (supra)* .

Acknowledgment is sufficient to establish a valid marriage, unless the contrary appears. Provided that no obstacle should exist as for example, the woman is the wife of another. If marriage be in dispute, it has to be established first before acknowledgment of paternity of the child is possible. If marriage was not possible at all, there can be no acknowledgment.[43]

31 *Habibur Rahman v.Altaf Ali*(1921)48 I.A. 114, 120, 48 Cal. 856, 60 I.C. 837, ('22) A.P.C. 159; *Abdool Razak v. Aga Mahomed Jaffer* (1893) 21 Cal. 666, 21 I.A. 56; *Sadakat Hossein v. Mahomed Yusuf* (1883) 10 Cal. 663, 11 I.A. 31; *Jiandkhan v. Province of Sind* ('48) A.S. 130.

32 *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 120-121, 48 Cal. 856, 60 I.C. 837, ('22) A.P.C. 159.

33 *Habibur Rahman v.Altaf Ali*(1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.C. 837, ('22) A.P.C. 159; *Sadik Husain v. Hashim Ali* (1916) 43 I.A. 212, 234, 38 All. 627, 661; 36 I.C. 104; *Rashid Ahmad v. Anisa Khatun* (1932) 59 I.A. 21, 54, All. 46, 135 I.C. 762, ('32) A.PT. 25; *Muhammad Allahdad v. Muhammad Ismail* (1888) 10 All. 289, 334-337; *Mardansaheb v. Rajak-saheb* (1909) 34 Bom. Ill, 4 I.C. 254; *Mohammad Hanif v. Badarannessa* (1938) 42 C.W.N. 272.

34 *Liaqat Ali v. Karim-un-nissa* (1893) 15 All. 396: *Mardansaheb v. Rajaksaheb* (1909) 34 Bom. 111, 41. I.C. 254: *Agha Muhammad v. Zohra Begum* (1928) 3 Luck. 199, 105 I.C. 490, ('28) A.O. 562; *Muhammad Shafiqullah v.Nuh-ullah*(1926) 48 All. 58, 88 I.C. 954, ('26) A.A. 48; *Naiz Mahommad v. Yusuf Khan* ('34) A.L. 462, 154 I.C. 733.

35 *Rashid Ahmad v. Anisa Khatun* (1932) 59 I.A. 21, 54 All. 46, 135 I.C. 762, ('32) A.PC. 25.

36 *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.C. 837, ('22) A.PC. 159.

37 *Dhan Bibi v. Lalon Bibi* (1900) 27 Cal. 801; *Firoz Din v. Nawab Khan* (1928) 9 Lah. 224, 109 I.C. 779, ('28) A.L. 432; *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 119, 121, 48 Cal. 856, 60 I.C. 837, ('22) A.P.C. 159.

38 *Usmanmiva v. Valli Mahomed* (1916) 40 Bom. 28, 30 I.C 904.

39 *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.C. 837, ('22) A.PC. 159.

40 (1921) 48 I.A. 114, 120-121, 48 Cal. 856, 60 I.C. 837, ('22) A.P.C 159.

41 *Mohammad Yusuf v. Maliboobunissa Begum* (1971) 1 A. W.R. 97; following *Habibur Rahaman Chaudhary v. Syed Altaf* AH 48 I.A. 144.

42 *Habibur Rahman v. Altaf Ali* (1921)48 I.A. 114. 121, 48 Cal. 856, 60 I.C. 837, ('32) A.PC 159; *Mahommad Sadiq v. Mohammad Hassan* (1943) 209 I.C. 601, ('43) A.L 225.

43 *Fathima Bi Ammal v. AA. Md. Mohiuddin* (1971) 2 M.L.J. 451; *Fatma Bibi v. Ad. Gen. Zanzibar* ('49) A.PC. 254.

Clause (1): Intention to confer status of legitimacy

The acknowledgment must be not merely of sonship, but of *legitimate* sonship. It must not, however, be supposed that an acknowledgment merely of sonship has no evidentiary value. Acknowledgment as a son *prima facie* means acknowledgment as a legitimate son.[44]

A *mere casual* acknowledgment of paternity, not intended to confer the status of legitimacy, will not have the effect of conferring the status. There must be an intention to confer that status.[45]

44 *Fuzzelun Bebee v. Omdah Bebee* (1868) 10 W.R. 469, cited with approval in *Sadik Husain v. Hashim Ali* (1916) 43 I.A. 212, 232, 38 All. 627, 659, 36 I.C. 104; *Usmanmiya v. Valli Mahomed* (1916) 40 Bom. 28, 33, 30 I.C 904.

45 *Abdool Razack v. Aga Mahomed Jaffer* (1893) 21 I.A. 56, 70, 21 Cal. 666, 679.

Clause (2): Age

The acknowledger must be at least twelve and a half years older than the person acknowledged (Baillie, 411).

Clause (3): Offspring of fornication

The issue of adultery, incest or fornication, cannot be legitimated by acknowledgment. If the marriage is *disproved*, the issue would be the issue of fornication. Similarly, the issue of a re-marriage between divorced persons, where the wife was repudiated by a triple divorce and no intermediate marriage is proved, would also be the issue of fornication on the footing that such re-marriage is void.[46](But see 336 (5) and the notes thereto).

No presumption of marriage arises from long cohabitation if the woman was a prostitute when she was brought to the home of the man whose wife she claims to be.[47] But if the man acknowledges his children by her as his legitimate children, marriage with her will be presumed, for marriage with a prostitute is not prohibited, and she could have been his lawful wife, when the children were begotten.[48] But if it is definitely proved that there was no marriage at all between the parties when the children were begotten, in other words, if marriage is *disproved*, the issue would be the issue of fornication, and they could not possibly be legitimated by acknowledgment.[49]

46 *Rashid Ahmad v. Anisa Khatun* (1932) 59 I.A. 21, 54 All. 46, 135 I.C. 762, ('32) A.P.C 25.

47 *Ghazanfar v. Kaniz Fatima* (1910) 37 I.A. 105, 32, All. 345, 6 I.C. 674.

48 *Imambandi v. Mutsaddi* (1918) 45 I.A. 73, 81-82, 45 Cal. 878, 889-890, 47 I.C. 513.

49 *Ghazanfar v. Kaniz Fatima* (1910) 37 I.A. 105, 32, All. 345, 6 I.C. 674.

Clause (5): Repudiation

The person acknowledged is entitled to repudiate the acknowledgment, if he has attained the age when he can understand the transaction.

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CHAPTER XVII

PARENTAGE -- LEGITIMACY AND ACKNOWLEDGMENT

B.--

ACKNOWLEDGMENT OF PATERNITY

345.

Right of inheritance

If an acknowledgment is of legitimate sonship, and that relationship is possible in fact and in law (344), it raises a presumption of marriage between the acknowledger and the mother of the person acknowledged, and unless rebutted, gives such person the right of inheritance to the acknowledger as his legitimate child,[50] and a similar right also to the mother as the lawful wife of the acknowledger.[51]

Clear and reliable evidence that a Mahomedan has acknowledged a child as his legitimate issue raises a presumption of a valid marriage between him and the children's mother.[52]

50 *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60' I.C 837, ('22) A.P.C. 159; *Mahommad Azmat v. Lalli Begum* (1881) 8 Cal. 422, 9 I.A. 8, *Sadakat Hossein v. Mahomed Yusuf* (1883) 10 Cal. 663, 11 I.A. 31.

51 *Khajah Hidayut v. Rai Jan Khanum* (1844) 3 M.I.A. 295, 318; *Wise v. Sunduloonissa* (1867) 11 M.I.A. 178, 193; *Newab Mulka Jehan v. Mahomed* (1873) Sup. Vol. I.A. 192; *Khajooroonissa v. Rowshan Jehan* (1876) 2 Cal. 184, 199, 3 I.A. 291; *Mahatala v. Heleemoozooman* (1881) 10 C.L.R. 293; *Imambandi v. Mutsaddi* (1918) 45 I.A. 73, 82, 45 Cal. 878, 890, 47 I.C 513; *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.C 837, ('22) A.PC. 159.

52 *Imambandi v. Mutsaddi* (1918) 45 I.A. 73, 81-82, 56 Cal. 878, 889, 890, 47 I.C 513.

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CHAPTER XVII

PARENTAGE -- LEGITIMACY AND ACKNOWLEDGMENT

B.--

ACKNOWLEDGMENT OF PATERNITY

346.

Acknowledgment of legitimacy irrevocable

An acknowledgment once made cannot be revoked.[53]

53 *Ashrufood Dowlah v. Hyder Hossein* (1866) 11 M.I.A. 94; *Muhammad Allahdad v. Muhammad Ismail* (1888) 10 All. 289, 317.

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CHAPTER XVII

PARENTAGE -- LEGITIMACY AND ACKNOWLEDGMENT

B.--

ACKNOWLEDGMENT OF PATERNITY

347.

Adoption not recognized

The Mahomedan law does not recognize adoption as a mode of filiation.[54]

Where custom is given priority by legislation over general Mahomedan law as in the Punjab, Oudh and some other places (11, 12, 13 and 15 above), a special family or tribal custom of adoption will, if proved,

prevail over that law.

The Oudh Estates Act, 1869, s. 29, permits a Mahomedan talukdar to adopt a son to him.[55]

The retention by Hindu converts to Mahomedanism of Hindu usages of inheritance and succession does not carry with it the Hindu custom of adoption. The burden of proving that the custom of adoption has also been retained lies on those who assert it.[56] Although a Mahomedan may be entitled under the law prevailing in a Native State to adopt a son, such a son cannot succeed to the property of his adoptive father in India in the absence of evidence establishing a custom to that effect in India.[57]

The above notes to this section are to be read subject to the Shariat Act, 1937.

Madras Shariat [Amendment Act (XVIII of 1949)] s. 3(1)--Adoption--Custom or usage to the contrary when shall stand abrogated.[58]

54 *Muhammad Allahdad v. Muhammad Ismail* (1888) 10 All. 289, 340; *Muhammad Umar v. Muhammad Niaz-ud-Din* (1912) 39 Cal. 418, 39 I.A. 19, 13, I.C. 344; *Mir Zaman v. Nur Alam* (1936) 162 I.C 314, ('36) A. Pesh. 108.

55 See *Abdul Halim Khan v. Saadat Ali Khan* (1932) 59 I.A. 202, 7 Luck. 194, 136 I.C. 745, ('32) A.PC. 137.

56 *Bai Machhbai v. Bai Hirbai* (1911) 35 Bom. 264, 10 I.C. 816.

57 *Ayubshah v. Babalaal* (1938) Bom. 150, 39 Bom. L.R. 1324, 173 I.C. 801, ('38) A.B. 111.

58 *Moulvi Mohammed v. S. Mahaboob Begum* (1983) 2 M.L.J. 357 [S. Nainar Sundaram, J.].

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CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

A.--

APPOINTMENT OF GUARDIANS

348.

Age of majority

In this Chapter, &uot;minor&uot; means a person who has not completed the age of eighteen years.

*See*the Indian Majority Act IX of 1875, s. 3, and the Guardian and Wards Act VIII of 1890, s. 4 cl. (1).

Age of majority under the Mahomedan law

According to the Islamic law, the minority of a male or female terminates when he or she attains puberty. Among the Hanafis and the Shias, puberty is presumed on the completion of the fifteenth year. Under the Indian Majority Act (s. 3), minority ceases on the completion of the eighteenth year, unless a guardian of the person or property or both of the minor has been or shall be appointed before the minor has attained the age of eighteen years, or the property of the minor is under the superintendence of a Court of Wards, in which case the age of minority is prolonged until the minor has completed the age of twenty-one years.

Under the Mahomedan Law any person who has attained puberty is entitled to act in all matters affecting his or her status or his or her property. But the law has been materially altered by the Indian Majority Act. This Act applies to all matters of Mahomedans except (1) Marriage, (2) Dower (3) Divorce. In all other matters, the age of majority remains eighteen years. Until then, the Court has power to appoint a guardian of his person or property or both under the Guardian and Wards Act. (see notes to 115 above)

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CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

A.--

APPOINTMENT OF GUARDIANS

349.

Application for appointment of guardian

All applications for the appointment of a guardian of the person or property or both of a minor are to be made under the Guardians and Wards Act, 1890.

Any person who is entitled to be a guardian by the Mahomedan law may act as such without any previous order of the Court. But there is nothing to prevent him from applying to the Court under the Guardians and Wards Act, that he may be appointed or declared a guardian under the Act. He is not bound to wait until his legal title or fitness to act as guardian is disputed by another person. The application for the appointment may be made not only by a person desirous of being[1] or claiming to be, the guardian of the minor, but also by any relative or friend of the minor, and in some cases by the Collector (s. 8 of the Act). It should be in the form prescribed by s. 10 of the Act, and no order should be made unless notice of the application is given to persons interested in the minor (s. 11 of the Act).

1 *In re Lovejoy Patell*(1943) 2 Cal. 554 ('44) A.C. 433.

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CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

A.--

APPOINTMENT OF GUARDIANS

350.

Power of Court to make order as to guardianship

When the Court is satisfied that it is for the welfare of a minor that an order should be made (1) appointing

a guardian of his person or property, or both, or (2) declaring a person to be such guardian, the Court may make an order accordingly.

Guardians and Wards Act, 1890s. 7.

CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

A.--

APPOINTMENT OF GUARDIANS

351.

Matters to be considered by Court in appointing guardian

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, *consistently with the law to which the minor is subject*, appears in the circumstances to be for the *welfare* of the minor.

(2) In considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

It is true that the father is not proved to have lost the right of being appointed as the guardian of the minor. He has no defect and he being the natural guardian of the minor could be appointed provided it was in the interests of the minor. Minor cannot be forced to live with the father because that may cause psychological deterioration to the minor and may eventually affect his health also because at this age he needs love and affection. He being of the age of seven cannot show his preference as to with whom he wants to live. If he is given affection and love which he needs at this age by the respondent or the appellant No. 1, then he should be permitted to have the affection and love of any one of them. For that purpose it is necessary to ascertain the wishes of the minor.

If the minor is capable of making the preference, he should be brought to the Court and thereafter order of appointment of guardian should be made.[2]

Welfare of the minor

The above section is a reproduction in terms of s. 17 cls. (1), (2) and (3), of the Guardian and Wards Act. It imposes a duty upon the Court in appointing a guardian to make the appointment *consistently with the law to which the minor is subject.* The central idea is the welfare of the minor, and the Allahabad and Jammu & Kashmir High Courts have said that though the rules of Mahomedan law have to be taken into

consideration the main question to be considered is what would be conducive to the child's welfare.[3] In a Rangoon case the mother has lost her right under Mahomedan law as she has been divorced and had remarried a Buddhist. She was nevertheless appointed guardian, as the Court considered that the interests of the minor would be best promoted by leaving her with the mother.[4] The mother would be the proper guardian for children of tender years, even though she lived separate from her husband owing to disputes over property, provided that she had not been guilty of misconduct.[5]

Under the Muslim Personal Law the mother is entitled to the custody (*Hizanat*) of her male child until he has completed the age of seven years and of the female child until she has attained puberty. Puberty is attained at the age of 14 or 15 years.

Another principle of law which is too well established is that in a proceeding for appointment of guardian, it is not that guardianship of the minor which is of importance, but the welfare of the minor has to be taken into consideration. If there is a conflict between the personal law to which the minor is subject and the consideration of the minor's welfare, the latter must prevail.

In appointing the respondent grandmother as guardian of the minor children, the Court below was not guided by what in the circumstances was conducive to the welfare of the minors and this order, therefore, cannot be upheld. The mother's application has to be allowed and the mother be appointed as guardian. Neither the mother nor the grandmother can be the guardian of the property of the minors.[6]

2 *Mst. Aisha & Another v. Bashir Ahmed Haji* (1987) J&K. 68.

3 *Mt. Haidri v Jawad Ali* (1934) All. L.J. 399, 150 I.C. 149, ('34) A.A. 722; *Sakina Begum v. Malka Ara Begum* ('48) A.A. 198; *Hasan Bhat v. G.M. Bhat* ('61) A. J.&K. 5; *Mohd. Amin v. Ateeka Banu,* ('63) A. J&K. 32.

4 *Ma Juli v. Moola Ebrahim* (1933) 145 I.C. 843, ('33) A.R. 210.

5 *Zynab Bibi v. Muhammad Ghouse* ('52) A.M. 284.

6 *Mostt. Bibi Saira Khatoon v. Mostt. Bibi Shahidan Khatoon* (1978) B.LJ.R. 420 [Medini Prasad Singh, J.].

Conflict between the Guardian and Wards Act, 1890, and the personal law

Where the provisions of the personal law are in conflict with the provisions of the Guardians and Wards Act, the latter will prevail over the former. Where the father of a Mahomedan minor girl was living and there was nothing to show that he was unfit to be guardian of the minor, he was entitled to retain the custody of the minor as against the preferential right under Mahomedan Law of the maternal aunt of the minor's mother. In other words, the provisions of s. 19 of the Act would prevail over the provisions of s. 17,[7]

7 *Rafiq v. Smt. Bashiran* ('63) A. Raj. 239.

CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

B.--

GUARDIANS OF THE PERSON OF A MINOR

352.

Right of mother to custody of infant children

The mother is entitled to the custody (*hizanat*) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child,[8] unless she marries a second husband in which case the custody belongs to the father.[9]

The principles propounded in these sections cannot, however be read in isolation and divorced from the provisions of the Guardians and Wards Act which vests in the court a discretion to direct the return to the custody of a guardian, a ward, who leaves or is removed from his custody in appropriate cases where the Court thinks that such a direction is necessary for the well being of the ward.

Where the dictates of personal law indicate one course of act ion and considerations of the welfare of the minor indicate another, the former must be sub-ordinated to the latter. The words that furnish a key to the correct legal position are to be found in s. 17 of the Guardians and Wards Act. Principles of personal law must be applied "subject to the provisions of this section". In other words, if there is a conflict between the personal law to which the minor is subject and considerations of his or her welfare, the latter must prevail.[10]

See Also:--*Mostt. Bibi Saira Khatoon v. Mostt. Bibi Shahidan Khatoon* .[11]

In *Akhtar Begum v. Jamshed Munir* .[12]

. The petitioner (mother) moved a petition firstly under s. 25 of the Act for custody of her minor daughter and then filed an application under s. 12 of the Act for temporary custody by invoking personal law of the parties. The petitioner and the respondent (her husband) were Sunni Muslims governed by the Hanafi Law of Sunni Muslims. The s. 12 application was dismissed by the trial Court which was influenced by the general principles of law of guardianship and lost sight of the personal law of the parties.

. The personal law of the parties enjoining custody of a minor girl being given to the mother till the minor attains the age of puberty is a vital factor in determining even the question of temporary custody. The Court below has not kept this aspect in view. That would bring the impugned order within the mischief of exercising jurisdiction illegally, "that is, in breach of some provision of law" as held by the Supreme Court in M.L. Sethi's case.[13]

Hedaya, 138; Baillie, 435.

Under the Hanafi law, the mother is the guardian of a minor girl till she attains puberty and of a male child till he attains the age of seven years. The same was reiterated by the Bombay High Court,[14] that it is the mother who is entitled to the custody of a male child until he has completed the age of 7 years or of a female child until she attains puberty. This 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 father.

On the other hand, the Bombay High Court in *Irfan Ahmad Shaikh v Mumtaz* [15] has held that the mother may be given the custody of the minor child even though she has remarried with a stranger, provided that the wishes, interest and the welfare of the child such a custody warrants. The difference between custody and guardianship has been explained in *Khatija Begum v. Ghulam Dastgir.* [16]

The mother of the child shall not suffer disqualification to have custody of the child for the mere fact that she is not residing with her husband, the child's father. If there exist circumstances to show that it was difficult for her to reside with her husband or that she had not forsaken voluntarily her husband's company,

she should not be penalised. That apart, importance must be attached to the main rider, namely, she rides &uot;at a distance from the father's place of residence.&uot; Indeed the court must be read the underlying meaning of the rider. Even if the mother must have custody of the child of the tender age, till he attains the age of 7 years, the father must not be denied access to the child.[17]

Nature and extent of right of hizanat (custody)

In *Imambandi v. Mutsaddi,* [18] their Lordships of the Privy Council said: &uot;It is perfectly clear that under the Mahomedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under/ the Sunni law) is the legal guardian.&uot;

It would appear from the passage quoted above that the father is the primary and natural guardian of his minor children, and that the right of custody of the mother and the female relations mentioned in 353 below is *subject to the supervision of the father* which he is entitled to exercise, by virtue of his guardianship. If so, the right of *hizanat*does not carry with it all the powers which a guardian of the person of a minor has under the Guardian and Wards Act, 1890. (*see* note to 357 &uot;Father as guardian of his minor children.&uot;)

If the minor's mother remarries, the real father can file an application under s. 25 and claim custody on the ground of the remarriage. He is not required to wait till the minor attains the age of 7 years.[19]

Section 25--*Scope--Custody of minor--Welfare of minor--If sole criterion--Right of legal guardian*.

Where the minor aged 10-11 years is in the custody of his mother and he has intelligently exercised his preference to continue to stay with her, his custody cannot be disturbed and given to his father though he is the legal guardian of the minor under the personal law (*viz.*, Mahomedan Law). A mere claim to legal guardianship in such a situation will not stand on a higher footing than the claim of the real mother to continue to have the custody of the minor who has remained in her custody or in the custody of her mother since the birth of the child. (Case-law discussed).[20]

Even during the marriage the custody of the minor children in case of a boy until he attains the age of 7 years, and in the case of a female until she attains puberty is with the wife. The right of the father to the custody of the child is deferred, and the primary right is in the mother, and in the absence of the mother, in mother's female heirs. As long as the right to custody is with the mother, the mother is deemed to be also having the custody and care of the minor. If that is so, it is obvious that the mother during the period laid down by the Mahomedan Law has both the custody and the care of the minor as long as she is not disqualified from retaining the custody of the minor.[21]

Where under the personal law, the mother is entitled to the custody of the minor child, she should normally get the custody of the minor but she may be deprived of the custody if the evidence on record shows that it would not be in the interest of the minor to give the minor the custody of the mother. Thus the provisions of the personal law are to be applied consistently with the provisions of the Guardians and Wards Act. The welfare of the minor can be determined only on the basis of evidence for which opportunity will have to be afforded to the party seeking it.[22]

The mother is not a de jure guardian of her children under Mahomedan Law, and therefore, has no right to sell the interest of her minor children in immovable property. Such transaction is not merely voidable but totally void.

The mother, a Mahomedan widow, act ing as guardian for her two children executed a sale deed. The amount borrowed was admittedly utilised in the payment of the deceased father's debts. The minor sought

to set aside the sale. The defendants filed a counterclaim claiming proportionate share of minors in the father's debts. The trial Court decreed the suit but the lower appellate Court held that the plaintiff was liable for the proportionate share of the debts.

On appeal held: Section 41 of the Specific Relief Act 1877 (now s. 33 of the Specific Relief Act, 1963) clearly provides that when the Court adjudged cancellation of an instrument on the ground that it was void or voidable, it had the power to call upon the plaintiffs at whose instance the instrument was adjudged void or voidable, to restore so far as may be any benefit which they might have received from the other party and to make any compensation to him which justice may require. On the ground that their mother was not competent to act as their guardian and dispose of the property when the plaintiffs sought to recover their share of the property, certainly they should pay their share of the liability because admittedly the sale proceeds were applied for the discharge of the debts of the estate.[23]

The mother has no right to be the legal guardian of minor's property and cannot enter into any agreement to alienate it.[24]

See *Enamul Haque v. Bibi Taimunissa* .[25](The mother is entitled to the custody of he female child until she has attained puberty).

8 Baillie, 435; *Zarabibi v. Abdul Rezzak* (1910) 12 Bom. L.R. 891.8 I.C. 618; *Emperor v. Ayshabai* (1904) 6 Bom.L.R. 536; *Allah Rakhi v. Karam Illahi* (1933) 14 Lah. 770, 147 I.C. 123, ('33) A.L. 969; *Mt. Haidri v. Jawad Ali* (1934) All. LJ. 399, 150 I.C. 149, ('34) A.A. 722.

9 *Ulfat Bibi v. Bafati* (1927) 49 All. 773, 102 I.C. 103, ('27) A.A. 581.

10 *Mohd. Yunus v. Shamshad Bano* 217 A.I.R. 1985 All.

11 (1978) B.L.J.R. 420.

12 I.L.R. 1979 II Del. 249 A.I.R. 1979 Delhi 67.

13 A.I.R. 1972 S.C. 2379.

14 *Abdul Sattar Husen v. Mrs Shahina* A.I.R. 1999 Bom 25.

15 A.I.R. 1996 Bom 134.

16 (1975) 2 All. W.R. 194*D.B. Kumaraswami v. Rajammal* ('57) A. Mad. 563.

17 *Mumtaz Begum v. Mubarak Hussain,* A.I.R. 1986 M.P. 221.

18 (1918) 45 I.A. 73, 83-84, 45 Cal. 878, 47 I.C. 513; *Ulfat Bibi v. Bafati* (1927) 49 All. 773, 102 I.C. 103, ('27) A.A. 581; *Mt. Siddiq-un-nissa v. Nizam- uddin* (1932) 54 All. 128, 137 I.C. 219, ('32) A.A. 215; *Mt. Ghuran v. Riaz Ahmad* (1935) 11 Luck. 553, 158 I.C. 581, ('35) A.O. 492; *Fatima Bibi v. Pentu Saheb* (1941) 2 M.L.J. 548, (1941) M.W.N. (1049), ('41) A.M. 944.

19 *Smt. Ainunnisa v. Mukhtar Ahmad,* A.I.R. 1975 All. 67 [M.P. Mehrotra. J.].

20 *Smt. Ainunnisa v. Mukhtar Ahmad.* A.I.R. 1975 All. 67 [M. P. Mehrotra, J.].

21 *Mohammed Shafi v. Shamin Banoo.* A.I.R. 1979 Bom. 156 [Tulpule, J.].

22 *Salamat Ali v. Majjo Begum* (1985) AXR. All. 29 & 31.

23 *Fatima Bibi v. Sadhakatalla* (1977) 1 M.LJ. 473: 90 L.W. 41: A.I.R. 1977 Mad. 215 [M. M. Ismail, J.].

24 A.I.R. 1963 S.C. 1405, referred to [C.P. Sen and B.C. Verma, JJ.]. *Gurubux Singh Corowara v. Smt. Begum Rafiya Khurshid.* A.I.R. 1979 MP. 66.

25 ('67) A.P. 344

Shia law

Under the Shia law, the mother is entitled to the custody of a male child until he attains the age of two years, and of a female child until she attains the age of seven years. After the child has attained the abovementioned age, the custody belongs to the father.[26] If the mother dies before the child has attained that age, the father is entitled to the custody.[27] On the death of both the parents, the custody belongs to the father's father. It is doubtful to whom the custody belongs in the absence of the father's father: Baillie, II, 95.

26 *Ladli v. Mahomed* (1887) 14 Cal. 615.

27 *Salim-un-nissa v. Saadat* (1914) 36 All. 466, 24 I.C. 632.

Shafei law

It has been observed that under Shafei Law the mother is entitled to the custody of her daughter even after she has attained puberty and until she is married.[28]

28 *Muhaidin Tharaganar v. Sainambu Ammal* (1941) Mad. 760, (1941) 1 M.L.J. 503, (1941) M.W.N. 308, ('41) A.M. 582.

CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

B.--

GUARDIANS OF THE PERSON OF A MINOR

353.

Right to female relations in default of mother

Failing the mother, the custody of a boy under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below:--

(1) mother's mother, how highsoever;

(2) father's mother, how highsoever;

(3) full sister;

(4) uterine sister;

(5) [consanguine sister];

(6) full sister's daughter;

(7) uterine sister's daughter;

(8) [consanguine sister's daughter];.

(9) maternal aunt, in like order as sisters; and

(10) paternal aunt, also in like order as sisters.

Hedaya, 138; Baillie, 435-436. Neither the *consanguine* sister (No. 5) nor her daughter (No. 8) is expressly mentioned either in the *Hedaya* or the *Fatawa Alamgiri*; it almost seems as if the omission is accidental, for *paternal aunts* are expressly mentioned.

If the minor's mother has lost her right by remarriage, the mother's mother has a right of guardianship preferential to the father's mother.[29] A maternal aunt has a preferential right to the custody of a minor over the step-mother of the father of the minor.[30] It has been held that the rights of the female relations of the mother cannot be taken away by the father appointing by his will other persons as the guardians of his minor children.[31]

The Andhra Pradesh High Court held that a mother can have custody upto the age of 7 years in case of a boy, in the absence of his mother it is the mother of the mother that gets the custody of the child but not the father. After 7 years the father can claim custody of the child and if the Court feels-that he is unfit to be appointed as a guardian, then it can entrust the custody of the child to another person keeping the welfare of the child which is a paramount consideration in passing order by the Court.[32]

In the instant case, the Kerala High Court observed that it would always respect the sentiments of the grandmother (mother's mother). Child's mother has committed suicide; father later remarried and has got children in that marriage. Conduct of remarriage by the father of the child itself is not a ground to reject the prayer for custody. Welfare of the child is of paramount consideration. By giving due respect to the sentiments expressed by the grandmother, the Court is of the view, it is for the welfare of the child that the child be with the father.[33]

In *Ather Hussain v Syed Siraj Ahmad* ,[34] the Apex Court granted interim injunction restraining father from interfering with the custody of children until disposal of custody proceedings. The Court held that the respondents despite the voluminous allegations levelled against the appellant have not been able to prove that he (the father) is not fit to take care of the minor children nor has the Family Court or the High Court found him so. However, the question of custody is different from the question of guardianship. Father can continue to be the natural guardian of the children. However, the considerations pertaining to the welfare of the child may indicate lawful custody with another friend or relative as serving his/her interest better.

29 *Nur Begum v. Mt. Begum* (1934) 149 I.C. 972, ('34) A.L. 274.

30 *Tumina Khatun v. Goharjan Bibi* (1941) 1 Cal. 419, 45 C.W.N. 515, ('42) A.C. 281.

31 *In re Isso*(1942) Kar. 215 ('42) A.S. 113.

32 *Syed Liaquat Hussain v Superintendent of Polic Kurnool* LNIND 2002 AP 935.

33 *P. Ayishakkutty v Abdul Samad* A.I.R. 2005 Ker 68.

34 [2010] 2 MLJ 967.

CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

B.--

GUARDIANS OF THE PERSON OF A MINOR

354.

Females when disqualified for custody

female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody--

(1) if she marries a person not related to the child within the prohibited degrees (260-261), e.g., a stranger,[35] but the right revives on the dissolution of marriage by death or divorce;[36] or,

(2) if she goes and resides, during the subsistence of the marriage, at a distance from the father's place of residence; or,

(3) if she is leading an immoral life, as where she is a prostitute;[37] or

(4) if she neglects to take proper care of the child.

Hedaya, 138-139; Baillie, 435-436.

The reason of the rule in cl. (1) is that if a woman marries a man not closely related to the child, the child may not be treated kindly. It is otherwise, however, where the mother, for instance, marries her child's paternal uncle or the maternal grandmother marries the paternal grandfather because these man, begin as parents, it is to be expected that they will treat the child kindly: *Hedaya*, 138. Where, however, there are no relations willing and able to look after the minor child, the mother who has become disqualified by marrying a stranger may be appointed by the Court as the guardian of her minor child.[38] But it is open to the Court to appoint the mother as the guardian even if she has married a stranger, if the Court considers it to be in the interest of the minor. Thus such a mother was preferred to a paternal aunt, who had married and was not in a better financial position that the mother[39] and similarly in a Pakistani case, where the father gave up all claims to the custody of the child when the child was of tender age, and the mother, upon divorce, married a stranger and the minor was well looked-after by the mother and where the minor being of the age of discretion refused to go to the father, the Court allowed the mother to retain custody of the child and rejected the father's application, the welfare of the minor being the prime consideration.[40]

This principle spelled out in the Mahomedan law is based on practical experience based on considerations which are conducive to the proper growth of the child. It cannot be disputed that a child of that tender age would feel psychologically most secure in the company of the mother rather than the father. No one can compete with the mother in that respect ordinarily. The amount of love and care which a child receives from the mother cannot be had or expected from any other relation including the father. It is necessary to dilate on the subject as, in my opinion, the law has been very ably summed up by the Division Bench decision of this Court in the case of Hafizur Rahaman (1983 All. WC 572) (supra). I however, cannot resist the temptation of citing a very apposite passage from 'Hedaya' Hamilton (Vol. 1) page 385:--

&uot;If a separation takes place between a husband and wife, who are possessed of an infant child, the right of nursing and keeping it rests with the mother because it is recorded that the woman once applied to the prophet, saying 'O prophet of God; this is my son, the fruit of my womb, cherished in my bosom and suckled at my breast, and his father is desirous of taking him away from me into his own 'care' to which the prophet replied 'thou hast a right in the child prior to that of thy husband. So long as thou does not marry with &uot;a stranger&uot; '. Moreover, a mother is naturally not only more tender, but also better qualified to cherish a child during infancy, so that committing the care to her is of advantage to the child.&uot;[41]

The High Court of Guwahati has held that as per the law of guardianship under Muslim Law, in case the mother of a female minor child marries for a second time, the custody of such child normally belongs to her former husband. But, in case the former husband is no more, the following female relations are entitled to the custody in order of priority (*i*) mother's mother, howsoever, (*ii*) father's mother, how highsoever and (*iii*) full sister and other female relations including aunts[42]

In another case, the Madras High Court has held that if a woman marries a person not related to the child within a prohibited degree i.e. a stranger, it is a disqualification under the Mohammedan Law to have the custody of the child. Though under the Mohammedan Law she is entitled to have the child till she attains puberty, since the mother had married a stranger, she is not entitled to have the custody of the child. Moreover, the paramount interest and the welfare of the child are the criteria to have the custody of the child. In the instant case, the evidence on record would show that the father of the child is in a sound financial position to give all comforts to the child.[43]

Apostasy

Apostasy is stated in *Fatawa Alamgiri* to be a ground of disqualification. \The reason given is that a woman who relinquishes the Moslem faith has to be kept in prison till she returns to the Mahomedan faith: Baillie. 435. But this reason cannot apply in India: hence apostasy would not be disqualification in India: Baillie, 435, f.n. (3). (*see* also Act XXI of 1850, and notes on 271 above)

35 *Nur Begum v. Mt. Begum* (1934) 149 I.C. 972, ('34) A.L. 274; *Kundan v. Aisha Begum* (1938) A.L.J 982, 173 I.C. 1003, ('39) A.A. 15; *Mir Mahomed v. Mujeebunnissa* ('52) A.M. 280. *Mst. Zadha Begum v. Mohd. Nazir Khan* , 1966 P.L.D. Azad J.&K. 1 (divorced mother on marrying stranger not related to minor daughter within prohibited degrees loses right to custody).

36 *Fussehun v. Kajo* (1884) 10 Cal. 15; *Bhoocha v. Elahi Bux* (1885) 11 Cal. 574; *Ansar Ahmad v. Samidan* ('28) A.O. 220, 106 I.C. 882.

37 *Abasi v. Dunne* (1878) 1 All. 598.

38 *In re Ghulam Mahomed*(1942) Kar. 363, ('42) A.S. 154.

39 *Haliman Khatoon v. Ahmadi Begum* (1949) All. L.J. 223, ('49) A.L. 627.

40 *Amar Ilahi v. Rashida Akhtar* (1955) Lah. 501 ('55) P. Lah. 412.

41 *Khurshid Gauhar v. Siddiqunnissa* (1986) All. 114, A. J.R.

42 *Musstt. Rahima Khatoon v. Musstt Saburjanessa* A.I.R. 1996 Gau 33.

43 *Arafathunnisa v. T.I. Zeeyavuddoen* [2011] 1 MLJ 1335.

CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

B.--

GUARDIANS OF THE PERSON OF A MINOR

355.

Right of male paternal relations in default of female relations

In default of the mother and the female relations mentioned in 353, the custody belongs to the following persons in the order given below:--

(1) the father;

(2) nearest paternal grandfather;

(3) full brother;

(4) consanguine brother;

(5) full brother's son;

(6) consanguine brother's son;

(7) full brother of the father;

(8) consanguine brother of the father;

(9) son of father's full brother;

(10) son of father's consanguine brother;

Provided that no male is entitled to the custody of an unmarried girl, unless he stands within the prohibited degrees of relationship to her (260-261).

If there be none of these, it is for the Court to appoint a guardian of the person of a minor.

Hedaya, 138-139; Baillie, 437.

It is clear from the proviso to the section that though a boy may be put in the custody of his paternal uncle's son, a *girl* should not be entrusted to him, for he is not within the prohibited degrees: Baillie, 437.

Under Muslim law, after the age of 7 years, it is the father who is entitled to the custody of the child, unless the Court holds on evidence, the father is not a fit person or that it is not conducive to the health whether physical or mental of the child, ordinarily, the child would be with the father. On evidence, since nothing is brought out against the father to show, he is unfit he is entitled to the custody of the child.[44]

Guardian of property of person of unsound mind

Brother cannot act as guardian.[45]

44 *Mohammed Jameel Ahmed Ansari v. Ishrath Sajeeda* (1983) 1 An. W.R. 49 [Raghuvir and Rama Rao, JJ.].

45 A.I.R. 1918 P.C. 11: 16 All. L.J. 800 (P.C). Applied. [K. C. Agarwal, J.] *Anwar A li v. Abdul Hamil* (1981) 7 All. L.R. 110.

CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

B.--

GUARDIANS OF THE PERSON OF A MINOR

356.

Custody of child wife

The mother of a girl who is married, but has not attained puberty, is entitled to the custody of the girl as against the husband of the girl.[46]

See Guardian and Wards Act, 1890, s. 19.

Husband as guardian

The court has no power under the Guardian and Wards Act [s. 19(1)] to appoint a guardian of the person of a minor, where the minor is a married woman, and her husband is not in the opinion of the Court *unfit* to be the guardian of her person. If it be a rule of the Mahomedan law that a husband is not entitled to the custody of his wife until she has attained puberty, it must be taken to rest on the hypothesis that he is unfit by that law for that custody. If so, the Court may hold under s. 19 of the Guardian and Wards Act that a Mahomedan husband is "unfit" within the meaning of that section to be the guardian of the person of his wife until she has attained puberty, and may, consistently with the provisions of that section, appoint her mother as her guardian until she attains puberty.

46 *Nur Kadir v. Zuleikha Bibi* (1885) 11 Cal. 649; *Korban v. Emperor* (1904) 32 Cal. 444.

CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

B.--

GUARDIANS OF THE PERSON OF A MINOR

357.

Right of father and paternal male relations to custody of boy over seven and of girl who has attained puberty

The father is entitled to the custody of a boy over seven years of age[47] and of an unmarried girl who has attained puberty. Failing the father, the custody belongs to the paternal relations in the order given in 355 above, and subject to the proviso to that section. (*see* 355 and the case noted there.)

If there be none of these, it is for the Court to appoint a guardian of the person of the minor.

Hedaya, 129; Baillie, 438.

Father as guardian of his minor children

The Court has no power under the Guardian and Wards Act [(s. 19(2)] to appoint a guardian of the person of a minor whose father is living, and is not in the opinion of the Court *unfit* to be guardian of the minor.[48] A father is under the Mahomedan law entitled to the custody of his son after he has completed the age of seven years, and of his daughter after she has attained the age of puberty, but there is no rule of Mahomedan law that he is entitled to that custody even if he is unfit for it. The Court, therefore, has power to appoint the mother or any other person whom it thinks proper, guardian of the person of the minor, if the father is, in its opinion, unfit to be such guardian. The Court is not bound, if the father is unfit, to appoint the person entitled next after him, namely, the father's father, guardian of the person of the minor, for the father's father has no legal right to the guardianship during the lifetime of the father. The paramount consideration in such a case should be the *welfare* of the minor. The fact that the father has married again does not render him unfit for the guardianship of his child.[49]

A second marriage by the father does not make him unfit to be the guardian.[50]

A father is entitled to the custody of a minor in preference to the maternal grandmother.[51] The father is the natural guardian of a minor Mahomedan girl and no other person can be appointed by the Court under s. 19 of the Guardians-and Wards Act, 1890, unless the father is unfit. However giving the maternal grandmother the custody of the minor does not offend s. 19 in the absence of the mother and when the minor is below the specified age.[52]

47 *Idu v. Amiran* (1886) 8 All. 322.

48 *Besant v. Narayanidh* (1914) 41 I.A. 314, 324, 38 Mad. 807, 822, 24 I.C. 290.

49 *Siddiq-un-nissa v. Nizam-uddin* (1932) 54 All. 128, 137 I.C. 219; ('32) A.A. 215.

50 *Khatija Begum v. Ghulam Dastgir* (1975) 2 An. W.R. 194; *Andiappa v. Nallendrani* 39 Mad. 473.

51 *Shakra Begum v. Ahmed Hasan* : 1972 An. W.R. 310.

52 *Khatija Begum v. Ghulam Dastgir* (1975) 2 An. W.R. 194.

Testamentary guardian of person

The father may, it seems, entrust the custody of his minor children to the executor appointed by his will:

Baillie. 676.

It has been held by the Chief Court of Sind that where the father at the time of his death was not entitled to the custody of the children, he was not entitled to appoint by will a guardian of the person of his children in derogation of the rights of the persons entitled to act as such guardians under the Mahomedan law. As the mother had predeceased the father, the female relations of the mother were held entitled to the guardianship of the minor daughters although the father had appointed by will a great-paternal uncle of the minor daughters as their guardian.[53]

53 *In re Isso*(1942) Kar. 215, ('42) A.S. 113.

Guardians and Wards Act (8 of1890), S s. 7,17

Custody of minor Muslim child above seven years of age -- Father not shown to be unfit to have custody.

Even since the birth, the child was in the custody of the mother. She, in her turn, entrusted the custody to her parents or, perhaps, after she was married or when she left for Saudi Arabia in 1976.

The child is above seven years. The trial court in the instant case has not recorded a finding that the father is not a fit person or that it is not conducive for the child to remain with the father.[54]

54 *Mohammed Jameel Ahmed Ansari v. Ishrath Sajeeda,* A.I.R. 1983 A.P. 106.

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CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

B.--

GUARDIANS OF THE PERSON OF A MINOR

358.

Custody of illegitimate children

The custody of illegitimate children belongs to the mother and her relations [Macnaghten, 298].

The right can be enforced by a writ of habeas corpus.[55]

55 *Gohar Begum v. Suggi* ('60) A.S.C. 93.

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CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

C.--

GUARDIAN OF THE PROPERTY OF A MINOR

359.

Legal guardians of property

The following persons are entitled in the order mentioned below to be guardians of the property of a minor[56]:--

(1) the father;

(2) the executor appointed by the father's will;

(3) the father's father;

(4) the executor appointed by the will of the father's father.

Baillie, 689: Macnaghten, 62, 304.

Mother, brother, uncle, etc., not legal guardians

The four guardians mentioned in this section are hereinafter called *legal guardians*. The only *relations* who are *legal guardians of the property* of a minor are (1) the father, and (2) the father's father. No other relation is entitled to the guardianship of the property of a minor *as of right*, not even the mother, brother or uncle. But the father or the paternal grandfather of the minor may appoint the mother, brother, uncle, or any other person as his executor or executrix, in which case they become *legal guardians* and have all the powers of a *legal guardian* as defined in 362 and 366. The Court also may appoint any one of them as guardian of the property of the minor, in which case they will have all the powers of a guardian appointed by the Court, as stated in 363 and 367. (*see* note 1 to 364 below)

56 *Imambandi v. Mutsaddi* (1918) 45, I.A. 73, 83-84, 45 Cal. 878, 892, 893, 47 I.C. 513; *Ara Begam v. Deputy Commissioner of Gonda* (1941) O.W.N. 906, 196 I.C. 787, ('41) A.O. 529. *Md. Zafir v. Amiruddin* (1963) A.P. 108.

Minor possessing more than one property

Income not sufficient to maintain him -- the legal guardian is competent to alienate any of the properties.[57]

A widowed mother is not the legal guardian of the property of her minor children and cannot, bind the children by any act in relation of the property. Therefore she cannot sell or mortgage the property. Even if she be a co-heir with them, it does not give her any more rights, except to manage the estate till partition among the share holders.[58]

Recently, the Jharkhand High Court has held that a mother is not *de jure* guardian of her minor children

under Mohammedan Law and therefore has no right to sell an interest of her minor children in immovable property and such transaction is not merely voidable but void.

Thus in the instant case, the mother of the minor children is entitled to inherit a portion of property (i.e. 1/8) of her deceased husband; she is not entitled to alienate immovable property, which fell in shares of her minor children.[59]

&uot;A brother is not a lawful (sic) guardian under Mahomedan law . Neither the mother nor the brother is a legal (sic) guardian though the father or the paternal grandfather of the minor may appoint the mother, brother or any other person as executor or executrix.&uot;[60]

The persons who are entitled to appoint a guardian of the property of a minor by will are his father and father's father. Even the mother has no power to appoint by will a guardian of the property of her minor children. A mother's executor is not a *legal guardian*, nor is a brother's executor, nor an uncle's executor. In fact, no executor, except the father's executor or the father's father's executor, can be a *legal guardian* of the property of the minor: Macnaghten, 304. As to the powers of a *legal guardian*, (*see* 362 and 366)

57 See AI.R. 1982 All. 9. *Kaiser Parvez v. Abdul Majid* .

58 *Patel Parshottamdas Narasinbhai v. Bai Dhabu* ('73) A. Guj. 88.

59 *Amar Ahmad Khan v. Shamim Ahmad Khan* A.I.R. 2012 Jhar 39.

60 *Syed Shah Gulam Ghouse Mohiuddin v. Syed Shah Ahmad Mohiuddin Kamisul Qadir* ('71) A.S.C. 2184. *Mohammad Amin v. Vakil Ahmed* ('25) A.S.C. 358. *Imambandi v. Mutsaddi* 43 I.A. 73.

Testamentary guardian of property

Any person appointed executor by the will of the father or paternal grandfather of the minor becomes by virtue of his office legal guardian of the property of the minor. But can the father or paternal grandfather appoint one person his executor and another person guardian of the property of the minor? It would appear that he can:[61] Baillie, 682.

In *Md. Jameel Ahmed Ansari v. Ishrath Sajeeda* .[62]

It was held that [A] even since the birth, the child was in the custody of mother. She, in her turn, entrusted the custody to her parents or, perhaps, after she was married or when she left for Saudi Arabia in 1976.

It was further observed that [B] the child is above seven years. The trial Court in the instant case has not recorded a finding that the father is not a fit person or that it is not conducive for the child to remain with the father.

Therefore [C] there is thus nothing to hold the father is not a fit person or it is not conducive to the safety and health of the child to entrust the child.

61 *Mata Din v. Ahmad Ali* (1912) 39 I.A. 49, 55, 34 All. 213, 13 I.C. 976.

62 A.I.R. (1983) A.P. 106.

CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

C.--

GUARDIAN OF THE PROPERTY OF A MINOR

360.

Guardian of property appointed by Court

In default of the legal guardians mentioned in 359, the duty of appointing a guardian for the protection and preservation of the minor's property falls on the Judge as representing the State.[63]

Appointment of guardian by Court

If there is no legal guardian (359), the Court may appoint any other person guardian of the property of a minor. In so doing, the Court should be guided by what appears in the circumstances to be for the welfare of the minor [351(1) and (2)]. Thus, the Court may appoint the mother, guardian of the property, of her minor son in preference to his paternal uncle.[64] The fact that the mother is a pardanashin lady is no objection to her appointment.[65]

The Court is not bound to appoint paternal relations guardians of property in preference to maternal relations. If the welfare of the minor requires it, the Court may appoint a maternal relation. The Court must also have regard to the *wishes of the minor's father*. Both these grounds concurred in a case in which a brother of the father's first wife was appointed guardian of the property of the minor in preference to a step-brother of the father.[66]

The power of a legal guardian to alienate property of a minor is subject to restrictions under Mahomedan Law and a donor cannot impose further restrictions in addition thereto.[67]

63 *Imambandi v. Mutsaddi* (1918) 45 I.A. 73, 84, 45 Cal. 878, 893, 47 I.C. 513.

64 *Alim-ullah v. Abadi* (1906) 29 All. 90.

65 *Jaivanti v. Gajadhar* (1911) 38 Cal. 783, 785, 10 I.C. 334.

66 *Mahomed Sayced v. Ismail* ('31) A.R. 66, 131 I.C. 497.

67 *Md. Naziruddin v. Govindrajulu Appah* ('71) A. Mad. 44.

CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

C.--

GUARDIAN OF THE PROPERTY OF A MINOR

361.

De facto guardian

A person may neither be a legal guardian (359) nor a guardian appointed by the Court (360), but may have voluntarily placed himself in charge of the person and property of a minor. Such a person is called *de facto* guardian. A *de facto* guardian is merely a custodian of the person and property of the minor.[68]

The expression &uot;*de facto* guardian&uot; is used in contradistinction to &uot;de jure guardian.&uot; Legal guardians (359) and guardians appointed by the Court (360) are *de jure* guardians. The mother, brother, uncle, and all relations other than the father and father's father are *de facto* guardians, unless they are appointed executor by the will of the father or father's father (359), or are appointed guardians by the Court (360).

A mother and her minor son executed a mortgage-deed. Later the son, as plaintiff, wanted to redeem the mortgage: It was held in the case that a *de facto* guardian has no power to transfer any right or interest in the immovable property of the minor and that such a transfer is not merely voidable but void. It is void also *qua* those who are *sui juris*.[69]

68 *Imambandi v. Mutsaddi* (1918) 45 I.A. 73, 84, 45 Cal. 878, 894-895. 47 I.C. 513; *Mohammad Ejaz v. Mohammad Iftikhar* (1932) 59 I.A. 92, 101, 7 Luck. 1, 136 I.C. 97, ('32) A.PC. 78; *Muhammad Maizuddin Mia v. Nalini Bala Devi* (1937) 2 Cal. 137, ('37) A.C. 284; *Anto v. Reoti Kuar* (1937) All. 195, 166 IC. 61, ('36) A.A. 837; *Abdul Karim v. Mt. Maniran* ('54) A. Pat. 6.

69 *Ali Mohammad v. Ramniwas* ('67) A. Raj. 258.

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CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

C.--

GUARDIAN OF THE PROPERTY OF A MINOR

362.

Alienation of immovable property by legal guardian

A legal guardian of the property of a minor (359) has no power to sell the immovable property of the minor except in the following cases, namely, (1) where he can obtain double its value; (2) where the minor has no other property and the sale is necessary for his maintenance; (3) where there are debts of the deceased, and no other means of paying them; (4) where there are legacies to be paid, and no other means of paying them; (5) where the expenses exceed the income of the property; (6) where the property is falling into decay; and (7) when the property has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.[70]

A legal guardian has no power to sell a minor's property unless the property is in a bad state and must be disposed of to avoid loss. If the minor has more than one property there must be justification to sell a particular property.[71]

The legal guardian of the property of a Mahomedan minor has no power to sell the immovable properties of the minor except in the following cases, namely: (1) where he can obtain double its value; (2) where the

minor has no other property and the sale is necessary for his maintenance; (3) where there are debts to be discharged and no other means of paying them; (4) where there are legacies to be paid, and no other means of paying them; (5) where the expenses exceed the income of the property; (6) where the property is falling into decay; and (7) when the property has been usurped, and the guardian has reason to fear that there is no chance of fair restitution. A *de facto* guardian has no power to effect a transfer. Such transaction is not merely voidable but void.[72]

The Madras High Court[73] affirmed that the sale of minor's property by a guardian, as a general rule, is void *ab initio*. The guardian can sell the minor's property only in exceptional circumstances. The minor after attaining majority can set aside such sale.

Mortgage

The same rule apply to a mortgage and unless it is a case of absolute necessity the mortgage is invalid.[74]

70 *Imambandi v. Mutsaddi* (1918) 45 I.A. 73, 91, 45 Cal. 878, 47 I.C. 513; *Ilurbai v. Hiraji* (1896) 20 Bom. 116, 121; *Kali Dutt v. Abdul Ali* (1888) 16 Cal. 627, 16 I.A. 96; *Thottoli v. Kunhammed* (1910) 34 Mad. 527, 8 I.C. 1093; *Mohammad Abdur Rahman Khan v. Mohammad Abdul Ghazi Khan* ('37) A.O. 56, 165 I.C. 597; *Basha v. Muthan* 70 Mad. L.W. 706.

71 *Mrs. Eishu Chugani v. Ranglal Agarwala* ('73) A. Cal. 64.

72 *Mohd. Raheemuddin v. Aayesha Begum* (1978) 2 An. W.R. 84 [Lakshamaiah, J.].

73 *A. Sarabanu v. A.M.A. Asmathullah* (2001) 3 MLJ 408.

74 *Yeajuddin Pramanick v. Rup Manjari* ('36) A.C. 326; *S.K. Nasirul Haque v. Zohra Khatoon* (1974) A. Cal. 248.

Lease

The father or other lawful guardian may grant a lease, if it be for the benefit of the minor.[75]

75 *Zeebunnissa Begum v. Mrs. Danagher* (1936) 59 Mad. 942, 163 I.C. 384, ('36) A.M. 584.

Where minor's title to property is in dispute

The prohibition against alienation referred to in this section applies to immovable property to which the minor has an undisputed title. It does not apply where the minor's title to the property is disputed. Thus, where the father of a minor sold part of the immovable property inherited by the minor from his mother, *the title to which was in dispute*, and the sale was made pursuant to a compromise which *put an end to pending litigation*, the sale was held to be binding on the minor as being one *for the minor's benefit.*[76] As to the power of a legal guardian to dispose of *movable* property belonging to his ward, (*see* 366 below).

The mother as *de facto* guardian has no power to alienate a minor's immovable property, but a joint sale together with major executants is good in law to the extent of the latter's shares.[77]

76 *Kali Dutt v. Abdul Ali* (1888) 16 Cal. 627, 16 I.A. 96.

77 *Maimunnissa Bibi v. Abdul Jabbar* ('66) A.M. 468. See also *Jaina Beevi v. Govindaswami* ('67) A.M. 369 (holding that a lease executed by the minor's father but in his capacity as power of attorney agent of the minor's mother was void); and *Ali Mohammad v. Ramniwas* ('67) A. Raj. 258.

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GUARDIANSHIP OF PERSON AND PROPERTY

C.--

GUARDIAN OF THE PROPERTY OF A MINOR

363.

Alienation of immovable property by guardian appointed by Court

A guardian of property appointed by the Court under the Guardian and Wards Act, 1890 (360) has no power *without the previous permission of the Court*, to mortgage or charge, or transfer by sale, gift, exchange, or otherwise, and part of the *immovable property* to this ward, or to lease any part of that property for a term exceeding five years, or for any term extending more than one year beyond the date on which the ward will cease to be a minor. A disposal of immovable property by a guardian in contravention of the foregoing provisions is voidable at the instance of the minor or any other person affected thereby.[78]Permission to the guardian to do any of the act s mentioned above must not be granted by the Court except in case of necessity or for any evident advantage to the ward (Guardian and Wards Act, 1890, ss. 29, 30, 31).

A minor on attaining majority made an application for accounts against his former guardian but it was held that this proper remedy was to file a suit for accounts.[79]

Reference to arbitration by guardian appointed by the Court

There are dicta of the High Court of Allahabad to the effect that a guardian appointed by the Court may refer to arbitration without the permission of the Court disputes as to the distribution of *immovable*properties of the minor's father, but that it is an irregularity if the guardian makes a reference without the &uot;opinion, advice or direction&uot; of the Court under s. 33 of the Act . There is no indication in the judgment as to the consequences of such an irregularity.[80]

As to the disposal of movable property by a guardian appointed by the Court, (*see* 367 below).

78 *Solema Bibi v. Hafeez Mahomed* (1927) 54 Cal. 687, 104 I.C. 833, ('27) A.C. 636.

79 *Shujauddin v. Shamsuddin* (1983)3 A.L.R, 157.

80 *Said-un-nissa v. Raqaiya Bibi* (1931) 53 All. 428, 130 I.C 201, ('31) A.A. 307.

Guardian ad litem

The guardian *ad litem*or next friend has full power of alienation of a minor's property in effecting a compromise on behalf of a minor. Mahomedan law does not apply in such a case. O. XXXII, r. 7, C.P.C, applies.[81]

81 *Babu Gyanu v. Mohamad Sardar* ('55) A.N. 193.

Guardian joining state service but continuing to be guardian of minor

Appointment of Counsel by guardian on his behalf to protect interests of minor--Is competent in absence of proof that such lawyer acted against interests of minors.[82]

82 *Nijma Naquishband v. Chief Secretary* AI.R. (1986) J&K. 63.

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C.--

GUARDIAN OF THE PROPERTY OF A MINOR

364.

Alienation of immovable property by de facto guardian

A *de facto* guardian (361) has no power to transfer any right or interest in the *immovable* property of the minor. Such a transfer is not merely voidable, but void.[83]

Mother, brother, uncle, etc., as de facto guardians

The mother, as has already been stated, is not the legal guardian of the property of her minor children (*see* note to 357). She is merely a *de facto* guardian -- a bare custodian of their property; and has no power to sell, mortgage, or otherwise deal with immovable property belonging to them. As stated by their Lordships of the Privy Council in *Imambandi v. Mutsaddi* ,[84] which is the leading case on the subject, "the mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant." A sale, mortgage, or any other transfer by the mother is wholly void.[85] The same remarks apply to a brother, uncle, and other relations. An alienation by a brother,[86] uncle,[87] or any other relation of the minor's immovable property is wholly void. If the alienee is let into possession of the property, his possession, so far as regards the minor's share, is no better than that of a *trespasser.*[88] The Sind Chief Court has held that the lessee under the lease granted by a *de facto* guardian of a minor is liable to pay compensation to the minor for use and occupation of the land.

The Madhya Pradesh High Court[89]has once again reiterated that a mother being not legal guardian of the property of her minor children, she cannot bind children by any act in relation of property. Any transfer of immovable property by the mother by way of sale, mortgage is void *ab initio*. Mother, even as a *de facto* guardian of Muslim minor, has no power to alienate any property and such transfer is not merely voidable but void *ab initio*.

In *Meethiyan Sidhiqu v. Muhammed Kunju Pareeth Kutty* ,[90] the Supreme Court held that father is the natural guardian and in his absence other legal guardians would be entitled to act. In their absence, property guardian appointed by the Court would be competent to alienate property of the minor with the permission of the Court. When a sale is to be made on behalf of the minor, the necessary ingredients are

that the sale must be for the benefit of the minor's estate and therefore, the competent person entitled to alienate the minor's property would be subject to above condition, either the natural guardian or the property guardian appointed by the Court. In this case after the demise of the father no property guardian was appointed. The mother, therefore, is not a guardian for the alienation of the property of the minor. The sale by mother therefore, is void.

The next question to consider is whether a sale or mortgage made by a *de facto* guardian is binding on the minor, if it was made to satisfy a mortgage or other debts of his father or other person from whom he acquires the property. In *Mala Din v. Ahmad Ali* ,[91] a Mahomedan executed a mortgage of his immovable property. He then died leaving a will by which he bequeathed the property to his four grandsons, one of whom was a minor, in equal shares subject to equal obligations in respect of his debts. After his death the three elder grandsons sold the mortgaged property including the minor's share to the mortgagee to satisfy the mortgage debt and other debts of the deceased. It was held by the Privy Council that the sale, though made to satisfy the debts of the deceased, was not binding on the minor, and that he was entitled to redeem his one-fourth share of the mortgaged property. In a Lahore case,[92] a Mahomedan executed a mortgage of his immovable property in favour of *A*. He then died leaving a widow and minor children. The widow borrowed Rs. 3,000 from *B*, out of which she paid Rs. 2,500 which was the amount due to *A* under his mortgage, and mortgaged the same property to *B*. The balance of Rs. 500 was applied by her towards the maintenance of the children. The mortgage was for a term of 60 years, and *B* was let into possession. *B* spent R s. 400 in improving the property. The children afterwards brought a suit against *B* to recover possession of their share of the property. It was held that the mortgage of the children's share was void, but the mortgage was set aside conditionally upon the children paying to *B* the amount by which they had benefited, namely, Rs. 2,500 + Rs. 500 + R s. 400 = Rs.3,400. In a Madras case[93] the major sons of a deceased Mahomedan undertook to pay off their father's debts, and as guardian of the minor son, the mother alienated some property. It was held, setting aside the mortgage by the mother, that the Court has a discretion to direct the minor to refund the amount by which his estate had benefited. These decisions probably go too far, and may require reconsideration.

83 *Imambandi v. Mutsaddi* (1918) 45 I.A. 73, 45 Cal. 878, 47 I.C. 513; *Mata Din v. Ahmad Ali* (1912) 39 I.A. 49, 34 All. 213, 13 I.C. 976; *Kannusami Chetti v. Rahimat Ammal* (1933) 65 Mad. L.J. 548, 147 I.C. 83, ('33) A.M. 806, 813; *Ramachandrayya v. Abdul Kadar* ('48) A.M. 37; *Relumal Kewalmal v. lluzur Baksh* ('47) A.S. 179; *Abdul Karim v. Mt. Maniran* ('54) A. Pat. 6; *Kharag Narain v. Hamida Khatoon* (1955) Pat. 709, ('55) A.P. 475; *Ardhanari Mudaliar v. Abdul Rahiman* (1956) 1 M.L.J. 243.

84 (1918) 45 I.A. 73, 83, 45 Cal. 878, 894, 47 I.C. 513.

85 *Imambandi v. Mutsaddi* (1918) 45 I.A. 73, 45 Cal. 878, 47 I.C. 513; *Muhammad Shaft v. Mst. Kalsum Bibi* (1923) 4 Lah. 467, 79 I.C. 260, ('24) A.L. 200; *Ghulam Hussein v. Mir Jakirali* (1940) Nag. 553, (1938) N.L.J. 409; *Sombhu Gosain v. Piyam Mian* (1941) 193 I.C. 253, 7 B.R. 520, ('41) A.P. 351; *Bhikaji Ramchandra v. Ajagarally Sarafally* (1945) Bom. 658, 47 Bom. L.R. 803, 224 I.C. 388, ('46) A.B. 57; *Venkama v. S.V. Chisty* (1950) 2 Mad. L.J. 587, ('51) A.M. 399. *Md. Zafir v. Amiruddin* (1963) A.PC. 108.

86 *Mata Din v. Ahmad Ali supra* ; *Fateh Din v. Gurumukh Singh* (1929) 10 Lah. 385, 113, I.C. 227, ('29) A.L. 810.

87 *Nizam-ud-din v. Anandi* (1896) 18 All. 373.

88 *Imambandi v. Mutsaddi* (1918) 45 I.A. 73, 92-93, 45 Cal. 878, 903-904, 47 I.C 513.

89 *Chiranjilal and other v. Khatoon Bi and others* A.I.R. 1995 MP 238.

90 (1996) 1 SCR 11.

91 (1912) 30 I.A. 49, 34 All. 213, 13 I.C. 976. The decision in *Haji Abdulla v. Daud Mahomedan* ('53) A. Saur. 84, it is submitted, is erroneous. It has been decided by the Supreme Court that benefit derived by the minor from the transaction is irrelevant: *Mohamed Amin v. Vakil Ahmad* ('52) A.SC. 358.

92 *Rang Illahi v. Mahbub Ilahi* (1926) 7 Lah. 35, 94 I.C. 25, ('26) A.L. 170.

93 *Kadir Meeral v. Muhammad Koya* ('56) A.M. 368, (1956) 1 M.LJ. 307.

Family settlement

The Supreme Court has held that a *de facto* guardian has no authority to enter into a family settlement in respect of a minor's property, even though the settlement might be for his benefit.[94]

But *see*: In appeal before the Supreme Court, parties arriving at settlement that father shall deposit in Bank within 4 months a cum of Rs. 16,000 in the name of the child under the guardianship of the child's mother and she would be entitled to receive interest every month on that amount for the maintenance of the child till he attains majority. It was held that on the facts and circumstances of the case the settlement was reasonable and in the interest of the child.[95]

Note: This case concerns Hindus but the principle will be applicable to Muslims.

See also: *Sunita v. Shyam Kali* .[96]

An alienation of property be a *de facto* guardian may be ratified by a minor on attaining majority.[97]

The Bombay High Court has held that the mother, brother or uncle etc. cannot act as legal guardian of a minor. The mother may be *de facto* guardian but can never be regarded as *de jure* guardian in respect of property of the minor. The power of a guardian appointed by a Court to dispose of property is limited to the extent of movable properties. That too it shall be disposed of carefully as a prudent man deal with it as if it were his own. In the instant case, the allged sale deed executed by mother clearly shows that minority of the child was within the knowledge of the purchaser and the suit to set aside the sale has been instituted within three years after he attained majority. Thus such a transfer of immovable property of a minor would not merely be voidable but would be void.[1]

Transaction of exchange

A single Judge of the High Court of Allahabad has held that a *de facto* guardian may enter into a transaction of exchange in respect of a minor's property, if it has the effect of conserving it.[2]

94 *Mohamed Amin v. Vakil Ahmad* ('52) A.SC. 358.

95 *Boomi v. Leela Rajan* A.I.R. 1977 S.C. 700 [H.R. Khanna and V.R. Krishna Iyer, JJ].

96 A.I.R. (1982) All. 1.

97 *Lakshmi Amma v. Saidutty* I.L.R. (1967) 1 Ker. 631.

1 *Tikaram Rajho Choudhary v Shaikh Bismillah* LNIND, 2008 Aug 364.

2 *Abdul Hakim v. Jan Mahomed* ('51) A.SC. 247.

Limitation for suit to set aside transfer of property by a de facto guardian

Article 44 of Sch. I of the Limitation Act, 1908, prescribed a period of three years within which a ward who has attained majority may sue to set aside a transfer of his property made by his guardian, the time running from the date of the ward's majority. This article applies to a transfer by a lawful guardian, and not one by a*de facto* or unauthorized guardian. The Article that applies to a transfer by a *de facto*guardian is Art. 144 read with s. 8 of the Act . Article 144 deals with immovable property, and prescribes a period of twelve years from the time when the possession of the defendant becomes adverse to the plaintiff.[3](*See*however, the Limitation Act, 1963)

3 *Mata Din v. Ahmad Ali* (1912) 39 I.A. 49, 34 All. 213, 13 I.C. 976.

Reference to arbitration by de facto guardian

The principle of the Privy Council decision in *Imambandi v. Mutsaddi* referred to in note 1 above has been applied to a reference to arbitration by a *de facto* guardian. Such a guardian has no power to refer to arbitration disputes as to the distribution of immovable properties of the minor's father, and the minor is not bound by an award made on such a reference. Nor does the subsequent appointment of the *de facto*guardian as guardian of the minor under s. 10 of the Guardian and Wards Act, 1890, make the award binding upon the minor in the absence of evidence that the Court approved of the reference.[4]

4 *Mohammad Ejaz v. Mohammad Iftikar* (1932) 59 I.A. 92, 7 Luck, 1, 136 I.C. 97, ('32) A.PC. 78; *Mohsiuddin v. K. Ahmed* (1920) 47 Cal. 713, 57 I.C. 945; *Abdul Karim v. Mt. Maniran* ('54) A.P. 6 (immovable and movables inseparable); *Johara Bibi v. Mohammad* (1951) 2 Mad. L.J. 56, ('51) A.M. 997.

Continuance of partnership business

It has been held, following the principle of the ruling in the Privy Council case of *Imambandi v. Mutsaddi* referred to in note 1 above, that where the father of a minor was a member of a firm which owned a rice mill and carried on rice milling business, the mother had no power to enter into an agreement with the surviving partners on behalf of the minor to continue the partnership business. Such an agreement is void.[5] Whether under the Mahomedan Law or on general principles defining the relations between a ward and a guardian, a guardian as such has no power to carry on business on behalf of his ward, especially if the business is such as may invoke the minor's estate in speculation or loss, and it is immaterial whether the business was that of the father of the minor or that was a break in it.[6]

5 *Khorasany v. Acha* (1928) 6 Rang. 198, 110 I.C. 349, ('28) A.R. 160.

6 *Ahmed Ibrahim Saheb v. Mcyyappa Chettiar* (1940) Mad. 285, (1939) M.W.N. 976, ('40) A.M. 285.

Bequest to an heir

On the same principle a mother cannot validate a bequest to an heir by consenting on behalf of her minor children who are co-heirs.[7]

7 *Bibi Kulsoom v. Mt. Mariam* (1933) 143 I.C. 108, ('33) A.O. 97.

Bequest to an heir

As a sale by a *de facto* guardian of the minor's immovable property is not merely voidable but is void, it cannot be ratified by the minor on attaining majority.[8] A contrary decision of the Peshawar Court is, it is submitted, incorrect.[9]

8 *Anto v. Reoti Kuar* (1937) All. 195, 166 I.C. 61, ('36) A.A. 837.

9 *Jawahir Singh v. Kohat Municipality* ('37) A. Pesh. 74, 170 I.C. 63.

Agra Tenancy Act

Settlement of agricultural land forming part of a zamindari property, inherited by a Mahomedan widow and her minor son, with a tenant for agricultural purposes does not amount to an alienation of the minor's interests in the immoveable property.[10]

As to the powers of a *de facto* guardian to deal with the moveable property of the minor, (*see* 368 below).

10 *Tahad Ali v. Israr-Ullah* (1939) All. 89, (1938) A.L.J. 1110, 180 I.C. 504, ('39) A.A. 121.

Partition

A deed of partition to which a minor is a party represented by his mother as a *de facto* guardian is void and not binding on him.[11]

11 *Assiz v. Chithamma* ('54) A. Tra. Coch. 370.

CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

C.--

GUARDIAN OF THE PROPERTY OF A MINOR

365.

Agreement by guardian for purchase of immovable property for his ward

Neither the guardian of a minor nor the manager of his estate is competent to bind the minor or his estate by an agreement for the *purchase* of immovable property. Such an agreement is void.[12]

(*A*, the manager of the estate of a minor, *B*, agrees to purchase from *C* immovable property on behalf of *B*. The agreement is void, and neither *B* nor *C* can sue for specific performance of the contract.)

12 *Mir Sarwarjan v. Fakhruddin* (1912) 39 I.A. 1, 39 Cal. 232, 13 I.C. 331.

CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

C.--

GUARDIAN OF THE PROPERTY OF A MINOR

366.

Power of legal guardian to dispose of movable property

A legal guardian of the property of a minor (359) has power to sell or pledge the goods and chattels of the minor.[13]

13 Fatawai Alamgiri (p. 222: Amir Ali's Translation) -- "If the father has pledged his minor child's property for such debts as he has incurred either for himself or for his minor child, then it is lawful (for him)." See *Zaitoon Begum v. Central Bank Ltd.* P.L.D. 1961 (W.P.) Lah. 888.

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CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

C.--

GUARDIAN OF THE PROPERTY OF A MINOR

367.

Power of guardian appointed by Court to dispose of movable property

A guardian of the property of a minor appointed by the Court (361) is bound to deal with *movable property*belonging to the minor as carefully as a man of ordinary prudence would deal with it if it were his own (Guardian and Wards Act, 1890, s. 27).

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CHAPTER XVIII

GUARDIANSHIP OF PERSON AND PROPERTY

C.--

GUARDIAN OF THE PROPERTY OF A MINOR

368.

Power of de facto guardian to dispose of movable property

A *de facto* guardian (361) has the power to sell and pledge the goods and chattels, of the minor in his charge for the minor's imperative necessities, such as food, clothing, or nursing.[14]

A mother has no power as *de facto* guardian to enter into any contract whereby a minor would be saddled with any pecuniary liability.[15] Nor has a brother.[16] It has been held in Madras that she has power to renew a promissory note executed by the minor's father and so stave off an execution against the minor's property.[17]*Sed squaere.*

14 *Imambandi v. Mutsaddi* (1918) 45 I.A. 73, 86-87, 45 Cal. 878, 895-896, 47 I.C. 513.

15 *Ghulam Ali v. Inayat Ali* (1933) 144 I.C. 68, ('33) A.L. 95; *Kunhibi v. Kaliani Amma* (1939) 2 M.L.J. 463, ('39) A.M. 881.

16 *Naziruddin v. Kharagnarain* (1939 (1771 I.C. 802, ('39) A.P. 29.

17 *Venkatarayudu v. Khasim Saheb* (1935) 160 I.C. 268, ('35) A.M. 1041; Dissented from in *Kunhibi v. Kaliani Amma* (1939) 2 M.L.J. 463, ('39) A.M. 881, and in *Ramchandrayya v. Abdul Kadar* (1948) Mad. 270, ('48) A.M. 37.

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CHAPTER XIX

MAINTENANCE OF RELATIVES

369.

Maintenance defined

&uot;Maintenance&uot; in this Chapter includes food, raiment and lodging.

This definition of 'maintenance' is not exhaustive. The word includes other necessary expenses for mental and physical well-being of a minor, according to his status in society. Educational expenses were included in the definition.[1]

Cases under s. 488 of the were held applicable to define the term.[2]

Cf. Baillies, 441.

1 *Ahmadellah v. Mafizuddin Ahmed* ('73) A. Gau. 56.

2 *Tekchand Partahrai Bhavani v. Kalavant Bai Tekchand* ('41) A. Sind 214; *Sm. Pumasoshi Devi v. Nagendra Nath* ('50) A. Cal. 465.

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CHAPTER XIX

MAINTENANCE OF RELATIVES

370.

Maintenance of children and grandchildren

(1) A father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. But he is not bound to maintain his *adult* sons unless they are disabled by infirmity or disease. The fact that the children are in the custody of their mother during their infancy (352) does not relieve the father from the obligation of maintaining them.[3] But the father is not bound to maintain a child who is capable of being maintained out of his or her own property.
(2) If the father is poor, and incapable of earning by his own labour, the mother, if she is in easy circumstances, is bound to maintain her children as the father would be.
(3) If the father is poor and infirm, and the mother also is poor, the obligation to maintain the children lies on the grandfather, provided he is in easy circumstances.

Section 125 -- Maintenance -- Children living with mother -- Right of children -- Not dependent on guardianship.

The plea of the father that while he is entitled to guardianship of his children, in fact they are living with their mother will not disentitle them from claiming maintenance.

As regards guardianship the forum is not that of the Magistrate's Court but is with the Court exercising powers under Guardians and Wards Act .[4]

In *Siraj Sahebji Mujawar v. Roshan Siraj Mujawar* ,[5]the Bombay High Court has held that under the Muslim Law so far as the children out of the dissolved wedlock are concerned, the father's obligation to maintain them is absolute in terms of s. 370 of the Code of Criminal Procedure , 1973, so long as he is in a position to do so and the children have no independent income of their own. Section 3(1)(b) of the Muslim Women (Protection of Rights and Divorce) Act, 1986 contemplates the divorced wife's right to claim maintenance in respect of her children and this has nothing to do with the independent right of the children to be maintained by the father under the Muslim Law. That right of the children is separate and independent of the divorcee wife's (their mother's) right to claim maintenance. Naturally, therefore, such a right cannot certainly be affected by the provision of s. 3(1)(b) of the Act of 1986.

The High Court of Andhra Pradesh has held that as per s. 3 of the Act of 1986, a divorced Muslim woman is also entitled to claim maintenance for the child for a period of two years, giving an additional safeguard to her under the Act of 1986. But there is no provision under the Act, taking away the right of the child to claim maintenance under s. 125 of the Code of Criminal Procedure . Therefore, even the child can claim maintenance under s. 125 CrPC under the guardianship against the father.[6]

In *Noor Saba Khatoon v. Mohd. Quasim* ,[7]the Supreme Court has observed that a careful reading of the provisions of s. 125 CrPC and s. 3(1)(b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986Act makes it clear that the two provisions apply and cover different situations and there is no conflict, much less a real one, between the two. Whereas the 1986 Act deals with the obligation of a Muslim husband*vis--vis* his divorce wife including the payment of maintenance to her for a period of two years of fosterage for maintaining the infants where they are in the custody of mother, the obligation of a Muslim father to maintain the minor children is governed by s. 125 CrPC and his obligation to maintain them is absolute till they attain majority or are able to maintain themselves, whichever date is earlier. In the case of female children this obligation extends till their marriage. Even under personal law, the right of minor children to receive maintenance is absolute.

Hedaya, 148; Baillie, 459-462. A daughter when married passes into her husband's family, and there is no obligation on the members of her natural family to maintain her, not even if she is divorced.[8]

Right to maintenance : how long it continues

The effect of the Indian Majority Act, 1875, so far as Mahomedans are concerned, is to extend the minority of a person until he has completed the age of eighteen years, except in matters of marriage, dower and divorce. In respect of these matters, a Mahomedan is entitled to act when he attains the

age of majority under the Mahomedan law. That age is reached when he attains puberty, that is, when he completes the age of fifteen years. Sir Ronald Wilson considers that since maintenance is not one of the excepted subjects, the age of minority for the purpose of maintenance must be deemed to have been extended until the age of eighteen years (Anglo-Muhammadan Law, ss. 140, 142). This view, it is submitted, is not correct, The effect of the Indian Majority Act is to extend the period of incapacity to act in matters other than the three months above,*e.g.*, contracts, wills, gifts, wakfs, etc. It is not to enlarge the duration of a *right* or of the corresponding duty. The children, therefore, of a Mahomedan have no right to maintenance after they have attained the age of puberty nor is there any obligation on the parents to maintain them after that age, except, as stated above, in the case of a son who is disabled by infirmity or disease. A child is entitled to past maintenance.[9]

3 *Emperor v. Ayshabai* (1904) 6 Bom. L.R. 536; *Mahomed Jusub v. Haji Adam* (1913) 37 Bom. 71, 15 I.C. 520 [a Cutchi Memon case]. *Allah Rakhi v. Karam Illahi* (1933) 14 Lah. 770, 147 I.C. 123, ('33) A.I. 969, *Mt. Sarfraz Begum v. Miran Bakhsh* (1928) 9 Lah. 313, 112 I.C. 476, ('28) A.L. 543; *Muhaiddin Tharaganar v. Sainambu Ammal* (1941) Mad. 760, (1941) 1 M.LJ. 503, (1941) M.W.N. 308, ('41) A.M. 582; *Mohammad Shamsuddin v. Noor Jehan Begum* ('55) A. Hyd. 144 (1955) Hyd. 418.

4 *Siddiq Ahmad Sanji v. Smt. Parveen* . 1984 Cri. LJ. 341: 1984 A.C.C. 65 : 1984 A.W.C 66 [M. Wahajuddin, J.].

5 *Siraj Sahebji Mujawas v. Roshan Siraj Mujawar* A.I.R. 1990 Bom 344.

6 *M.A. Hameed v. Arif Jan* LNIND 1989 AP 335, *Mohd. Kutubuddin v. Noore Nazar* LNIND 1989 Bom. 184, (1990) 1 DMC 459(Bom), See also, LNIND 1990 Bom 495.

7 A.I.R. 1997 SC 3280, See also, *Mufees v. State of Uttar Pradesh and Anam* (2007) DMC 22, See also, *Mahaboob Ali alias Khalid v. Zeehan* LNIND 1999 Kant 119, See *Mst Noor Jehan v. State of Maharashtra* LNIND 1994 Bom. 504, (1996) 1 DMC 120.

8 *Pakrichi v. Kunhacha* (1913) 36 Mad. 385, 13 I.C. 236.

9 *Moosa Seethy v. Mariakutty* (1954) Trav.-Co. 690.

Maintenance where daughter stays away from father

Where the father is entitled to the custody of the daughter and offers to keep her in the house and maintain her, the daughter has no right to separate maintenance unless there are circumstances which justify the daughter in staying away from the father's house.[10] In this case the facts were that the daughter's mother had been divorced and the father had married again. The father did not offer to keep her in the house and later on became a lunatic. These circumstances were held to be sufficient to entitle the daughter to separate maintenance.

Where the father, having divorced the child's mother, obtained a decree for guardianship of the child (a daughter, aged, nine years) but did not execute the decree, so that the child remained with its mother, the Court held that the child was entitled to maintenance.[11] In another case, where the father had married again and not divorced his first wife, and was willing to maintain his two children by the first wife who had attained the age of seven, it was held that he was not bound to pay maintenance allowance to the mother if the two children were deliberately not sent to him.[12] But a single Judge of the Madras High Court has expressed the view that the father's liability to maintain his children is absolute and if the father has any right of custody of his children, he is entitled to enforce that right, but the fact that he has not done so or that his children are residing elsewhere did not deprive them of their right to claim maintenance from their father.[13] This view has been dissented from by the Bombay High Court[14] where it was held that the father was entitled to decline to maintain his children, if they refused to live with him without reasonable cause, although he was entitled to their custody as their guardian. The father, however, is bound to pay separate maintenance allowance until he expresses his willingness to keep and maintain his child in his own house. Minor child living with the divorced mother is entitled to maintenance.[15]

10 *Bayabai v.Esmail Ahmed*(1941) Bom. 643, 43 Bom. L.R. 823, 197 I.C. ('41) A.B. 369 (Decision of a single Judge). *Dinsab Kasimsab v. Mahamad Hussein* (1945) 47 Bom. L.R. 345, ('45) A.B. 390.

11 *Mohammad Shamsuddin v. NoorJehan Begum* (1955) Hyd. 418, ('55) A. Hyd. 144.

12 *Dinsab Kasimsab v. Mahamad Hussain* (1945) 47 Bom. L.R. 345, ('45) A.B. 390.

13 *Muhaiddin Tharaganar v. Sainambu Ammal* (1941) Mad. 760, (1941) 1 M.LJ. 503, ('41) A.M. 582.

14 *Dinsab Kasimsab v. Mahomed Hussain* (1945) 47 Bom. L.R. 345 ('45) A.B. 390.

15 *Mohammad Yusuf Khan v. Mst. Zarina* ; 1975 Cr. LJ. 1988.

Maintenance of illegitimate children

Mahomedan Law imposes no obligation upon the natural father to maintain his illegitimate children. It has been held by the Kerala High Court that apart from any rights conferred by any statute or the personal law, an illegitimate daughter of a Mahomedan male and a Hindu female was not entitled to claim maintenance from the putative father or from the assets left by him on general principles that a person having begotten the child, is bound to provide for its maintenance.[16]

16 *Pavitri v. Katheesumma* ('59) A. Ker. 319.

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CHAPTER XIX

MAINTENANCE OF RELATIVES

371.

Maintenance of parents

(1) Children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves.
(2) A son though in straitened circumstances is bound to maintain his mother, if the mother is poor, though she may not be infirm.
(3) A son, who, though poor, is earning something, is bound to support his poor father who earns nothing.

Hedaya, 148; Baillie, 465, 466.

In the instant case the point for consideration before the Calcutta High Court is whether a divorced Muslim woman is entitled to invoke the provisions of s. 125 of CrPC for her maintenance against her sons and whether such a proceeding under s. 125 of CrPC against the sons of the divorced Muslim woman is maintainable when a proceeding under ss. 3, 4 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 is pending before the Court of competent jurisdiction. The Court held that s. 125 CrPC enacted to provide a quick summary remedy to persons unable to maintain themselves. Quoting the judgment of Apex Court in*Danial Latifi v. Union of India* ,[17] the Court held that the proceeding under s. 125 of CrPC against children of the respondent mother is quite maintainable despite the pendency of the proceeding under ss. 3, 4 of the Act against her husband.[18]

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

18 *Makiur Rahaman Khan v. Mahila Bibi* 2002 CrLJ 1751, (2002) 2 DMC 549, LNIND 2001 Cal. 409.

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CHAPTER XIX

MAINTENANCE OF RELATIVES

372.

Maintenance of grandparents

A person is bound to maintain his paternal and maternal grandfathers and grandmothers if they are poor but not otherwise, to the same extent as he is bound to maintain his poor father.

Baillie, 466.

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CHAPTER XIX

MAINTENANCE OF RELATIVES

373.

Maintenance of other relations

Persons who are not themselves poor are bound to maintain their poor relations within the prohibited degrees in proportion to the share which they would inherit from them on their death. A father is not bound to maintain his son's widow.[19]

Baillie, 467.

19 *Mahomed Abdul v. Khairunnissa* (1950) 52 Bom. L.R. 133, ('50) A.B. 245.

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CHAPTER XIX

MAINTENANCE OF RELATIVES

374.

Statutory obligation of father to maintain his children

If a father, who has sufficient means, neglects or refuses to maintain his legitimate or illegitimate children who are unable to maintain themselves, he may be compelled, under the provisions of the Code of Criminal Procedure, 1898, to make a monthly allowance, not exceeding five hundred rupees, for their maintenance.[20]

The obligation of the Mahomedan father to maintain his minor children may be described as a personal obligation and may be correctly so described. But that does not mean that the context of that obligation falls within the literal meaning of the expression 'persona', saying that an obligation is personal does not mean that the only sanction which the law imposes for the performance of the obligation is to proceed against the obligee's person whenever he fails to discharge that obligation. In the context of the relationship between a father and his minor children, all that the idea of personal obligation imports is that he is under a duty to maintain them even on the mere aspect of his being their parent.

The text books on Mahomedan Law might for aught be variations of the same theme. But both show that the Prophet as the supreme law giver had to be on the subject of maintenance of wives and children and the liability of the husband's or father's property as the case may be to such maintenance. Reducing the Prophet's words in modern legal terminology it can be said that a Muslim father's obligation to maintain his children attaches to his property and runs with it.

In the absence of any leading authority, the Courts in this land must administer the personal law for Muslims on this difficult question only on the basis of the ancient textual authorities, whose validity as sources of law can hardly be questioned. Having regard to the tradition handed down from the Prophet himself there seems to be every judicial compulsion to follow the injunction which the Prophet administered to his followers as the only rule of law bearing on the subject of maintenance.[21]

See the Code of Criminal Procedure, 1898, s. 488 as amended by s. 131 of the (Amendment) Act, 1955 (XXVI of 1955). If the children are illegitimate, the refusal of the mother to surrender them to the father is not a ground for refusing an order of maintenance.[22](*see* 358 above) (*see also*Code of Criminal Procedure, 1973).

20 Although Mahomedan Law imposes no duty on the father to maintain his illegitimate children, an agreement to maintain an illegitimate child is not void. See *Sukha v. Ninni* ('66) A. Raj. 163.

21 *Ibrahim Fathima v. Mohammed Saleem* (minor) (1979) 2 M.LJ. 199:92 LW. 390.

22 *Kariyadan v. Kayat Beeran* (1895) 19 Mad. 461

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MAINTENANCE OF RELATIVES

375.

Maintenance of wives

(*see* 277 to 279 above)

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APPENDIX I - THE MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937 [1]

(**26 of 1937)**

[7th *October* , 1937]

STATEMENT OF OBJECTS AND REASONS

For several years it has been the cherished desire of the Muslims of British India that Customary Law should in no case take the place of Muslim Personal Law. The matter has been repeatedly agitated in the press as well as on the platform. The Jamiat-ul-Ulema-i-Hind, the greatest moslem religious body has supported the demand and invited the attention of all concerned to the urgent necessity of introducing a measure to this effect. Customary Law is a misnomer inasmuch as it has not any sound basis to stand upon and is very much liable to frequent changes and cannot be expected to attain at any time in the future that certainty and definiteness which must be the characteristic of all laws. The status of Muslim women under the so-called Customary Law is simple disgraceful. All the Muslim Women Organisations have, therefore, condemned the Customary Law as it adversely affects their rights. They demand that the Muslim Personal Law (Shariat) should be made applicable to them. The introduction of Muslim Personal Law will automatically raise them to the position to which they are naturally entitled. In addition to this present measure, if enacted, would have very salutary effect on society because it would ensure certainty and definiteness in the mutual rights and obligations of the public. Muslim Personal Law (Shariat) exists in the form of a veritable code and is too well known to admit of any doubt or to entail any great labour in the shape of research, which is the chief feature of Customary Law.

An Act to make provision for the application of the Muslim Personal Law (Shariat) to Muslims [2] [* * *].

WHEREAS it is expedient to make provision for the application of the Muslim Personal Law (Shariat) to Muslims [3] [* * *]; It is hereby enacted as follows:--

1.

Short title and extent.--

(1) This Act may be called THE MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937.

(2) It extends to the whole of India [4] [except the State of Jammu and Kashmir] [5] [* * *]

State Amendment

Pondicherry.-- In its application to the Union territory of Pondicherry, in s. 1, after sub-s. (2), insert the following proviso, namely:--

&uot;Provided that nothing contained in this Act shall apply to the Renoncants of the Union territory of Pondicherry.&uot;--Act 26 of 1968, s. 3 and Sch.

2.

Application of Personal Law to Muslims.--

Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq, illa, 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).

State Amendments

Andhra Pradesh.-- Same as that of Tamil Nadu.--A.P. (Andhra Area) Amendment Act (18 of 1949).

Kerala.-- Same as that of Tamil Nadu except that between the words &uot;trust properties and wakfs&uot; and &uot;the rule of decision in cases&uot;, the words and brackets, &uot;(other than charities and charitable institutions and charitable and religious endowments)&uot; are to be added.--Kerala Act 42 of 1963, S. 3 (w.e.f. 12-12-1963).

Tamil Nadu.-- In its application to the State of Tamil Nadu, for S. 2, substitute the following section, namely:--

&uot; *2. Application of Personal Law to Muslims* .--Notwithstanding any custom or usage to the contrary, in all questions 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, illa, zihar, lian, khula* and *mubaraat* , maintenance, dower, guardianship gifts, trusts and trust properties and wakfs the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)&uot;.--T.N. Act 18 of 1949, s. 2 (w.e.f. 12-7-1949), as amended by T.N. Act 25 of 1957. This has been extended to the transferred territories (*i.e* .,) the Kanyakumari district and the Shencottah taluk of the Tirunelveli district in Tamil Nadu, by T.N. Act 23 of 1960. It has also been extended to the territories added to Tamil Nadu under the Central Act 56 of 1959--See T.N. (Added Territories) Adaptation of Laws Order, 1961.

Comment

Question of legitimacy.-- A close reading of Sec. 2 of the Central Act 26 of 1937 and Sec. 16 of the Madras Civil Courts Act, 1873, indicates that they do not deal with the law relating to legitimacy. It is true, they refer to the law of succession and wherever the parties are Muslims, the Court has to decide their rights with reference to the Muslim law of succession. But the law relating to legitimacy cannot be taken to be a part of the law of inheritance or succession.[6] &uot;

3.

Power to make a declaration.--

(1) Any person who satisfies the prescribed authority--
  (a) that he is a Muslim, and
  (b) that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872 (9 of 1872), and
  (c) that he is a resident of [7] [the territories to which this Act extends],

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of [8] [the provisions of this section], and thereafter the provisions of section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

(2) Where the prescribed authority refuses to accept a declaration under sub-section (1), the person desiring to make the same may appeal to such officer as the [9] [State Government] may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same.

Comment

Section 112 of the Evidence Act, is very general in its terms and it applies to all persons including Mahommedans who may have a personal law of their own relating to legitimacy as there is no provision exempting them from the application of s. 117. [10]

4.

Rule-making power.--

(1) The [11] [State Government] may make rules to carry into effect the purposes of this Act .

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:--

(a) for prescribing the authority before whom and the form in which declarations under this Act shall be made;

(b) for prescribing the fees to be paid for the filing of declarations and for the attendance at private residences of any person in the discharge of his duties under this Act ; and for prescribing the times at which such fees shall be payable and the manner in which they shall be levied.

(3) Rules made under the provisions of this section shall be published in the Official Gazette and shall thereupon have effect as if enacted in this Act.

[12] [(4) Every rule made by the State Government under this Act shall be laid, as soon as it is made, before the State Legislature.]

[13] 5.

Dissolution of marriage by Court in certain circumstances.--

[*Repealed by the Dissolution of Muslim Marriages Act, 1939 (8 of 1939), section 6 (w.e.f. 17-3-1939)*.]

6.

Repeals.--

[14] [The under mentioned provisions] of the Act s and Regulations mentioned below shall be repealed insofar as they are inconsistent with the provisions of this Act, namely:--

(1) Section 26 of the Bombay Regulation 4 of 1827;

(2) Section 16 of the Madras Civil Courts Act, 1873 (3 of 1873);[15] [* * * *]

(4) Section 3 of the Oudh Laws Act, 1876 (18 of 1876);
(5) Section 5 of the Punjab Laws Act, 1872 (5 of 1872);
(6) Section 5 of the Central Provinces Laws Act, 1875 (20 of 1875); and
(7) Section 4 of the Ajmer Laws Regulation, 1877 (Regn. 3 of 1877).

Comment

Questions of legitimacy whether come under Sec. 16 of the Madras Civil Courts Act read with Sec. 2 of the Muslim Personal Law (Shariat) Application Act, 1937.--Legitimacy may be a matter relevant for deciding the claims relating to succession but it cannot be said that it is part of the law of succession. The question whether a particular is legitimate or not can arise not only with reference to succession but also with reference to various other matters. It is not correct to say that questions of legitimacy will come under Sec. 16 of the Madras Civil Courts Act, read with Sec 2 of Act 26 of 1937, so as to say that the Court is bound to apply the presumption under the Mahomedan law on question of legitimacy and not the presumption contained in Sec. 112. Therefore, the presumption under Sec. 112 of the Evidence Act should be taken to have superseded the Mahomedan law relating to legitimacy to the extent of any inconsistency between the two of the Evidence Act.[16]

1 The Act has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 and to the States of Manipur, Tripura and Vindhya Pradesh, by the Union Territories (Laws) Act, 1950. Manipur and Tripura are State now, see Act 81 of 1971. It has been extended to Kanyakumari district and Shencottah taluk of Tirunelveli district in Tamil Nadu by T.N. Act 23 of 1960. It has now been extended to the Union Territories of (1) Dadra and Nagar Haveli by Regulation (6 of 1963); (2) Laccadive, Minicoy and Amindivi Islands by Regulation (8 of 1965). These Islands are now known as Union Territory of Lakshdweep, see Act (34 of 1973); and (3) Pondicherry by Act (26 of 1968).

2 The words "in the Provinces of India" omitted by A.O. 1950.

3 The words "in the Provinces of India" omitted by A.O. 1950.

4 Subs. by Act 48 of 1959, s. 3 and Sch. I, for certain words (w.e.f. 1-2-1960).

5 The words "excluding the North-West Frontier Province" omitted by A.O. 1948.

6 *A.G. Ramachandran v. Shamsunnissa Bivi,* A.I.R. 1977 Mad. 182 at p. 185.

7 Subs. by the Adaptation of Laws (No. 3) Order, 1956, for "a Part A State or a Part C State".

8 Subs. by Act 16 of 1943, s. 2, for "this Act" (w.e.f. 7-4-1943).

9 Subs. by A.O. 1950, for "Provincial Government".

10 *A.G. Ramchandran v. Shamsunnissa Bivi,* A.I.R. 1977 Mad. 182 at p. 184.

11 Subs. by Act 16 of 1943, s. 2, for "this Act " (w.e.f. 7-4-1943).

12 Ins. by Act 20 of 1983, s. 2 and Sch. (w.e.f. 15-3-1984).

13 The repealed S. 5, was as follows:--The District Judge may, on petition made by a Muslim married woman, dissolve a marriage on any ground recognised by Muslim Personal Law (Shariat.).

14 Subs. by Act 16 of 1943, s. 3, for "Provisions".

15 The brackets, figures and words "(3) Section 37 of the Bengal, Agra and Assam Civil Courts Act, 1897" omitted by Act 16 of 1943, s. 3.

16 *A.G. Ramchandran v. Shamsunnissa Bivi,* A.I.R. 1977 Mad. 182 at p. 185.

APPENDIX II - THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986

(25 of 1986)

[19th *May* , 1986]

STATEMENT OF OBJECTS AND REASONS

The Supreme Court, in *Mohd. Ahmed Khan v. Shah Bano Begum* A.I.R. 1985 S.C. 945, has held that although the Muslim law limits the husband's liability to provide for maintenance of the divorced wife to the period of *iddat* , it does not contemplate or countenance the situation envisaged by section 125 of the Code of Criminal Procedure , 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim law to cases in which the divorced wife is unable to maintain herself. The Court, therefore, came to the conclusion that if the divorced wife is able to maintain herself, the husband's liability ceases with the expiration of the period of*iddat* but if she is unable to maintain herself after the period of *iddat* , she is entitled to have recourse to section 125 of the Code of Criminal Procedure , 1973.

2. This decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. The Bill accordingly provides for the following among other things, namely:--
   (a) a Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period of *iddat* by her former husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extended to a period of two years from the dates of birth of the children. She will also be entitled to *mahr* or dower and all the properties given to her by her relatives, friends, husband and the husband's relatives. If the above benefits are not given to her at the time of divorce, she is entitled to apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of *mahr* or dower or the delivery of the properties;
   (b) where a Muslim divorced woman is unable to maintain herself after the period of *iddat* , the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim law in the proportions in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where a divorced woman has no relatives or such relatives or any one of them has not enough means to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives also do not have the means to pay the shares of the defaulting relatives, the Magistrate would order the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.

(3) The Bill seeks to achieve the above objects.

An Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto .

Be it enacted by Parliament in the Thirty-seventh Year of the Republic of India as follows:--

1.

Short title and extent.--

(1) This Act may be called THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986.
(2) It extends to the whole of India except the State of Jammu and Kashmir.

2.

Definitions.--

In this Act, unless the context otherwise requires,--

(a) &uot;divorced woman&uot; means a Muslim woman who was married according to Muslim law, and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim law;
(b) &uot; *iddat* period&uot; means, in the case of a divorced woman,--
  (i) three menstrual courses after the date of divorce, if she is subject to menstruation;
  (ii) three lunar months after her divorce, if she is not subject to menstruation; and
  (iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier;

(c) &uot;Magistrate&uot; means a Magistrate of the First Class exercising jurisdiction under the Code of Criminal Procedure, 1973 (2 of 1974) in the area where the divorced woman resides;
(d) &uot;prescribed&uot; means prescribed by rules made under this Act.

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;
  (b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;
  (c) an amount equal to the sum of *mahr* or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and

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

(2) Where a reasonable and fair provision and maintenance or the amount of *mahr* or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, *mahr* or dower or the delivery of properties, as the case may be.

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that--

(a) her husband having sufficient means, has failed or neglected to make or pay her within the *iddat* period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of *mahr* or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her,

make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as 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 her former husband or, as the case may be, for the payment of such *mahr* or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or *mahr* or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974), and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

4.

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 a Magistrate is satisfied that a divorced woman has not re-married 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.

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order, direct the State Wakf Board established under section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.

5.

Option to be governed by the provisions of sections 125 to 128 of Act 2 of 1974.--

If, on the date of the first hearing of the application under sub-section (2) of section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure , 1973 (2 of 1974) and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly.

Explanation .--For the purposes of this section, &uot;date of the first hearing of the application&uot; means the date fixed in the summons for the attendance of the respondent to the application.

6.

Power to make rules.--

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act .

(2) In particular and without prejudice to the foregoing power, such rules may provide for--

(a) the form of the affidavit or other declaration in writing to be filed under section 5;

(b) the procedure to be followed by the Magistrate in disposing of applications under this Act, including the serving of notices to the parties to such applications, dates of hearing of such applications and other matters;

(c) any other matter which is required to be or may be prescribed.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

7.

Transitional provisions.--

Every application by a divorced woman under section 125 or under section 127 of the, 1973 (2 of 1974) pending before a Magistrate on the commencement of this Act, shall, notwithstanding anything contained in that Code and subject to the provisions of section 5 of this Act, be dispose of by such Magistrate in accordance with the provisions of this Act.

Mulla: Mahomedan law, Updated 20th edition/APPENDIX/APPENDIX II - THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) RULES, 1986

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) RULES, 1986[1]

In exercise of the powers conferred by section 6 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (25 of 1986), the Central Government hereby makes the following rules for carrying out the purposes of the said Act, namely:--

1.

Short title and commencement.--

These rules may be called THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) RULES, 1986.

They shall come into force at once.

2.

Definitions.--

In these rules, unless the context otherwise requires,--

(a) "Act" means the Muslim Women (Protection of Rights on Divorce) Act, 1986 (25 of 1986);
(b) "Code" means the Code of Criminal Procedure, 1973 (2 of 1974); and
(c) "Form" means form annexed to these rules.

3.

Service of summons.--

Every summons issued by a Magistrate on an application made under the Act, shall be in writing, in duplicate, signed by the Magistrate or by such other officer as he may, from time to time, direct, and shall bear the seal of the Court.

Every such summons shall be accompanied by a true copy of the application.

Every summons issued under sub-rule (1) shall specify the date of the first hearing of the application which shall not be later than seven days from the date on which the summons is issued.

Every summons shall be served by a police officer or by an officer of the Court issuing it.

The summons shall, if practicable, be served personally on the respondent, by delivering or tendering to him one of the duplicates of the summons.

Every respondent on whom the summons is so served shall, if so required by the serving officer, sign a receipt, therefor on the back of other duplicate.

Where the respondent cannot, by the exercise of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family residing with him, and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt, therefor on the back of the other duplicate.

If the service cannot, by the exercise of due diligence, be effected as provided in[2] [sub-rule (5)] or sub-rule (7), the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the respondent ordinarily resides; and thereupon the Court, after making such inquiries as it thinks fit, may either declare that the summons has been duly served or order fresh summons in such a manner as it considers proper.

When a court desires that a summons issued by it shall be served at any place outside its local jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within whose local jurisdiction, the respondent resides, or is, to be there served.

When a summons issued by a court is served outside its local jurisdiction and in any case when an officer who served the summons is not present at the hearing of the case, an affidavit purporting to be made before a Magistrate that such summons has been served and a duplicate of summons purporting to be endorsed [in the manner provided by sub-rule (6) or sub-rule (7)] by the person to whom it was delivered or tendered or with whom it was left shall be admissible in evidence and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

The affidavit mentioned in sub-rule (10) may be attached to the duplicates of the summons and returned to the Court.

4.

Evidence.--

All evidence in the proceedings under the Act shall be taken in the presence of the respondent against whom an order for the payment of provision and maintenance, *mahr* or dower or the delivery of property is proposed to be made or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner specified for summary trials under the Code:

Provided that if the Magistrate is satisfied that the respondent is wilfully avoiding service or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on application made within seven days from the date thereof subject to such terms as to payment of cost to the opposite party as the Magistrate may think just and proper.

5.

Power to postpone or adjourn proceedings.--

In every application under the Act, the proceedings shall be held as expeditiously as possible and in particular, when the examination of witnesses has once begun, the same shall be contained from day to day until all the witnesses in attendance have been examined unless the court finds adjournment of the same beyond the following day to be necessary for reasons to be recorded.

6.

Costs.--

The court in dealing with the applications under the Act shall have power to make such order as to cost as may be just.

7.

Affidavit under section 5.--

An affidavit filed under section 5 of the Act shall be in Form "A".

8.

Declaration under section 5.--

A declaration in writing filed under section 5 shall be in Form "B".

[Forms]

FORM "A"

FORM OF AFFIDAVIT

(*See* rule 7)

I/We.....son/wife of.....aged.....years, residentof..... and.....son/wife of..... aged.....years, resident of.....hereby state on oath as follows:--

1. That I/We have informed myself/ourselves of the provisions of section 5 of the Muslim

Women (Protection of Rights on Divorce) Act, 1986 and of the provisions of sections 125 to 128 of the Code of Criminal Procedure , 1973.

2. That I/We..... desire to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure , 1973 in preference to the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986.
3. That the contents of the above affidavit are true.

Deponent/Deponents

Signed and verified at.....this the.....day of.....20.... *Deponent/Deponents*.

FORM &uot;B&uot;

FORM OF DECLARATION

(*See* rule 8)

I/We.....son/wife of.....aged.....years, residentof..... and.....son/wife of..... aged.....years, resident of.....hereby declare as follows:--

1. That I/We have informed myself/ourselves of the provisions of section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and of the provisions of sections 125 to 128 of the Code of Criminal Procedure , 1973.
2. That I/We..... desire to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure , 1973 in preference to the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986.
3. That the contents of the above declaration are true.

Deponent/Deponents

Signed and verified at.....this the.....day of.....20....

Deponent/Deponents.

1 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 2 (w.e.f. 1-11-2013), for the word &uot;Wakfs&uot;.

2 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 3 (w.e.f. 1-11-2013), for the word &uot;WAKF&uot;. * Brought into force on 1-1-1996.

APPENDIX III - THE [WAQF] ACT, 1995 [3]

(43 of 1995)

[*As amended by the Wakf (Amendment) Act, 2013 (27 of 2013) (w.e.f. 1-11-2013)*]

[22nd November, 1995]

STATEMENT OF OBJECTS AND REASONS

The act ual working of the Wakf Act, 1954 had brought out many deficiencies in it as also in the set up of the Wakf Boards, especially, their powers of superintendence and control over the management of individual wakfs. To clarify some of these matters--the Act had to be amended three times--in 1959, in 1964 and in 1969--within a period of 15 years.

2. Comprehensive amendments to the Wakf Act were made by the Wakf (Amendment) Act, 1984 which were based largely on the recommendations of the Wakf Inquiry Committee set up in December, 1970 to enquire into administration of wakfs at all levels and in response to a demand made in Parliament by the Members during a discussion on the Wakf (Amendment) Bill, 1969.
3. Only two provisions of 1984 Act could, however, be enforced because of strong opposition to its various provisions from the Muslim Community. The two provisions related to:--
   (i) increasing the period of limitation for filing suits in respect of wakf properties in adverse possession from 12 years to 30 years; and
   (ii) application of the provisions of Wakf Act, 1954, to the evacuee properties.

4. The main criticism related to provisions concerning the powers of the Wakf Commissioner. It was stated that the Wakf Commissioner has been given overriding powers and the Wakf Board had been made subordinate to him. The other criticisms were that the Amendment Act, 1984 is a gross interference by the State and the Central Government in the day to day management and administration of the wakfs by the Trustees and Mutawallis of wakfs.
5. After a careful consideration of the objections to the various provisions of the 1984 Act, and after holding wide ranging discussions with the leaders of the Muslim community, it has been decided to bring in a new comprehensive Bill on wakf matters incorporating the features of 1954 Act and such provisions of the 1984 Act in respect of which there was a near consensus.
6. Now, the new Wakf Law will have, inter alia, the following features:--
   (a) Wakf Boards for the States and for the Union Territory of Delhi shall have not less than 7 and not more than 13 members of which the majority will comprise such persons as are elected from amongst Muslim Members of Parliament, Muslim Members of State Legislatures, Muslim Members of the Bar Council in a State and Mutawallis of wakfs having an annual income of Rs. 1 lakh or more. The nominated members will be from Muslim organisations of State eminence, recognised scholars in Muslim theology and a representative of the State Government not below the rank of Deputy Secretary. In a State where there are Shia wakfs but no separate Shia Wakf Board, at least one of the Members shall be a Shia Muslim. A smaller Wakf Board is envisaged for Union Territories other than Delhi.
   (b) The other important feature is about distribution of powers between the Wakf Board and the Wakf Commissioner which would now be re-designated as the Chief Executive Officer and would be subordinate to the Wakf Board.
   (c) Provisions are also being made for appointment of the Executive Officer in respect of wakfs whose performance is not satisfactory and whose annual income is Rs. 5 lakhs or more.
   (d) To strengthen the finances of the Wakf Board, one of the measures being contemplated is to raise the rate of the contribution by a Wakf to the Wakf Board from 6 per cent. of its annual income to 7 per cent.
   (e) It is also intended to put certain restrictions on the powers of Mutawallis in the interest of better management of wakf properties.
   (f) An important provision in the proposed Bill relates to setting up of Wakf Tribunals to consider questions and disputes pertaining to wakfs.

(g) There are instances of misuse of wakf properties either with or without the connivance of the Mutawallis. It is now proposed to incorporate in the Bill a provision so that the alienation of wakf properties will not be easy.

(h) At present, the Wakf Act, 1954 is not applicable to Uttar Pradesh, West Bengal, parts of Gujarat, parts of Maharashtra and some of the North-Eastern States. With the enforcement of this legislation, there will be uniformity in respect of wakf administration throughout the country except in Jammu and Kashmir State.

7. The present Bill seeks to achieve the above objectives.

An Act to provide for the better administration of [4] *[Auqaf] and for matters connected therewith or incidental thereto* .

BE it enacted by Parliament in the Forty-sixth Year of the Republic of India as follows:--

CHAPTER I

PRELIMINARY

1.

Short title, extent and commencement.--

(1) This Act may be called THE [5] [WAQF] ACT, 1995.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force in a State on such date* as the Central Government may, by notification in the Official Gazette, appoint; and different dates may be appointed for different areas within a State and for different provisions of this Act, and any reference in any provision to the commencement of this Act, shall, in relation to any State or area therein, be construed as reference to the commencement of that provision in such State or area.

2.

Application of the Act.--

Save as otherwise expressly provided under this Act, this Act shall apply to all [6] [auqaf] whether created before, or after the commencement of this Act :

Provided that nothing in this Act shall apply to Durgah Khawaja Saheb, Ajmer to which the Durgah Khawaja Saheb Act, 1955 (36 of 1955) applies.

3.

Definitions.--

In this Act, unless the context otherwise requires,--

(a) &uot;beneficiary&uot; means a person or object for whose benefit a [7] [waqf] is created and includes religious, pious and charitable objects and any other objects of public utility sanctioned by the Muslim law;

(b) &uot;benefit&uot; does not include any benefit which a mutawalli is entitled to claim solely by reason of his being such mutawalli;

(c) &uot;Board&uot; means a Board of [8] [Waqf] established under sub-section (1), or as

the case may be, under sub-section (2) of section 13 and shall include a common [9] [Waqf] Board established under section 106;

(d) &uot;Chief Executive Officer&uot; means the Chief Executive Officer appointed under subsection (1) of section 23;

(e) &uot;Council&uot; means the Central [10] [Waqf] Council established under section 9;

[11] [(ee) &uot;encroacher&uot; means any person or institution, public or private, occupying waqf property, in whole or part, without the authority of law and includes a person whose tenancy, lease or licence has expired or has been terminated by mutawalli or the Board;]

(f) &uot;Executive Officer&uot; means the Executive Officer appointed by the Board under subsection (1) of section 38;

[12] (g) &uot;list of auqaf&uot; means the list of auqaf published under sub-section (2) of section 5 or contained in the register of auqaf maintained under section 37;]

(h) &uot;member&uot; means a member of the Board and includes the Chairperson;

(i) &uot;mutawalli&uot; means any person appointed, either verbally or under any deed or instrument by which a [13] [waqf] has been created, or by a competent authority, to be the mutawalli of a [14] [waqf] and includes any person who is a mutawalli of a [15] [waqf] by virtue of any custom or who is a naib-mutawalli, khadim, mujawar, sajjadanashin, amin or other person appointed by a mutawalli to perform the duties of a mutawalli and save as otherwise provided in this Act, any person, committee or corporation for the time being managing or administering any [16] [waqf] or [17] [waqf] property: *Provided* that no member of a committee or corporation shall be deemed to be a mutawalli unless such member is an Office bearer of such committee or corporation; [18] [*Provided further* that the mutawalli shall be a citizen of India and shall fulfil such other qualifications as may be prescribed: *Provided also* that in case a waqf has specified any qualifications, such qualifications may be provided in the rules as may be made by the State Government;]

(j) &uot;net annual income&uot; in relation to a [19] [waqf], means net annual income determined in accordance with the provisions of the *Explanations* to sub-section (1) of section 72;

(k) &uot;person interested in a [20] [waqf]&uot; means any person who is entitled to receive any pecuniary or other benefits from the [21] [waqf] and includes--

(i) any person who has a right to [22] [offer prayer] or to perform any religious rite in a mosque, idgah, imambara, dargah, [23] [khanqah, peerkhana and karbala], maqbara, graveyard or any other religious institution connected with the [24] [waqf] or to participate in any religious or charitable institution under the [25] [waqf];

(ii) the [26] [waqif] and any descendant of the [27] [waqif] and the mutawalli;

(l) &uot;prescribed&uot;, except in Chapter III, means, prescribed by rules made by the State Government;

(m) &uot;regulations&uot; means the regulations made by the Board under this Act;

(n) &uot;Shia [28] [waqf]&uot; means a [29] [waqf] governed by Shia law;

(o) &uot;Sunni [30] [waqf]&uot; means a [31] [waqf] governed by Sunni law;

(p) &uot;Survey Commissioner&uot; means the Survey Commissioner of [32] [Waqf] appointed under sub-section (1) of section 4 and includes any Additional or Assistant Survey Commissioners of [33] [Auqaf] under sub-section (2) of section 4;

(q) &uot;Tribunal&uot;, in relation to any area, means the Tribunal constituted under sub-section (1) of section 83 having jurisdiction in relation to that area;

[34] [(r) &uot;waqf&uot; means the permanent dedication by any person, of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes--

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

(ii) a Shamlat Patti, Shamlat Deh, Jumla Malkkan or by any other name entered in a revenue record;

(iii) &uot;grants&uot;, including mashrat-ul-khidmat for any purpose recognised by the Muslim law as pious, religious or charitable; and

(iv) a waqf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable, provided when the line of succession fails, the income of the waqf shall be spent for education, development, welfare and such other purposes as recognised by Muslim law,

and &uot;waqif&uot; means any person making such dedication;]

(s) &uot; [35] [waqf] deed&uot; means any deed or instrument by which a [36] [waqf] has been created and includes any valid subsequent deed or instrument by which any of the terms of the original dedication have been varieds:

(t) &uot; [37] [Waqf] Fund&uot; means a [38] [Waqf] Fund formed under sub-section (1) of section 77.

CHAPTER II

SURVEY OF [39] [AUQAF]

4.

Preliminary survey of [40] [auqaf].--

(1) The State Government may, by notification in the Official Gazette, appoint for the State a Survey Commissioner of [41] [Auqaf] and as many Additional or Assistant Survey Commissioners of [42] [Auqaf] as may be necessary for the purpose of making a survey of [43] [auqaf in the State].

[44] [(1A) Every State Government shall maintain a list of auqaf referred to in sub-section (1) and the survey of auqaf shall be completed within a period of one year from the date of commencement of the Wakf (Amendment) Act, 2013, in case such survey was not done before the commencement of the Wakf (Amendment) Act, 2013:

Provided that where no Survey Commissioner of Waqf has been appointed, a Survey Commissioner for auqaf shall be appointed within three months from the date of such commencement.]

(2) All Additional and Assistant Survey Commissioners of [45] [Auqaf] shall perform their functions under this Act under the general supervision and control of the Survey Commissioner of [46] [Auqaf].

(3) The Survey Commissioner shall, after making such inquiry as he may consider necessary, submit his report, in respect of [47] [auqaf] existing at the date of the commencement of this Act in the State or any part thereof, to the State Government containing the following particulars, namely:--

(a) the number of [48] [auqaf] in the State showing the Shia [49] [auqaf] and Sunni [50] [auqaf] separately;

(b) the nature and objects of each [51] [waqf];

(c) the gross income of the property comprised in each [52] [waqf];

(d) the amount of land revenue, cesses, rates and taxes payable in respect of each [53] [waqf];

(e) the expenses incurred in the realisation of the income and the pay or other remuneration of the mutawalli of each [54] [waqf]; and

(f) such other particulars relating to each [55] [waqf] as may be prescribed.

(4) The Survey Commissioner shall, while making any inquiry, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely:--

(a) summoning and examining any witness;

(b) requiring the discovery and production of any document;
(c) requisitioning any public record from any Court or office;
(d) issuing commissions for the examination of any witness or accounts;
(e) making any local inspection or local investigation;
(f) such other matters as may be prescribed.

(5) If, during any such inquiry, any dispute arises as to whether a particular [56] [waqf] is a Shia [57] [waqf] or Sunni [58] [waqf] and there are clear indications in the deed of [59] [waqf] as to its nature, the dispute shall be decided on the basis of such deed.

(6) The State Government may, by notification in the Official Gazette, direct the Survey Commissioner to make a second or subsequent survey of [60] [waqf] properties in the State and the provisions of sub-sections (2), (3), (4) and (5) shall apply to such survey as they apply to a survey directed under sub-section (1):

Provided that no such second or subsequent survey shall be made until the expiry of a period of [61] [ten years] from the date on which the report in relation to the immediately previous survey was submitted under sub-section (3).

[62] [*Provided further* that the waqf properties already notified shall not be reviewed again in subsequent survey except where the status of such property has been changed in accordance with the provisions of any law.]

5.

Publication of list of [63] [auqaf].--

(1) On receipt of a report under sub-section (3) of section 4, the State Government shall forward a copy of the same to the Board.

(2) The Board shall examine the report forwarded to it under sub-section (1) and [64] [forward it back to the Government within a period of six months for publication in the Official Gazette] a list of Sunni [65] [auqaf] or Shia [66] [auqaf] in the State, whether in existence at the commencement of this Act or coming into existence thereafter, to which the report relates and containing such other particulars as may be prescribed.

[67] [(3) The revenue authorities shall--
(i) include the list of auqaf referred to in sub-section (2), while updating the land records; and
(ii) take into consideration the list of auqaf referred to in sub-section (2), while deciding mutation in the land records.

(4) The State Government shall maintain a record of the lists published under sub-section (2) from time to time.]

6.

Disputes regarding [68] [auqaf].--

(1) If any question arises whether a particular property specified as [69] [waqf] property in the list of [70] [auqaf] is [71] [waqf] property or not or whether a [72] [waqf] specified in such list is a Shia [73] [waqf] or Sunni [74] [waqf], the Board or the mutawalli of the [75] [waqf] or [76] [any person aggrieved] may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final:

Provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of [77] [auqaf].

[78] [*Provided further* that no suit shall be instituted before the Tribunal in respect of such properties notified in a second or subsequent survey pursuant to the provisions contained in subsection (6) of section 4.]

[79] [* * *]

(2) Notwithstanding anything contained in sub-section (1), no proceeding under this Act in respect of any [80] [waqf] shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.

(3) The Survey Commissioner shall not be made a party to any suit under sub-section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

(4) The list of [81] [auqaf] shall, unless it is modified in pursuance of a decision or the Tribunal under sub-section (1), be final and conclusive.

(5) On and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a Court in that State in relation to any question referred to in subsection (1).

7.

Power of Tribunal to determine disputes regarding [82] [auqaf].--

(1) If, after the commencement of this Act, [83] [any question or dispute] arises, whether a particular property specified as [84] [waqf] property in a list of [85] [auqaf] is [86] [waqf] property or not, or whether a [87] [waqf] specified in such list is a Shia [88] [waqf] or a Sunni [89] [waqf], the Board or the mutawalli of the [90] [waqf], [91] [or any person aggrieved by the publication of the list of auqaf under section 5] therein, may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final:

Provided that--

(a) in the case of the list of [92] [auqaf] relating to any part of the State and published after the commencement of this Act no such application shall be entertained after the expiry of one year from the date of publication of the list of [93] [auqaf]; and

(b) in the case of the list of [94] [auqaf] relating to any part of the State and published at any time within a period of one year immediately preceding the commencement of this Act, such an application may be entertained by Tribunal within the period of one year from such commencement:

Provided further that where any such question has been heard and finally decided by a Civil Court in a suit instituted before such commencement, the Tribunal shall not reopen such question.

(2) Except where the Tribunal has no jurisdiction by reason of the provisions of sub-section (5), no proceeding under this section in respect of any [95] [waqf] shall be stayed by any Court, Tribunal or other authority by reason only of the pendency of any suit, application or appeal or other proceeding arising out of any such suit, application, appeal or other proceeding.

(3) The Chief Executive Officer shall not be made a party to any application under subsection (1).

(4) The list of [96] [auqaf] and where any such list is modified in pursuance of a decision of the Tribunal under sub-section (1), the list as so modified, shall be final.

(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a Civil Court under

sub-section (1) of section 6, before the commencement of this Act or which is the subject-matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be.

[97] [(6) The Tribunal shall have the powers of assessment of damages by unauthorised occupation of waqf property and to penalise such unauthorised occupants for their illegal occupation of the waqf property and to recover the damages as arrears of land revenue through the Collector:

Provided that whosoever, being a public servant, fails in his lawful duty to prevent or remove an encroachment, shall on conviction be punishable with fine which may extend to fifteen thousand rupees for each such offence.]

[98] [8.

State Government to bear cost of survey.--

The total cost of making a survey including the cost of publication of the list or lists of auqaf under this Chapter shall be borne by the State Government.]

CHAPTER III

CENTRAL [99] [WAQF] COUNCIL

9.

Establishment and constitution of Central [100] [Waqf] Council.--

[101] [(1) The Central Government may, by notification in the Official Gazette, establish a Council to be called the Central Waqf Council, for the purpose of advising the Central Government, the State Governments and the Boards on matters concerning the working of Boards and the due administration of auqaf.

(1A) The Council referred to in sub-section (1) shall issue directives to the Boards, on such issues and in such manner, as provided under sub-sections (4) and (5).]

(2) The Council shall consist of--

(a) the Union Minister in charge of [102] [auqaf]-- *ex officio* Chairperson;

(b) the following members to be appointed by the Central Government from amongst Muslims, namely:--

(i) three persons to represent Muslim organisations having all India character and national importance;

[103] [(ii) four persons of national eminence, one each from the fields of administration or management, financial management, engineering or architecture and medicine;]

(iii) three Members of Parliament of whom two shall be from the House of the People and one from the Council of States;

(iv) Chairpersons of three Boards by rotation;

(v) two persons who have been Judges of the Supreme Court or a High Court;

(vi) one advocate of national eminence;

(vii) one person to represent the mutawallis of the [104] [waqf] having a gross annual income of rupees five lakhs and above;

(viii) three persons who are eminent scholars in Muslim Law.

[105] [*Provided* that at least two of the members appointed under sub-clauses (i) to (viii) shall be women.]

(3) The term of office of, the procedure to be followed in the discharge of their functions by, and the manner of filling casual vacancies among, members of the Council shall be such as may be prescribed by rules made by the Central Government.

[106] [(4) The State Government or, as the case may be, the Board, shall furnish information to the Council on the performance of Waqf Boards in the State, particularly on their financial performance, survey, maintenance of waqf deeds, revenue records, encroachment of waqf properties, annual reports and audit reports in the manner and time as may be specified by the Council and it may *suo motu* call for information on specific issues from the Board, if it is satisfied that there was *prima facie* evidence of irregularity or violation of the provisions of this Act and if the Council is satisfied that such irregularity or violation of the Act is established, it may issue such directive, as considered appropriate, which shall be complied with by the concerned Board under intimation to the concerned State Government.

(5) Any dispute arising out of a directive issued by the Council under sub- section (4) shall be referred to a Board of Adjudication to be constituted by the Central Government, to be presided over by a retired Judge of the Supreme Court or a retired Chief Justice of a High Court and the fees and travelling and other allowances payable to the Presiding Officer shall be such as may be specified by that Government.]

10.

Finance of Council.--

(1) Every Board shall pay from its [107] [Waqf] Fund annually to the Council such contribution as is equivalent to one per cent. of the aggregate of the net annual income of the [108] [auqaf] in respect of which contribution is payable under sub-section (1) of section 72:

Provided that where the Board, in the case of any particular [109] [waqf] has remitted under sub-section (2) of section 72 the whole of the contribution payable to it under sub-section (1) of that section, then for calculating the contribution payable to the Council under this section the net annual income of the [110] [waqf] in respect of which such remission has been granted shall not be taken into account.

(2) All monies received by the Council under sub-section (1) and all other monies received by it as donations, benefactions and grants shall form a fund to be called the Central [111] [Waqf] Fund.

(3) Subject to any rules that may be made by the Central Government in this behalf, the Central [112] [Waqf] Fund shall be under the control of the Council and may be applied for such purposes as the Council may deem fit.

11.

Accounts and audit.--

(1) The Council shall cause to be maintained such books of account and other books in relation to its accounts in such form and in such manner as may be prescribed by rules made by the Central Government.

(2) The accounts of the Council shall be audited and examined annually by such auditor as may be appointed by the Central Government.

(3) The costs of the audit shall be paid from the Central [113] [Waqf] Fund.

12.

Power of Central Government to make rules.--

(1) The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:--

(a) the term of office of, the procedure to be followed in the discharge of their functions by, and the manner of filling casual vacancies among, the members of the Council;

(b) control over and application of the Central [114] [Waqf] Fund;

(c) the form and manner in which accounts of the Council may be maintained.

(3) Every rule made by the Central Government under this Chapter shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule shall not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

CHAPTER IV

ESTABLISHMENT OF BOARDS AND THEIR FUNCTIONS

13.

Incorporation.--

(1) With effect from such date as the State Government may, by notification in the Official Gazette, appoint in this behalf, there shall be established a Board of [115] [Auqaf] under such name as may be specified in the notification.

[116] [*Provided* that in case where a Board of Waqf has not been established, as required under this sub-section, a Board of Waqf shall, without prejudice to the provisions of this Act or any other law for the time being in force, be established within six months from the date of commencement of the Wakf (Amendment) Act, 2013.]

(2) Notwithstanding anything contained in sub-section (1), if the Shia [117] [auqaf] in any State constitute in number more than fifteen per cent. of all the [118] [auqaf] in the State or if the income of the properties of the Shia [119] [auqaf] in the State constitutes more than fifteen per cent., of the total income of properties of all the [120] [auqaf] in the State, the State Government may, by notification in the Official Gazette, establish a Board of [121] [Auqaf] each for Sunni [122] [auqaf] and for Shia [123] [auqaf] under such names as may be specified in the notification.

[124] [(2A) Where a Board of Waqf is established under sub-section (2) of section 13, in the case of Shia waqf, the Members shall belong to the Shia Muslim and in the case of Sunni waqf, the Members shall belong to the Sunni Muslim.]

(3) The Board shall be a body corporate having perpetual succession and a common seal

with power to acquire and hold property and to transfer any such property subject to such conditions and restrictions as may be prescribed and shall by the said name sue and be sued.

14.

Composition of Board.--

(1) The Board for a State and [125] [the National Capital Territory of Delhi] shall consist of--

(a) a Chairperson;

(b) one and not more than two members, as the State Government may think fit, to be elected from each of the electoral colleges consisting of--

(i) Muslim Members of Parliament from the State or, as the case may be, [126] [the National Capital Territory of Delhi],

(ii) Muslim Members of the State Legislature,

[127] [(iii) Muslim members of the Bar Council of the concerned State or Union territory:

Provided that in case there is no Muslim member of the Bar Council of a State or a Union territory, the State Government or the Union territory administration, as the case may be, may nominate any senior Muslim advocate from that State or the Union territory, and]

(iv) mutawallis of the [128] [auqaf] having an annual income of rupees one lakh and above;

[129] [*Explanation I* .--For the removal of doubts, it is hereby declared that the members from categories mentioned in sub-clauses (i) to (iv), shall be elected from the electoral college constituted for each category.

Explanation II .--For the removal of doubts it is hereby declared that in case a Muslim member ceases to be a Member of Parliament from the State or National Capital Territory of Delhi as referred to in sub-clause (i) of clause (b) or ceases to be a Member of the State Legislative Assembly as required under sub-clause (ii) of clause (b), such member shall be deemed to have vacated the office of the member of the Board for the State or National Capital Territory of Delhi, as the case may be, from the date from which such member ceased to be a Member of Parliament from the State or National Capital Territory of Delhi, or a Member of the State Legislative Assembly, as the case may be;]

[130] [(c) one person from amongst Muslims, who has professional experience in town planning or business management, social work, finance or revenue, agriculture and development act ivities, to be nominated by the State Government;

(d) one person each from amongst Muslims, to be nominated by the State Government from recognised scholars in Shia and Sunni Islamic Theology;

(e) one person from amongst Muslims, to be nominated by the State Government from amongst the officers of the State Government not below the rank of Joint Secretary to the State Government;]

[131] [(1A) No Minister of the Central Government or, as the case may be, a State Government, shall be elected or nominated as a member of the Board:

Provided that in case of a Union territory, the Board shall consist of not less than five and not more than seven members to be appointed by the Central Government from

categories specified under sub-clauses (i) to (iv) of clause (b) or clauses (c) to (e) in sub-section (1):

Provided further that at least two Members appointed on the Board shall be women:

Provided also that in every case where the system of mutawalli exists, there shall be one mutawalli as the member of the Board.]

(2) Election of the members specified in clause (b) of sub-section (1) shall be held in accordance with the system of proportional representation by means of a single transferable vote, in such manner as may be prescribed:

Provided that where the number of Muslim Members of Parliament, the State Legislature or the State Bar Council, as the case may be, is only one, such Muslim Member shall be declared to have been elected on the Board:

Provided further that where there are no Muslim Members in any of the categories mentioned in sub-clauses (i) to (iii) of clause (b) of sub-section (1), the ex-Muslim Members of Parliament, the State Legislature or ex-member of the State Bar Council, as the case may be, shall constitute the electoral college.

(3) Notwithstanding anything contained in this section, where the State Government is satisfied, for reasons to be recorded in writing, that it is not reasonably practicable to constitute an electoral college for any of the categories mentioned in sub-clauses (i) to (iii) of clause (b) of sub-section (1), the State Government may nominate such persons as the members of the Board as it deems fit.

(4) The number of elected members of the Board shall, at all times, be more than the nominated members of the Board except as provided under sub-section (3).

[132] [* * *]

(6) In determining the number of Shia members or Sunni members of the Board, the State Government shall have regard to the number and value of Shia [133] [auqaf] and Sunni [134] [auqaf] to be administered by the Board and appointment of the members shall be made, so far as may be, in accordance with such determination.

[135] [* * *]

(8) Whenever the Board is constituted or re-constituted, the members of the Board present at a meeting convened for the purpose shall elect one from amongst themselves as the Chairperson of the Board.

(9) The members of the Board shall be appointed by the State Government by notification in the Official Gazette.

15.

Term of office.--

The members of the Board shall hold office for a term of five years [136] [from the date of notification referred to in sub-section (9) of section 14].

16.

Disqualification for being appointed, or for continuing as, a member of the Board.--

A person shall be disqualified for being appointed, or for continuing as, a member of the Board if--

(a) he is not a Muslim and is less than twenty-one years of age;
(b) he is found to be a person of unsound mind;
(c) he is an undischarged insolvent;

(d) he has been convicted of an offence involving moral turpitude and such conviction has not been reversed or he has not been granted full pardon in respect of such offence;

[137] [(da) he has been held guilty of encroachment on any waqf property;]

(e) he has been on a previous occasion--

(i) removed from his office as a member or as a mutawalli, or

(ii) removed by an order of a competent Court or tribunal from any position of trust either for mismanagement or for corruption.

17.

Meetings of the Board.--

(1) The Board shall meet for the transaction of business at such time and places as may be provided by regulations.

(2) The Chairperson, or in his absence, any member chosen by the members from amongst themselves shall preside at a meeting of the Board.

(3) Subject to the provisions of this Act, all questions which come before any meeting of the Board shall be decided by a majority of votes of the members present, and in the case of equality of votes, the Chairperson or, in his absence, any other person presiding shall have a second or casting vote.

18.

Committees of the Board.--

(1) The Board may, whenever it considers necessary, establish either generally or for a particular purpose or for any specified area or areas committees for the supervision of [138] [auqaf].

(2) The constitution, functions and duties and the term of office of such committees shall be determined from time to time by the Board:

Provided that it shall not be necessary for the members of such committees to be members of the Board.

19.

Resignation of Chairperson and members.--

The Chairperson or any other member may resign his office by writing under his hand addressed to the State Government:

Provided that the Chairperson or the member shall continue in office until the appointment of his successor is notified in the Official Gazette.

20.

Removal of Chairperson and member.--

(1) The State Government may, by notification in the Official Gazette, remove the Chairperson of the Board or any member thereof if he--

(a) is or becomes subject to any disqualifications specified in section 16; or

(b) refuses to act or is incapable of acting or act s in a manner which the State Government, after hearing any explanation that he may offer, considers to be prejudicial to the interests of the [139] [auqaf]; or

(c) fails in the opinion of the Board, to attend three consecutive meetings of the Board, without sufficient excuse.

(2) Where the Chairperson of the Board is removed under sub-section (1), he shall also cease to be a member of the Board.

[140] **[20A.**

Removal of Chairperson by vote of no confidence.--

Without prejudice to the provisions of section 20, the Chairperson of a Board may be removed by vote of no confidence in the following manner, namely:--

(a) no resolution expressing a vote of confidence or no confidence in any person elected as Chairperson of a Board shall be moved except in the manner prescribed and twelve months have not elapsed after the date of his election as a Chairperson and be removed except with the prior permission of the State Government;

(b) notice for no confidence shall be addressed to the State Government stating clearly the grounds on which such motion is proposed to be moved and shall be signed by at least half the total members of the Board;

(c) at least three members of the Board signing the notice of no confidence shall personally present to the State Government, the notice together with an affidavit signed by them to the effect that the signatures on no confidence motion are genuine and have been made by the signatories after hearing or reading the contents of the notice;

(d) on receipt of the notice of no confidence, as provided hereinabove, the State Government shall fix such time, date and place as may be considered suitable for holding a meeting for the purpose of the proposed no confidence motion:

Provided that at least fifteen days notice shall be given for such a meeting;

(e) notice for meeting under clause (d) shall also provide that in the event of no confidence motion being duly carried on or, election of the new Chairperson, as the case may be, shall also be held in the same meeting;

(f) the State Government shall also nominate a Gazetted Officer (other than an officer of the department which is concerned with the supervision and administration of the Board) to act as presiding officer of the meeting in which the resolution for no confidence shall be considered;

(g) the quorum for such a meeting of the Board shall be one-half of the total number of members of the Board;

(h) the resolution for no confidence shall be deemed to be carried out, if passed by a simple majority of the members present;

(i) if a resolution for no confidence is carried out, the Chairperson shall cease to hold office forthwith and shall be succeeded by his successor who shall be elected by another resolution in the same meeting;

(j) election of the new Chairperson shall be conducted under clause (i), in the meeting under the chairmanship of the said presiding officer referred to in clause (f), in the following manner, namely:--

(A) Chairperson shall be elected from amongst the elected members of the Board;

(B) nomination of candidates shall be proposed and seconded in the meeting itself and election after withdrawal, if any, shall be held by method of secret ballot;

(C) election shall be held by simple majority of the members present in the meeting and in case of equality of votes, the matter shall be decided by drawing of lots; and

(D) proceedings of the meeting shall be signed by the presiding officer;

(k) new Chairperson elected under clause (h) shall hold the office only up to the remainder of the term of the Chairperson removed by the resolution of no confidence; and

(l) if the motion for passing the resolution of no confidence fails for want of quorum or lack of requisite majority at the meeting, no subsequent meeting for considering the motion of no confidence shall be held within six months of the date of the previous meeting.]

21.

Filling of a vacancy.--

When the seat of a member becomes vacant by his removal, resignation, death or otherwise, a new member shall be appointed in his place and such member shall hold office so long as the member whose place he fills would have been entitled to hold office, if such vacancy had not occurred.

22.

Vacancies, etc., not to invalidate proceedings of the Board.--

No act or proceeding of the Board shall be invalid by reason only of the existence of any vacancy amongst its members or any defect in the constitution thereof.

23.

Appointment of Chief Executive Officer and his term of office and other conditions of service.--

141 [(1) There shall be a full-time Chief Executive Officer of the Board who shall be a Muslim and shall be appointed by the State Government, by notification in the Official Gazette, from a panel of two names suggested by the Board and who shall not be below the rank of Deputy Secretary to the State Government, and in case of non-availability of a Muslim officer of that rank, a Muslim officer of equivalent rank may be appointed on deputation.]

(2) The term of office and other conditions of service of the Chief Executive Officer shall be such as may be prescribed.

(3) The Chief Executive Officer shall be *ex officio* Secretary of the Board and shall be under the administrative control of the Board.

24.

Officers and other employees of the Board.--

(1) The Board shall have the assistance of such number of officers and other employees as may be necessary for the efficient performance of its functions under this Act, details thereof shall be determined by the Board in consultation with the State Government.

(2) The appointment of officers and other employees, their term of office and conditions of service shall be such as may be provided by regulations.

25.

Duties and powers of Chief Executive Officer.--

(1) Subject to the provisions of this Act and of the rules made thereunder and the directions of the Board, functions of the Chief Executive Officer shall include--

(a) investigating the nature and extent of [142] [auqaf] and [143] [waqf] properties and calling whenever necessary, an inventory of [144] [waqf] properties and calling, from time to time, for accounts, returns and information from mutawallis;
(b) inspecting or causing inspection of [145] [waqf] properties and account, records, deeds or documents relating thereto;
(c) doing generally of such acts as may be necessary for the control, maintenance and superintendence of [146] [auqaf].

(2) In exercising the powers of giving directions under sub-section (1) in respect of any [147] [waqf], the Board shall act in conformity with the directions by the [148] [waqf] in the deed of the [149] [waqf], the purpose of [150] [waqf] and such usage and customs of the [151] [waqf] as are sanctioned by the school of Muslim law to which the [152] [waqf] belongs.
(3) Save as otherwise expressly provided in this Act, the Chief Executive Officer shall exercise such powers and perform such duties as may be assigned to him or delegated to him under this Act .

26.

Powers of Chief Executive Officer in respect of orders or resolutions of Board.--

Where the Chief Executive Officer considers that an order or resolution passed by the Board--

(a) has not been passed in accordance with the law; or
(b) is in excess of or is an abuse of the powers conferred on the Board by or under this Act or by any other law; or
(c) if implemented, is likely to--
(i) cause financial loss to the Board or to the concerned [153] [waqf] or to the [154] [auqaf] generally; or
(ii) lead to a riot or breach of peace; or
(iii) cause danger to human life, health or safety; or

(d) is not beneficial to the Board or to any [155] [waqf] or to [156] [auqaf] generally,

he may, before implementing such order or resolution place the matter before the Board for its reconsideration and, if such order or resolution is not confirmed by a majority of vote of the members present and voting after such reconsideration, refer the matter to the State Government alongwith his objections to the order or resolution, and the decision of the State Government thereon shall be final.

[157] **[27.**

Delegation of powers by Board.--

The Board may, by a general or special order in writing, delegate to the Chairperson, any other member, the Chief Executive Officer or any other officer or servant of the Board or any area committee, subject to such conditions and limitations as may be specified in the said order, such of its powers and duties under this Act, as it may deem necessary, except the powers and functions of the Board mentioned under clauses (c), (d), (g) and (j) of sub-section (2) of section 32 and section 110.]

[158] **[28.**

Power of District Magistrate, Additional District Magistrate or Sub-Divisional Magistrate to implement the directions of the Board.--

Subject to the provisions of this Act and the rules made thereunder, the District Magistrate or in his absence an Additional District Magistrate or Sub-Divisional Magistrate of a District in the State shall be responsible for implementation of the decisions of the Board which may be conveyed through the

Chief Executive Officer and the Board may, wherever considers necessary, seek directions from the Tribunal for the implementation of its decisions.]

29.

Powers of Chief Executive Officer to inspect records, registers, etc.--

[159] [(1)] The Chief Executive Officer or any officer of the Board duly authorised by him in this behalf shall, [160] [subject to such conditions as may be prescribed], be entitled to all reasonable time to inspect, in any public office, any records, registers or other documents relating to a [161] [waqf] or movable or immovable properties which are [162] [waqf] properties or are claimed to be [163] [waqf] properties.

[164] [(2) The mutawalli or any other person having the custody of any document related to waqf properties shall produce the same, within the prescribed period, before the Chief Executive Officer on being called upon to do so in writing.

(3) Subject to such conditions as may be prescribed, an agency of the Government or any other organisation shall supply, within ten working days, copies of the records, registers of properties or other documents relating to waqf properties or claimed to be waqf properties, to the Chief Executive Officer on a written request to this effect from him:

Provided that before taking any course of act ion as mentioned in sub-sections (2) and (3), the Chief Executive Officer shall obtain approval of the Board.]

30.

Inspection of records.--

(1) The Board may allow inspection of its proceedings of other records in its custody and issue copies of the same on payment of such fees and subject to such conditions as may be prescribed.

(2) All copies issued under this section shall be certified by the Chief Executive Officer of the Board in the manner provided in section 76 of the Indian Evidence Act, 1872 (1 of 1872).

(3) The powers conferred on the Chief Executive Officer by sub-section (2) may be exercised by such other officer or officers of the Board as may either generally or specially by authorised in this behalf by the Board.

31.

Prevention of disqualification for membership of Parliament.--

It is hereby declared that the offices of the Chairperson or members of a Board shall not be disqualified and shall be deemed never to have been disqualified for being chosen as, or for being, a Member of Parliament [165] [or a Member of Union territory Legislature or a Member of a State Legislature if so declared under a law made by the appropriate State Legislature].

32.

Powers and functions of the Board.--

(1) Subject to any rules that may be made under this Act, the general superintendence of all [166] [auqaf] in a State shall vest in the board established or the State; and it shall be the duty of the Board so to exercise its powers under this Act as to ensure that the [167]

[auqaf] under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such [168] [auqaf] were created or intended:

Provided that in exercising its powers under this Act in respect of any [169] [waqf], the Board shall act in conformity with the directions of the [170] [waqf], the purposes of the [171] [waqf] and any usage or custom of the [172] [waqf] sanctioned by the school of Muslim law to which the [173] [waqf] belongs.

Explanation .--For the removal of doubts, it is hereby declared that in this sub-section, &uot; [174] [waqf]&uot; includes a [175] [waqf] in relation to which any scheme has been made by any Court of law, whether before or after the commencement of this Act .

(2) Without prejudice to the generality of the foregoing power, the functions of the Board shall be--

(a) to maintain a record containing information relating to the origin, income, object and beneficiaries of every [176] [waqf];

(b) to ensure that the income and other property of [177] [auqaf] are applied to the objects and for the purposes for which such [178] [auqaf] were intended or created;

(c) to give directions for the administration of [179] [auqaf];

(d) to settle schemes of management for a [180] [waqf]:

Provided that no such settlement shall be made without giving the parties affected an opportunity of being heard;

(e) to direct--

(i) the utilisation of the surplus income of a [181] [waqf] consistent with the object of a [182] [waqf];

(ii) in what manner the income of a [183] [waqf], the objects of which are not evident from any written instrument, shall be utilized.

(iii) in any case where any object of [184] [waqf] has ceased to exist or has become incapable of achievement, that so much of the income of the [185] [waqf] as was previously applied to that object shall be applied to any other object, which shall be similar, or nearly similar or to the original object or for the benefit of the poor or for the purpose of promotion of knowledge and learning in the Muslim community:

Provided that no direction shall be given under this clause without giving the parties affected an opportunity of being heard.

Explanation .--For the purposes of this clause, the powers of the Board shall be exercised--

(i) in the case of a Sunni [186] [waqf], by the Sunni members of the Board only; and

(ii) in the case of a Shia [187] [waqf], by the Shia members of the Board only:

Provided that where having regard to the number of the Sunni or Shia members in the Board and other circumstances, it appears to the Board that the power should not be exercised by such members only, it may co-opt such other Muslims being Sunnis or Shias, as the case may be, as it thinks fit, to be temporary members of the Board for exercising its powers under this clause;

(f) to scrutinise and approve the budgets submitted by mutawallis and to arrange for the auditing of account of [188] [auqaf];

(g) to appoint and remove mutawallis in accordance with the provisions of this Act;

(h) to take measures for the recovery of lost properties of any [189] [waqf];
(i) to institute and defend suits and proceedings relating to [190] [auqaf];
[191] [(j) to sanction lease of any immovable property of a waqf in accordance with the provisions of this Act and the rules made thereunder:

Provided that no such sanction shall be given unless a majority of not less than two-thirds of the members of the Board present cast their vote in favour of such transaction:

Provided further that where no such sanction is given by the Board, the reasons for doing so shall be recorded in writing.]
(k) to administer the [192] [Waqf] Fund;
(l) to call for such returns, statistics, accounts and other information from the mutawallis with respect to the [193] [waqf] property as the Board may, from time to time, require;
(m) to inspect, or cause inspection of, [194] [waqf] properties, accounts, records or deeds and documents relating thereto;
(n) to investigate and determine the nature and the extent of [195] [waqf] and [196] [waqf] property, and to cause whenever necessary, a survey of such [197] [waqf] property;
[198] [(na) to determine or cause to be determined, in such manner as may be specified by the Board, market rent of the waqf land or building;]
(o) generally do all such acts as may be necessary for the control, maintenance and administration of [199] [auqaf].

(3) Where the Board has settled any scheme of management under clause (d) or given any direction under clause (e) of sub-section (2), any person interested in the [200] [waqf] or affected by such settlement or direction may institute a suit in a Tribunal for setting aside such settlement or directions and the decision of the Tribunal thereon shall be final.
(4) Where the Board is satisfied that any [201] [waqf] land, which is a [202] [waqf] property, [203] [has the potential for development as an educational institution, shopping centre, market, housing or residential flats and the like], market, housing flats and the like, it may serve upon the mutawalli of the concerned [204] [waqf] a notice requiring him within such time, but not less than sixty days, as may be specified in the notice, to convey its decision whether he is willing to execute the development works specified in the notice.
(5) On consideration of the reply, if any, received to the notice issued under sub- section (4), the Board, if it is satisfied that the mutawalli is not willing or is not capable of executing the works required to be executed in terms of the notice, it may, [205] [* * *], take over the property, clear it of any building or structure thereon, which, in the opinion of the Board is necessary for execution of the works and execute such works from [206] [Waqf] Funds or from the finances which may be raised on the security of the properties of the [207] [waqf] concerned, and control and manage the properties till such time as all expenses incurred by the Board under this section, together with interest thereon, the expenditure on maintenance of such works and other legitimate changes incurred on the property are recovered from the income derived from the property:

Provided that the Board shall compensate annually the mutawalli of the concerned [208] [waqf] to the extent of the average annual net income derived from the property during the three years immediately preceding the taking over of the property by the Board.

(6) After all the expenses as enumerated in sub-section (5) have been recouped from the income of the developed properties, the developed properties shall be handed over to mutawalli of the concerned [209] [waqf].

State Amendment

West Bengal.-- In its application to the State of West Bengal, in sub-S. (5) of s. 32, after the words "and control and manage the properties", insert "in such manner as may be prescribed".-- West Bengal Act 33 of 1997, s. 3.

33.

Powers of inspection by Chief Executive Officer or persons authorised by him.--

(1) With a view to examining whether, by reason of any failure or negligence on the part of a mutawalli in the performance of his executive or administrative duties, any loss or damage has been caused to any [210] [waqf] or [211] [waqf] property, the Chief Executive Officer [212] [or any other person authorised by him in writing] with the prior approval of the Board, [213] [* * *], may inspect all movable and immovable properties, which are [214] [waqf] properties, and all records, correspondence, plans, accounts and other documents relating thereto.

(2) Whenever any such inspection as referred to in sub-section (1) is made, the concerned mutawalli and all officers and either employees working under him and every person connected with the administration of the [215] [waqf], shall extend to the person making such inspection, all such assistance and facilities as may be necessary and reasonably required by him to carry out such inspection, and shall also produce for inspection any movable property or documents relating to the [216] [waqf] as may be called for by the person making the inspection and furnish to him such information relating to the [217] [waqf] as may be required by him.

(3) Where, after any such inspection, it appears that the concerned mutawalli or any officer or other employee who is or was working under him had misappropriated, misapplied or fraudulently retained, any money or other [218] [waqf] property, or had incurred irregular, unauthorised or improper expenditure from the funds of the [219] [waqf], the Chief Executive Officer may, after giving the mutawalli or the person concerned a reasonable opportunity of showing cause why an order for the recovery of the amount or property, should not be passed against him and after considering such explanation, if any, as such person may furnish, determine the amount or the property, which has been misappropriated, misapplied or fraudulently retained, or the amount of the irregular, unauthorised or improper expenditure incurred by such person, and make an order directing such person to make payment of the amount so determined and to restore the said property to the [220] [waqf], within such time as may be specified in the order.

(4) A mutawalli or other person aggrieved by such order may, within thirty days of the receipt by him of the order, appeal to the Tribunal:

Provided that no such appeal shall be entertained by the Tribunal unless the appellant first deposits with the Chief Executive Officer the amount which has been determined under sub-section (3) as being payable by the appellant and the Tribunal shall have no power to make any order staying pending the disposal of the appeal, the operation of the order made by the Chief Executive Officer under sub-section (3).

(5) The Tribunal may, after taking such evidence as it may think fit, confirm, reverse or modify the order made by the Chief Executive Officer under sub-section (3) or may remit, either in whole or in part, the amount specified in such order and may make such orders as to costs as it may think appropriate in the circumstances of the case.

(6) The order made by the Tribunal under sub-section (5) shall be final.

34.

Recovery of the amount determined under section 33.--

Where any mutawalli or other person who has been ordered, whether under sub-section (3) or sub-section (5) of section 33, to make any payment or to restore the possession of any property, omits or fails to make such payment or restoration within the time specified in such order, the Chief Executive Officer, with the prior approval of the Board shall, take such steps as he may think fit for the recovery of possession of the property aforesaid and shall also send a certificate to the Collector of the district in which the property of such mutawalli or other person is situate, stating therein the amount that has been determined by him or by the Tribunal, as the case may be, under section 33, as being payable by such mutawalli or other person, and, thereupon, the Collector shall recover the amount specified in such certificate as if it were an arrear of land revenue and on the recovery of such amount, pay the same to the Chief Executive Officer, who shall, on receipt thereof, credit the amount to the funds of the concerned [221] [waqf].

35.

Conditional attachment by Tribunal.--

(1) Where the Chief Executive Officer is satisfied that the mutawalli or any other person who has been ordered under sub-section (3) or sub-section (5) of section 33 to make any payment, with intent to defeat or delay the execution of the said order,--
(a) is about to dispose of the whole or any part of his property; or
(b) is about to remove the whole or any part of his property from the jurisdiction of the Chief Executive Officer,

he may, with the prior approval of the Board, apply to the Tribunal for the conditional attachment of the said property or such part thereof, as he may think necessary.

(2) The Chief Executive Officer shall, unless the Tribunal otherwise directs, specify in the application the property required to be attached and the estimated value thereof.

(3) The Tribunal may direct the mutawalli or the person concerned, as the case may be, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Tribunal when required, the said property or the value of the same or such portion thereof as may be sufficient to satisfy the amount specified in the certificate referred to in section 34, or to appear and show cause why he should not furnish such security.

(4) The Tribunal may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(5) Every attachment made under this section shall be made in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as if it were an order for attachment made under the provision of the said Code.

CHAPTER V

REGISTRATION OF [222] [AUQAF]

36.

Registration.--

(1) Every [223] [waqf], whether created before or after the commencement of this Act, shall be registered at the office of the Board.

(2) Application for registration shall be made by the mutawalli:

Provided that such applications may be [224] [made by the waqf] or his descendants or a beneficiary of the [225] [waqf] or any Muslim belonging to the sect to which the [226] [waqf] belongs.

(3) An application for registration shall be made in such form and manner and at such place as the Board may by regulation provide and shall contain following particulars:--
(a) a description of the [227] [waqf] properties sufficient for the identification thereof;
(b) the gross annual income from such properties;
(c) the amount of land revenue, cesses, rates and taxes annually payable in respect of the [228] [waqf] properties;
(d) an estimate of the expenses annually incurred in the realisation to the income of the [229] [waqf] properties;
(e) the amount set apart under the [230] [waqf] for--
(i) the salary of the mutawalli and allowances to the individuals;
(ii) purely religious purposes;
(iii) charitable purposes; and
(iv) any other purposes;

(f) any other particulars provided by the Board by regulations.

(4) Every such application shall be accompanied by a copy of the [231] [waqf] deed or if no such deed has been executed or a copy thereof cannot be obtained, shall contain full particulars, as far as they are known to the applicant, of the origin, nature and objects of the [232] [waqf].

(5) Every application made under sub-section (2) shall be signed and verified by the applicant in the manner provided in the Code of Civil Procedure, 1908 (5 of 1908) for the signing and verification of pleadings.

(6) The Board may require the applicant to supply any further particulars or information that it may consider necessary.

(7) On receipt of an application for registration, the Board may, before the registration of the [233] [waqf] make such inquiries as it thinks fit in respect of the genuineness and validity of the application and correctness of any particulars therein and when the application is made by any person other than the person administering the [234] [waqf] property, the Board shall, before registering the [235] [waqf], give notice of the application to the person administering the [236] [waqf] property and shall hear him if he desires to be heard.

(8) In the case of [237] [auqaf] created before the commencement of this Act, every application for registration shall be made, within three months from such commencement and in the case of [238] [auqaf] created after such commencement, within three months from the date of the creation of the [239] [waqf]:

Provided that where there is no Board at the time of creation of a [240] [waqf], such application will be made within three months from the date of establishment of the Board.

37.

Register of [241] [auqaf].--

[242] [(1)] The Board shall maintain a register of [243] [auqaf] which shall contain in respect of each [244] [waqf] copies of the [245] [waqf] deeds, when available and the following particulars, namely:--
(a) the class of the [246] [waqf];
(b) the name of the mutawalli;
(c) the rule of succession to the office of mutawalli under the [247] [waqf] deed or by

custom or by usage;

(d) particulars of all [248] [waqf] properties and all title deeds and documents relating thereto;

(e) particulars of the scheme of administration and the scheme of expenditure at the time of registration;

(f) such other particulars as may be provided by regulations.

[249] [(2) The Board shall forward the details of the properties entered in the register of auqaf to the concerned land record office having jurisdiction of the waqf property.

(3) On receipt of the details as mentioned in sub-section (2), the land record office shall, according to established procedure, either make necessary entries in the land record or communicate, within a period of six months from the date of registration of waqf property under section 36, its objections to the Board.]

38.

Powers of Board to appoint Executive Officer.--

(1) Notwithstanding anything contained in this Act, the Board may, if it is of the opinion that it is necessary so to do in the interests of the [250] [waqf], appoint on whole-time or part-time basis or in an honorary capacity, subject to such conditions as may be provided by regulations, an Executive Officer with such supporting staff as it considers necessary for any [251] [waqf] having a gross annual income of not less than five lakhs rupees:

Provided that the person chosen for appointment should be a person professing Islam.

(2) Every Executive Officer appointed under sub-section (1) shall exercise such powers and discharge such duties as pertain only to the administration of the property of the [252] [waqf] for which he has been appointed and shall exercise those powers and discharge those duties under the direction, control and supervision of the Board:

Provided that the Executive Officer who is appointed for a [253] [waqf] having a gross annual income of not less than five lakhs rupees shall ensure that the budget of the [254] [waqf] is submitted, the accounts of the [255] [waqf] are regularly maintained, and the yearly statement of accounts are submitted within such time as the Board may specify.

(3) While exercising his powers and discharging his functions under sub-section (2), the Executive Officer shall not interfere with any religious duties or any usage or custom of the [256] [waqf] sanctioned by the Muslim law.

(4) The salaries and allowances of the Executive Officer and his staff shall be fixed by the Board and in fixing the quantum of such salary the Board shall have due regard to the income of the [257] [waqf], the extent and nature of the duties of the Executive Officer and shall also ensure that the amounts of such salaries and allowances are not disproportionate to the income of the [258] [waqf] and do not operate as an unnecessary financial burden on it.

(5) The salaries and allowances of the Executive Officer and his staff shall be paid by the Board from the [259] [Waqf] Fund and, if the [260] [waqf] generates any additional income as a result of appointment of the Executive Officer, the Board may claim reimbursement of amounts spent on the salaries and allowances from the fund of the [261] [waqf] concerned.

(6) The Board may, for sufficient reasons, and after giving to the Executive Officer or a member of his staff, a reasonable opportunity of being heard, suspend, remove or dismiss the Executive Officer or a member of his staff from his post.

(7) Any Executive Officer or a member of his staff who is aggrieved by any order of removal or dismissal made under sub-section (6) may within thirty days from the date of communication of the order, prefer an appeal against the order to the Tribunal and the Tribunal may, after considering such representation as the Board may make in the matter and after giving a reasonable opportunity to the Executive Officer or a member of his staff of being heard, confirm, modify or reverse the order.

39.

Powers of Board in relation to [1] [auqaf] which have ceased to exist.--

(1) The Board shall, if it is satisfied that the objects or any part thereof of a [2] [waqf] have ceased to exist, whether such cessation took place before or after the commencement of this Act, cause an inquiry to be held by the Chief Executive Officer, in the prescribed manner, to ascertain the properties and funds pertaining to such [3] [waqf].

(2) On the receipt of the report of inquiry of the Chief Executive Officer, the Board shall pass an order--

(a) specifying the property and funds of such [4] [waqf];

(b) directing that any property or funds pertaining to such [5] [waqf] which have been recovered shall be applied or utilised for the renovation of any [6] [waqf] property and where there is no need for making any such renovation or where utilisation of the funds for such renovation is not possible, be appropriated, to any of the purposes specific in sub-clause (iii) of clause (e) of sub-section (2) of section 32.

(3) The Board may, if it has reason to believe that any building or other place which was being used for religious purpose or instruction or for charity has, whether before or after the commencement of this Act, ceased to be used for that purpose, make an application to the Tribunal for an order directing the recovery of possession of such building or other place.

(4) The Tribunal may, if it is satisfied, after making such inquiry as it may think fit, that such building or other place--

(a) is [7] [waqf] property;

(b) has not been acquired under any law for the time being in force relating to acquisition of land or is not under any process of acquisition under any such law, or has not vested in the State Government under any law for the time being in force relating to land reforms; and

(c) is not in the occupation of any person who has been authorised by or under any law for the time being in force to occupy such building or other place, make an order--

(i) directing the recovery of such building or place from any person who may be in unauthorised possession thereof, and

(ii) directing that such property, building or place be used for religious purpose or instruction as before, or if such use is not possible, be utilised for any purpose specified in sub-clause (iii) of clause (e) of sub-section (2) of section 32.

40.

Decision if a property is [8] [waqf] property.--

(1) The Board may itself collect information regarding any property which it has reason to believe to be [9] [waqf] property and if any question arises whether a particular property is [10] [waqf] property or not or whether a [11] [waqf] is a Sunni [12] [waqf] or a Shia [13] [waqf] it may, after making such inquiry as it may deem fit, decide the question.

(2) The decision of the Board on a question under sub-section (1) shall, unless revoked or modified by the Tribunal, be final.

(3) Where the Board has any reason to believe that any property of any trust or society registered in pursuance of the Indian Trusts Act, 1882 (2 of 1882) or under the Societies Registration Act, 1860 (21 of 1860) or under any other Act, is[14] [waqf] property, the Board may notwithstanding anything contained in such Act, hold an inquiry in regard to such property and if after such inquiry the Board is satisfied that such property is [15] [waqf] property, call upon the trust or society, as the case may be, either to register such property under this Act as [16] [waqf] property or show cause why such property should not be so registered:

Provided that in all such cases, notice of the act ion proposed to be taken under this sub-section shall be given to the authority by whom the trust or society had been registered.

(4) The Board shall, after duly considering such cause as may be shown in pursuance of notice issued under sub-section (3) pass such orders as it may think fit and the order so made by the Board, shall be final, unless it is revoked or modified by a Tribunal.

41.

Power to cause registration of [17] [waqf] and to amend register.--

The Board may direct a mutawalli to apply for the registration of a [18] [waqf], or to supply any information regarding a [19] [waqf] or may itself cause the [20] [waqf] to be registered or may at any time amend the register of [21] [auqaf].

42.

Change in the management of [22] [auqaf] to be notified.--

(1) In the case of any change in the management of a registered [23] [waqf] due to the death or retirement or removal of the mutawalli, the incoming mutawalli shall forthwith, and any other person may notify the change to the Board.

(2) In the case of any other change in any of the particulars mentioned in section 36, the mutawalli shall, within three months from the occurrence of the change, notify such change to the Board.

43.

[24] [Auqaf] registered before the commencement of this Act deemed to be registered.--

Notwithstanding anything contained in this Chapter, where any [25] [waqf] has been registered before the commencement of this Act, under any law for the time being in force, it shall not be necessary to register the [26] [waqf] under the provisions of this Act and any such registration made before such commencement shall be deemed to be a registration made under this Act .

CHAPTER VI

MAINTENANCE OF ACCOUNTS OF [27] [AUQAF]

44.

Budget.--

(1) Every mutawalli of a [28] [waqf] shall, in every year prepare, in such form and at such time as may be prescribed, a budget in respect of the financial year next ensuing showing the estimated receipts and expenditure during that financial year.

(2) Every such budget shall be submitted by the mutawalli atleast [29] [thirty days] before the beginning of the financial year to the Board and shall make adequate provision for the following:--

(i) for carrying out the objects of the [30] [waqf];

(ii) for the maintenance and preservation of the [31] [waqf] property;

(iii) for the discharge of all liabilities and subsisting commitments binding on the [32] [waqf] under this Act or any other law for the time being in force.

[33] [(3) In case the Board considers any item in the budget being contrary to the objects of the waqf and the provisions of this Act, it may give such direction for addition or deletion of such item as it may deem fit.]

(4) If in the course of the financial year the mutawalli finds it necessary to modify the provisions made in the budget in regard to the receipt or to the distribution of the amounts to be expended under the different heads, he may submit to the Board a supplementary or a revised budget and the provisions of sub-section (3) shall, as far as may be, apply to such supplementary or revised budget.

45.

Preparation of budget of [34] [auqaf] under direct management of the Board.--

(1) The Chief Executive Officer shall prepare, in such form and at such time as may be prescribed, a budget in respect of the financial year next ensuing showing the estimated receipts and expenditure for each of the [35] [auqaf] under the direct management of the Board, showing therein the estimated receipts and expenditure and submit it to the Board for its approval.

(2) While submitting the budget under sub-section (1), the Chief Executive Officer shall also prepare statement giving details of the increase, if any, in the income of each [36] [waqf] under the direct management of the Board and the steps which have been taken for its better management and the results accruing therefrom during the year.

(3) The Chief Executive Officer shall keep regular accounts and be responsible for the proper management of every [37] [waqf] under the direct management of the Board.

(4) Every budget submitted by the Chief Executive Officer under sub-section (1) shall comply with the requirements of section 46 and, for this purpose, references therein to the mutawalli of the [38] [waqf] shall be construed as pre-references to the Chief Executive Officer.

(5) The audit of accounts of every [39] [waqf] under the direct management of the Board shall be undertaken by the State Examiner of Local Funds or any other officer appointed by the State Government for this purpose, irrespective of the income of the [40] [waqf].

(6) The provisions of sub-sections (2) and (3) of section 47 and the provisions of sections 48 and 49 shall, insofar as they are not inconsistent with the provisions of this section, apply to the audit of accounts referred to in this section.

(7) Where any [41] [waqf] is under the direct management of the Board, such administrative charges as may be specified by the Chief Executive Officer shall be payable by the [42] [waqf] to the Board:

Provided that the Chief Executive Officer shall not collect more than ten per cent. of the gross annual income of the [43] [waqf] under the direct management of the Board as administrative charges.

46.

Submission of accounts of [44] [auqaf].--

(1) Every mutawalli shall keep regular accounts.

(2) Before the [45] [1st day of July], next, following the date on which the application referred to in section 36 has been made and thereafter before the [46] [1st day of July] in every year, every mutawalli of a [47] [waqf] shall prepare and furnish to the Board a full and true statement of accounts, in such form and containing such particulars as may be provided by regulations by the Board, of all moneys received or expended by the mutawalli on behalf of the [48] [waqf] during the period of twelve months ending on the 31st day of March, or, as the case may be, during that portion of the said period during which the provisions of this Act have been applicable to the [49] [waqf]:

Provided that the date on which the annual accounts are to be closed may be varied at the discretion of the Board.

47.

Audit of accounts of [50] [auqaf].--

(1) The accounts of [51] [auqaf] submitted to the Board under section 46 shall be audited and examined in the following manner, namely:--

(a) in the case of a [52] [waqf] having no income or a net annual income not exceeding [53] [fifty thousand rupees], the submission of a statement of accounts shall be a sufficient compliance with the provisions of section 46 and the accounts of two per cent. of such [54] [auqaf] shall be audited annually by an auditor appointed by the Board;

(b) the accounts of the [55] [waqf] having net annual income exceeding [56] [fifty thousand rupees] shall be audited annually, or at such other intervals as may be prescribed, by an auditor appointed by the Board from out of the panel of auditors prepared by the State Government and while drawing up such panel of auditors, the State Government shall specify the scale of remuneration of auditors;

(c) the State Government may, [57] [under intimation to the Board,] at any time cause the account of any [58] [waqf] audited by the State Examiner of Local Funds or by any other Officer designated for that purpose by that State Government.

(2) The auditor shall submit his report to the Board and the report of the auditor shall among other things, specify all cases of irregular, illegal or improper expenditure or of failure to recover money or other property caused by neglect or misconduct and any other matter which the auditor considers it necessary to report; and the report shall also contain the name of any person who, in the opinion of the auditor, is responsible for such expenditure or failure and the auditor shall in every such case certify the amount of such expenditure or loss as due from such person.

(3) The cost of the audit of the accounts of a [59] [waqf] shall be met from the funds of that [60] [waqf]:

Provided that the remuneration of the auditors appointed from out of the panel drawn by the State Government in relation to [61] [auqaf] having a net annual income of [62] [more than fifty thousand rupees] shall be paid in accordance with the scale of remuneration specified by the State Government under clause (c) of sub-section (1):

Provided further that where the audit of the accounts of any [63] [waqf] is made by the State Examiner of Local Funds or any other officer designated by the State Government in this behalf, the cost of such audit shall not exceed one and a half per cent. of the net annual income of such [64] [waqf] and such costs shall be met from the funds of the [65] [auqaf] concerned.

48.

Board to pass orders on auditor's report.--

(1) The Board shall examine the auditor's report and may call for the explanation of any person in regard to any matter mentioned therein, and shall pass such orders as it thinks fit including orders for the recovery of the amount certified by the auditor under sub-section (2) of section 47.

(2) The mutawalli or any other person aggrieved by any order made by the Board may, within thirty days of the receipt by him of the order, apply to the Tribunal to modify or set aside the order and the Tribunal may, after taking such evidence as it may think necessary, confirm or modify the order or remit the amount so certified, either in whole or in part, and may also make such order as to costs as it may think appropriate in the circumstances of the case.

(3) No application made under sub-section (2) shall be entertained by the Tribunal unless the amount certified by the auditor under sub-section (2) of section 47 has first been deposited in the Tribunal and the Tribunal shall not have any power to stay the operation of the order made by the Board under sub-section (1).

(4) The order made by the Tribunal under sub-section (2) shall be final.

(5) Every amount for the recovery of which any order has been made under sub-section (1) or sub-section (2) shall, where such amount remains unpaid, be recoverable in the manner specified in section 34 or section 35 as if the said order were an order for the recovery of any amount determined under sub-section (3) of section 35.

49.

Sums certified to be due recoverable as arrears of land revenue.--

(1) Every sum certified to be due from any person by an auditor in his report under section 47 unless such certificate is modified or cancelled by an order of the Board or of the Tribunal made under section 48, and every sum due on a modified certificate shall be paid by such person within sixty days after the service of a demand for the same issued by the Board.

(2) If such payment is not made in accordance with the provisions of sub-section (1), the sum payable may, on a certificate issued by the Board after giving the person concerned an opportunity of being heard, be recovered in the same manner as an arrear of land revenue.

50.

Duties of mutawalli.--

It shall be the duty of every mutawalli,--

(a) to carry out the directions of the Board in accordance with the provisions of this Act or of any rule or order made thereunder;

(b) to furnish such returns and supply such information or particulars as may from time to time be required by the Board in accordance with the provisions of this Act or of any rule

or order made thereunder;

(c) to allow inspection of [66] [waqf] properties, accounts or records or deeds and documents relating thereto;

(d) to discharge all public dues; and

(e) to do any other act which he is lawfully required to do by or under this Act.

51.

Alienation of [67] [waqf] property without sanction of Board to be void.--

[68] [(1) Notwithstanding anything contained in the waqf deed, any lease of any immovable property which is waqf property, shall be void unless such lease is effected with the prior sanction of the Board:

Provided that no mosque, dargah, khanqah, graveyard, or imambara shall be leased except any unused graveyards in the States of Punjab, Haryana and Himachal Pradesh where such graveyard has been leased out before the date of commencement of the Wakf (Amendment) Act, 2013.

(1A) Any sale, gift, exchange, mortgage or transfer of waqf property shall be void *ab initio* :

Provided that in case the Board is satisfied that any waqf property may be developed for the purposes of the Act, it may, after recording reasons in writing, take up the development of such property through such agency and in such manner as the Board may determine and move a resolution containing recommendation of development of such waqf property, which shall be passed by a majority of two-thirds of the total membership of the Board:

Provided further that nothing contained in this sub-section shall affect any acquisition of waqf properties for a public purpose under the Land Acquisition Act, 1894 (1 of 1894) or any other law relating to acquisition of land if such acquisition is made in consultation with the Board:

Provided also that--

(a) the acquisition shall not be in contravention of the Places of Public Worship (Special Provisions) Act, 1991 (42 of 1951);

(b) the purpose for which the land is being acquired shall be undisputedly for a public purpose;

(c) no alternative land is available which shall be considered as more or less suitable for that purpose; and

(d) to safeguard adequately the interest and objective of the waqf, the compensation shall be at the prevailing market value or a suitable land with reasonable solatium in lieu of the acquired property.]

[69] [* * *]

52.

Recovery of [70] [waqf] property transferred in contravention of section 51.--

(1) If the Board is satisfied, after making any inquiry in such manner as may be prescribed, that any immovable property of a [71] [waqf] entered as such in the register of [72] [waqf] maintained under section 36, has been transferred without the previous sanction of the

Board in contravention of the provisions of section 51[73] [or section 56], it may send a requisition to the Collector within whose jurisdiction the property is situate to obtain and deliver possession of the property to it.

(2) On receipt of a requisition under sub-section (1), the Collector shall pass an order directing the person in possession of the property to deliver the property to the Board within a period of thirty days from the date of the service of the order.

(3) Every order passed under sub-section (2) shall be served--

(a) by giving or tendering the order, or by sending it by post to the person for whom it is intended; or

(b) if such person cannot be found, by affixing the order on some conspicuous part of his last known place of abode or business, or by giving or tendering the order to some adult male member or servant of his family or by causing it to be affixed on some conspicuous part of the property to which it relates:

Provided that where the person on whom the order is to be served is a minor, service upon his guardian or upon any adult male member or servant of his family shall be deemed to be the service upon the minor.

(4) Any person aggrieved by the order of the Collector under sub-section (2) may, within a period of thirty days from the date of the service of the order, prefer an appeal to the Tribunal within whose jurisdiction the property is situate and the decision of the Tribunal on such appeal shall be final.

(5) Where an order passed under sub-section (2) has not been complied with and the time for appealing against such order has expired without an appeal having been preferred or the appeal, if any, preferred within that time has been dismissed, the Collector shall obtain possession of the property in respect of which the order has been made, using such force, if any, as may be necessary for the purpose and deliver it to the Board.

(6) In exercising his functions under this section the Collector shall be guided by such rules as may be provided by regulations.

[74] [52A.

Penalty for alienation of waqf property without sanction of Board.--

(1) Whoever alienates or purchases or takes possession of, in any manner whatsoever, either permanently or temporarily, any movable or immovable property being a waqf property, without prior sanction of the Board, shall be punishable with rigorous imprisonment for a term which may extend to two years:

Provided that the waqf property so alienated shall without prejudice to the provisions of any law for the time being in force, be vested in the Board without any compensation therefor.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) any offence punishable under this section shall be cognizable and non-bailable.

(3) No court shall take cognizance of any offence under this section except on a complaint made by the Board or any officer duly authorised by the State Government in this behalf.

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

53.

Restriction on purchase of property on behalf of [75] [waqf].--

Notwithstanding anything contained in a [76] [waqf] deed, no immovable property shall be purchased

for or on behalf of any [77] [waqf] from the funds of any [78] [waqf] except with the prior sanction of the Board, and the Board shall not accord such sanction unless it considers that the acquisition of such property is necessary or beneficial to the [79] [waqf] and that the price proposed to be paid therefor is adequate and reasonable:

Provided that before such sanction is accorded, the particulars relating to the proposed transaction shall be published in the Official Gazette inviting objections and suggestions with respect thereto and, the Board shall, after considering the objections and suggestions that may be received by it from mutawallis or other persons interested in the [80] [waqf], make such orders as it may think fit.

54.

Removal of encroachment from [81] [waqf] property.--

(1) Whenever the Chief Executive Officer considers whether on receiving any complaint or on his own motion that there has been an encroachment on any land, building, space or other property which is [82] [waqf] property and, which has been registered as such under this Act, he shall cause to be served upon the encroacher a notice specifying the particulars of the encroachment and calling upon him to show cause before a date to be specified in such notice, as to why an order requiring him to remove the encroachment before the date so specified should not be made and shall also send a copy of such notice to the concerned mutawalli.

(2) The notice referred to in sub-section (1) shall be served in such manner as may be prescribed.

(3) If, after considering the objections, received during the period specified in the notice, and after conducting an inquiry in such manner as may be prescribed, the Chief Executive Officer is satisfied that the property in question is [83] [waqf] property and that there has been an encroachment on any such [84] [waqf] property, [85] [he may, make an application to the Tribunal for grant of order of eviction for removing] such encroachment and deliver possession of the land, building, space or other property encroached upon to the mutawalli of the [86] [waqf].

[87] [(4) The Tribunal, upon receipt of such application from the Chief Executive Officer, for reasons to be recorded therein, make an order of eviction directing that the waqf property shall be vacated by all persons who may be in occupation thereof or any part thereof, and cause a copy of the order to be affixed on the outer door or some other conspicuous part of the waqf property:

Provided that the Tribunal may before making an order of eviction, give an opportunity of being heard to the person against whom the application for eviction has been made by the Chief Executive Officer.

(5) If any person refuses or fails to comply with the order of eviction within forty-five days from the date of affixture of the order under sub-section (2), the Chief Executive Officer or any other person duly authorised by him in this behalf may evict that person from, and take possession of, the waqf property.]

55.

Enforcement of orders made under section 54.--

Where the person, ordered under [88] [sub section (4)] of section 54 to remove any encroachment, omits or fails to remove such encroachment, within the time specified in the order or, as the case may be, fails to vacate the land, building, space or other property to which the order relates, within the time aforesaid, the Chief Executive Officer may [89] [refer the order of the Tribunal to the Executive Magistrate] within the local limits of whose jurisdiction the land, building, space or other property is

situated for evicting the encroacher, and thereupon, such Magistrate shall make an order directing the encroacher to remove the encroachment, or, as the case may be, vacate the land, building, space or other property and to deliver possession thereof to the concerned mutawalli and in default of compliance with the order, remove the encroachment or, as the case may be, evict the encroacher from the land, building, space or other property and may, for this purpose, take such police assistance as may be necessary.

State Amendment

West Bengal.-- In its application to the State of West Bengal,--

(1) After S. 55, insert the following section, namely:--

&uot; **55-A. Penalty for encroachment on wakf property.--**

(1) Whoever encroaches on any land, building space or other property which is waqf property, and which has been registered as such under this Act, shall be punishable with rigorous imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both.

(2) Any offence publishable under this section shall be cognizable.

(3) No Court shall take cognizance of any offence punishable under this section save on complaint made by the Board or by an officer of the Board duly authorized by it in this behalf.

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

(5) Any fine imposed under this section shall, when realised, be credited to the Wakf Fund.&uot;--West Bengal Act 33 of 1997, S. 4.

(2) In S. 55-A of the principal Act as inserted by the Wakf (West Bengal Amendment) Act, 1997 (West Bengal Act 33 of 1997),--

(i) in sub-S. (1), the words &uot;or with fine which may extend to five thousand rupees, or with both&uot; shall be omitted;

(ii) in sub-S. (2), after the word &uot;cognizable&uot;, insert &uot;and non-bailable&uot;;

(iii) sub-S. (5) shall be omitted.--West Bengal Act 16 of 1998, S. 3.

[90] [55A.

Disposal of property left on waqf property by unauthorised occupants.--

(1) Where any person has been evicted from any waqf property under sub-section (4) of section 54, the Chief Executive Officer may, after giving fourteen days' notice to the person from whom possession of the waqf property has been taken and after publishing the notice in at least one newspaper having circulation in the locality and after proclaiming the contents of the notice by placing it on conspicuous part of the waqf property, remove or cause to be removed or dispose of by public auction any property remaining on such premises.

(2) Where any property is sold under sub-section (1), the sale proceeds shall, after deducting the expenses relating to removal, sale and such other expenses, the amount, if any, due to the State Government or a local authority or a corporate authority on account of arrears of rent, damages or costs, be paid to such person, as may appear to

the Chief Executive Officer to be entitled to the same:

Provided that where the Chief Executive Officer is unable to decide as to the person to whom the balance of the amount is payable or as to the appointment of the same, he may refer such dispute to the Tribunal and the decision of the Tribunal thereon shall be final.]

56.

Restriction on power to grant lease of [91] [waqf] property.--

(1) [92] [A lease for any period exceeding thirty years] of any immovable property which is [93] [waqf] property shall, notwithstanding anything contained in the deed or instrument of [94] [waqf] or in any other law for the time being in force, be void and of no effect.

[95] [*Provided* that a lease for any period up to thirty years may be made for commercial act ivities, education or health purposes, with the approval of the State Government, for such period and purposes as may be specified in the rules made by the Central Government:

Provided further that lease of any immovable waqf property, which is an agricultural land, for a period exceeding three years shall, notwithstanding anything contained in the deed or instrument of waqf or in any other law for the time being in force, be void and of no effect:

Provided also that before making lease of any waqf property, the Board shall publish the details of lease and invite bids in at least one leading national and regional news papers.]

(2) [96] [A lease for a period of one year but not exceeding thirty years] of immovable property which is [97] [waqf] property shall, notwithstanding anything contained in the deed or instrument of [98] [waqf] or in any other law for the time being in force, be void and of no effect unless it is made with the previous sanction of the Board.

(3) The Board shall, in granting sanction for lease [99] [* * *] or renewal thereof under this section review the terms and conditions on which the lease [100] [* * *] is proposed to be granted or renewed and make its approval subject to the revision of such terms and conditions in such manner as it may direct.

[101] [*Provided* that the Board shall immediately intimate the State Government regarding a lease for any period exceeding three years of any waqf property and thereafter it may become effective after the expiry of forty-five days from the date on which the Board intimates the State Government.]

[102] [(4) Every rule made by the Central Government under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.]

57.

Mutawalli entitled to pay certain costs from income of [103] [waqf] property.--

Notwithstanding anything contained in the [104] [waqf] deed, every mutawalli may pay from the income of the [105] [waqf] property any expenses properly incurred by him for the purpose of enabling him to furnish any particulars, documents or copies under section 36 or any accounts under section 46 or any information or documents, required by the Board or for the purpose of enabling him to carry out the directions of the Board.

58.

Power of Board to pay dues in case of default by mutawalli.--

(1) Where a mutawalli refuses to pay or fails to pay any revenue, cess, rates or taxes due to the Government or any local authority, the Board may discharge dues from the [106] [Waqf] Fund and may recover the amount so paid from the [107] [waqf] property and may also recover damages not exceeding twelve and a half per cent. of the amount so paid.

(2) Any sum of money due under sub-section (1) may, on a certificate issued by the Board after giving the mutawalli concerned an opportunity of being heard, be recovered in the same manner as an arrear of land revenue.

59.

Creation of reserve fund.--

For the purpose of making provisions for the payment of rent and of revenue, cess, rates and taxes due to the Government or any local authority, for the discharge of the expenses of the repair of the [108] [waqf] property and for the preservation of the [109] [waqf] property, the Board may direct the creation and maintenance, in such manner as it may think fit, of a reserve fund from the income of a [110] [waqf].

60.

Extension of time.--

The Board may, if it is satisfied that it is necessary so to do, extend the time within which any act is required to be done by the mutawalli under this Act .

61.

Penalties.--

(1) If a mutawalli fails to--

(a) apply for the registration of a [111] [auqaf];

(b) furnish statements of particulars or accounts or returns as required under this Act;

(c) supply information or particulars as required by the Board;

(d) allow inspection of [112] [waqf] properties, accounts, records or deeds and documents relating thereto;

(e) deliver possession of any [113] [waqf] property, if ordered by the Board or Tribunal;

(f) carry out the directions of the Board;

(g) discharge any public dues; or

(h) do any other act which he is lawfully required to do by or under this Act,

he shall, unless he satisfies the Court or the Tribunal that there was reasonable cause for his failure, be punishable with fine which may extend to [114] [ten thousand rupees for non-compliance of clauses (a) to (d) and in case of non-compliance of clauses (e) to (h), he shall be punishable with imprisonment for a term which may extend to six months and also with fine which may extend to ten thousand rupees].

(2) Notwithstanding anything contained in sub-section (1), if--

(a) a mutawalli omits or fails, with a view to concealing the existence of a [115] [waqf], to apply for its registration under this Act,--
(i) in the case of a [116] [waqf] created before the commencement of this Act, within the period specified therefor in sub-section (8) of section 36;
(ii) in the case of any [117] [waqf] created after such commencement, within three months from the date of the creation of the [118] [waqf]; or

(b) a mutawalli furnishes any statement, return or information to the Board, which he knows or has reason to believe to be false, misleading, untrue or incorrect in any material particular,

he shall be punishable with imprisonment for a term which may extend to six months and also with fine which may extend to fifteen thousand rupees.

(3) No Court shall take cognizance of an offence punishable under this Act save upon complaint made by the Board or an officer duly authorised by the Board in this behalf.
(4) No Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act .
(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the fine imposed under sub-section (1), when realised, shall be credited to the[119] [Waqf] Fund.
(6) In every case where offender is convicted after the commencement of this Act, of an offence punishable under sub-section (1) and sentenced to a fine, the Court shall also impose such term of imprisonment in default of payment of fine as is authorised by law for such default.

62.

Mutawalli not to spend any money belonging to [120] [waqf] for selfdefence.--

No mutawalli shall spend any money out of the funds of the [121] [waqf], of which he is the mutawalli, for meeting any costs, charges, or expenses which are or may be, incurred by him, in relation to any suit, appeal or any other proceeding for, or incidental to, his removal from office or for taking any disciplinary act ion against himself.

63.

Power to appoint mutawallis in certain cases.--

When there is a vacancy in the office of the mutawalli of a [122] [waqf] and there is no one to be appointed under the terms of the deed of the [123] [waqf], or where the right of any person to act as mutawalli is disputed, the Board may appoint any person to act as mutawalli for such period and on such conditions as it may think fit.

64.

Removal of mutawalli.--

(1) Notwithstanding anything contained in any other law or the deed of [124] [waqf], the Board may remove a mutawalli from his office if such mutawalli--
(a) has been convicted more than once of an offence punishable under section 61; or
(b) has been convicted of any offence of criminal breach of trust or any other offence involving moral turpitude, and such conviction has not been reversed and he has not been granted full pardon with respect to such offence; or

(c) is of unsound mind or is suffering from other mental or physical defect or infirmity which would render him unfit to perform the functions and discharge the duties of a mutawalli; or

(d) is an undischarged insolvent; or

(e) is proved to be addicted to drinking liquor or other spirituous preparations, or is addicted to the taking of any narcotic drugs; or

(f) is employed as a paid legal practitioner on behalf of, or against, the [125] [waqf]; or

(g) has failed, without reasonable excuse, to maintain regular accounts for two consecutive years or has failed to submit, in two consecutive years, the yearly statement of accounts, as required by sub-section (2) of section 46; or

(h) is interested, directly or indirectly, in a subsisting lease in respect of any [126] [waqf] property, or in any contract made with, or any work being done for the [127] [waqf] or is in arrears in respect of any sum due by him to such [128] [waqf]; or

(i) continuously neglects his duties or commits any misfeasance, malfeasance, misapplication of funds or breach of trust in relation to the [129] [waqf] or in respect of any money or other [130] [waqf] property; or

(j) wilfully and persistently disobeys the lawful orders made by the Central Government, State Government, Board under any provision of this Act or rule or order made thereunder;

(k) misappropriates or fraudulently deals with the property of the [131] [waqf].

(2) The removal of a person from the office of the mutawalli shall not affect his personal rights, if any, in respect of the [132] [waqf] property either as a beneficiary or in any other capacity or his right, if any, as a sajjadanashin.

(3) No act ion shall be taken by the Board under sub-section (1), unless it has held an inquiry into the matter in a prescribed manner and the decision has been taken by a majority of not less than two-thirds of the members of the Board.

(4) A mutawalli who is aggrieved by an order passed under any of the clauses (c) to (j) of subsection (1), may, within one month from the date of the receipt by him of the order, appeal against the order to the Tribunal and the decision of the Tribunal on such appeal shall be final.

(5) Where any inquiry under sub-section (3) is proposed, or commenced, against any mutawalli, the Board may, if it is of opinion that it is necessary so to do in the interest of the [133] [waqf], by an order suspend such mutawalli until the conclusion of the inquiry:

Provided that no suspension for a period exceeding ten days shall be made except after giving the mutawalli a reasonable opportunity of being heard against the proposed action.

(6) Where any appeal is filed by the mutawalli to the Tribunal under sub- section (4), the Board may make an application to the Tribunal for the appointment of a receiver to manage the [134] [waqf] pending the decision of the appeal, and where such an application is made, the Tribunal shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), appoint a suitable person as receiver to manage the[135] [waqf] and direct the receiver so appointed to ensure that the customary or religious rights of the mutawalli and of the [136] [waqf] are safeguarded.

(7) Where a mutawalli has been removed from his office under sub-section (1), the Board may, by order, direct the mutawalli to deliver possession of the [137] [waqf] property to the Board or any officer duly authorised in this behalf or to any person or committee appointed to act as the mutawalli of the [138] [waqf] property.

(8) A mutawalli of a [139] [waqf] removed from his office under this section shall not be eligible for reappointment as a mutawalli of that [140] [waqf] for a period of five years from the date of such removal.

65.

Assumption of direct management of certain [141] [auqaf] by the Board.--

(1) Where no suitable person is available for appointment as a mutawalli of a [142] [waqf], or where the Board is satisfied, for reasons to be recorded by it in writing, that the filling up of the vacancy in the office of a mutawalli is prejudicial to the interests of the [143] [waqf], the Board may, by notification in the Official Gazette, assume direct management of the [144] [waqf] for such period or periods, not exceeding five years in the aggregate, as may be specified in the notification.

(2) The State Government may, on its own motion or on the application of any person interested in the [145] [waqf], call for the records of any case for the purpose of satisfying itself as to the correctness, legality or propriety of the notification issued by the Board under sub-section (1) and pass such orders as it may think fit and the orders so made by the State Government shall be final and shall be published in the manner specified in sub-section (1).

(3) As soon as possible after the close of every financial year, the Board shall send to the State Government a detailed report in regard to every [146] [waqf] under its direct management, giving therein--

(a) the details of the income of the [147] [waqf] for the year immediately preceding the year under report;

(b) the steps taken to improve the management and income of the [148] [waqf];

(c) the period during which the [149] [waqf] has been under the direct management of the Board and explaining the reasons as to why it has not been possible to entrust the management of the [150] [waqf] to the mutawalli or any committee of management during the year; and

(d) such other matters as may be prescribed.

(4) The State Government shall examine the report submitted to it under sub-section (3), and after such examination issue such directions or instructions to the Board as it may think fit and the Board shall comply with such directions or instructions on receipt thereof.

[151] [(5) Notwithstanding anything contained in sub-section (1), the Board shall take over the administration of a waqf, if the waqf Board has evidence before it to prove that management of the waqf has contravened the provisions of this Act.]

66.

Powers of appointment and removal of mutawalli when to be exercised by the State Government.--

Whenever a deed of [152] [waqf] or any decree or order of a Court or any scheme of management of any [153] [waqf] provides that a Court or any authority other than a Board may appoint or remove a mutawalli or settle or modify such scheme of management or otherwise exercise superintendence over the [154] [waqf], then notwithstanding anything contained in such deed of [155] [waqf], decree, order or scheme, such powers aforesaid shall be exercisable by the State Government:

Provided that where a Board has been established, the State Government shall consult the Board before exercising such powers.

67.

Supervision and supersession of committee of management.--

(1) Whenever the supervision or management of a [156] [waqf] is vested in any committee

appointed by the [157] [waqf], then, notwithstanding anything contained in this Act, such committee shall continue to function until it is superseded by the Board or until the expiry of its term as may be specified by the [158] [waqf], whichever is earlier:

Provided that such committee shall function under the direction, control and supervision of the Board and abide by such directions as the Board may issue from time to time:

Provided further that if the Board is satisfied that any scheme for the management of a [159] [waqf] by a committee is inconsistent with any provision of this Act or of any rule made thereunder or with the directions of the [160] [waqf], it may, at any time, modify the scheme in such manner as may be necessary to bring it in conformity with the directions of the [161] [waqf] or of the provisions of this Act and the rules made thereunder.

(2) Notwithstanding anything contained in this Act and in the deed of the [162] [waqf], the Board may, if it is satisfied, for reasons to be recorded in writing, that a committee, referred to in subsection (1) is not functioning properly and satisfactorily, or that the [163] [waqf] is being mismanaged and that in the interest of its proper management, it is necessary so to do, by an order, supersede such committee, and, on such supersession, any direction of the [164] [waqf], insofar as it relates to the constitution of the committee, shall cease to have any force:

Provided that the Board shall, before making any order superseding any committee, issue a notice setting forth therein the reasons for the proposed act ion and calling upon the committee to show cause within such time, not being less than one month, as may be specified in the notice, as to why such action shall not be taken.

(3) Every order made by the Board under sub-section (2) shall be published in the prescribed manner and on such publication shall be binding on the mutawalli and all persons having any interest in the [165] [waqf].

(4) Any order made by the Board under sub-section (2) shall be final:

Provided that any person aggrieved by the order made under sub-section (2) may, within sixty days from the date of the order, appeal to the Tribunal:

Provided further that the Tribunal shall have no power to suspend the operation of the order made by the Board pending such appeal.

(5) The Board shall, whenever it supersedes any committee under sub-section (2), constitute a new committee of management simultaneously with the order made by it under sub-section (2).

(6) Notwithstanding anything contained in the foregoing sub-sections, the Board may, instead of superseding any committee under sub-section (2), remove any member thereof if it is satisfied that such member has abused his position as such member or had knowingly act ed in a manner prejudicial to the interests of the [166] [waqf], and every such order for the removal of any member shall be served upon him by registered post:

Provided that no order for the removal of the member shall be made unless he has been given a reasonable opportunity of showing cause against the proposed action:

Provided further that any member aggrieved by any order for his removal from the membership of the committee may, within a period of thirty days from the date of service of the order on him, prefer an appeal against such order to the Tribunal and the Tribunal may, after giving a reasonable opportunity to the appellant and the Board of being heard, confirm, modify or reverse the order made by the Board and the order made by the Tribunal in such appeal shall be final.

68.

Duty of mutawalli or committee to deliver possession of records, etc.--

(1) Where any mutawalli or committee of management has been removed by the Board in accordance with the provisions of this Act, or of any scheme made by the Board, the mutawalli or the committee so removed from the office (hereinafter in this section referred to as the removed mutawalli or committee) shall hand over charge and deliver possession of the records, accounts and all properties of the [167] [waqf] (including cash) to the successor mutawalli or the successor committee, within one month from the date specified in the order.

(2) Where any removed mutawalli or committee fails to deliver charge or deliver possession of the records, accounts and properties (including cash) to the successor mutawalli or committee within the time specified in sub-section (1), or prevents or obstructs such mutawalli or committee, from obtaining possession thereof after the expiry of the period aforesaid, the successor mutawalli or any member of the successor committee may make an application, accompanied by a certified copy of the order appointing such successor mutawalli or committee, to any [168] [District Magistrate, Additional District Magistrate, Sub-Divisional Magistrate or their equivalent] within the local limits of whose jurisdiction any part of the [169] [waqf] property is situated and, thereupon, such [170] [District Magistrate, Additional District Magistrate, Sub-Divisional Magistrate or their equivalent] may, after giving notice to the removed mutawalli or members of the removed committee, make an order directing the delivery of charge and possession of such records, accounts and properties (including cash) of the [171] [waqf] to the successor mutawalli or the committee, as the case may be, within such time as may be specified in the order.

(3) Where the removed mutawalli or any member of the removed committee, omits or fails to deliver charge and possession of the records, accounts and properties (including cash) within the time specified by [172] [any Magistrate] under sub-section (2), the removed mutawalli or every member of the removed committee, as the case may be, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to eight thousand rupees, or with both.

(4) Whenever any removed mutawalli or any member of the removed committee omits or fails to comply with the orders made by [173] [any Magistrate] under sub-section (2), [174] [any Magistrate] may authorise the successor mutawalli or committee to take charge and possession of such records, accounts, properties (including cash) and may authorise such person to take such police assistance as may be necessary for the purpose.

(5) No order of appointment of the successor mutawalli or committee, shall be called in question in the proceedings before [175] [any Magistrate] under this section.

(6) Nothing contained in this section shall bar the institution of any suit in a competent Civil Court by any person aggrieved by any order made under this section, to establish that he has right, title and interest in the properties specified in the order made by [176] [any Magistrate] under sub-section (2).

69.

Power of Board to frame scheme for administration of [177] [waqf].--

[178] [(1) Where the Board is satisfied after an enquiry, whether on its own motion or on the application of not less than five persons interested in any waqf, to frame a scheme for the proper administration of the waqf, it may, by an order, frame such scheme for the administration of the waqf, after giving reasonable opportunity and after consultation with the mutawalli or others in the prescribed manner.]

(2) A scheme framed under sub-section (1) may provide for the removal of the mutawalli of the [179] [waqf] holding office as such immediately before the date on which the scheme

comes into force:

Provided that where any such scheme provides for the removal of any hereditary mutawalli, the scheme shall also provide for the appointment of the person next in hereditary succession of the mutawalli so removed, as one of the members of the committee appointed for the proper administration of the [180] [waqf].

(3) Every order made under sub-section (2) shall be published in the prescribed manner, and, on such publication shall be final and binding on the mutawalli and all persons interested in the [181] [waqf]:

Provided that any person aggrieved by an order made under this section may, within sixty days from the date of the order, prefer an appeal to the Tribunal and after hearing such appeal, the Tribunal may confirm, reverse or modify the order:

Provided further that the Tribunal shall have no power to stay the operation of the order made under this section.

(4) The Board may, at any time by an order, whether made before or after the scheme has come into force, cancel or modify the scheme.

(5) Pending the framing of the scheme for the proper administration of the [182] [waqf], the Board may appoint a suitable person to perform all or any of the functions of the mutawalli thereof and to exercise the powers, and perform the duties, of such mutawalli.

70.

Inquiry relating to administration of [183] [waqf].--

Any person interested in a [184] [waqf] may make an application to the Board supported by an affidavit to institute an inquiry relating to the administration of the [185] [waqf] and if the Board is satisfied that there are reasonable grounds for believing that the affairs of the [186] [waqf] are being mismanaged, it shall take such action thereon as it thinks fit.

71.

Manner of holding inquiry.--

(1) The Board may, either on an application received under section [187] [70] or on its own motion,--

(a) hold an inquiry in such manner as may be prescribed; or

(b) authorise any person in this behalf to hold an inquiry into any matter relating to a [188] [waqf] and take such act ion as it thinks fit.

(2) For the purposes of an inquiry under this section, the Board or any person authorised by it in this behalf, shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908) for enforcing the attendance of witnesses and production of documents.

CHAPTER VII

FINANCE OF THE BOARD

72.

Annual contribution payable to Board.--

(1) The mutawalli of every [189] [waqf], the net annual income of which is not less than five thousand rupees, shall pay annually, out of the net annual income derived by the [190] [waqf], such contributions, not exceeding seven per cent. of such annual income, as may be prescribed, to the Board for the services rendered by such Board to the [191] [waqf].

Explanation I .--For the purposes of this Act, &uot;net annual income&uot; shall mean the gross income of the [192] [waqf] from all sources, including nazars and offerings which do not amount to contributions to the corpus of the [193] [auqaf], in a year after deducting therefrom the following, namely:--

(i) the land revenue paid by it to the Government;

(ii) the rates, cesses, taxes and licence fees, paid by it to the Government or any local authority;

(iii) expenditure incurred for all or any of the following purposes [194] [in respect of lands directly under cultivation by the mutawalli for the benefit of the waqf], namely:--

(a) maintenance of, or repairs to, irrigation works, which shall not include the capital cost of irrigation;

(b) seeds or seedlings;

(c) manure;

(d) purchase and maintenance of agricultural implements;

(e) purchase and maintenance of cattle for cultivation;

(f) wages for ploughing, watering, sowing, transplanting, harvesting, threshing and other agricultural operations:

Provided that the total deduction in respect of an expenditure incurred under this clause shall not exceed [195] [twenty per cent.] of the income derived from lands belonging to the [196] [waqf];

[197] [*Provided further* that no such deduction shall be permitted in respect of waqf land given on lease, by whatever name called, whether *batai* or share cropping or any other name.]

(iv) expenditure on sundry repairs to rented buildings, not exceeding five per cent. of the annual rent derived therefrom, or the act ual expenditure, whichever is less;

(v) sale proceeds of immovable properties or rights relating to, or arising out of immovable properties, if such proceeds are re-invested to earn income for the [198] [waqf]:

Provided that the following items of receipts shall not be deemed to be income for the purposes of this section, namely:--

(a) advances and deposits recovered and loans taken or recovered;

(b) deposits made as security by employees, lessees or contractors and other deposits, if any;

(c) withdrawals from banks or of investments;

(d) amounts recovered towards costs awarded by Courts;

(e) sale proceeds of religious books and publications where such sales are undertaken as an un-remunerative enterprise with a view to propagating religion;

(f) donations in cash or kind or offerings made by the donors as contribution to the corpus of the [199] [waqf]:

Provided that the interest or income, if any, accruing from such donations

or offerings shall be taken into account in calculating the gross annual income;

(g) voluntary contributions received in cash or kind for a specific service to be performed by the [200] [waqf] and expended on such service;

(h) audit recoveries.

Explanation II .--In determining, the net annual income for the purposes of this section, only the net profit derived by any [201] [waqf] from its remunerative undertakings, if any, shall be taken as income, and in respect of its nonremunerative undertakings, such as, schools, colleges, hospitals, poor homes, orphanages or any other similar institutions, the grants given by the Government or any local authority or donations received from the public or fees collected from the pupils of educational institutions shall not be taken as income.

(2) The Board may in the case of any mosque or orphanage or any particular [202] [waqf] reduce or remit such contribution for such time as it thinks fit.

(3) The mutawalli of the [203] [waqf] may realise the contributions payable by him under sub-section (1) from the various persons entitled to receive any pecuniary or other material benefit from the [204] [waqf], but the sum realisable from any one of such persons shall not exceed such amount as shall bear to the total contribution payable the same proportion, as the value of the benefits receivable by such person bears to the entire net annual income of the [205] [waqf]:

Provided that if there is any income of the [206] [waqf] available in excess of the amount payable as dues under this Act, other than as the contribution under sub-section (1), and in excess of the amount payable under the [207] [waqf] deed, the contribution shall be paid out of such income.

(4) The contribution payable under sub-section (1) in respect of a [208] [waqf] shall, subject to the prior payment of any dues to the Government or any local authority or of any other statutory first charge on the [209] [waqf] property or the income thereof, be a first charge on the income of the [210] [waqf] and shall be recoverable, on a certificate issued by the Board after giving the mutawalli concerned an opportunity of being heard, as an arrear of land revenue.

(5) If a mutawalli realises the income of the [211] [waqf] and refuses to pay or does not pay such contribution, he shall also be personally liable for such contribution which may be realised from his person or property in the manner aforesaid.

(6) Where, after the commencement of this Act, the mutawalli of a [212] [waqf] fails to submit a return of the net annual income of the [213] [waqf] within the time specified therefor or submits a return which, in the opinion of the Chief Executive Officer is incorrect or false in any material particular, or which does not comply with the provisions of this Act or any rule or order made thereunder, the Chief Executive Officer may assess the net annual income of the [214] [waqf] to the best of his judgment or revise the net annual income as shown in the return submitted by the mutawalli and the net annual income as so assessed or revised shall be deemed to be the net annual income of the [215] [waqf] for the purposes of this section:

Provided that no assessment of the net annual income or revision of return submitted by mutawalli shall be made except after giving a notice to the mutawalli calling upon him to show cause, within the time specified in the notice, as to why such assessment or revision of the return shall not be made and every such assessment or revision shall be made after considering the reply, if any, given by the mutawalli.

(7) Any mutawalli who is aggrieved by the assessment or revision made by the Chief Executive Officer, under sub-section (6), may prefer an appeal to the Board within thirty

days from the date of the receipt of the assessment or revision of return and the Board may, after giving the appellant a reasonable opportunity of being heard, confirm, reverse or modify the assessment or revision or the return and the decision of the Board thereon shall be final.

(8) If, for any reason, the contribution or any portion thereof leviable under this section has escaped assessment in any year, whether before or after the commencement of this Act, the Chief Executive Officer may, within five years from the last date of the year to which such escaped assessment relates serve upon the mutawalli a notice assessing him with the contribution or portion thereof which had escaped assessment, and demanding payment thereof within thirty days from the date of service of such notice, and the provisions of this Act and the rules made thereunder, shall, as far as may be, apply as if the assessments were made under this Act, in the first instance.

73.

Power of Chief Executive Officer to direct banks or other person to make payments.--

(1) Notwithstanding anything contained in any other law for the time being in force, the Chief Executive Officer, if he is satisfied that it is necessary and expedient so to do, make an order directing any bank in which, or any person with whom any money belonging to a [216] [waqf] is deposited, to pay the contribution, leviable under section 72, out of such money, as may be standing to the credit of the [217] [waqf] in such bank or may be deposited with such person, or out of the moneys which may, from time to time, be received by bank or other person for or on behalf of the [218] [waqf] by way of deposit, and on receipt of such orders, the bank or the other person, as the case may be, shall, when no appeal has been preferred under sub-section (3), comply with such orders, or where an appeal has been preferred under sub-section (3), shall comply with the orders made by the Tribunal on such appeal.

(2) Every payment made by a bank or other person in pursuance of any order made under subsection (1), shall operate as a full discharge of the liability of such bank or other person in relation to the sum so paid.

(3) Any bank or other person who is ordered under sub-section (1) to make any payment may, within thirty days from the date of the order, prefer an appeal against such order to the Tribunal and the decision of the Tribunal on such appeal shall be final.

(4) Every officer of the bank or other person who fails, without any reasonable excuse to comply with the order made under sub-section (1) or, as the case may be, under sub-section (3), shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to eight thousand rupees, or with both.

74.

Deduction of contribution from perpetual annuity payable to the [219] [waqf].--

(1) Every authority empowered to disburse any perpetual annuity payable to a [220] [waqf] under any law relating to the abolition of zamindaries or jagirs, or laying down land ceilings, shall, on receipt of a certificate from the Chief Executive Officer, specifying the amount of contribution payable by the [221] [waqf] under section 72 which remains unpaid, deduct before making payment of the perpetual annuity to the [222] [waqf], the amount specified in such certificate and remit the amount so deducted to the Chief Executive Officer.

(2) Every amount remitted under sub-section (1) to the Chief Executive Officer shall be deemed to be a payment made by the [223] [waqf] and shall, to the extent of the amount

so remitted, operate as a full discharge of the liability of such authority with regard to the payment of the perpetual annuity.

75.

Power of Board to borrow.--

(1) For the purpose of giving effect to the provisions of this Act, the Board may, with the previous sanction of the State Government, borrow such sum of money and on such terms and conditions as the State Government may determine.

(2) The Board shall repay the money borrowed, together with any interest or costs due in respect thereof, according to the terms and conditions of the loan.

76.

Mutawalli not to lend or borrow moneys without sanction.--

(1) No mutawalli, Executive Officer or other person in charge of the administration of a [224] [waqf] shall lend any money belonging to the [225] [waqf] or any [226] [waqf] property or borrow any money for the purposes of the [227] [waqf] except with the previous sanction of the Board:

Provided that no such sanction is necessary if there is an express provision in the deed of [228] [waqf] for such borrowing or lending, as the case may be.

(2) The Board may, while according sanction, specify any terms and conditions subject to which the person referred to in sub-section (1) is authorised by him to lend or borrow any money or lend any other [229] [waqf] property.

(3) Where any money is lent or borrowed, or other [230] [waqf] property is lent in contravention of the provisions of this section, it shall be lawful for the Chief Executive Officer,--

(a) to recover an amount equal to the amount which has been so lent or borrowed, together with interest due thereon, from the personal funds of the person by whom such amount was lent or borrowed;

(b) to recover the possession of the [231] [waqf] property lent in contravention of the provisions of this Act, from the person to whom it was lent, or from persons who claim title to such property through the person to whom such property was lent.

77.

[232] [Waqf] Fund.--

(1) All moneys received or realised by the Board under this Act and all other moneys received as donation, benefactions or grants by the Board shall form a fund to be called the [233] [Waqf] Fund.

(2) All moneys received by the Board, as donations, benefactions and grants shall be deposited and accounted for under a separate sub-head.

(3) Subject to any rules that may be made by the State Government in this behalf, the [234] [Waqf] Fund shall be under the control of the Board, so, however, that the [235] [Waqf] Fund under the control of common [236] [Waqf] Board shall be subject to rules, if any,

made in this behalf by the Central Government.

(4) The [237] [Waqf] Fund shall be applied to--

(a) repayment of any loan incurred under section 75 and payment of interest thereon;

(b) payment of the cost of audit of the [238] [Waqf] Fund and the accounts of [239] [auqaf];

(c) payment of the salary and allowances to the officers and staff of the Board;

(d) payment of travelling allowances to the Chairperson and members of the Board;

(e) payment of all expenses incurred by the Board in the performance of the duties imposed, and the exercise of the powers conferred, by or under this Act ;

(f) payment of all expenses incurred by the Board for the discharge of any obligation imposed on it by or under any law for the time being in force.

[240] [(g) payment of maintenance to Muslim women as ordered by a court of competent jurisdiction under the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (25 of 1986).]

(5) If any balance remains after meeting the expenditure referred to in sub- section (4), the Board may use any portion of such balance for the preservation and protection of [241] [waqf] properties or for such other purposes as it may deem fit.

78.

Budget of Board.--

(1) The Board shall in every year prepare, in such form and at such time as may be prescribed, a budget for the next financial year showing the estimated receipts and expenditure during that financial year and forward a copy of the same to the State Government.

(2) On receipt of the budget forwarded to it under sub-section (1), the State Government shall examine the same and suggest such alterations, corrections, or modifications to be made therein as it may think fit and forward such suggestions to the Board for its consideration.

(3) On receipt of the suggestions from the State Government, the Board may make written representations to that Government with regard to the alterations, corrections or modifications suggested by that Government and the State Government shall, after considering such representations, communicate, within a period of three weeks from the date of receipt, to the Board its final decision in relation to the matter and the decision of the State Government shall be final.

(4) On receipt of the decision of the State Government under sub-section (3), the Board shall incorporate in its budget all the alternations, corrections, modifications finally suggested by the State Government and the budget as so altered, corrected or modified, shall be the budget which shall be passed by the Board.

79.

Accounts of Board.--

The Board shall cause to be maintained such books of account and other books in relation to its accounts in such form and in such manner as may be provided by regulations.

80.

Audit of accounts of Board.--

(1) The accounts of the Board shall be audited and examined annually by such auditor as may be appointed by the State Government.

(2) The auditor shall submit his report to the State Government and the report of the auditor shall, among other things, specify whether the accounts of every [242] [waqf] under the direct management of the Board have been kept separately and whether such accounts have been audited annually by the State Examiner of Local Funds and shall also specify all cases of irregular, illegal or improper expenditure or of failure to recover money or other property caused by neglect or misconduct and any other matter which the auditor considers it necessary to report; and the report shall also contain the name of any person who, in the opinion of the auditor, is responsible for such expenditure or failure and the auditor shall in every such case certify the amount of such expenditure or loss as due from such person.

(3) The cost of the audit shall be paid from the [243] [Waqf] Fund.

81.

State Government to pass orders on auditor's report.--

The State Government shall examine the auditor's report and may call for the explanation of any person in regard to any matter mentioned therein, and shall pass such orders on the report as it thinks fit [244] [and a copy of the said auditor's report, along with orders shall be forwarded by the State Government to the Council within a period of thirty days of laying of such report before each House of the State Legislature where it consists of two Houses or where such Legislatures consist of one House, before that House.]

82.

Dues of Board to be recovered as arrears of land revenue.--

(1) Every sum certified to be due from any person by an auditor in his report under section 80, be paid by such person within sixty days after the service of a demand notice by the Board.

(2) If such payment is not made in accordance with the provisions of sub-section (1), the sum payable may, on a certificate issued by the Board, after giving the person concerned an opportunity of being heard, be recovered as an arrear of land revenue.

CHAPTER VIII

JUDICIAL PROCEEDINGS

83.

Constitution of Tribunals, etc.--

[245] [(1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such property, under this Act and define the local limits and jurisdiction of such Tribunals;]

(2) Any mutawalli, person interested in a [246] [waqf] or any other person aggrieved by an

order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other matter relating to the [247] [waqf].

(3) Where any application made under sub-section (1) relates to any [248] [waqf] property which falls within the territorial limits of the jurisdiction of two or more Tribunals, such application may be made to the Tribunal within the local limits of whose jurisdiction the mutawalli or any one of the mutawallis of the [249] [waqf] actually and voluntarily resides, carries on business or personally works for gain, and, where any such application is made to the Tribunal aforesaid, the other Tribunal or Tribunals having jurisdiction shall not entertain any application for the determination of such dispute, question or other matter:

Provided that the State Government may, if it is of opinion that it is expedient in the interest of the [250] [waqf] or any other person interested in the [251] [waqf] or the [252] [waqf] property to transfer such application to any other Tribunal having jurisdiction for the determination of the dispute, question or other matter relating to such [253] [waqf] or [254] [waqf] property, transfer such application to any other Tribunal having jurisdiction, and, on such transfer, the Tribunal to which the application is so transferred shall deal with the application from the stage which was reached before the Tribunal from which the application has been so transferred, except where the Tribunal is of opinion that it is necessary in the interests of justice to deal with the application afresh.

[255] [(4) Every Tribunal shall consist of--

(a) one person, who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class I, who shall be the Chairman;

(b) one person, who shall be an officer from the State Civil Services equivalent in rank to that of the Additional District Magistrate, Member;

(c) one person having knowledge of Muslim law and jurisprudence, Member; and the appointment of every such person shall be made either by name or by designation.

(4A) The terms and conditions of appointment including the salaries and allowances payable to the Chairman and other members other than persons appointed as *ex officio* members shall be such as may be prescribed.]

(5) The Tribunal shall be deemed to be a Civil Court and shall have the same powers as may be exercised by a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, or executing a decree or order.

(6) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), the Tribunal shall follow such procedure as may be prescribed.

(7) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a Civil Court.

(8) The execution of any decision of the Tribunal shall be made by the Civil Court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(9) No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal:

Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such other order as it may think fit.

State Amendment

West Bengal.-- In its application to the State of West Bengal, in s. 83, for sub-s. (4), substitute the following sub-section, namely:--

&uot;(4)(a) Every Tribunal shall consist of one person, who is or has been a member of the State Judicial Service holding a rank, not below the rank of a District and Sessions Judge, and the appointment of every such person may be made either by name or by designation.

(b) On such appointment, such person shall be designated as Judge, Wakf Tribunal, bearing the name of the State and shall hold office for a term of three years from the date of such appointment or till he attains the age of sixty-two years, whichever is earlier.&uot;--West Bengal Act 20 of 2001, s. 3.

84.

Tribunal to hold proceedings expeditiously and to furnish to the parties copies of its decision.--

Whenever an application is made to a Tribunal for the determination of any dispute, question or other matter relating to a [256] [waqf] or [257] [waqf] property it shall hold its proceedings as expeditiously as possible and shall as soon as practicable, on the conclusion of the hearing of such matter give its decision in writing and furnish a copy of such decision to each of the parties to the dispute.

85.

Bar of jurisdiction of Civil Courts.--

No suit or other legal proceeding shall lie in any [258] [civil court, revenue court and any other authority] in respect of any dispute, question or other matter relating to any [259] [waqf], [260] [waqf] property or other matter which is required by or under this Act to be determined by a Tribunal.

86.

Appointment of a receiver in certain cases.--

Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or in any other law for the time being in force, where any suit or other legal proceeding is instituted or commenced--

(a) by or on behalf of a Board--
  (i) to set aside the sale of any immovable property, which is [261] [waqf] property in execution of a decree or order of a Civil Court;
  (ii) to set aside the transfer of any immovable property, which is [262] [waqf] property, made by the mutawalli thereof, whether for valuable consideration or not, without or otherwise than in accordance with, the sanction of the Board;
  (iii) to recover possession of the property referred to in clause (a) or clause (b) or to restore possession of such property to the mutawalli of the concerned [263] [waqf]; or

(b) by a mutawalli to recover possession of immovable property, which is [264] [waqf] property, which has been transferred by a previous mutawalli [265] [or by any other person], whether for valuable consideration or not, without otherwise than in accordance with the sanction of the Board, and which is in the possession of the defendant, the

Court may, on the application of the plaintiff, appoint a receiver of such property and direct such receiver to pay from time to time to the plaintiff, out of the income of the property, such amount as the Court may consider to be necessary for further prosecution of the suit.

[266] [* * *]

88.

Bar to challenge the validity of any notification, etc.--

Save as otherwise expressly provided in this Act, no notification or order or decision made, proceeding or action taken, by the Central Government or the State Government under this Act or any rule made thereunder shall be questioned in any Civil Court.

89.

Notice of suits by parties against Board.--

No suit shall be instituted against the Board in respect of any act purporting to be done by it in pursuance of this Act or of any rules made thereunder, until the expiration of two months next after notice in writing has been delivered to, or left at, the office of the Board, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

90.

Notice of suits, etc., by Courts.--

(1) In every suit or proceeding relating to a title to or possession of a [267] [waqf] property or the right of a mutawalli or beneficiary, the Court or Tribunal shall issue notice to the Board at the cost of the party instituting such suit or proceeding.

(2) Whenever any [268] [waqf] property is notified for sale in execution of a decree of a Civil Court or for the recovery of any revenue, cess, rates or taxes due to the Government or any local authority, notice shall be given to the Board by the Court, Collector or other person under whose order the sale is notified.

(3) In the absence of a notice under sub-section (1), any decree or order passed in the suit or proceeding shall be declared void, if the Board, within [269] [six months] of its coming to know of such suit or proceeding, applies to the Court in this behalf.

(4) In the absence of a notice under sub-section (2), the sale shall be declared void, if the Board, within one month of its coming to know of the sale, applies in this behalf to the Court or other authority under whose order the sale was held.

91.

Proceedings under Act 1 of 1894.--

(1) If, in the course of proceedings under the Land Acquisition Act, 1894 (1 of 1894) or under any law for the time being in force relating to the acquisition of land or other property,[270] [and before an award is made, in case the property] under acquisition is [271] [waqf] property, a notice of such acquisition shall be served by Collector on the Board and further proceedings shall be stayed to enable the Board to appear and plead as a party to the proceeding at any time within three months from the date of the receipt of such notice.

Explanation .--The reference to the Collector in the foregoing provisions of this sub-section shall, in relation to any other law referred to therein, be construed, if the Collector is not the competent authority under such other law to make an award of the compensation or other amount payable for acquisition of land or other property thereunder, as a reference to the authority under such other law competent to make such award.

(2) Where the Board has reason to believe that any property under acquisition is [272] [waqf] property, it may at any time before the award is made appear and plead as a party to the proceeding.

(3) When the Board has appeared under the provisions of sub-section (1) or sub-section (2), no order shall be passed under section 31 or section 32 of the Land Acquisition Act, 1894 (1 of 1894) or under the corresponding provisions of the other law referred to in sub-section (1) without giving an opportunity to the Board to be heard.

(4) Any order passed under section 31 or section 32 of the Land Acquisition Act, 1894 (1 of 1894) or under the corresponding provisions of the other law referred to in sub-section (1) without giving an opportunity to the Board to be heard, shall be declared void if the Board, within one month of its coming to know of the order, applies in this behalf to the authority which made the order.

92.

Board to be party to suit or proceeding.--

In any suit or proceeding in respect of a [273] [waqf] or any [274] [waqf] property the Board may appear and plead as a party to the suit or proceeding.

93.

Bar to compromise of suits by or against mutawallis.--

No suit or proceeding in any Court by or against the mutawalli of a [275] [waqf] relating to title to [276] [waqf] property or the rights of the mutawalli shall be compromised without the sanction of the Board.

94.

Power to make application to the Tribunal in case of failure of mutawalli to discharge his duties.--

(1) Where a mutawalli is under an obligation to perform any act which is recognised by Muslim law as pious, religious or charitable and the mutawalli fails to perform such act, the Board may apply to the Tribunal for an order directing the mutawalli to pay to the Board or to any person authorised by the Board in this behalf the amount necessary for the performance of such act .

(2) Where a mutawalli is under an obligation to discharge any other duties imposed on him under the [277] [waqf] and the mutawalli wilfully fails to discharge such duties, the Board or any person interested in the [278] [waqf] may make an application to the Tribunal and the Tribunal may pass such order thereon as it thinks fit.

95.

Power of appellate authority to entertain appeal after expiry of specified period.--

Where under this Act any period has been specified for the filing of any appeal, the appellate authority may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal

within the period so specified, entertain the appeal after the expiry of the said period.

CHAPTER IX

MISCELLANEOUS

96.

Power of Central Government to regulate secular activities of [279] [auqaf].--

(1) For the purpose of regulating the secular act ivities of [280] [auqaf], the Central Government shall have the following powers and functions, namely:--
(a) to lay down general principles, and policies of [281] [waqf] administration insofar as they relate to the secular activities of the [282] [auqaf];
(b) to co-ordinate the functions of the Central [283] [Waqf] Council and the Board, insofar as they relate to their secular functions;
(c) to review administration of the secular act ivities of [284] [auqaf] generally and to suggest improvements, if any.

(2) In exercising its powers and functions under sub-section (1), the Central Government may call for any periodic or other reports from any Board and may issue to the Board such directions as it may think fit and the Board shall comply with such directions.

Explanation .--For the purposes of this section &uot;secular activities&uot; shall include social, economic, educational and other welfare act ivities.

97.

Directions by State Government.--

Subject to any directions issued by the Central Government under section 96, the State Government may, from time to time, give to the Board such general or special directions as the State Government thinks fit and in the performance of its functions, the Board shall comply with such directions.

[285] [*Provided* that the State Government shall not issue any direction being contrary to any waqf deed or any usage; practice or custom of the waqf.]

98.

Annual report by State Government.--

As soon as may be after the close of a financial year, the State Government shall cause a general annual report on the working and administration of the State [286] [Waqf] Board and the administration of [287] [auqaf] in the State during that year to be prepared and laid before each House of the State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House, and every such report shall be in such form and shall contain such matters as may be provided by regulations.

99.

Power to supersede Board.--

(1) If the State Government is of opinion that the Board is unable to perform or has persistently made default in the performance of, the duty imposed on it by or under this Act or has exceeded or abused its powers, or has wilfully and without sufficient cause

failed to comply with any direction issued by the Central Government under section 96 or the State Government under section 97, or if the State Government is satisfied on consideration of any report submitted after annual inspection, that the Board's continuance is likely to be injurious to the interests of the [288] [auqaf] in the State, the State Government may, by notification in the Official Gazette, supersede the Board for a period not exceeding six months:

Provided that before issuing a notification under this sub-section, the State Government shall give a reasonable time to the Board to show cause why it should not be superseded and shall consider the explanations and objections, if any, of the Board.

[289] [*Provided further* that the power of the State Government under this section shall not be exercised unless there is a *prima facie* evidence of financial irregularity, misconduct or violation of the provisions of this Act .]

(2) Upon the publication of a notification under sub-section (1) superseding the Board,--

(a) all the members of the Board shall, as from the date of supersession, vacate their offices as such members;

(b) all the powers and duties which may, by or under the provisions of this Act, be exercised or performed by or on behalf of the Board shall, during the period of supersession, be exercised and performed by such person or persons as the State Government may direct; and

(c) all property vested in the Board shall, during the period of supersession vest in the State Government.

(3) On the expiration of the period of supersession specified in the notification issued under subsection (1), the State Government may--

[290] [(a) extend the period of supersession by another six months with reasons to be recorded in writing and, the period of continuous supersession shall not exceed more than a year; or]

(b) reconstitute the Board in the manner provided in section 14.

100.

Protection of action taken in good faith.--

No suit or other legal proceeding shall lie against the Board or Chief Executive Officer or Survey Commissioner or any other person duly appointed under this Act in respect of anything which is in good faith done or intended to be done under this Act.

101.

Survey Commissioner, members and officers of the Board deemed to be public servants.--

(1) The Survey Commissioner, members of the Board, every officer, every auditor of the Board and every other person duly appointed to discharge any duties imposed on him by this Act or any rule or order made thereunder, shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

(2) Every mutawalli of a [291] [waqf], every member of managing committee, whether constituted by the Board or under any deed of [292] [waqf], every Executive Officer and every person holding any office in a [293] [waqf] shall also be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860).

102.

Special provision for reorganisation of certain Boards.--

(1) Where on account of the reorganisation of States under any law providing reorganisation of States, the whole or any part of a State in respect of which a Board was, immediately before the day of such reorganisation, functioning has been transferred on that day to another State and by reason of such transfer, it appears to the Government of a State in any part of which the Board is functioning that the Board should be dissolved or that it should be reconstituted as an Infra-State Board for the whole or any part of that State, the State Government may frame a scheme or such dissolution or such reconstitution, including proposals regarding the transfer of all assets, rights and liabilities of the Board to any other Board or State Government and the transfer or re-employment of employees of the Board and forward that scheme to the Central Government.

(2) On receipt of a scheme forwarded to it under sub-section (1), the Central Government may, [294] [after consulting the Council and the State Governments] concerned, approve the scheme with or without modifications and give effect to the scheme so approved by making such order as it thinks fit.

(3) An order under sub-section (2) may provide for all or any of the following matters, namely:--

(a) the dissolution of the Board;

(b) the reconstitution in any manner whatsoever of the Board including the establishment, where necessary, of a new Board;

(c) the area in respect of which the reconstituted Board or new Board shall function and operate;

(d) the transfer, in whole or in part, of the assets, rights and liabilities of the Board (including the rights and liabilities under any contract made by it) to any other Board or State Government and the terms and conditions of such transfer;

(e) the substitution of any such transferee for the Board, or the addition of any such transferee, as a party to any legal proceeding to which the Board is a party; and the transfer of any proceeding pending before the Board to any such transferee;

(f) the transfer or re-employment of any employee of the Board to or by, any such transferee and subject to the provisions of law providing for the reorganisation of the concerned State, the terms and conditions of service applicable to such employees after such transfer or re-employment; and

(g) such incidental, consequential and supplemental matters as may be necessary to give effect to the approved scheme.

(4) Where an order is made under this section transferring the assets, rights and liabilities of any Board, then, by virtue of that order, such assets, rights and liabilities of the Board shall vest in, and be the assets, rights and liabilities of, the transferee.

(5) Every order made under this section shall be published in the Official Gazette.

(6) Every order made under this section shall be laid before each House of Parliament, as soon as may be, after it is made.

103.

Special provision for establishment of Board for part of a State.--

Where on account of the territorial changes brought about by any law providing for the reorganisation of any State, this Act is as from the date on which that law comes into force applicable only to any part or parts of a State but has not been brought into force in the remaining part thereof, then notwithstanding anything contained in this Act, it shall be lawful for the Government of the State to

establish one or more Boards for such part or parts in which this Act is in force and in such a case any reference in this Act to the word &uot;State&uot; in relation of a Board shall be construed as a reference to that part of the State for which the Board is established.

(2) Where any such Board has been established and it appears to the Government of the State that a Board should be established for the whole of the State, the State Government may, by order notified in the Official Gazette, dissolve the Board established for the part of the State or reconstitute and reorganise such Board or establish a new Board for the whole of the State and thereupon, the assets, rights and liabilities of the Board for the part of the State shall vest in and be in the assets, rights and liabilities of the reconstituted Board or the new Board, as the case may be.

104.

Application of Act to properties given or donated by persons not professing Islam for support of certain [295] [waqf].--

Notwithstanding anything contained in this Act where any movable or immovable property has been given or donated by any person not professing Islam for the support of a [296] [waqf] being--

(a) a mosque, idgah, imambara, dargah, khangah or a maqbara;
(b) a Muslim graveyard;
(c) a choultry or *musafarkhana* ,

then such property shall be deemed to be comprised in that [297] [waqf] and be dealt in the same manner as the [298] [waqf] in which it is so comprised.

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[299] [104A.

Prohibition of sale, gift, exchange, mortgage or transfer of waqf property.--

(1) Notwithstanding anything contained in this Act or any other law for the time being in force or any waqf deed, no person shall sell, gift, exchange, mortgage or transfer any movable or immovable property which is a waqf property to any other person.
(2) Any sale, gift, exchange, mortgage or transfer of property referred to in sub-section (1) shall be void *ab initio* .]

[300] [104B.

Restoration of waqf properties in occupation of Government agencies to waqf Board.--

(1) If any waqf property has been occupied by the Government agencies it shall be returned to the Board or the mutawalli within a period of six months from the date of the order of the Tribunal.
(2) The Government agency may, if the property is required for a public purpose, make an application for determination of the rent, or as the case may be, the compensation, by the Tribunal at the prevailing market value.]

105.

Power of Board and Chief Executive Officer to require copies of documents, etc., to be furnished.--

Notwithstanding anything contained in any law for the time being in force, it shall be lawful for the Board or the Chief Executive Officer to require any person having the custody of any record, register, report or other document relating to a [301] [waqf] or any immovable property, which is [302] [waqf] property, to furnish subject to the payment of necessary costs, copies of, or extracts from, any such record, register, report or document and every person to whom such a requisition is made, shall furnish, as soon as may be practicable, to the Board or Chief Executive Officer copies or extracts from the required record, register, report or other document.

106.

Powers of Central Government to constitute common Boards.--

(1) Where the Central Government is satisfied that by reasons of--

(i) the smallness of the Muslim population in two or more States,

(ii) the slender resources of the [303] [auqaf] in such States, and

(iii) the disproportion between the number and income of the [304] [auqaf] and the Muslim population in such States,

it is expedient in the interests of the [305] [auqaf] in the States and the Muslim population of such States, to have, instead of separate Boards for each of such States, a common Board, it may, [306] [after consultation with the Council and the Government] of each of the concerned States, establish, by notification in the Official Gazette, a common Board for such States as it may deem fit, and may, by the same or any subsequent notification specify the place at which the principal office of such common Board shall be located.

(2) Every common Board established under sub-section (1) shall, as far as practicable, consist of the persons specified in sub-section (1) or, as the case may be, sub-section (7) of section 14.

(3) Whenever any common Board is established under sub-section (1),--

(a) all powers vested in the State Government under any deed of [307] [waqf] or any provision of law for the time being in force relating to [308] [auqaf], shall stand transferred to, and vested in, the Central Government and, thereupon, references in such deed of [309] [waqf] or law to the State Governments shall be construed as references to the Central Government:

Provided that while establishing a common Board for two or more States, the Central Government shall ensure that at least one representative of each of the concerned States is included as a member of the Board;

(b) references in this Act to a State shall be construed as references to each of the States for which the common Board has been established;

(c) the Central Government may, without prejudice to any rule applicable to a Board in a State, make, by notification in the Official Gazette, rules regulating the conduct of business by, and affairs of, the common Board.

(4) The common Board shall be a body corporate, with objects not confined to one State, having perpetual succession and a common seal with power to acquire and hold property and to transfer any such property, subject to such conditions and restrictions as may be specified by the Central Government, and shall by the said name sue or be sued.

107.

Act 36 of 1963 not to apply for recovery of [310] [waqf] properties.--

Nothing contained in the Limitation Act, 1963 (36 of 1963) shall apply to any suit for possession of immovable property comprised in any[311] [waqf] or for possession of any interest in such property.

108.

Special provision as to evacuee [312] [waqf] properties.--

The provisions of this Act shall apply, and shall be deemed always to have applied, in relation to any evacuee property within the meaning of clause (f) of section 2 of the Administration of Evacuee Property Act, 1950 (31 of 1950), which immediately before it became such evacuee property within the said meaning was property comprised in any [313] [waqf] and, in particular any entrustment (whether by transfer of any documents or in any other manner and whether generally or for specified purpose) of any such property to a Board made before the commencement of this Act in pursuance of the instructions of the Custodian under the Administration of Evacuee Property Act, 1950 (31 of 1950) shall have, and shall be deemed always to have had, notwithstanding anything contained in any other provision of this Act, effect as if such entrustment had operated to--

(a) vest such property in such Board in the same manner and with the same effect as in a trustee of such property for the purposes of sub-section (1) of section 11 of the Administration of Evacuee Property Act, 1950 (31 of 1950) with effect from the date of such entrustment, and

(b) authorise such Board to assume direct management of the [1] [waqf] concerned for so long as it might deem necessary.

[2] [108A.

Act to have overriding effect.--

The provisions of this Act shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.]

109.

Power to make rules.--

(1) The State Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act, other than those of Chapter III.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:--

[3] [(i) the qualifications required to be fulfilled by a person to be appointed as a mutawalli under clause (i) of section 3;

(ia) other particulars which the report of the Survey Commissioner may contain under clause (f) of sub-section (3) of section 4;]

(ii) any other matter under clause (f) of sub- section (4) of section 4;

(iii) the particulars which a list of [4] [auqaf] published under sub-section (2) of section 5, may contain;

(iv) the manner of election of members of the Board by means of a single transferable vote, under sub-section (2) of section 14;

(v) the terms and conditions of service of the Chief Executive Officer under sub-section (2) of section 23;

(vi) the conditions and restrictions subject to which the Chief Executive Officer or any other officer may inspect any public office, records or registers [5] [under sub-section (1) of] section 29;

[6] [(via) the period within which the mutawalli or any other person may produce documents related to waqf properties under sub-section (2) of section 31;

(vib) the conditions under which an agency of the Government or any other organisation may supply copies of records, registers and other documents under sub-section (3) of section 31;]

(vii) the conditions subject to which an Executive Officer and supporting staff may be appointed under sub-section (1) of section 38;

(viii) the manner in which an inquiry may be held by the Chief Executive Officer under subsection (1) of section 39;

(ix) the form in which, and the time within which, a separate budget for [7] [auqaf] under the direct management of the Board shall be prepared under sub-section (1) of section 45;

(x) the interval at which accounts of [8] [auqaf] may be audited in pursuance of the provisions of sub-section (1) of section 47;

[9] [* * *]

(xii) the guidance subject to which the Collector shall recover the property transferred in contravention of the provisions of this Act, under section 52;

(xiii) the manner of service of notice issued under sub-section (1) of section 54 and the manner in which any inquiry is to be made under sub-section (3) of that section;

(xiv) the manner in which any inquiry may be held under section 64 or section 71;

(xv) the other matters which may be specified in the report submitted under sub-section (3) of section 65;

(xvi) the manner of publication of order made under sub-section (2) of section 67;

(xvii) the manner in which consultation may be made with mutawalli under sub-section (1) of section 69;

(xviii) the manner of publication of order made under sub-section (3) of section 69;

(xix) the rate at which contribution is to be made by a mutawalli under section 72;

(xx) the payment of moneys into the [10] [Waqf] Fund, the investment, the custody and disbursement of such moneys under section 77;

(xxi) the form in which, and the time within which, the budget of the Board may be prepared and submitted under section 78;

(xxii) the time within which application is to be made to the Tribunal under sub-section (2) of section 83;

[11] [(xxiia) the terms and conditions of appointment including the salaries and allowances payable to the Chairman and other members other than persons appointed as *ex officio* members under sub-section (4A) of section 83;]

(xxiii) the procedure which the Tribunal shall follow under sub-section (6) of section 83;

(xxiv) the form in which the annual report is to be submitted and the matters which such report shall contain under section 98; and

(xxv) any other matter which is required to be, or may be, prescribed.

State Amendment

West Bengal.-- In its application to the State of West Bengal, in sub-s. (2) of s. 109, after cl. (vi), insert the following clause, namely:--

&uot;(via) the manner of control and management of the properties of the wakf under subsection (5) of section 32;&uot;.--West Bengal Act 33 of 1997, S. 5.

110.

Powers to make regulations by the Board.--

(1) The Board may, with the previous sanction of the State Government, make regulations not inconsistent with this Act or the rules made thereunder, for carrying out its functions under this Act .

(2) In particular, and without prejudice to the generality of the foregoing powers, such regulations may provide for all or any of the following matters, namely:--

(a) the time and places of the meetings of the Board under sub-section (1) of section 17;

(b) the procedure and conduct of business at the meetings of the Board;

(c) the constitution and functions of the committees and the Board and the procedure for transaction of business at the meetings of such committees;

(d) the allowances or fees to be paid to the Chairperson or members of the Board or members of committees;

(e) the terms and conditions of service of the officers and other employees of the Board under sub-section (2) of section 24;

(f) the forms of application for registration of [12] [auqaf] further particulars to be contained therein and the manner and place of registration of [13] [auqaf] under sub-section (3) of section 36;

(g) further particulars to be contained in the register of [14] [auqaf] under section 37;

(h) the form in which, and the time within which, the budgets of [15] [auqaf] may be prepared and submitted by the mutawalli and approved by the Board under subsection (1) of section 44;

(i) the books of accounts and other books to be maintained by the Board under section 79;

(j) fees payable for inspection of proceedings and records of the Board or for issue of copies of the same;

(k) persons by whom any order or decision of the Board may be authenticated; and

(l) any other matter which has to be, or may be, provided by regulations.

(3) All regulations made under this section shall be published in the Official Gazette and shall have effect from the date of such publication.

111.

Laying of rules and regulations before State Legislature.--

Every rule made under section 109 and every regulation made under section 110 shall be laid, as soon as may be after it is made, before the State Legislature.

112.

Repeal and savings.--

(1) The Wakf Act, 1954 (29 of 1954) and the Wakf (Amendment) Act, 1984 (69 of 1984) are hereby repealed.

(2) Notwithstanding such repeal, anything done or any act ion taken under the said Acts shall be deemed to have been done or taken under the corresponding provisions of this Act .

(3) If, immediately before the commencement of this Act, in any State, there is in force in that State, any law which corresponds to this Act, that corresponding law shall stand repealed:

Provided that such repeal shall not affect the previous operation of that corresponding law, and subject thereto, anything done or any action taken in the exercise of any power conferred by or under the corresponding law shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act was in force on the day on which such things were done or act ion was taken.

113.

Power to remove difficulties.--

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, not inconsistent with the provisions of this Act, remove the difficulty:

Provided that no such order shall be made after the expiry of the period of two years from the commencement of this Act.

(2) However, order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

299 Ins. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 53 (w.e.f. 1-11-2013).

300 Ins. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 54 (w.e.f. 1-11-2013).

301 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakf&uot;.

302 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakf&uot;.

303 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakfs&uot;.

304 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakfs&uot;.

305 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakfs&uot;.

306 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 55 (w.e.f. 1-11-2013), for the words &uot;after consultation with the Government&uot;.

307 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakf&uot;.

308 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakfs&uot;.

309 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakf&uot;.

310 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakf&uot;.

311 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakf&uot;.

312 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakf&uot;.

313 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakf&uot;.

1 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakf&uot;.

2 Ins. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 56 (w.e.f. 1-11-2013).

3 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 57(a) (w.e.f. 1-11-2013). Prior to substitution &uot;clause (i)&uot; stood as under:-- &uot;(i) other particulars which the report of the Survey Commissioner may contain, under clause (f) of sub-section (3) of section (4);&uot;

4 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakfs&uot;.

5 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 57(b) (w.e.f. 1-11-2013), for the word &uot;under&uot;.

6 Ins. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 57(c) (w.e.f. 1-11-2013).

7 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakfs&uot;.

8 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakfs&uot;.

9 Omitted by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 57(d) (w.e.f. 1-11-2013). Prior to omission &uot;clause (xi)&uot; stood as under:-- &uot;(xi) the time within which, the sale of any property is to be informed under the first proviso to sub-section (2) of section 51 and the manner in which the approval given under sub-section (3) of that section shall be published;&uot;

10 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;Wakf&uot;.

11 Ins. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 57(e) (w.e.f. 1-11-2013).

12 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakfs&uot;.

13 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakfs&uot;.

14 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakfs&uot;.

15 Subs. by the Wakf (Amendment) Act, 2013 (27 of 2013), s. 4 (w.e.f. 1-11-2013), for the word &uot;wakfs&uot;.

APPENDIX IV - THE WAKF ACT, 1995

(43 of 1995)

[*As stood prior to the Wakf (Amendment) Act, 2013 (27 of 2013)*]

[22nd November, 1995]

STATEMENT OF OBJECTS AND REASONS

The act ual working of the Wakf Act, 1954 had brought out many deficiencies in it as also in the set up of the Wakf Boards, especially, their powers of superintendence and control over the management of individual wakfs. To clarify some of these matters--the Act had to be amended three times--in 1959, in 1964 and in 1969--within a period of 15 years.

2. Comprehensive amendments to the Wakf Act were made by the Wakf (Amendment) Act, 1984 which were based largely on the recommendations of the Wakf Inquiry Committee set up in December, 1970 to enquire into administration of wakfs at all levels and in response to a demand made in Parliament by the Members during a discussion on the Wakf (Amendment) Bill, 1969.

3. Only two provisions of 1984 Act could, however, be enforced because of strong opposition to its various provisions from the Muslim Community. The two provisions related to:--
   (i) increasing the period of limitation for filing suits in respect of wakf properties in adverse possession from 12 years to 30 years; and
   (ii) application of the provisions of Wakf Act, 1954, to the evacuee properties.

4. The main criticism related to provisions concerning the powers of the Wakf Commissioner. It was stated that the Wakf Commissioner has been given overriding powers and the Wakf Board had been made subordinate to him. The other criticisms were that the Amendment Act, 1984 is a gross interference by the State and the Central Government in the day to day management and administration of the wakfs by the Trustees and Mutawallis of wakfs.

5. After a careful consideration of the objections to the various provisions of the 1984 Act, and after holding wide ranging discussions with the leaders of the Muslim community, it has been decided to bring in a new comprehensive Bill on wakf matters incorporating the features of 1954 Act and such provisions of the 1984 Act in respect of which there was a near consensus.

6. Now, the new Wakf Law will have, inter alia, the following features:--
   (a) Wakf Boards for the States and for the Union Territory of Delhi shall have not less than 7 and not more than 13 members of which the majority will comprise such persons as are elected from amongst Muslim Members of Parliament, Muslim Members of State Legislatures, Muslim Members of the Bar Council in a State and Mutawallis of wakfs having an annual income of Rs. 1 lakh or more. The nominated members will be from Muslim organisations of State eminence, recognised scholars in Muslim theology and a representative of the State Government not below the rank of Deputy Secretary. In a State where there are Shia wakfs but no separate Shia Wakf Board, at least one of the Members shall be a Shia Muslim. A smaller Wakf Board is envisaged for Union Territories other than Delhi.
   (b) The other important feature is about distribution of powers between the Wakf Board and the Wakf Commissioner which would now be re-designated as the Chief Executive Officer and would be subordinate to the Wakf Board.
   (c) Provisions are also being made for appointment of the Executive Officer in respect of wakfs whose performance is not satisfactory and whose annual income is Rs. 5 lakhs or more.
   (d) To strengthen the finances of the Wakf Board, one of the measures being contemplated is to raise the rate of the contribution by a Wakf to the Wakf Board from 6 per cent. of its annual income to 7 per cent.
   (e) It is also intended to put certain restrictions on the powers of Mutawallis in the interest of better management of wakf properties.
   (f) An important provision in the proposed Bill relates to setting up of Wakf Tribunals to consider questions and disputes pertaining to wakfs.
   (g) There are instances of misuse of wakf properties either with or without the connivance of the Mutawallis. It is now proposed to incorporate in the Bill a provision so that the alienation of wakf properties will not be easy.
   (h) At present, the Wakf Act, 1954 is not applicable to Uttar Pradesh, West Bengal, parts of Gujarat, parts of Maharashtra and some of the North-Eastern States. With the enforcement of this legislation, there will be uniformity in respect of wakf administration throughout the country except in Jammu and Kashmir State.

7. The present Bill seeks to achieve the above objectives.

An Act to provide for the better administration of Wakfs and for matters connected therewith or incidental thereto .

BE it enacted by Parliament in the Forty-sixth Year of the Republic of India as follows:--

CHAPTER I

PRELIMINARY

1.

Short title, extent and commencement.--

(1) This Act may be called THE WAKF ACT, 1995.
(2) It extends to the whole of India except the State of Jammu and Kashmir.
(3) It shall come into force in a State on such date [1] as the Central Government may, by notification in the Official Gazette, appoint; and different dates may be appointed for different areas within a State and for different provisions of this Act, and any reference in any provision to the commencement of this Act, shall, in relation to any State or area therein, be construed as reference to the commencement of that provision in such State or area.

2.

Application of the Act.--

Save as otherwise expressly provided under this Act, this Act shall apply to all wakfs whether created before, or after the commencement of this Act :

Provided that nothing in this Act shall apply to Durgah Khawaja Saheb, Ajmer to which the Durgah Khawaja Saheb Act, 1955 (36 of 1955) applies.

3.

Definitions.--

In this Act, unless the context otherwise requires,--

(a) &uot;beneficiary&uot; means a person or object for whose benefit a wakf is created and includes religious, pious and charitable objects and any other objects of public utility sanctioned by the Muslim law;
(b) &uot;benefit&uot; does not include any benefit which a mutawalli is entitled to claim solely by reason of his being such mutawalli;
(c) &uot;Board&uot; means a Board of Wakf established under sub-section (1), or as the case may be, under sub-section (2) of section 13 and shall include a common Wakf Board established under section 106;
(d) &uot;Chief Executive Officer&uot; means the Chief Executive Officer appointed under subsection (1) of section 23;
(e) &uot;Council&uot; means the Central Wakf Council established under section 9;
(f) &uot;Executive Officer&uot; means the Executive Officer appointed by the Board under subsection (1) of section 38;
(g) &uot;list of wakfs&uot; means the list of wakfs, published under sub-section (2) of section 5;
(h) &uot;member&uot; means a member of the Board and includes the Chairperson;
(i) &uot;mutawalli&uot; means any person appointed, either verbally or under any deed or instrument by which a wakf has been created, or by a competent authority, to be the mutawalli of a wakf and includes any person who is a mutawalli of a wakf by virtue of

any custom or who is a naib-mutawalli, khadim, mujawar, sajjadanashin, amin or other person appointed by a mutawalli to perform the duties of a mutawalli and save as otherwise provided in this Act, any person, committee or corporation for the time being managing or administering any wakf or wakf property:

Provided that no member of a committee or corporation shall be deemed to be a mutawalli unless such member is an Office bearer of such committee or corporation;

(j) &uot;net annual income&uot; in relation to a wakf, means net annual income determined in accordance with the provisions of the *Explanations* to sub-section (1) of section 72;

(k) &uot;person interested in a wakf&uot; means any person who is entitled to receive any pecuniary or other benefits from the wakf and includes--

(i) any person who has a right to worship or to perform any religious rite in a mosque, idgah, imambara, dargah, khangah, maqbara, graveyard or any other religious institution connected with the wakf or to participate in any religious or charitable institution under the wakf;

(ii) the wakif and any descendant of the wakif and the mutawalli;

(l) &uot;prescribed&uot;, except in Chapter III, means, prescribed by rules made by the State Government;

(m) &uot;regulations&uot; means the regulations made by the Board under this Act;

(n) &uot;Shia wakf&uot; means a wakf governed by Shia law;

(o) &uot;Sunni wakf&uot; means a wakf governed by Sunni law;

(p) &uot;Survey Commissioner&uot; means the Survey Commissioner of Wakf appointed under subsection (1) of section 4 and includes any Additional or Assistant Survey Commissioners of Wakfs under sub-section (2) of section 4;

(q) &uot;Tribunal&uot;, in relation to any area, means the Tribunal constituted under sub-section (1) of section 83 having jurisdiction in relation to that area;

(r) &uot;wakf&uot; 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) &uot;grants&uot;, 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 &uot;wakf&uot; means any person making such dedication;

(s) &uot;wakf deed&uot; means any deed or instrument by which a wakf has been created and includes any valid subsequent deed or instrument by which any of the terms of the original dedication have been varieds:

(t) &uot;Wakf Fund&uot; means a Wakf Fund formed under sub-section (1) of section 77.

CHAPTER II

SURVEY OF WAKFS

4.

Preliminary survey of wakfs.--

(1) The State Government may, by notification in the Official Gazette, appoint for the State a Survey Commissioner of Wakfs and as many Additional or Assistant Survey

Commissioners of Wakfs as may be necessary for the purpose of making a survey of wakfs existing in the State at the date of the commencement of this Act .

(2) All Additional and Assistant Survey Commissioners of Wakfs shall perform their functions under this Act under the general supervision and control of the Survey Commissioner of Wakfs.

(3) The Survey Commissioner shall, after making such inquiry as he may consider necessary, submit his report, in respect of wakfs existing at the date of the commencement of this Act in the State or any part thereof, to the State Government containing the following particulars, namely:--

(a) the number of wakfs in the State showing the Shia wakfs and Sunni wakfs separately;
(b) the nature and objects of each wakf;
(c) the gross income of the property comprised in each wakf;
(d) the amount of land revenue, cesses, rates and taxes payable in respect of each wakf;
(e) the expenses incurred in the realisation of the income and the pay or other remuneration of the mutawalli of each wakf; and
(f) such other particulars relating to each wakf as may be prescribed.

(4) The Survey Commissioner shall, while making any inquiry, have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely:--

(a) summoning and examining any witness;
(b) requiring the discovery and production of any document;
(c) requisitioning any public record from any Court or office;
(d) issuing commissions for the examination of any witness or accounts;
(e) making any local inspection or local investigation;
(f) such other matters as may be prescribed.

(5) If, during any such inquiry, any dispute arises as to whether a particular wakf is a Shia wakf or Sunni wakf and there are clear indications in the deed of wakf as to its nature, the dispute shall be decided on the basis of such deed.

(6) The State Government may, by notification in the Official Gazette, direct the Survey Commissioner to make a second or subsequent survey of wakf properties in the State and the provisions of sub-sections (2), (3), (4) and (5) shall apply to such survey as they apply to a survey directed under sub-section (1):

Provided that no such second or subsequent survey shall be made until the expiry of a period of twenty years from the date on which the report in relation to the immediately previous survey was submitted under sub-section (3).

5.

Publication of list of wakfs.--

(1) On receipt of a report under sub-section (3) of section 4, the State Government shall forward a copy of the same to the Board.

(2) The Board shall examine the report forwarded to it under sub-section (1) and publish in the Official Gazette a list of Sunni wakfs or Shia wakfs in the State, whether in existence at the commencement of this Act or coming into existence thereafter, to which the report relates and containing such other particulars as may be prescribed.

6.

Disputes regarding wakfs.--

(1) If any question arises whether a particular property specified as wakf property in the list of wakfs is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final:

Provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of wakfs.

Explanation .--For the purposes of this section and section 7, the expression &uot;any person interested therein,&uot; shall, in relation to any property specified as wakf property in the list of wakfs published after the commencement of this Act, shall include also every person who, though not interested in the wakf concerned, is interested in such property and to whom a reasonable opportunity had been afforded to represent his case by notice served on him in that behalf during the course of the relevant inquiry under section 4.

(2) Notwithstanding anything contained in sub-section (1), no proceeding under this Act in respect of any wakf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.

(3) The Survey Commissioner shall not be made a party to any suit under sub-section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

(4) The list of wakfs shall, unless it is modified in pursuance of a decision or the Tribunal under sub-section (1), be final and conclusive.

(5) On and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a Court in that State in relation to any question referred to in subsection (1).

7.

Power of Tribunal to determine disputes regarding wakfs.--

(1) If, after the commencement of this Act, any question arises, whether a particular property specified as wakf property in a list of wakfs is wakf property or not, or whether a wakf specified in such list is a Shia wakf or a Sunni wakf, the Board or the mutawalli of the wakf, or any person interested therein, may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final:

Provided that--

(a) in the case of the list of wakfs relating to any part of the State and published after the commencement of this Act no such application shall be entertained after the expiry of one year from the date of publication of the list of wakfs; and

(b) in the case of the list of wakfs relating to any part of the State and published at any time within a period of one year immediately preceding the commencement of this Act, such an application may be entertained by Tribunal within the period of one year from such commencement:

Provided further that where any such question has been heard and finally decided by a Civil Court in a suit instituted before such commencement, the

Tribunal shall not reopen such question.

(2) Except where the Tribunal has no jurisdiction by reason of the provisions of sub-section (5), no proceeding under this section in respect of any wakf shall be stayed by any Court, Tribunal or other authority by reason only of the pendency of any suit, application or appeal or other proceeding arising out of any such suit, application, appeal or other proceeding.

(3) The Chief Executive Officer shall not be made a party to any application under subsection (1).

(4) The list of wakfs and where any such list is modified in pursuance of a decision of the Tribunal under sub-section (1), the list as so modified, shall be final.

(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a Civil Court under sub-section (1) of section 6, before the commencement of this Act or which is the subject-matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be.

8.

Recovery of costs of survey.--

(1) The total cost of making a survey including the cost of publication of the list or lists of wakfs under this Chapter shall be borne by all the mutawalli of the wakfs the net annual income whereof exceeds five hundred rupees, in proportion to the net annual income accruing in the State to such wakfs, such proportion being assessed by the Survey Commissioner.

(2) Notwithstanding anything contained in the deed or instrument by which the wakfs was created, any mutawalli may pay from the income of the wakf any sum due from him under subsection (1).

(3) Any sum due from a mutawalli under sub-section (1) may, on a certificate issued by the State Government, be recovered from the property comprised in the wakf in the same manner as an arrear of land revenue.

CHAPTER III

CENTRAL WAKF COUNCIL

9.

Establishment and constitution of Central Wakf Council.--

(1) For the purpose of advising it, on matters concerning the working of Boards and the due administration of wakfs, the Central Government may, by notification in the Official Gazette, establish a Council to be called the Central Wakf Council.

(2) The Council shall consist of--

(a) the Union Minister in charge of wakfs-- *ex officio* Chairperson;

(b) the following members to be appointed by the Central Government from amongst Muslims, namely:--

(i) three persons to represent Muslim organisations having all India character and national importance;

(ii) four persons of national eminence of whom two shall be from amongst

persons having administrative and financial expertise;

(iii) three Members of Parliament of whom two shall be from the House of the People and one from the Council of States;

(iv) Chairpersons of three Boards by rotation;

(v) two persons who have been Judges of the Supreme Court or a High Court;

(vi) one advocate of national eminence;

(vii) one person to represent the mutawallis of the wakf having a gross annual income of rupees five lakhs and above;

(viii) three persons who are eminent scholars in Muslim Law.

(3) The term of office of, the procedure to be followed in the discharge of their functions by, and the manner of filling casual vacancies among, members of the Council shall be such as may be prescribed by rules made by the Central Government.

10.

Finance of Council.--

(1) Every Board shall pay from its Wakf Fund annually to the Council such contribution as is equivalent to one per cent. of the aggregate of the net annual income of the wakfs in respect of which contribution is payable under sub-section (1) of section 72:

Provided that where the Board, in the case of any particular wakf has remitted under sub-section (2) of section 72 the whole of the contribution payable to it under sub-section (1) of that section, then for calculating the contribution payable to the Council under this section the net annual income of the wakf in respect of which such remission has been granted shall not be taken into account.

(2) All monies received by the Council under sub-section (1) and all other monies received by it as donations, benefactions and grants shall form a fund to be called the Central Wakf Fund.

(3) Subject to any rules that may be made by the Central Government in this behalf, the Central Wakf Fund shall be under the control of the Council and may be applied for such purposes as the Council may deem fit.

11.

Accounts and audit.--

(1) The Council shall cause to be maintained such books of account and other books in relation to its accounts in such form and in such manner as may be prescribed by rules made by the Central Government.

(2) The accounts of the Council shall be audited and examined annually by such auditor as may be appointed by the Central Government.

(3) The costs of the audit shall be paid from the Central Wakf Fund.

12.

Power of Central Government to make rules.--

(1) The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:--

(a) the term of office of, the procedure to be followed in the discharge of their functions by, and the manner of filling casual vacancies among, the members of the Council;

(b) control over and application of the Central Wakf Fund;

(c) the form and manner in which accounts of the Council may be maintained.

(3) Every rule made by the Central Government under this Chapter shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days, which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule shall not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

CHAPTER IV

ESTABLISHMENT OF BOARDS AND THEIR FUNCTIONS

13.

Incorporation.--

(1) With effect from such date as the State Government may, by notification in the Official Gazette, appoint in this behalf, there shall be established a Board of Wakfs under such name as may be specified in the notification.

(2) Notwithstanding anything contained in sub-section (1), if the Shia wakfs in any State constitute in number more than fifteen per cent. of all the wakfs in the State or if the income of the properties of the Shia wakfs in the State constitutes more than fifteen per cent., of the total income of properties of all the wakfs in the State, the State Government may, by notification in the Official Gazette, establish a Board of Wakfs each for Sunni wakfs and for Shia wakfs under such names as may be specified in the notification.

(3) The Board shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property and to transfer any such property subject to such conditions and restrictions as may be prescribed and shall by the said name sue and be sued.

14.

Composition of Board.--

(1) The Board for a State and the Union territory of Delhi shall consist of--

(a) a Chairperson;

(b) one and not more than two members, as the State Government may think fit, to be elected from each of the electoral colleges consisting of--

(i) Muslim Members of Parliament from the State or, as the case may be, the

Union territory of Delhi,

(ii) Muslim Members of the State Legislature,

(iii) Muslim Members of the Bar Council of the State, and

(iv) mutawallis of the wakfs having an annual income of rupees one lakh and above;

(c) one and not more than two members to be nominated by the State Government representing eminent Muslim organisations;

(d) one and not more than two members to be nominated by the State Government, each from recognised scholars in Islamic Theology;

(e) an officer of the State Government not below the rank of Deputy Secretary.

(2) Election of the members specified in clause (b) of sub-section (1) shall be held in accordance with the system of proportional representation by means of a single transferable vote, in such manner as may be prescribed:

Provided that where the number of Muslim Members of Parliament, the State Legislature or the State Bar Council, as the case may be, is only one, such Muslim Member shall be declared to have been elected on the Board:

Provided further that where there are no Muslim Members in any of the categories mentioned in sub-clauses (i) to (iii) of clause (b) of sub-section (1), the ex-Muslim Members of Parliament, the State Legislature or ex-member of the State Bar Council, as the case may be, shall constitute the electoral college.

(3) Notwithstanding anything contained in this section, where the State Government is satisfied, for reasons to be recorded in writing, that it is not reasonably practicable to constitute an electoral college for any of the categories mentioned in sub-clauses (i) to (iii) of clause (b) of sub-section (1), the State Government may nominate such persons as the members of the Board as it deems fit.

(4) The number of elected members of the Board shall, at all times, be more than the nominated members of the Board except as provided under sub-section (3).

(5) Where there are Shia wakfs but no separate Shia Wakfs Board exists, at least one of the members from the categories listed in sub-section (1), shall be a Shia Muslim.

(6) In determining the number of Shia members or Sunni members of the Board, the State Government shall have regard to the number and value of Shia wakfs and Sunni wakfs to be administered by the Board and appointment of the members shall be made, so far as may be, in accordance with such determination.

(7) In the case of the Union territory other than Delhi, the Board shall consist of not less than three and not more than five members to be appointed by the Central Government from amongst the categories of persons specified in sub-section (1):

Provided that there shall be one mutawalli as the member of the Board.

(8) Whenever the Board is constituted or re-constituted, the members of the Board present at a meeting convened for the purpose shall elect one from amongst themselves as the Chairperson of the Board.

(9) The members of the Board shall be appointed by the State Government by notification in the Official Gazette.

15.

Term of office.--

The members of the Board shall hold office for a term of five years.

16.

Disqualification for being appointed, or for continuing as, a member of the Board.--

A person shall be disqualified for being appointed, or for continuing as, a member of the Board if--

(a) he is not a Muslim and is less than twenty-one years of age;
(b) he is found to be a person of unsound mind;
(c) he is an undischarged insolvent;
(d) he has been convicted of an offence involving moral turpitude and such conviction has not been reversed or he has not been granted full pardon in respect of such offence;
(e) he has been on a previous occasion--
  (i) removed from his office as a member or as a mutawalli, or
  (ii) removed by an order of a competent Court or tribunal from any position of trust either for mismanagement or for corruption.

17.

Meetings of the Board.--

(1) The Board shall meet for the transaction of business at such time and places as may be provided by regulations.
(2) The Chairperson, or in his absence, any member chosen by the members from amongst themselves shall preside at a meeting of the Board.
(3) Subject to the provisions of this Act, all questions which come before any meeting of the Board shall be decided by a majority of votes of the members present, and in the case of equality of votes, the Chairperson or, in his absence, any other person presiding shall have a second or casting vote.

18.

Committees of the Board.--

(1) The Board may, whenever it considers necessary, establish either generally or for a particular purpose or for any specified area or areas committees for the supervision of wakfs.
(2) The constitution, functions and duties and the term of office of such committees shall be determined from time to time by the Board:

Provided that it shall not be necessary for the members of such committees to be members of the Board.

19.

Resignation of Chairperson and members.--

The Chairperson or any other member may resign his office by writing under his hand addressed to the State Government:

Provided that the Chairperson or the member shall continue in office until the appointment of his successor is notified in the Official Gazette.

20.

Removal of Chairperson and member.--

(1) The State Government may, by notification in the Official Gazette, remove the Chairperson of the Board or any member thereof if he--
(a) is or becomes subject to any disqualifications specified in section 16; or
(b) refuses to act or is incapable of act ing or acts in a manner which the State Government, after hearing any explanation that he may offer, considers to be prejudicial to the interests of the wakfs; or
(c) fails in the opinion of the Board, to attend three consecutive meetings of the Board, without sufficient excuse.

(2) Where the Chairperson of the Board is removed under sub-section (1), he shall also cease to be a member of the Board.

21.

Filling of a vacancy.--

When the seat of a member becomes vacant by his removal, resignation, death or otherwise, a new member shall be appointed in his place and such member shall hold office so long as the member whose place he fills would have been entitled to hold office, if such vacancy had not occurred.

22.

Vacancies, etc., not to invalidate proceedings of the Board.--

No act or proceeding of the Board shall be invalid by reason only of the existence of any vacancy amongst its members or any defect in the constitution thereof.

23.

Appointment of Chief Executive Officer and his term of office and other conditions of service.--

(1) There shall be a Chief Executive Officer of the Board who shall be a Muslim and shall be appointed by the State Government, in consultation with the board, by notification in the Official Gazette.
(2) The term of office and other conditions of service of the Chief Executive Officer shall be such as may be prescribed.
(3) The Chief Executive Officer shall be *ex officio* Secretary of the Board and shall be under the administrative control of the Board.

24.

Officers and other employees of the Board.--

(1) The Board shall have the assistance of such number of officers and other employees as may be necessary for the efficient performance of its functions under this Act, details thereof shall be determined by the Board in consultation with the State Government.
(2) The appointment of officers and other employees, their term of office and conditions of service shall be such as may be provided by regulations.

25.

Duties and powers of Chief Executive Officer.--

(1) Subject to the provisions of this Act and of the rules made thereunder and the directions of the Board, functions of the Chief Executive Officer shall include--
  (a) investigating the nature and extent of wakfs and wakf properties and calling whenever necessary, an inventory of wakf properties and calling, from time to time, for accounts, returns and information from mutawallis;
  (b) inspecting or causing inspection of wakf properties and account, records, deeds or documents relating thereto;
  (c) doing generally of such acts as may be necessary for the control, maintenance and superintendence of wakfs.

(2) In exercising the powers of giving directions under sub-section (1) in respect of any wakf, the Board shall act in conformity with the directions by the wakf in the deed of the wakf, the purpose of wakf and such usage and customs of the wakf as are sanctioned by the school of Muslim law to which the wakf belongs.

(3) Save as otherwise expressly provided in this Act, the Chief Executive Officer shall exercise such powers and perform such duties as may be assigned to him or delegated to him under this Act .

26.

Powers of Chief Executive Officer in respect of orders or resolutions of Board.--

Where the Chief Executive Officer considers that an order or resolution passed by the Board--

(a) has not been passed in accordance with the law; or
(b) is in excess of or is an abuse of the powers conferred on the Board by or under this Act or by any other law; or
(c) if implemented, is likely to--
  (i) cause financial loss to the Board or to the concerned wakf or to the wakfs generally; or
  (ii) lead to a riot or breach of peace; or
  (iii) cause danger to human life, health or safety; or

(d) is not beneficial to the Board or to any wakf or to wakfs generally,

he may, before implementing such order or resolution place the matter before the Board for its reconsideration and, if such order or resolution is not confirmed by a majority of vote of the members present and voting after such reconsideration, refer the matter to the State Government alongwith his objections to the order or resolution, and the decision of the State Government thereon shall be final.

27.

Delegation of powers by the Board.--

The Board may, by a general or special order in writing, delegate to the Chairperson, any other member, the secretary or any other officer or servant of the Board or any area committee, subject to such conditions and limitations as may be specified in the said order, such of its powers and duties under this Act, as it may deem necessary.

28.

Chief Executive Officer to exercise powers through Collectors, etc.--

(1) Subject to the provisions of this Act and of the rules made thereunder, the Chief Executive Officer may exercise all or any of the powers conferred on him by or under this Act with the previous approval of the Board through the Commissioner of the division or the Collector of the district in which the concerned wakf property is situated or through any other Gazetted Officer whom he may appoint for such purpose and may, from time to time, delegate any of his powers to any such Commissioner of the division or Collector or any other Gazetted Officer and may, at any time revoke the delegations so made by him.

(2) Where any delegation of powers is made by the Chief Executive Officer under sub-section (1), the person to whom such delegation is made may exercise those powers in the same manner and to the same extent as if they have been conferred on him directly by this Act and not by way of delegation.

29.

Powers of Chief Executive Officer to inspect records, registers, etc.--

The Chief Executive Officer or any officer of the Board duly authorised by him in this behalf shall, subject to such conditions and restrictions as may be prescribed and subject to the payment of such fees as may be leviable under any law for the time being in force, be entitled to all reasonable time to inspect, in any public office, any records, registers or other documents relating to a wakf or movable or immovable properties which are wakf properties or are claimed to be wakf properties.

30.

Inspection of records.--

(1) The Board may allow inspection of its proceedings of other records in its custody and issue copies of the same on payment of such fees and subject to such conditions as may be prescribed.

(2) All copies issued under this section shall be certified by the Chief Executive Officer of the Board in the manner provided in section 76 of the Indian Evidence Act, 1872 (1 of 1872).

(3) The powers conferred on the Chief Executive Officer by sub-section (2) may be exercised by such other officer or officers of the Board as may either generally or specially by authorised in this behalf by the Board.

31.

Prevention of disqualification for membership of Parliament.--

It is hereby declared that the offices of the Chairperson or members of a Board shall not be disqualified and shall be deemed never to have been disqualified for being chosen as, or for being, a Member of Parliament.

32.

Powers and functions of the Board.--

(1) Subject to any rules that may be made under this Act, the general superintendence of all wakfs in a State shall vest in the board established or the State; and it shall be the duty of the Board so to exercise its powers under this Act as to ensure that the wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such wakfs were created or intended:

Provided that in exercising its powers under this Act in respect of any wakf, the Board shall act in conformity with the directions of the wakf, the purposes of the wakf and any usage or custom of the wakf sanctioned by the school of Muslim law to which the wakf belongs.

Explanation .--For the removal of doubts, it is hereby declared that in this sub-section, &uot;wakf&uot; includes a wakf in relation to which any scheme has been made by any Court of law, whether before or after the commencement of this Act.

(2) Without prejudice to the generality of the foregoing power, the functions of the Board shall be--

(a) to maintain a record containing information relating to the origin, income, object and beneficiaries of every wakf;

(b) to ensure that the income and other property of wakfs are applied to the objects and for the purposes for which such wakfs were intended or created;

(c) to give directions for the administration of wakfs;

(d) to settle schemes of management for a wakf:

Provided that no such settlement shall be made without giving the parties affected an opportunity of being heard;

(e) to direct--

(i) the utilisation of the surplus income of a wakf consistent with the object of a wakf;

(ii) in what manner the income of a wakf, the objects of which are not evident from any written instrument, shall be utilized.

(iii) in any case where any object of wakf has ceased to exist or has become incapable of achievement, that so much of the income of the wakf as was previously applied to that object shall be applied to any other object, which shall be similar, or nearly similar or to the original object or for the benefit of the poor or for the purpose of promotion of knowledge and learning in the Muslim community:

Provided that no direction shall be given under this clause without giving the parties affected an opportunity of being heard.

Explanation .--For the purposes of this clause, the powers of the Board shall be exercised--

(i) in the case of a Sunni wakf, by the Sunni members of the Board only; and

(ii) in the case of a Shia wakf, by the Shia members of the Board only:

Provided that where having regard to the number of the Sunni or Shia members in the Board and other circumstances, it appears to the Board that the power should not be exercised by such members only, it may co-opt such other Muslims being Sunnis or Shias, as the case may be, as it thinks fit, to be temporary members of the Board for exercising its powers under this clause;

(f) to scrutinise and approve the budgets submitted by mutawallis and to arrange for

the auditing of account of wakfs;

(g) to appoint and remove mutawallis in accordance with the provisions of this Act ;

(h) to take measures for the recovery of lost properties of any wakf;

(i) to institute and defend suits and proceedings relating to wakfs;

(j) to sanction any transfer of immovable property of a wakf by way of sale, gift, mortgage, exchange or lease, in accordance with the provisions of this Act:

Provided that no such sanction shall be given unless at least two-thirds of the members of the Board vote in favour of such transaction;

(k) to administer the Wakf Fund;

(l) to call for such returns, statistics, accounts and other information from the mutawallis with respect to the wakf property as the Board may, from time to time, require;

(m) to inspect, or cause inspection of, wakf properties, accounts, records or deeds and documents relating thereto;

(n) to investigate and determine the nature and the extent of wakf and wakf property, and to cause whenever necessary, a survey of such wakf property;

(o) generally do all such act s as may be necessary for the control, maintenance and administration of wakfs.

(3) Where the Board has settled any scheme of management under clause (d) or given any direction under clause (e) of sub-section (2), any person interested in the wakf or affected by such settlement or direction may institute a suit in a Tribunal for setting aside such settlement or directions and the decision of the Tribunal thereon shall be final.

(4) Where the Board is satisfied that any wakf land, which is a wakf property, offers a feasible potential for development as a shopping centre, market, housing flats and the like, it may serve upon the mutawalli of the concerned wakf a notice requiring him within such time, but not less than sixty days, as may be specified in the notice, to convey its decision whether he is willing to execute the development works specified in the notice.

(5) On consideration of the reply, if any, received to the notice issued under sub- section (4), the Board, if it is satisfied that the mutawalli is not willing or is not capable of executing the works required to be executed in terms of the notice, it may, with the prior approval of the Government, take over the property, clear it of any building or structure thereon, which, in the opinion of the Board is necessary for execution of the works and execute such works from Wakf Funds or from the finances which may be raised on the security of the properties of the wakf concerned, and control and manage the properties till such time as all expenses incurred by the Board under this section, together with interest thereon, the expenditure on maintenance of such works and other legitimate changes incurred on the property are recovered from the income derived from the property:

Provided that the Board shall compensate annually the mutawalli of the concerned wakf to the extent of the average annual net income derived fromthe property during the three years immediately preceding the taking over of the property by the Board.

(6) After all the expenses as enumerated in sub-section (5) have been recouped from the income of the developed properties, the developed properties shall be handed over to mutawalli of the concerned wakf.

State Amendment

West Bengal.-- In its application to the State of West Bengal, in sub-S. (5) of s. 32, after the words &uot;and control and manage the properties&uot;, insert &uot;in such manner as may be

prescribed&uot;.-- West Bengal Act 33 of 1997, s. 3.

33.

Powers of inspection by Chief Executive Officer or persons authorised by him.--

(1) With a view to examining whether, by reason of any failure or negligence on the part of a mutawalli in the performance of his executive or administrative duties, any loss or damage has been caused to any wakf or wakf property, the Chief Executive Officer with the prior approval of the Board, either himself or any other person authorised by him in writing in this behalf, may inspect all movable and immovable properties, which are wakf properties, and all records, correspondence, plans, accounts and other documents relating thereto.

(2) Whenever any such inspection as referred to in sub-section (1) is made, the concerned mutawalli and all officers and either employees working under him and every person connected with the administration of the wakf, shall extend to the person making such inspection, all such assistance and facilities as may be necessary and reasonably required by him to carry out such inspection, and shall also produce for inspection any movable property or documents relating to the wakf as may be called for by the person making the inspection and furnish to him such information relating to the wakf as may be required by him.

(3) Where, after any such inspection, it appears that the concerned mutawalli or any officer or other employee who is or was working under him had misappropriated, misapplied or fraudulently retained, any money or other wakf property, or had incurred irregular, unauthorised or improper expenditure from the funds of the wakf, the Chief Executive Officer may, after giving the mutawalli or the person concerned a reasonable opportunity of showing cause why an order for the recovery of the amount or property, should not be passed against him and after considering such explanation, if any, as such person may furnish, determine the amount or the property, which has been misappropriated, misapplied or fraudulently retained, or the amount of the irregular, unauthorised or improper expenditure incurred by such person, and make an order directing such person to make payment of the amount so determined and to restore the said property to the wakf, within such time as may be specified in the order.

(4) A mutawalli or other person aggrieved by such order may, within thirty days of the receipt by him of the order, appeal to the Tribunal:

Provided that no such appeal shall be entertained by the Tribunal unless the appellant first deposits with the Chief Executive Officer the amount which has been determined under subsection (3) as being payable by the appellant and the Tribunal shall have no power to make any order staying pending the disposal of the appeal, the operation of the order made by the Chief Executive Officer under sub-section (3).

(5) The Tribunal may, after taking such evidence as it may think fit, confirm, reverse or modify the order made by the Chief Executive Officer under sub-section (3) or may remit, either in whole or in part, the amount specified in such order and may make such orders as to costs as it may think appropriate in the circumstances of the case.

(6) The order made by the Tribunal under sub-section (5) shall be final.

34.

Recovery of the amount determined under section 33.--

Where any mutawalli or other person who has been ordered, whether under sub-section (3) or sub-section (5) of section 33, to make any payment or to restore the possession of any property, omits

or fails to make such payment or restoration within the time specified in such order, the Chief Executive Officer, with the prior approval of the Board shall, take such steps as he may think fit for the recovery of possession of the property aforesaid and shall also send a certificate to the Collector of the district in which the property of such mutawalli or other person is situate, stating therein the amount that has been determined by him or by the Tribunal, as the case may be, under section 33, as being payable by such mutawalli or other person, and, thereupon, the Collector shall recover the amount specified in such certificate as if it were an arrear of land revenue and on the recovery of such amount, pay the same to the Chief Executive Officer, who shall, on receipt thereof, credit the amount to the funds of the concerned wakf.

35.

Conditional attachment by Tribunal.--

(1) Where the Chief Executive Officer is satisfied that the mutawalli or any other person who has been ordered under sub-section (3) or sub-section (5) of section 33 to make any payment, with intent to defeat or delay the execution of the said order,--
(a) is about to dispose of the whole or any part of his property; or
(b) is about to remove the whole or any part of his property from the jurisdiction of the Chief Executive Officer,

he may, with the prior approval of the Board, apply to the Tribunal for the conditional attachment of the said property or such part thereof, as he may think necessary.

(2) The Chief Executive Officer shall, unless the Tribunal otherwise directs, specify in the application the property required to be attached and the estimated value thereof.
(3) The Tribunal may direct the mutawalli or the person concerned, as the case may be, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Tribunal when required, the said property or the value of the same or such portion thereof as may be sufficient to satisfy the amount specified in the certificate referred to in section 34, or to appear and show cause why he should not furnish such security.
(4) The Tribunal may also in the order direct the conditional attachment of the whole or any portion of the property so specified.
(5) Every attachment made under this section shall be made in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as if it were an order for attachment made under the provision of the said Code.

CHAPTER V

REGISTRATION OF WAKFS

36.

Registration.--

(1) Every wakf, whether created before or after the commencement of this Act, shall be registered at the office of the Board.
(2) Application for registration shall be made by the mutawalli:

Provided that such applications may be made by the wakf or his descendants or a beneficiary of the wakf or any Muslim belonging to the sect to which the wakf belongs.

(3) An application for registration shall be made in such form and manner and at such place as the Board may by regulation provide and shall contain following particulars:--

(a) a description of the wakf properties sufficient for the identification thereof;

(b) the gross annual income from such properties;

(c) the amount of land revenue, cesses, rates and taxes annually payable in respect of the wakf properties;

(d) an estimate of the expenses annually incurred in the realisation to the income of the wakf properties;

(e) the amount set apart under the wakf for--

(i) the salary of the mutawalli and allowances to the individuals;

(ii) purely religious purposes;

(iii) charitable purposes; and

(iv) any other purposes;

(f) any other particulars provided by the Board by regulations.

(4) Every such application shall be accompanied by a copy of the wakf deed or if no such deed has been executed or a copy thereof cannot be obtained, shall contain full particulars, as far as they are known to the applicant, of the origin, nature and objects of the wakf.

(5) Every application made under sub-section (2) shall be signed and verified by the applicant in the manner provided in the Code of Civil Procedure, 1908 (5 of 1908) for the signing and verification of pleadings.

(6) The Board may require the applicant to supply any further particulars or information that it may consider necessary.

(7) On receipt of an application for registration, the Board may, before the registration of the wakf make such inquiries as it thinks fit in respect of the genuineness and validity of the application and correctness of any particulars therein and when the application is made by any person other than the person administering the wakf property, the Board shall, before registering the wakf, give notice of the application to the person administering the wakf property and shall hear him if he desires to be heard.

(8) In the case of wakfs created before the commencement of this Act, every application for registration shall be made, within three months from such commencement and in the case of wakfs created after such commencement, within three months from the date of the creation of the wakf:

Provided that where there is no Board at the time of creation of a wakf, such application will be made within three months from the date of establishment of the Board.

37.

Register of wakfs.--

The Board shall maintain a register of wakfs which shall contain in respect of each wakf copies of the wakf deeds, when available and the following particulars, namely:--

(a) the class of the wakf;

(b) the name of the mutawalli;

(c) the rule of succession to the office of mutawalli under the wakf deed or by custom or by usage;

(d) particulars of all wakf properties and all title deeds and documents relating thereto;

(e) particulars of the scheme of administration and the scheme of expenditure at the time of registration;

(f) such other particulars as may be provided by regulations.

38.

Powers of Board to appoint Executive Officer.--

(1) Notwithstanding anything contained in this Act, the Board may, if it is of the opinion that it is necessary so to do in the interests of the wakf, appoint on whole-time or part-time basis or in an honorary capacity, subject to such conditions as may be provided by regulations, an Executive Officer with such supporting staff as it considers necessary for any wakf having a gross annual income of not less than five lakhs rupees:

Provided that the person chosen for appointment should be a person professing Islam.

(2) Every Executive Officer appointed under sub-section (1) shall exercise such powers and discharge such duties as pertain only to the administration of the property of the wakf for which he has been appointed and shall exercise those powers and discharge those duties under the direction, control and supervision of the Board:

Provided that the Executive Officer who is appointed for a wakf having a gross annual income of not less than five lakhs rupees shall ensure that the budget of the wakf is submitted, the accounts of the wakf are regularly maintained, and the yearly statement of accounts are submitted within such time as the Board may specify.

(3) While exercising his powers and discharging his functions under sub-section (2), the Executive Officer shall not interfere with any religious duties or any usage or custom of the wakf sanctioned by the Muslim law.

(4) The salaries and allowances of the Executive Officer and his staff shall be fixed by the Board and in fixing the quantum of such salary the Board shall have due regard to the income of the wakf, the extent and nature of the duties of the Executive Officer and shall also ensure that the amounts of such salaries and allowances are not disproportionate to the income of the wakf and do not operate as an unnecessary financial burden on it.

(5) The salaries and allowances of the Executive Officer and his staff shall be paid by the Board from the Wakf Fund and, if the wakf generates any additional income as a result of appointment of the Executive Officer, the Board may claim reimbursement of amounts spent on the salaries and allowances from the fund of the wakf concerned.

(6) The Board may, for sufficient reasons, and after giving to the Executive Officer or a member of his staff, a reasonable opportunity of being heard, suspend, remove or dismiss the Executive Officer or a member of his staff from his post.

(7) Any Executive Officer or a member of his staff who is aggrieved by any order of removal or dismissal made under sub-section (6) may within thirty days from the date of communication of the order, prefer an appeal against the order to the Tribunal and the Tribunal may, after considering such representation as the Board may make in the matter and after giving a reasonable opportunity to the Executive Officer or a member of his staff of being heard, confirm, modify or reverse the order.

39.

Powers of Board in relation to wakfs which have ceased to exist.--

(1) The Board shall, if it is satisfied that the objects or any part thereof of a wakf have ceased to exist, whether such cessation took place before or after the commencement of this Act, cause an inquiry to be held by the Chief Executive Officer, in the prescribed manner, to ascertain the properties and funds pertaining to such wakf.

(2) On the receipt of the report of inquiry of the Chief Executive Officer, the Board shall

pass an order--

(a) specifying the property and funds of such wakf;

(b) directing that any property or funds pertaining to such wakf which have been recovered shall be applied or utilised for the renovation of any wakf property and where there is no need for making any such renovation or where utilisation of the funds for such renovation is not possible, be appropriated, to any of the purposes specific in sub-clause (iii) of clause (e) of sub-section (2) of section 32.

(3) The Board may, if it has reason to believe that any building or other place which was being used for religious purpose or instruction or for charity has, whether before or after the commencement of this Act, ceased to be used for that purpose, make an application to the Tribunal for an order directing the recovery of possession of such building or other place.

(4) The Tribunal may, if it is satisfied, after making such inquiry as it may think fit, that such building or other place--

(a) is wakf property;

(b) has not been acquired under any law for the time being in force relating to acquisition of land or is not under any process of acquisition under any such law, or has not vested in the State Government under any law for the time being in force relating to land reforms; and

(c) is not in the occupation of any person who has been authorised by or under any law for the time being in force to occupy such building or other place, make an order--

(i) directing the recovery of such building or place from any person who may be in unauthorised possession thereof, and

(ii) directing that such property, building or place be used for religious purpose or instruction as before, or if such use is not possible, be utilised for any purpose specified in sub-clause (iii) of clause (e) of sub-section (2) of section 32.

40.

Decision if a property is wakf property.--

(1) The Board may itself collect information regarding any property which it has reason to believe to be wakf property and if any question arises whether a particular property is wakf property or not or whether a wakf is a Sunni wakf or a Shia wakf it may, after making such inquiry as it may deem fit, decide the question.

(2) The decision of the Board on a question under sub-section (1) shall, unless revoked or modified by the Tribunal, be final.

(3) Where the Board has any reason to believe that any property of any trust or society registered in pursuance of the Indian Trusts Act, 1882 (2 of 1882) or under the Societies Registration Act, 1860 (21 of 1860) or under any other Act, is wakf property, the Board may notwithstanding anything contained in such Act, hold an inquiry in regard to such property and if after such inquiry the Board is satisfied that such property is wakf property, call upon the trust or society, as the case may be, either to register such property under this Act as wakf property or show cause why such property should not be so registered:

Provided that in all such cases, notice of the act ion proposed to be taken under this sub-section shall be given to the authority by whom the trust or society had been registered.

(4) The Board shall, after duly considering such cause as may be shown in pursuance of notice issued under sub-section (3) pass such orders as it may think fit and the order so made by the Board, shall be final, unless it is revoked or modified by a Tribunal.

41.

Power to cause registration of wakf and to amend register.--

The Board may direct a mutawalli to apply for the registration of a wakf, or to supply any information regarding a wakf or may itself cause the wakf to be registered or may at any time amend the register of wakfs.

42.

Change in the management of wakfs to be notified.--

(1) In the case of any change in the management of a registered wakf due to the death or retirement or removal of the mutawalli, the incoming mutawalli shall forthwith, and any other person may notify the change to the Board.

(2) In the case of any other change in any of the particulars mentioned in section 36, the mutawalli shall, within three months from the occurrence of the change, notify such change to the Board.

43.

Wakfs registered before the commencement of this Act deemed to be registered.--

Notwithstanding anything contained in this Chapter, where any wakf has been registered before the commencement of this Act, under any law for the time being in force, it shall not be necessary to register the wakf under the provisions of this Act and any such registration made before such commencement shall be deemed to be a registration made under this Act .

CHAPTER VI

MAINTENANCE OF ACCOUNTS OF WAKFS

44.

Budget.--

(1) Every mutawalli of a wakf shall, in every year prepare, in such form and at such time as may be prescribed, a budget in respect of the financial year next ensuing showing the estimated receipts and expenditure during that financial year.

(2) Every such budget shall be submitted by the mutawalli atleast ninety days before the beginning of the financial year to the Board and shall make adequate provision for the following:--

(i) for carrying out the objects of the wakf;

(ii) for the maintenance and preservation of the wakf property;

(iii) for the discharge of all liabilities and subsisting commitments binding on the wakf under this Act or any other law for the time being in force.

(3) The Board may give such directions for making alterations, omissions or additions in the

budget as it may deem fit, consistent with the objects of the wakf and the provisions of this Act .

(4) If in the course of the financial year the mutawalli finds it necessary to modify the provisions made in the budget in regard to the receipt or to the distribution of the amounts to be expended under the different heads, he may submit to the Board a supplementary or a revised budget and the provisions of sub-section (3) shall, as far as may be, apply to such supplementary or revised budget.

45.

Preparation of budget of wakfs under direct management of the Board.--

(1) The Chief Executive Officer shall prepare, in such form and at such time as may be prescribed, a budget in respect of the financial year next ensuing showing the estimated receipts and expenditure for each of the wakfs under the direct management of the Board, showing therein the estimated receipts and expenditure and submit it to the Board for its approval.

(2) While submitting the budget under sub-section (1), the Chief Executive Officer shall also prepare statement giving details of the increase, if any, in the income of each wakf under the direct management of the Board and the steps which have been taken for its better management and the results accruing therefrom during the year.

(3) The Chief Executive Officer shall keep regular accounts and be responsible for the proper management of every wakf under the direct management of the Board.

(4) Every budget submitted by the Chief Executive Officer under sub-section (1) shall comply with the requirements of section 46 and, for this purpose, references therein to the mutawalli of the wakf shall be construed as pre-references to the Chief Executive Officer.

(5) The audit of accounts of every wakf under the direct management of the Board shall be undertaken by the State Examiner of Local Funds or any other officer appointed by the State Government for this purpose, irrespective of the income of the wakf.

(6) The provisions of sub-sections (2) and (3) of section 47 and the provisions of sections 48 and 49 shall, insofar as they are not inconsistent with the provisions of this section, apply to the audit of accounts referred to in this section.

(7) Where any wakf is under the direct management of the Board, such administrative charges as may be specified by the Chief Executive Officer shall be payable by the wakf to the Board:

Provided that the Chief Executive Officer shall not collect more than ten per cent. of the gross annual income of the wakf under the direct management of the Board as administrative charges.

46.

Submission of accounts of wakfs.--

(1) Every mutawalli shall keep regular accounts.

(2) Before the 1st day of May next, following the date on which the application referred to in section 36 has been made and thereafter before the 1st day of May in every year, every mutawalli of a wakf shall prepare and furnish to the Board a full and true statement of accounts, in such form and containing such particulars as may be provided by regulations by the Board, of all moneys received or expended by the mutawalli on behalf of the wakf during the period of twelve months ending on the 31st day of March, or, as the case may be, during that portion of the said period during which the provisions of this Act have been applicable to the wakf:

Provided that the date on which the annual accounts are to be closed may be varied at the discretion of the Board.

47.

Audit of accounts of wakfs.--

(1) The accounts of wakfs submitted to the Board under section 46 shall be audited and examined in the following manner, namely:--

(a) in the case of a wakf having no income or a net annual income not exceeding ten thousand rupees, the submission of a statement of accounts shall be a sufficient compliance with the provisions of section 46 and the accounts of two per cent. of such wakfs shall be audited annually by an auditor appointed by the Board;

(b) the accounts of the wakf having net annual income exceeding ten thousand rupees shall be audited annually, or at such other intervals as may be prescribed, by an auditor appointed by the Board from out of the panel of auditors prepared by the State Government and while drawing up such panel of auditors, the State Government shall specify the scale of remuneration of auditors;

(c) the State Government may, at any time cause the account of any wakf audited by the State Examiner of Local Funds or by any other Officer designated for that purpose by that State Government.

(2) The auditor shall submit his report to the Board and the report of the auditor shall among other things, specify all cases of irregular, illegal or improper expenditure or of failure to recover money or other property caused by neglect or misconduct and any other matter which the auditor considers it necessary to report; and the report shall also contain the name of any person who, in the opinion of the auditor, is responsible for such expenditure or failure and the auditor shall in every such case certify the amount of such expenditure or loss as due from such person.

(3) The cost of the audit of the accounts of a wakf shall be met from the funds of that wakf:

Provided that the remuneration of the auditors appointed from out of the panel drawn by the State Government in relation to wakfs having a net annual income of more than ten thousand rupees but less than fifteen thousand rupees shall be paid in accordance with the scale of remuneration specified by the State Government under clause (c) of sub-section (1):

Provided further that where the audit of the accounts of any wakf is made by the State Examiner of Local Funds or any other officer designated by the State Government in this behalf, the cost of such audit shall not exceed one and a half per cent. of the net annual income of such wakf and such costs shall be met from the funds of the wakfs concerned.

48.

Board to pass orders on auditor's report.--

(1) The Board shall examine the auditor's report and may call for the explanation of any person in regard to any matter mentioned therein, and shall pass such orders as it thinks fit including orders for the recovery of the amount certified by the auditor under sub-section (2) of section 47.

(2) The mutawalli or any other person aggrieved by any order made by the Board may, within thirty days of the receipt by him of the order, apply to the Tribunal to modify or set aside the order and the Tribunal may, after taking such evidence as it may think necessary, confirm or modify the order or remit the amount so certified, either in whole or in part, and may also make such order as to costs as it may think appropriate in the

circumstances of the case.

(3) No application made under sub-section (2) shall be entertained by the Tribunal unless the amount certified by the auditor under sub-section (2) of section 47 has first been deposited in the Tribunal and the Tribunal shall not have any power to stay the operation of the order made by the Board under sub-section (1).

(4) The order made by the Tribunal under sub-section (2) shall be final.

(5) Every amount for the recovery of which any order has been made under sub-section (1) or sub-section (2) shall, where such amount remains unpaid, be recoverable in the manner specified in section 34 or section 35 as if the said order were an order for the recovery of any amount determined under sub-section (3) of section 35.

49.

Sums certified to be due recoverable as arrears of land revenue.--

(1) Every sum certified to be due from any person by an auditor in his report under section 47 unless such certificate is modified or cancelled by an order of the Board or of the Tribunal made under section 48, and every sum due on a modified certificate shall be paid by such person within sixty days after the service of a demand for the same issued by the Board.

(2) If such payment is not made in accordance with the provisions of sub-section (1), the sum payable may, on a certificate issued by the Board after giving the person concerned an opportunity of being heard, be recovered in the same manner as an arrear of land revenue.

50.

Duties of mutawalli.--

It shall be the duty of every mutawalli,--

(a) to carry out the directions of the Board in accordance with the provisions of this Act or of any rule or order made thereunder;

(b) to furnish such returns and supply such information or particulars as may from time to time be required by the Board in accordance with the provisions of this Act or of any rule or order made thereunder;

(c) to allow inspection of wakf properties, accounts or records or deeds and documents relating thereto;

(d) to discharge all public dues; and

(e) to do any other act which he is lawfully required to do by or under this Act.

51.

Alienation of wakf property without sanction of Board to be void.--

(1) Notwithstanding anything contained in the wakf deed, any gift, sale or exchange mortgage of any immovable property which is wakf property, shall be void unless such gift, sale, exchange or mortgage is effected with the prior sanction of the Board:

Provided that no mosque, dargah or khangah shall be gifted, sold, exchanged or mortgaged except in accordance with any law for the time being in force.

(2) The Board may, after publishing in the Official Gazette, the particulars relating to the transaction referred to in sub-section (1) and inviting any objections and suggestions with respect thereto and considering all objections and suggestions, if any, that may be received by it from the concerned mutawalli or any other person interested in the wakf, accord sanction to such transaction if it is of opinion that such transaction is--

(i) necessary or beneficial to the wakf;

(ii) consistent with the objects of the wakf;

(iii) the consideration thereof is reasonable and adequate:

Provided that the sale of any property sanctioned by the Board shall be effected by public auction and shall be subject to confirmation by the Board within such time as may be prescribed:

Provided further that the Tribunal may, on the application of the aggrieved mutawalli or other person, for reasons to be recorded by it in writing, permit such sale to be made otherwise than by public auction, if it is of opinion that it is necessary so to do in the interest of the wakf.

(3) The utilisation or investment of the amount realised by the sale or exchange mortgage of any property shall be made by the mutawalli subject to the approval of the Board, and where any amount has been raised by mortgage of any such property, the mutawalli or other person shall make repayment of the mortgage-debt and obtain a discharge of the mortgage-debt from the mortgage within such reasonable time as the Board may specify.

(4) Every approval given by the Board under sub-section (3) shall be communicated to the mutawalli and shall also be published in the manner prescribed.

(5) The mutawalli or any other person having an interest in the wakf who is aggrieved by the decision given under sub-section (3), may, within ninety days from the date of communication to him of such decision or the publication of the decision, as the case may be, prefer an appeal to the Tribunal against such decision, and thereupon, the Tribunal may, after giving the appellant and the Board, a reasonable opportunity of being heard, confirm, modify or set aside such decision.

52.

Recovery of wakf property transferred in contravention of section 51.--

(1) If the Board is satisfied, after making any inquiry in such manner as may be prescribed, that any immovable property of a wakf entered as such in the register of wakf maintained under section 36, has been transferred without the previous sanction of the Board in contravention of the provisions of section 51, it may send a requisition to the Collector within whose jurisdiction the property is situate to obtain and deliver possession of the property to it.

(2) On receipt of a requisition under sub-section (1), the Collector shall pass an order directing the person in possession of the property to deliver the property to the Board within a period of thirty days from the date of the service of the order.

(3) Every order passed under sub-section (2) shall be served--

(a) by giving or tendering the order, or by sending it by post to the person for whom it is intended; or

(b) if such person cannot be found, by affixing the order on some conspicuous part of his last known place of abode or business, or by giving or tendering the order to some adult male member or servant of his family or by causing it to be affixed on some conspicuous part of the property to which it relates:

Provided that where the person on whom the order is to be served is a minor, service upon his guardian or upon any adult male member or servant of his family shall be deemed to be the service upon the minor.

(4) Any person aggrieved by the order of the Collector under sub-section (2) may, within a period of thirty days from the date of the service of the order, prefer an appeal to the Tribunal within whose jurisdiction the property is situate and the decision of the Tribunal on such appeal shall be final.

(5) Where an order passed under sub-section (2) has not been complied with and the time for appealing against such order has expired without an appeal having been preferred or the appeal, if any, preferred within that time has been dismissed, the Collector shall obtain possession of the property in respect of which the order has been made, using such force, if any, as may be necessary for the purpose and deliver it to the Board.

(6) In exercising his functions under this section the Collector shall be guided by such rules as may be provided by regulations.

53.

Restriction on purchase of property on behalf of wakf.--

Notwithstanding anything contained in a wakf deed, no immovable property shall be purchased for or on behalf of any wakf from the funds of any wakf except with the prior sanction of the Board, and the Board shall not accord such sanction unless it considers that the acquisition of such property is necessary or beneficial to the wakf and that the price proposed to be paid therefor is adequate and reasonable:

Provided that before such sanction is accorded, the particulars relating to the proposed transaction shall be published in the Official Gazette inviting objections and suggestions with respect thereto and, the Board shall, after considering the objections and suggestions that may be received by it from mutawallis or other persons interested in the wakf, make such orders as it may think fit.

54.

Removal of encroachment from wakf property.--

(1) Whenever the Chief Executive Officer considers whether on receiving any complaint or on his own motion that there has been an encroachment on any land, building, space or other property which is wakf property and, which has been registered as such under this Act, he shall cause to be served upon the encroacher a notice specifying the particulars of the encroachment and calling upon him to show cause before a date to be specified in such notice, as to why an order requiring him to remove the encroachment before the date so specified should not be made and shall also send a copy of such notice to the concerned mutawalli.

(2) The notice referred to in sub-section (1) shall be served in such manner as may be prescribed.

(3) If, after considering the objections, received during the period specified in the notice, and after conducting an inquiry in such manner as may be prescribed, the Chief Executive Officer is satisfied that the property in question is wakf property and that there has been an encroachment on any such wakf property, he may, by an order, require the encroacher to remove such encroachment and deliver possession of the land, building, space or other property encroached upon to the mutawalli of the wakf.

(4) Nothing contained in sub-section (3) shall prevent any person aggrieved by the order made by the Chief Executive Officer under that subsection from instituting a suit in a Tribunal to establish that he has right, title or interest in the land, building, space or other

property:

Provided that no such suit shall be instituted by a person who has been let into possession of the land, building, space or other property as a lessee, licensee or mortgagee by the mutawalli of the wakf or by any other person authorised by him in this behalf.

55.

Enforcement of orders made under section 54.--

Where the person, ordered under subsection (3) of section 54 to remove any encroachment, omits or fails to remove such encroachment, within the time specified in the order or, as the case may be, fails to vacate the land, building, space or other property to which the order relates, within the time aforesaid, the Chief Executive Officer may apply to the Sub-Divisional Magistrate within the local limits of whose jurisdiction the land, building, space or other property is situated for evicting the encroacher, and thereupon, such Magistrate shall make an order directing the encroacher to remove the encroachment, or, as the case may be, vacate the land, building, space or other property and to deliver possession thereof to the concerned mutawalli and in default of compliance with the order, remove the encroachment or, as the case may be, evict the encroacher from the land, building, space or other property and may, for this purpose, take such police assistance as may be necessary.

State Amendment

West Bengal.-- In its application to the State of West Bengal,--

(1) After S. 55, insert the following section, namely:--

&uot; **55-A. Penalty for encroachment on wakf property.--**

(1) Whoever encroaches on any land, building space or other property which is wakf property, and which has been registered as such under this Act, shall be punishable with rigorous imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both.
(2) Any offence publishable under this section shall be cognizable.
(3) No Court shall take cognizance of any offence punishable under this section save on complaint made by the Board or by an officer of the Board duly authorized by it in this behalf.
(4) No Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this section.
(5) Any fine imposed under this section shall, when realised, be credited to the Wakf Fund.&uot;--West Bengal Act 33 of 1997, S. 4.

(2) In S. 55-A of the principal Act as inserted by the Wakf (West Bengal Amendment) Act, 1997 (West Bengal Act 33 of 1997),--
(i) in sub-S. (1), the words &uot;or with fine which may extend to five thousand rupees, or with both&uot; shall be omitted;
(ii) in sub-S. (2), after the word &uot;cognizable&uot;, insert &uot;and non-bailable&uot;;
(iii) sub-S. (5) shall be omitted.--West Bengal Act 16 of 1998, S. 3.

56.

Restriction on power to grant lease of wakf property.--

(1) A lease or sub-lease for any period exceeding three years of any immovable property which is wakf property shall, notwithstanding anything contained in the deed or instrument of wakf or in any other law for the time being in force, be void and of no effect.

(2) A lease or sub-lease for a period exceeding one year and not exceeding three years of immovable property which is wakf property shall, notwithstanding anything contained in the deed or instrument of wakf or in any other law for the time being in force, be void and of no effect unless it is made with the previous sanction of the Board.

(3) The Board shall, in granting sanction for lease or sub-lease or renewal thereof under this section review the terms and conditions on which the lease or sub-lease is proposed to be granted or renewed and make its approval subject to the revision of such terms and conditions in such manner as it may direct.

57.

Mutawalli entitled to pay certain costs from income of wakf property.--

Notwithstanding anything contained in the wakf deed, every mutawalli may pay from the income of the wakf property any expenses properly incurred by him for the purpose of enabling him to furnish any particulars, documents or copies under section 36 or any accounts under section 46 or any information or documents, required by the Board or for the purpose of enabling him to carry out the directions of the Board.

58.

Power of Board to pay dues in case of default by mutawalli.--

(1) Where a mutawalli refuses to pay or fails to pay any revenue, cess, rates or taxes due to the Government or any local authority, the Board may discharge dues from the Wakf Fund and may recover the amount so paid from the wakf property and may also recover damages not exceeding twelve and a half per cent. of the amount so paid.

(2) Any sum of money due under sub-section (1) may, on a certificate issued by the Board after giving the mutawalli concerned an opportunity of being heard, be recovered in the same manner as an arrear of land revenue.

59.

Creation of reserve fund.--

For the purpose of making provisions for the payment of rent and of revenue, cess, rates and taxes due to the Government or any local authority, for the discharge of the expenses of the repair of the wakf property and for the preservation of the wakf property, the Board may direct the creation and maintenance, in such manner as it may think fit, of a reserve fund from the income of a wakf.

60.

Extension of time.--

The Board may, if it is satisfied that it is necessary so to do, extend the time within which any act is

required to be done by the mutawalli under this Act .

61.

Penalties.--

(1) If a mutawalli fails to--

(a) apply for the registration of a wakfs;

(b) furnish statements of particulars or accounts or returns as required under this Act;

(c) supply information or particulars as required by the Board;

(d) allow inspection of wakf properties, accounts, records or deeds and documents relating thereto;

(e) deliver possession of any wakf property, if ordered by the Board or Tribunal;

(f) carry out the directions of the Board;

(g) discharge any public dues; or

(h) do any other act which he is lawfully required to do by or under this Act,

he shall, unless he satisfies the Court or the Tribunal that there was reasonable cause for his failure, be punishable with fine which may extend to eight thousand rupees.

(2) Notwithstanding anything contained in sub-section (1), if--

(a) a mutawalli omits or fails, with a view to concealing the existence of a wakf, to apply for its registration under this Act,--

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

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

(b) a mutawalli furnishes any statement, return or information to the Board, which he knows or has reason to believe to be false, misleading, untrue or incorrect in any material particular,

he shall be punishable with imprisonment for a term which may extend to six months and also with fine which may extend to fifteen thousand rupees.

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

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

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

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

62.

Mutawalli not to spend any money belonging to wakf for selfdefence.--

No mutawalli shall spend any money out of the funds of the wakf, of which he is the mutawalli, for meeting any costs, charges, or expenses which are or may be, incurred by him, in relation to any suit, appeal or any other proceeding for, or incidental to, his removal from office or for taking any disciplinary act ion against himself.

63.

Power to appoint mutawallis in certain cases.--

When there is a vacancy in the office of the mutawalli of a wakf and there is no one to be appointed under the terms of the deed of the wakf, or where the right of any person to act as mutawalli is disputed, the Board may appoint any person to act as mutawalli for such period and on such conditions as it may think fit.

64.

Removal of mutawalli.--

(1) Notwithstanding anything contained in any other law or the deed of wakf, the Board may remove a mutawalli from his office if such mutawalli--
- (a) has been convicted more than once of an offence punishable under section 61; or
- (b) has been convicted of any offence of criminal breach of trust or any other offence involving moral turpitude, and such conviction has not been reversed and he has not been granted full pardon with respect to such offence; or
- (c) is of unsound mind or is suffering from other mental or physical defect or infirmity which would render him unfit to perform the functions and discharge the duties of a mutawalli; or
- (d) is an undischarged insolvent; or
- (e) is proved to be addicted to drinking liquor or other spirituous preparations, or is addicted to the taking of any narcotic drugs; or
- (f) is employed as a paid legal practitioner on behalf of, or against, the wakf; or
- (g) has failed, without reasonable excuse, to maintain regular accounts for two consecutive years or has failed to submit, in two consecutive years, the yearly statement of accounts, as required by sub-section (2) of section 46; or
- (h) is interested, directly or indirectly, in a subsisting lease in respect of any wakf property, or in any contract made with, or any work being done for the wakf or is in arrears in respect of any sum due by him to such wakf; or
- (i) continuously neglects his duties or commits any misfeasance, malfeasance, misapplication of funds or breach of trust in relation to the wakf or in respect of any money or other wakf property; or
- (j) wilfully and persistently disobeys the lawful orders made by the Central Government, State Government, Board under any provision of this Act or rule or order made thereunder;
- (k) misappropriates or fraudulently deals with the property of the wakf.

(2) The removal of a person from the office of the mutawalli shall not affect his personal rights, if any, in respect of the wakf property either as a beneficiary or in any other capacity or his right, if any, as a sajjadanashin.

(3) No act ion shall be taken by the Board under sub-section (1), unless it has held an inquiry into the matter in a prescribed manner and the decision has been taken by a majority of not less than two-thirds of the members of the Board.

(4) A mutawalli who is aggrieved by an order passed under any of the clauses (c) to (j) of subsection (1), may, within one month from the date of the receipt by him of the order, appeal against the order to the Tribunal and the decision of the Tribunal on such appeal

shall be final.

(5) Where any inquiry under sub-section (3) is proposed, or commenced, against any mutawalli, the Board may, if it is of opinion that it is necessary so to do in the interest of the wakf, by an order suspend such mutawalli until the conclusion of the inquiry:

Provided that no suspension for a period exceeding ten days shall be made except after giving the mutawalli a reasonable opportunity of being heard against the proposed action.

(6) Where any appeal is filed by the mutawalli to the Tribunal under sub- section (4), the Board may make an application to the Tribunal for the appointment of a receiver to manage the wakf pending the decision of the appeal, and where such an application is made, the Tribunal shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), appoint a suitable person as receiver to manage the wakf and direct the receiver so appointed to ensure that the customary or religious rights of the mutawalli and of the wakf are safeguarded.

(7) Where a mutawalli has been removed from his office under sub-section (1), the Board may, by order, direct the mutawalli to deliver possession of the wakf property to the Board or any officer duly authorised in this behalf or to any person or committee appointed to act as the mutawalli of the wakf property.

(8) A mutawalli of a wakf removed from his office under this section shall not be eligible for reappointment as a mutawalli of that wakf for a period of five years from the date of such removal.

65.

Assumption of direct management of certain wakfs by the Board.--

(1) Where no suitable person is available for appointment as a mutawalli of a wakf, or where the Board is satisfied, for reasons to be recorded by it in writing, that the filling up of the vacancy in the office of a mutawalli is prejudicial to the interests of the wakf, the Board may, by notification in the Official Gazette, assume direct management of the wakf for such period or periods, not exceeding five years in the aggregate, as may be specified in the notification.

(2) The State Government may, on its own motion or on the application of any person interested in the wakf, call for the records of any case for the purpose of satisfying itself as to the correctness, legality or propriety of the notification issued by the Board under sub-section (1) and pass such orders as it may think fit and the orders so made by the State Government shall be final and shall be published in the manner specified in sub-section (1).

(3) As soon as possible after the close of every financial year, the Board shall send to the State Government a detailed report in regard to every wakf under its direct management, giving therein--

(a) the details of the income of the wakf for the year immediately preceding the year under report;

(b) the steps taken to improve the management and income of the wakf;

(c) the period during which the wakf has been under the direct management of the Board and explaining the reasons as to why it has not been possible to entrust the management of the wakf to the mutawalli or any committee of management during the year; and

(d) such other matters as may be prescribed.

(4) The State Government shall examine the report submitted to it under sub-section (3), and after such examination issue such directions or instructions to the Board as it may think fit and the Board shall comply with such directions or instructions on receipt

thereof.

66.

Powers of appointment and removal of mutawalli when to be exercised by the State Government.--

Whenever a deed of wakf or any decree or order of a Court or any scheme of management of any wakf provides that a Court or any authority other than a Board may appoint or remove a mutawalli or settle or modify such scheme of management or otherwise exercise superintendence over the wakf, then notwithstanding anything contained in such deed of wakf, decree, order or scheme, such powers aforesaid shall be exercisable by the State Government:

Provided that where a Board has been established, the State Government shall consult the Board before exercising such powers.

67.

Supervision and supersession of committee of management.--

(1) Whenever the supervision or management of a wakf is vested in any committee appointed by the wakf, then, notwithstanding anything contained in this Act, such committee shall continue to function until it is superseded by the Board or until the expiry of its term as may be specified by the wakf, whichever is earlier:

Provided that such committee shall function under the direction, control and supervision of the Board and abide by such directions as the Board may issue from time to time:

Provided further that if the Board is satisfied that any scheme for the management of a wakf by a committee is inconsistent with any provision of this Act or of any rule made thereunder or with the directions of the wakf, it may, at any time, modify the scheme in such manner as may be necessary to bring it in conformity with the directions of the wakf or of the provisions of this Act and the rules made thereunder.

(2) Notwithstanding anything contained in this Act and in the deed of the wakf, the Board may, if it is satisfied, for reasons to be recorded in writing, that a committee, referred to in sub-section (1) is not functioning properly and satisfactorily, or that the wakf is being mismanaged and that in the interest of its proper management, it is necessary so to do, by an order, supersede such committee, and, on such supersession, any direction of the wakf, insofar as it relates to the constitution of the committee, shall cease to have any force:

Provided that the Board shall, before making any order superseding any committee, issue a notice setting forth therein the reasons for the proposed action and calling upon the committee to show cause within such time, not being less than one month, as may be specified in the notice, as to why such act ion shall not be taken.

(3) Every order made by the Board under sub-section (2) shall be published in the prescribed manner and on such publication shall be binding on the mutawalli and all persons having any interest in the wakf.

(4) Any order made by the Board under sub-section (2) shall be final:

Provided that any person aggrieved by the order made under sub-section (2) may, within sixty days from the date of the order, appeal to the Tribunal:

Provided further that the Tribunal shall have no power to suspend the operation of the order made by the Board pending such appeal.

(5) The Board shall, whenever it supersedes any committee under sub-section (2), constitute a new committee of management simultaneously with the order made by it under sub-section (2).

(6) Notwithstanding anything contained in the foregoing sub-sections, the Board may, instead of superseding any committee under sub-section (2), remove any member thereof if it is satisfied that such member has abused his position as such member or had knowingly acted in a manner prejudicial to the interests of the wakf, and every such order for the removal of any member shall be served upon him by registered post:

Provided that no order for the removal of the member shall be made unless he has been given a reasonable opportunity of showing cause against the proposed act ion:

Provided further that any member aggrieved by any order for his removal from the membership of the committee may, within a period of thirty days from the date of service of the order on him, prefer an appeal against such order to the Tribunal and the Tribunal may, after giving a reasonable opportunity to the appellant and the Board of being heard, confirm, modify or reverse the order made by the Board and the order made by the Tribunal in such appeal shall be final.

68.

Duty of mutawalli or committee to deliver possession of records, etc.--

(1) Where any mutawalli or committee of management has been removed by the Board in accordance with the provisions of this Act, or of any scheme made by the Board, the mutawalli or the committee so removed from the office (hereinafter in this section referred to as the removed mutawalli or committee) shall hand over charge and deliver possession of the records, accounts and all properties of the wakf (including cash) to the successor mutawalli or the successor committee, within one month from the date specified in the order.

(2) Where any removed mutawalli or committee fails to deliver charge or deliver possession of the records, accounts and properties (including cash) to the successor mutawalli or committee within the time specified in sub-section (1), or prevents or obstructs such mutawalli or committee, from obtaining possession thereof after the expiry of the period aforesaid, the successor mutawalli or any member of the successor committee may make an application, accompanied by a certified copy of the order appointing such successor mutawalli or committee, to any Magistrate of the first class within the local limits of whose jurisdiction any part of the wakf property is situated and, thereupon, such Magistrate may, after giving notice to the removed mutawalli or members of the removed committee, make an order directing the delivery of charge and possession of such records, accounts and properties (including cash) of the wakf to the successor mutawalli or the committee, as the case may be, within such time as may be specified in the order.

(3) Where the removed mutawalli or any member of the removed committee, omits or fails to deliver charge and possession of the records, accounts and properties (including cash) within the time specified by the Magistrate under sub-section (2), the removed mutawalli or every member of the removed committee, as the case may be, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to eight thousand rupees, or with both.

(4) Whenever any removed mutawalli or any member of the removed committee omits or fails to comply with the orders made by the Magistrate under sub-section (2), the Magistrate may authorise the successor mutawalli or committee to take charge and possession of such records, accounts, properties (including cash) and may authorise such person to take such police assistance as may be necessary for the purpose.

(5) No order of appointment of the successor mutawalli or committee, shall be called in question in the proceedings before the Magistrate under this section.

(6) Nothing contained in this section shall bar the institution of any suit in a competent Civil

Court by any person aggrieved by any order made under this section, to establish that he has right, title and interest in the properties specified in the order made by the Magistrate under subsection (2).

69.

Power of Board to frame scheme for administration of wakf.--

(1) Whenever the Board is satisfied, whether on its own motion or on the application of not less than five persons interested in any wakf, that it is necessary or desirable to frame a scheme for the proper administration of the wakf, it may by an order frame such scheme for the administration of the wakf, after consultation with the mutawalli or the applicant in the prescribed manner.

(2) A scheme framed under sub-section (1) may provide for the removal of the mutawalli of the wakf holding office as such immediately before the date on which the scheme comes into force:

Provided that where any such scheme provides for the removal of any hereditary mutawalli, the scheme shall also provide for the appointment of the person next in hereditary succession of the mutawalli so removed, as one of the members of the committee appointed for the proper administration of the wakf.

(3) Every order made under sub-section (2) shall be published in the prescribed manner, and, on such publication shall be final and binding on the mutawalli and all persons interested in the wakf:

Provided that any person aggrieved by an order made under this section may, within sixty days from the date of the order, prefer an appeal to the Tribunal and after hearing such appeal, the Tribunal may confirm, reverse or modify the order:

Provided further that the Tribunal shall have no power to stay the operation of the order made under this section.

(4) The Board may, at any time by an order, whether made before or after the scheme has come into force, cancel or modify the scheme.

(5) Pending the framing of the scheme for the proper administration of the wakf, the Board may appoint a suitable person to perform all or any of the functions of the mutawalli thereof and to exercise the powers, and perform the duties, of such mutawalli.

70.

Inquiry relating to administration of wakf.--

Any person interested in a wakf may make an application to the Board supported by an affidavit to institute an inquiry relating to the administration of the wakf and if the Board is satisfied that there are reasonable grounds for believing that the affairs of the wakf are being mismanaged, it shall take such act ion thereon as it thinks fit.

71.

Manner of holding inquiry.--

(1) The Board may, either on an application received under section 73 or on its own

motion,--
(a) hold an inquiry in such manner as may be prescribed; or
(b) authorise any person in this behalf to hold an inquiry into any matter relating to a wakf and take such action as it thinks fit.

(2) For the purposes of an inquiry under this section, the Board or any person authorised by it in this behalf, shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908) for enforcing the attendance of witnesses and production of documents.

CHAPTER VII

FINANCE OF THE BOARD

72.

Annual contribution payable to Board.--

(1) The mutawalli of every wakf, the net annual income of which is not less than five thousand rupees, shall pay annually, out of the net annual income derived by the wakf, such contributions, not exceeding seven per cent. of such annual income, as may be prescribed, to the Board for the services rendered by such Board to the wakf.

Explanation I .--For the purposes of this Act, &uot;net annual income&uot; shall mean the gross income of the wakf from all sources, including nazars and offerings which do not amount to contributions to the corpus of the wakfs, in a year after deducting therefrom the following, namely:--
(i) the land revenue paid by it to the Government;
(ii) the rates, cesses, taxes and licence fees, paid by it to the Government or any local authority;
(iii) expenditure incurred for all or any of the following purposes, namely:--
(a) maintenance of, or repairs to, irrigation works, which shall not include the capital cost of irrigation;
(b) seeds or seedlings;
(c) manure;
(d) purchase and maintenance of agricultural implements;
(e) purchase and maintenance of cattle for cultivation;
(f) wages for ploughing, watering, sowing, transplanting, harvesting, threshing and other agricultural operations:

Provided that the total deduction in respect of an expenditure incurred under this clause shall not exceed ten per cent. of the income derived from lands belonging to the wakf;

(iv) expenditure on sundry repairs to rented buildings, not exceeding five per cent. of the annual rent derived therefrom, or the actual expenditure, whichever is less;
(v) sale proceeds of immovable properties or rights relating to, or arising out of immovable properties, if such proceeds are re-invested to earn income for the wakf:

Provided that the following items of receipts shall not be deemed to be income for the purposes of this section, namely:--
(a) advances and deposits recovered and loans taken or recovered;
(b) deposits made as security by employees, lessees or contractors and other

deposits, if any;

(c) withdrawals from banks or of investments;

(d) amounts recovered towards costs awarded by Courts;

(e) sale proceeds of religious books and publications where such sales are undertaken as an un-remunerative enterprise with a view to propagating religion;

(f) donations in cash or kind or offerings made by the donors as contribution to the corpus of the wakf:

Provided that the interest or income, if any, accruing from such donations or offerings shall be taken into account in calculating the gross annual income;

(g) voluntary contributions received in cash or kind for a specific service to be performed by the wakf and expended on such service;

(h) audit recoveries.

Explanation II .--In determining, the net annual income for the purposes of this section, only the net profit derived by any wakf from its remunerative undertakings, if any, shall be taken as income, and in respect of its nonremunerative undertakings, such as, schools, colleges, hospitals, poor homes, orphanages or any other similar institutions, the grants given by the Government or any local authority or donations received from the public or fees collected from the pupils of educational institutions shall not be taken as income.

(2) The Board may in the case of any mosque or orphanage or any particular wakf reduce or remit such contribution for such time as it thinks fit.

(3) The mutawalli of the wakf may realise the contributions payable by him under sub-section (1) from the various persons entitled to receive any pecuniary or other material benefit from the wakf, but the sum realisable from any one of such persons shall not exceed such amount as shall bear to the total contribution payable the same proportion, as the value of the benefits receivable by such person bears to the entire net annual income of the wakf:

Provided that if there is any income of the wakf available in excess of the amount payable as dues under this Act, other than as the contribution under sub-section (1), and in excess of the amount payable under the wakf deed, the contribution shall be paid out of such income.

(4) The contribution payable under sub-section (1) in respect of a wakf shall, subject to the prior payment of any dues to the Government or any local authority or of any other statutory first charge on the wakf property or the income thereof, be a first charge on the income of the wakf and shall be recoverable, on a certificate issued by the Board after giving the mutawalli concerned an opportunity of being heard, as an arrear of land revenue.

(5) If a mutawalli realises the income of the wakf and refuses to pay or does not pay such contribution, he shall also be personally liable for such contribution which may be realised from his person or property in the manner aforesaid.

(6) Where, after the commencement of this Act, the mutawalli of a wakf fails to submit a return of the net annual income of the wakf within the time specified therefor or submits a return which, in the opinion of the Chief Executive Officer is incorrect or false in any material particular, or which does not comply with the provisions of this Act or any rule or order made thereunder, the Chief Executive Officer may assess the net annual income of the wakf to the best of his judgment or revise the net annual income as shown in the return submitted by the mutawalli and the net annual income as so assessed or revised shall be deemed to be the net annual income of the wakf for the purposes of this

section:

Provided that no assessment of the net annual income or revision of return submitted by mutawalli shall be made except after giving a notice to the mutawalli calling upon him to show cause, within the time specified in the notice, as to why such assessment or revision of the return shall not be made and every such assessment or revision shall be made after considering the reply, if any, given by the mutawalli.

(7) Any mutawalli who is aggrieved by the assessment or revision made by the Chief Executive Officer, under sub-section (6), may prefer an appeal to the Board within thirty days from the date of the receipt of the assessment or revision of return and the Board may, after giving the appellant a reasonable opportunity of being heard, confirm, reverse or modify the assessment or revision or the return and the decision of the Board thereon shall be final.

(8) If, for any reason, the contribution or any portion thereof leviable under this section has escaped assessment in any year, whether before or after the commencement of this Act, the Chief Executive Officer may, within five years from the last date of the year to which such escaped assessment relates serve upon the mutawalli a notice assessing him with the contribution or portion thereof which had escaped assessment, and demanding payment thereof within thirty days from the date of service of such notice, and the provisions of this Act and the rules made thereunder, shall, as far as may be, apply as if the assessments were made under this Act, in the first instance.

73.

Power of Chief Executive Officer to direct banks or other person to make payments.--

(1) Notwithstanding anything contained in any other law for the time being in force, the Chief Executive Officer, if he is satisfied that it is necessary and expedient so to do, make an order directing any bank in which, or any person with whom any money belonging to a wakf is deposited, to pay the contribution, leviable under section 72, out of such money, as may be standing to the credit of the wakf in such bank or may be deposited with such person, or out of the moneys which may, from time to time, be received by bank or other person for or on behalf of the wakf by way of deposit, and on receipt of such orders, the bank or the other person, as the case may be, shall, when no appeal has been preferred under sub-section (3), comply with such orders, or where an appeal has been preferred under sub-section (3), shall comply with the orders made by the Tribunal on such appeal.

(2) Every payment made by a bank or other person in pursuance of any order made under subsection (1), shall operate as a full discharge of the liability of such bank or other person in relation to the sum so paid.

(3) Any bank or other person who is ordered under sub-section (1) to make any payment may, within thirty days from the date of the order, prefer an appeal against such order to the Tribunal and the decision of the Tribunal on such appeal shall be final.

(4) Every officer of the bank or other person who fails, without any reasonable excuse to comply with the order made under sub-section (1) or, as the case may be, under sub-section (3), shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to eight thousand rupees, or with both.

74.

Deduction of contribution from perpetual annuity payable to the wakf.--

(1) Every authority empowered to disburse any perpetual annuity payable to a wakf under any law relating to the abolition of zamindaries or jagirs, or laying down land ceilings, shall, on receipt of a certificate from the Chief Executive Officer, specifying the amount of contribution payable by the wakf under section 72 which remains unpaid, deduct before making payment of the perpetual annuity to the wakf, the amount specified in such certificate and remit the amount so deducted to the Chief Executive Officer.

(2) Every amount remitted under sub-section (1) to the Chief Executive Officer shall be deemed to be a payment made by the wakf and shall, to the extent of the amount so remitted, operate as a full discharge of the liability of such authority with regard to the payment of the perpetual annuity.

75.

Power of Board to borrow.--

(1) For the purpose of giving effect to the provisions of this Act, the Board may, with the previous sanction of the State Government, borrow such sum of money and on such terms and conditions as the State Government may determine.

(2) The Board shall repay the money borrowed, together with any interest or costs due in respect thereof, according to the terms and conditions of the loan.

76.

Mutawalli not to lend or borrow moneys without sanction.--

(1) No mutawalli, Executive Officer or other person in charge of the administration of a wakf shall lend any money belonging to the wakf or any wakf property or borrow any money for the purposes of the wakf except with the previous sanction of the Board:

Provided that no such sanction is necessary if there is an express provision in the deed of wakf for such borrowing or lending, as the case may be.

(2) The Board may, while according sanction, specify any terms and conditions subject to which the person referred to in sub-section (1) is authorised by him to lend or borrow any money or lend any other wakf property.

(3) Where any money is lent or borrowed, or other wakf property is lent in contravention of the provisions of this section, it shall be lawful for the Chief Executive Officer,--

(a) to recover an amount equal to the amount which has been so lent or borrowed, together with interest due thereon, from the personal funds of the person by whom such amount was lent or borrowed;

(b) to recover the possession of the wakf property lent in contravention of the provisions of this Act, from the person to whom it was lent, or from persons who claim title to such property through the person to whom such property was lent.

77.

Wakf Fund.--

(1) All moneys received or realised by the Board under this Act and all other moneys received as donation, benefactions or grants by the Board shall form a fund to be called

the Wakf Fund.

(2) All moneys received by the Board, as donations, benefactions and grants shall be deposited and accounted for under a separate sub-head.

(3) Subject to any rules that may be made by the State Government in this behalf, the Wakf Fund shall be under the control of the Board, so, however, that the Wakf Fund under the control of common Wakf Board shall be subject to rules, if any, made in this behalf by the Central Government.

(4) The Wakf Fund shall be applied to--

(a) repayment of any loan incurred under section 75 and payment of interest thereon;

(b) payment of the cost of audit of the Wakf Fund and the accounts of wakfs;

(c) payment of the salary and allowances to the officers and staff of the Board;

(d) payment of travelling allowances to the Chairperson and members of the Board;

(e) payment of all expenses incurred by the Board in the performance of the duties imposed, and the exercise of the powers conferred, by or under this Act;

(f) payment of all expenses incurred by the Board for the discharge of any obligation imposed on it by or under any law for the time being in force.

(5) If any balance remains after meeting the expenditure referred to in sub- section (4), the Board may use any portion of such balance for the preservation and protection of wakf properties or for such other purposes as it may deem fit.

78.

Budget of Board.--

(1) The Board shall in every year prepare, in such form and at such time as may be prescribed, a budget for the next financial year showing the estimated receipts and expenditure during that financial year and forward a copy of the same to the State Government.

(2) On receipt of the budget forwarded to it under sub-section (1), the State Government shall examine the same and suggest such alterations, corrections, or modifications to be made therein as it may think fit and forward such suggestions to the Board for its consideration.

(3) On receipt of the suggestions from the State Government, the Board may make written representations to that Government with regard to the alterations, corrections or modifications suggested by that Government and the State Government shall, after considering such representations, communicate, within a period of three weeks from the date of receipt, to the Board its final decision in relation to the matter and the decision of the State Government shall be final.

(4) On receipt of the decision of the State Government under sub-section (3), the Board shall incorporate in its budget all the alternations, corrections, modifications finally suggested by the State Government and the budget as so altered, corrected or modified, shall be the budget which shall be passed by the Board.

79.

Accounts of Board.--

The Board shall cause to be maintained such books of account and other books in relation to its accounts in such form and in such manner as may be provided by regulations.

80.

Audit of accounts of Board.--

(1) The accounts of the Board shall be audited and examined annually by such auditor as may be appointed by the State Government.

(2) The auditor shall submit his report to the State Government and the report of the auditor shall, among other things, specify whether the accounts of every wakf under the direct management of the Board have been kept separately and whether such accounts have been audited annually by the State Examiner of Local Funds and shall also specify all cases of irregular, illegal or improper expenditure or of failure to recover money or other property caused by neglect or misconduct and any other matter which the auditor considers it necessary to report; and the report shall also contain the name of any person who, in the opinion of the auditor, is responsible for such expenditure or failure and the auditor shall in every such case certify the amount of such expenditure or loss as due from such person.

(3) The cost of the audit shall be paid from the Wakf Fund.

81.

State Government to pass orders on auditor's report.--

The State Government shall examine the auditor's report and may call for the explanation of any person in regard to any matter mentioned therein, and shall pass such orders on the report as it thinks fit.

82.

Dues of Board to be recovered as arrears of land revenue.--

(1) Every sum certified to be due from any person by an auditor in his report under section 80, be paid by such person within sixty days after the service of a demand notice by the Board.

(2) If such payment is not made in accordance with the provisions of sub-section (1), the sum payable may, on a certificate issued by the Board, after giving the person concerned an opportunity of being heard, be recovered as an arrear of land revenue.

CHAPTER VIII

JUDICIAL PROCEEDINGS

83.

Constitution of Tribunals, etc.--

(1) The State Government shall, by notification in the Official Gazette, constitute as many Tribunals as it may think fit, for the determination of any dispute, question or other matter relating to a wakf or wakf property under this Act and define the local limits and jurisdiction under this Act of each of such Tribunals.

(2) Any mutawalli, person interested in a wakf or any other person aggrieved by an order made under this Act, or rules made thereunder, may make an application within the time specified in this Act or where no such time has been specified, within such time as may be prescribed, to the Tribunal for the determination of any dispute, question or other

matter relating to the wakf.

(3) Where any application made under sub-section (1) relates to any wakf property which falls within the territorial limits of the jurisdiction of two or more Tribunals, such application may be made to the Tribunal within the local limits of whose jurisdiction the mutawalli or any one of the mutawallis of the wakf act ually and voluntarily resides, carries on business or personally works for gain, and, where any such application is made to the Tribunal aforesaid, the other Tribunal or Tribunals having jurisdiction shall not entertain any application for the determination of such dispute, question or other matter:

Provided that the State Government may, if it is of opinion that it is expedient in the interest of the wakf or any other person interested in the wakf or the wakf property to transfer such application to any other Tribunal having jurisdiction for the determination of the dispute, question or other matter relating to such wakf or wakf property, transfer such application to any other Tribunal having jurisdiction, and, on such transfer, the Tribunal to which the application is so transferred shall deal with the application from the stage which was reached before the Tribunal from which the application has been so transferred, except where the Tribunal is of opinion that it is necessary in the interests of justice to deal with the application afresh.

(4) Every Tribunal shall consist of one person, who shall be a member of the State Judicial Service holding a rank, not below that of a District, Sessions or Civil Judge, Class I, and the appointment of every such person may be made either by name or by designation.

(5) The Tribunal shall be deemed to be a Civil Court and shall have the same powers as may be exercised by a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, or executing a decree or order.

(6) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), the Tribunal shall follow such procedure as may be prescribed.

(7) The decision of the Tribunal shall be final and binding upon the parties to the application and it shall have the force of a decree made by a Civil Court.

(8) The execution of any decision of the Tribunal shall be made by the Civil Court to which such decision is sent for execution in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(9) No appeal shall lie against any decision or order whether interim or otherwise, given or made by the Tribunal:

Provided that a High Court may, on its own motion or on the application of the Board or any person aggrieved, call for and examine the records relating to any dispute, question or other matter which has been determined by the Tribunal for the purpose of satisfying itself as to the correctness, legality or propriety of such determination and may confirm, reverse or modify such determination or pass such other order as it may think fit.

State Amendment

West Bengal.-- In its application to the State of West Bengal, in s. 83, for sub-s. (4), substitute the following sub-section, namely:--

&uot;(4)(a) Every Tribunal shall consist of one person, who is or has been a member of the State Judicial Service holding a rank, not below the rank of a District and Sessions Judge, and the appointment of every such person may be made either by name or by designation.

(b) On such appointment, such person shall be designated as Judge, Wakf Tribunal, bearing the name of the State and shall hold office for a term of three years from the date of such appointment or till he attains the age of sixty-two years, whichever is earlier.&uot;--West Bengal Act 20 of 2001, s. 3.

84.

Tribunal to hold proceedings expeditiously and to furnish to the parties copies of its decision.--

Whenever an application is made to a Tribunal for the determination of any dispute, question or other matter relating to a wakf or wakf property it shall hold its proceedings as expeditiously as possible and shall as soon as practicable, on the conclusion of the hearing of such matter give its decision in writing and furnish a copy of such decision to each of the parties to the dispute.

85.

Bar of jurisdiction of Civil Courts.--

No suit or other legal proceeding shall lie in any Civil Court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal.

86.

Appointment of a receiver in certain cases.--

Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or in any other law for the time being in force, where any suit or other legal proceeding is instituted or commenced--

(a) by or on behalf of a Board--
  (i) to set aside the sale of any immovable property, which is wakf property in execution of a decree or order of a Civil Court;
  (ii) to set aside the transfer of any immovable property, which is wakf property, made by the mutawalli thereof, whether for valuable consideration or not, without or otherwise than in accordance with, the sanction of the Board;
  (iii) to recover possession of the property referred to in clause (a) or clause (b) or to restore possession of such property to the mutawalli of the concerned wakf; or

(b) by a mutawalli to recover possession of immovable property, which is wakf property, which has been transferred by a previous mutawalli, whether for valuable consideration or not, without otherwise than in accordance with the sanction of the Board, and which is in the possession of the defendant, the Court may, on the application of the plaintiff, appoint a receiver of such property and direct such receiver to pay from time to time to the plaintiff, out of the income of the property, such amount as the Court may consider to be necessary for further prosecution of the suit.

87.

Bar to the enforcement of right on behalf of unregistered wakfs.--

(1) Notwithstanding anything contained in any other law for the time being in force, no suit, appeal or other legal proceeding for the enforcement of any right on behalf of any wakf which has not been registered in accordance with the provisions of this Act, shall be instituted or commenced or heard, tried or decided by any Court after the

commencement of this Act, or where any such suit, appeal or other legal proceeding had been instituted or commenced before such commencement, no such suit, appeal or other legal proceeding shall be continued, heard, tried or decided by any Court after such commencement unless such wakf has been registered, in accordance with the provisions of this Act.

(2) The provisions of sub-section (1) shall apply as far as may be, to the claim for set-off or any other claim made on behalf of any wakf which has not been registered in accordance with the provisions of this Act .

88.

Bar to challenge the validity of any notification, etc.--

Save as otherwise expressly provided in this Act, no notification or order or decision made, proceeding or act ion taken, by the Central Government or the State Government under this Act or any rule made thereunder shall be questioned in any Civil Court.

89.

Notice of suits by parties against Board.--

No suit shall be instituted against the Board in respect of any act purporting to be done by it in pursuance of this Act or of any rules made thereunder, until the expiration of two months next after notice in writing has been delivered to, or left at, the office of the Board, stating the cause of act ion, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

90.

Notice of suits, etc., by Courts.--

(1) In every suit or proceeding relating to a title to or possession of a wakf property or the right of a mutawalli or beneficiary, the Court or Tribunal shall issue notice to the Board at the cost of the party instituting such suit or proceeding.

(2) Whenever any wakf property is notified for sale in execution of a decree of a Civil Court or for the recovery of any revenue, cess, rates or taxes due to the Government or any local authority, notice shall be given to the Board by the Court, Collector or other person under whose order the sale is notified.

(3) In the absence of a notice under sub-section (1), any decree or order passed in the suit or proceeding shall be declared void, if the Board, within one month of its coming to know of such suit or proceeding, applies to the Court in this behalf.

(4) In the absence of a notice under sub-section (2), the sale shall be declared void, if the Board, within one month of its coming to know of the sale, applies in this behalf to the Court or other authority under whose order the sale was held.

91.

Proceedings under Act 1 of 1894.--

(1) If, in the course of proceedings under the Land Acquisition Act, 1894 (1 of 1894) or under any law for the time being in force relating to the acquisition of land or other property, it appears to the Collector before an award is made that any property under acquisition is wakf property, a notice of such acquisition shall be served by Collector on

the Board and further proceedings shall be stayed to enable the Board to appear and plead as a party to the proceeding at any time within three months from the date of the receipt of such notice.

Explanation .--The reference to the Collector in the foregoing provisions of this sub-section shall, in relation to any other law referred to therein, be construed, if the Collector is not the competent authority under such other law to make an award of the compensation or other amount payable for acquisition of land or other property thereunder, as a reference to the authority under such other law competent to make such award.

(2) Where the Board has reason to believe that any property under acquisition is wakf property, it may at any time before the award is made appear and plead as a party to the proceeding.

(3) When the Board has appeared under the provisions of sub-section (1) or sub-section (2), no order shall be passed under section 31 or section 32 of the Land Acquisition Act, 1894 (1 of 1894) or under the corresponding provisions of the other law referred to in sub-section (1) without giving an opportunity to the Board to be heard.

(4) Any order passed under section 31 or section 32 of the Land Acquisition Act, 1894 (1 of 1894) or under the corresponding provisions of the other law referred to in sub-section (1) without giving an opportunity to the Board to be heard, shall be declared void if the Board, within one month of its coming to know of the order, applies in this behalf to the authority which made the order.

92.

Board to be party to suit or proceeding.--

In any suit or proceeding in respect of a wakf or any wakf property the Board may appear and plead as a party to the suit or proceeding.

93.

Bar to compromise of suits by or against mutawallis.--

No suit or proceeding in any Court by or against the mutawalli of a wakf relating to title to wakf property or the rights of the mutawalli shall be compromised without the sanction of the Board.

94.

Power to make application to the Tribunal in case of failure of mutawalli to discharge his duties.--

(1) Where a mutawalli is under an obligation to perform any act which is recognised by Muslim law as pious, religious or charitable and the mutawalli fails to perform such act, the Board may apply to the Tribunal for an order directing the mutawalli to pay to the Board or to any person authorised by the Board in this behalf the amount necessary for the performance of such act .

(2) Where a mutawalli is under an obligation to discharge any other duties imposed on him under the wakf and the mutawalli wilfully fails to discharge such duties, the Board or any person interested in the wakf may make an application to the Tribunal and the Tribunal may pass such order thereon as it thinks fit.

95.

Power of appellate authority to entertain appeal after expiry of specified period.--

Where under this Act any period has been specified for the filing of any appeal, the appellate authority may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the period so specified, entertain the appeal after the expiry of the said period.

CHAPTER IX

MISCELLANEOUS

96.

Power of Central Government to regulate secular activities of wakfs.--

(1) For the purpose of regulating the secular act ivities of wakfs, the Central Government shall have the following powers and functions, namely:--
   (a) to lay down general principles, and policies of wakf administration insofar as they relate to the secular activities of the wakfs;
   (b) to co-ordinate the functions of the Central Wakf Council and the Board, insofar as they relate to their secular functions;
   (c) to review administration of the secular act ivities of wakfs generally and to suggest improvements, if any.

(2) In exercising its powers and functions under sub-section (1), the Central Government may call for any periodic or other reports from any Board and may issue to the Board such directions as it may think fit and the Board shall comply with such directions.

Explanation .--For the purposes of this section &uot;secular activities&uot; shall include social, economic, educational and other welfare act ivities.

97.

Directions by State Government.--

Subject to any directions issued by the Central Government under section 96, the State Government may, from time to time, give to the Board such general or special directions as the State Government thinks fit and in the performance of its functions, the Board shall comply with such directions.

98.

Annual report by State Government.--

As soon as may be after the close of a financial year, the State Government shall cause a general annual report on the working and administration of the State Wakf Board and the administration of wakfs in the State during that year to be prepared and laid before each House of the State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House, and every such report shall be in such form and shall contain such matters as may be provided by regulations.

99.

Power to supersede Board.--

(1) If the State Government is of opinion that the Board is unable to perform or has

persistently made default in the performance of, the duty imposed on it by or under this Act or has exceeded or abused its powers, or has wilfully and without sufficient cause failed to comply with any direction issued by the Central Government under section 96 or the State Government under section 97, or if the State Government is satisfied on consideration of any report submitted after annual inspection, that the Board's continuance is likely to be injurious to the interests of the wakfs in the State, the State Government may, by notification in the Official Gazette, supersede the Board for a period not exceeding six months:

Provided that before issuing a notification under this sub-section, the State Government shall give a reasonable time to the Board to show cause why it should not be superseded and shall consider the explanations and objections, if any, of the Board.

(2) Upon the publication of a notification under sub-section (1) superseding the Board,--
- (a) all the members of the Board shall, as from the date of supersession, vacate their offices as such members;
- (b) all the powers and duties which may, by or under the provisions of this Act, be exercised or performed by or on behalf of the Board shall, during the period of supersession, be exercised and performed by such person or persons as the State Government may direct; and
- (c) all property vested in the Board shall, during the period of supersession vest in the State Government.

(3) On the expiration of the period of supersession specified in the notification issued under subsection (1), the State Government may--
- (a) extend the period of supersession for such further period as it may consider necessary; or
- (b) reconstitute the Board in the manner provided in section 14.

100.

Protection of action taken in good faith.--

No suit or other legal proceeding shall lie against the Board or Chief Executive Officer or Survey Commissioner or any other person duly appointed under this Act in respect of anything which is in good faith done or intended to be done under this Act.

101.

Survey Commissioner, members and officers of the Board deemed to be public servants.--

(1) The Survey Commissioner, members of the Board, every officer, every auditor of the Board and every other person duly appointed to discharge any duties imposed on him by this Act or any rule or order made thereunder, shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

(2) Every mutawalli of a wakf, every member of managing committee, whether constituted by the Board or under any deed of wakf, every Executive Officer and every person holding any office in a wakf shall also be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860).

102.

Special provision for reorganisation of certain Boards.--

(1) Where on account of the reorganisation of States under any law providing reorganisation of States, the whole or any part of a State in respect of which a Board was, immediately before the day of such reorganisation, functioning has been transferred on that day to another State and by reason of such transfer, it appears to the Government of a State in any part of which the Board is functioning that the Board should be dissolved or that it should be reconstituted as an Infra-State Board for the whole or any part of that State, the State Government may frame a scheme or such dissolution or such reconstitution, including proposals regarding the transfer of all assets, rights and liabilities of the Board to any other Board or State Government and the transfer or re-employment of employees of the Board and forward that scheme to the Central Government.

(2) On receipt of a scheme forwarded to it under sub-section (1), the Central Government may, after consulting the State Governments concerned, approve the scheme with or without modifications and give effect to the scheme so approved by making such order as it thinks fit.

(3) An order under sub-section (2) may provide for all or any of the following matters, namely:--

(a) the dissolution of the Board;

(b) the reconstitution in any manner whatsoever of the Board including the establishment, where necessary, of a new Board;

(c) the area in respect of which the reconstituted Board or new Board shall function and operate;

(d) the transfer, in whole or in part, of the assets, rights and liabilities of the Board (including the rights and liabilities under any contract made by it) to any other Board or State Government and the terms and conditions of such transfer;

(e) the substitution of any such transferee for the Board, or the addition of any such transferee, as a party to any legal proceeding to which the Board is a party; and the transfer of any proceeding pending before the Board to any such transferee;

(f) the transfer or re-employment of any employee of the Board to or by, any such transferee and subject to the provisions of law providing for the reorganisation of the concerned State, the terms and conditions of service applicable to such employees after such transfer or re-employment; and

(g) such incidental, consequential and supplemental matters as may be necessary to give effect to the approved scheme.

(4) Where an order is made under this section transferring the assets, rights and liabilities of any Board, then, by virtue of that order, such assets, rights and liabilities of the Board shall vest in, and be the assets, rights and liabilities of, the transferee.

(5) Every order made under this section shall be published in the Official Gazette.

(6) Every order made under this section shall be laid before each House of Parliament, as soon as may be, after it is made.

103.

Special provision for establishment of Board for part of a State.--

Where on account of the territorial changes brought about by any law providing for the reorganisation of any State, this Act is as from the date on which that law comes into force applicable only to any part or parts of a State but has not been brought into force in the remaining part thereof, then notwithstanding anything contained in this Act, it shall be lawful for the Government of the State to establish one or more Boards for such part or parts in which this Act is in force and in such a case any reference in this Act to the word &uot;State&uot; in relation of a Board shall be construed as a reference to that part of the State for which the Board is established.

(2) Where any such Board has been established and it appears to the Government of the State that a Board should be established for the whole of the State, the State Government may, by order notified in the Official Gazette, dissolve the Board established for the part of the State or reconstitute and reorganise such Board or establish a new Board for the whole of the State and thereupon, the assets, rights and liabilities of the Board for the part of the State shall vest in and be in the assets, rights and liabilities of the reconstituted Board or the new Board, as the case may be.

104.

Application of Act to properties given or donated by persons not professing Islam for support of certain wakf.--

Notwithstanding anything contained in this Act where any movable or immovable property has been given or donated by any person not professing Islam for the support of a wakf being--

(a) a mosque, idgah, imambara, dargah, khangah or a maqbara;
(b) a Muslim graveyard;
(c) a choultry or *musafarkhana* ,

then such property shall be deemed to be comprised in that wakf and be dealt in the same manner as the wakf in which it is so comprised.

105.

Power of Board and Chief Executive Officer to require copies of documents, etc., to be furnished.--

Notwithstanding anything contained in any law for the time being in force, it shall be lawful for the Board or the Chief Executive Officer to require any person having the custody of any record, register, report or other document relating to a wakf or any immovable property, which is wakf property, to furnish subject to the payment of necessary costs, copies of, or extracts from, any such record, register, report or document and every person to whom such a requisition is made, shall furnish, as soon as may be practicable, to the Board or Chief Executive Officer copies or extracts from the required record, register, report or other document.

106.

Powers of Central Government to constitute common Boards.--

(1) Where the Central Government is satisfied that by reasons of--
(i) the smallness of the Muslim population in two or more States,
(ii) the slender resources of the wakfs in such States, and
(iii) the disproportion between the number and income of the wakfs and the Muslim population in such States,

it is expedient in the interests of the wakfs in the States and the Muslim population of such States, to have, instead of separate Boards for each of such States, a common Board, it may, after consultation with the Government of each of the concerned States, establish, by notification in the Official Gazette, a common Board for such States as it may deem fit, and may, by the same or any subsequent notification specify the place at which the principal office of such common Board shall be located.

(2) Every common Board established under sub-section (1) shall, as far as practicable,

consist of the persons specified in sub-section (1) or, as the case may be, sub-section (7) of section 14.

(3) Whenever any common Board is established under sub-section (1),--

(a) all powers vested in the State Government under any deed of wakf or any provision of law for the time being in force relating to wakfs, shall stand transferred to, and vested in, the Central Government and, thereupon, references in such deed of wakf or law to the State Governments shall be construed as references to the Central Government:

Provided that while establishing a common Board for two or more States, the Central Government shall ensure that at least one representative of each of the concerned States is included as a member of the Board;

(b) references in this Act to a State shall be construed as references to each of the States for which the common Board has been established;

(c) the Central Government may, without prejudice to any rule applicable to a Board in a State, make, by notification in the Official Gazette, rules regulating the conduct of business by, and affairs of, the common Board.

(4) The common Board shall be a body corporate, with objects not confined to one State, having perpetual succession and a common seal with power to acquire and hold property and to transfer any such property, subject to such conditions and restrictions as may be specified by the Central Government, and shall by the said name sue or be sued.

107.

Act 36 of 1963 not to apply for recovery of wakf properties.--

Nothing contained in the Limitation Act, 1963 (36 of 1963) shall apply to any suit for possession of immovable property comprised in any wakf or for possession of any interest in such property.

108.

Special provision as to evacuee wakf properties.--

The provisions of this Act shall apply, and shall be deemed always to have applied, in relation to any evacuee property within the meaning of clause (f) of section 2 of the Administration of Evacuee Property Act, 1950 (31 of 1950), which immediately before it became such evacuee property within the said meaning was property comprised in any wakf and, in particular any entrustment (whether by transfer of any documents or in any other manner and whether generally or for specified purpose) of any such property to a Board made before the commencement of this Act in pursuance of the instructions of the Custodian under the Administration of Evacuee Property Act, 1950 (31 of 1950) shall have, and shall be deemed always to have had, notwithstanding anything contained in any other provision of this Act, effect as if such entrustment had operated to--

(a) vest such property in such Board in the same manner and with the same effect as in a trustee of such property for the purposes of sub-section (1) of section 11 of the Administration of Evacuee Property Act, 1950 (31 of 1950) with effect from the date of such entrustment, and

(b) authorise such Board to assume direct management of the wakf concerned for so long as it might deem necessary.

109.

Power to make rules.--

(1) The State Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act, other than those of Chapter III.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:--

(i) other particulars which the report of the Survey Commissioner may contain, under clause (f) of sub-section (3) of section (4);

(ii) any other matter under clause (f) of sub- section (4) of section 4;

(iii) the particulars which a list of wakfs published under sub-section (2) of section 5, may contain;

(iv) the manner of election of members of the Board by means of a single transferable vote, under sub-section (2) of section 14;

(v) the terms and conditions of service of the Chief Executive Officer under sub-section (2) of section 23;

(vi) the conditions and restrictions subject to which the Chief Executive Officer or any other officer may inspect any public office, records or registers under section 29;

(vii) the conditions subject to which an Executive Officer and supporting staff may be appointed under sub-section (1) of section 38;

(viii) the manner in which an inquiry may be held by the Chief Executive Officer under subsection (1) of section 39;

(ix) the form in which, and the time within which, a separate budget for wakfs under the direct management of the Board shall be prepared under sub-section (1) of section 45;

(x) the interval at which accounts of wakfs may be audited in pursuance of the provisions of sub-section (1) of section 47;

(xi) the time within which, the sale of any property is to be informed under the first proviso to sub-section (2) of section 51 and the manner in which the approval given under subsection (3) of that section shall be published;

(xii) the guidance subject to which the Collector shall recover the property transferred in contravention of the provisions of this Act, under section 52;

(xiii) the manner of service of notice issued under sub-section (1) of section 54 and the manner in which any inquiry is to be made under sub-section (3) of that section;

(xiv) the manner in which any inquiry may be held under section 64 or section 71;

(xv) the other matters which may be specified in the report submitted under sub-section (3) of section 65;

(xvi) the manner of publication of order made under sub-section (2) of section 67;

(xvii) the manner in which consultation may be made with mutawalli under sub-section (1) of section 69;

(xviii) the manner of publication of order made under sub-section (3) of section 69;

(xix) the rate at which contribution is to be made by a mutawalli under section 72;

(xx) the payment of moneys into the Wakf Fund, the investment, the custody and disbursement of such moneys under section 77;

(xxi) the form in which, and the time within which, the budget of the Board may be prepared and submitted under section 78;

(xxii) the time within which application is to be made to the Tribunal under sub-section (2) of section 83;

(xxiii) the procedure which the Tribunal shall follow under sub-section (6) of section 83;

(xxiv) the form in which the annual report is to be submitted and the matters which such report shall contain under section 98; and

(xxv) any other matter which is required to be, or may be, prescribed.

State Amendment

West Bengal.-- In its application to the State of West Bengal, in sub-s. (2) of s. 109, after cl. (vi), insert the following clause, namely:--

&uot;(via) the manner of control and management of the properties of the wakf under subsection (5) of section 32;&uot;.--West Bengal Act 33 of 1997, S. 5.

110.

Powers to make regulations by the Board.--

(1) The Board may, with the previous sanction of the State Government, make regulations not inconsistent with this Act or the rules made thereunder, for carrying out its functions under this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such regulations may provide for all or any of the following matters, namely:--

- (a) the time and places of the meetings of the Board under sub-section (1) of section 17;
- (b) the procedure and conduct of business at the meetings of the Board;
- (c) the constitution and functions of the committees and the Board and the procedure for transaction of business at the meetings of such committees;
- (d) the allowances or fees to be paid to the Chairperson or members of the Board or members of committees;
- (e) the terms and conditions of service of the officers and other employees of the Board under sub-section (2) of section 24;
- (f) the forms of application for registration of wakfs further particulars to be contained therein and the manner and place of registration of wakfs under sub-section (3) of section 36;
- (g) further particulars to be contained in the register of wakfs under section 37;
- (h) the form in which, and the time within which, the budgets of wakfs may be prepared and submitted by the mutawalli and approved by the Board under sub-section (1) of section 44;
- (i) the books of accounts and other books to be maintained by the Board under section 79;
- (j) fees payable for inspection of proceedings and records of the Board or for issue of copies of the same;
- (k) persons by whom any order or decision of the Board may be authenticated; and
- (l) any other matter which has to be, or may be, provided by regulations.

(3) All regulations made under this section shall be published in the Official Gazette and shall have effect from the date of such publication.

111.

Laying of rules and regulations before State Legislature.--

Every rule made under section 109 and every regulation made under section 110 shall be laid, as soon as may be after it is made, before the State Legislature.

112.

Repeal and savings.--

(1) The Wakf Act, 1954 (29 of 1954) and the Wakf (Amendment) Act, 1984 (69 of 1984) are hereby repealed.

(2) Notwithstanding such repeal, anything done or any act ion taken under the said Acts shall be deemed to have been done or taken under the corresponding provisions of this Act .

(3) If, immediately before the commencement of this Act, in any State, there is in force in that State, any law which corresponds to this Act, that corresponding law shall stand repealed:

Provided that such repeal shall not affect the previous operation of that corresponding law, and subject thereto, anything done or any action taken in the exercise of any power conferred by or under the corresponding law shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act was in force on the day on which such things were done or act ion was taken.

113.

Power to remove difficulties.--

(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, not inconsistent with the provisions of this Act, remove the difficulty:

Provided that no such order shall be made after the expiry of the period of two years from the commencement of this Act.

(2) However, order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

1 Brought into force on 1-1-1996.

Mulla: Mahomedan law, Updated 20th edition/APPENDIX/APPENDIX V - THE CENTRAL WAKF COUNCIL RULES, 1998

APPENDIX V - THE CENTRAL WAKF COUNCIL RULES, 1998[1]

In exercise of the powers conferred by sub-sections (1) and (2) of section 12 of the Wakf Act, 1954 (43 of 1995), the Central Government hereby makes the following rules, namely:--

1.

Short title and commencement.--

(1) These rules may be called THE CENTRAL WAKF COUNCIL RULES, 1998.
(2) They shall come into force on the date of their publication in the Official Gazette.

2.

Definitions.--

In these rules, unless the context otherwise requires,--

(a) &uot;Act&uot; means the Wakf Act, 1954 (43 of 1995);
(b) &uot;Chairperson&uot; means the Chairperson of the Council;
(c) &uot;Council&uot; means the Central Wakf Council established under section 9 of the Act ;
[2'(*ca*) &uot;employee&uot; means an employee of the council;']
(d) &uot;Fund&uot; means the Central Wakf Fund formed under sub-section (2) of section 10 of the Act;
(e) &uot;Member&uot; means a member of the Council;
(f) &uot;Secretary&uot; means the Secretary of the Council.

3.

Register of members.--

(1) The Council shall maintain a roll of members indicating their name, occupation and address and every member shall sign the same.
(2) The member of the Council shall intimate the change of his address, if any, to the Secretary of the Council who shall cause to make the entry in the roll of members.

4.

Term of office, resignation and removal of members.--

(1) Save as otherwise provided in these rules, every member shall hold office for a term of five years from the date on which he assumed such office and shall be eligible for re-appointment.
(2) A member may resign his office by writing under his hand addressed to the Central Government and such resignation shall take effect from the date on which it is accepted by the Central Government or on the expiry of thirty days from the date of resignation, whichever is earlier.
(3) The Central Government may remove a member from the Council if he--
    (a) becomes an undischarged insolvent;
    (b) is, in the opinion of the Central Government, unfit to continue in office by reason of infirmity of mind or body;
    (c) gets convicted and sentenced to imprisonment for an offence which in the opinion of the Central Government involves moral turpitude;
    (d) is without obtaining leave of absence from the Chairperson of the Council, absent from three consecutive meetings of the Council;
    (e) in the opinion of the Central Government, has so abused the position of member as to render that person's continuance in the office detrimental to the purposes of the Act .

5.

Filling of casual vacancies.--

In the event of occurrence of any vacancy in the office of a member by reason of his death, resignation, removal or otherwise, the Central Government may appoint another person in his place and the person appointed to fill the vacancy shall hold office only for the remainder of the term for which the member in whose place he was so appointed.

6.

Committees of the Council.--

(1) The Council may appoint, from amongst its members, such number of Committees as the Council deems necessary but not exceeding four, and assign to them such functions, duties and powers as it may consider necessary for the purpose.
(2) The members of the Committee shall hold office for such period as may be specified by the Council.
(3) A member shall cease to be a member of a Committee if he ceases to be a member of the Council.
(4) The Committee of the Council may meet frequently depending upon the exigencies of work.
(5) The recommendations or decisions of the Committee shall be placed before the Council for its approval:

Provided that when the Council is not holding its meetings the recommendations or decisions shall be placed before the Chairperson by the Secretary of the Council and the Chairperson shall inform the Council of the recommendations or decisions taken in view thereof to the Council as soon as the Council meets:

Provided further that if the Committee is unable to meet for reasons beyond its control, the Secretary of the Council may submit the matter falling within purview of such Committee directly to the Chairperson for directions:

Provided also that all decisions taken by the Chairperson either on the recommendations of a Committee or otherwise shall be ratified forthwith by the Council.

7.

Secretary to the Council.--

[3] [&uot;(1) There shall be a Secretary to the Council, who shall be a Muslim;
(1a) The Chairperson shall make appointment to the post of Secretary, which shall be equivalent to a Group A post of the Central Government on such terms and conditions as may be determined by the Central Government&uot;.]
(2) The Secretary shall be the Chief Executive Officer of the Council and shall exercise powers of control, supervision and management over the office and[4] [employees] of the Council.
(3) The Secretary shall give effect to the decisions of, and carry out the instructions that may, from time to time, be given by the Council or the Chairperson:

Provided that when the Council is in the process of reconstitution or unable to meet for reasons beyond its control, the Secretary may seek the orders or approval of the Chairperson on an urgent matter:

Provided further that all such orders or approval of the Chairperson shall be placed before the Council for its decision, as soon as the Council meets.

(4) The Secretary shall ensure that all the records of the Council are properly maintained and kept in safe custody.
(5) The Secretary shall be responsible for the presentation of the annual statement of accounts of the Council duly authenticated in the proper form to the auditor appointed by the Central Government for this purpose.

8.

Meeting of the Council.--

(1) There shall ordinarily be two meetings of the Council every year which may be increased to five, if necessary.
(2) An extraordinary meeting of the Council may be convened by the Secretary, if the Chairperson so desires, or if a requisition in that behalf is presented to the Chairperson by at least one-third members of the Council and such requisition shall set out matters for consideration in the meeting.
(3) The date and venue of the meeting shall be such as may be decided by the Chairperson.
(4) An ordinary meeting of the Council may be called by giving not less than one month's notice in writing and an extraordinary meeting by giving not less than one week's notice in writing:

Provided that an extraordinary meeting may be called by giving shorter notice if the urgency of the business to be transacted, so requires.

9.

Procedure at meeting.--

(1) An agenda for every meeting of the Council shall be prepared by the Secretary with the approval of the Chairperson and shall be circulated to the members[5] [at least ten days in advance].
(2) The quorum necessary for the transaction of business at a meeting of the Council shall be one-third of the total number of members.
(3) Where a meeting has been adjourned for lack of quorum, the business which would have been brought before the original meeting if there had been a quorum present thereat, shall be brought before, and may be transacted at an adjourned meeting whether[6] [a quorum] or not.
[7] [&uot;(4) The Chairperson or in his absence, any member of the Council present as is decided by the Council, shall preside over the meeting of the Council.&uot;]
(5) All matters brought before any meeting of the Council shall be decided by the majority of the votes of the members present and voting.
(6) The Chairperson or the[8] [member] presiding over a meeting shall have and exercise a second or a casting vote in all cases of equality of votes.
(7) It shall be open to any member to raise any matter not included in the agenda with the

permission of the Chairperson.

[9] [&uot;(8) The minutes of the meeting shall be recorded by the Secretary and circulated to the members, with a period of ten day days after the approval of the Chairperson.&uot;]

(9) At the next meeting of the Council, the approved minutes of the previous meeting shall be read and confirmed.

10.

Invitees to the Council meeting.--

The Chairperson of the Council may invite any person or persons to attend any meeting of the Council but such persons shall have no right to vote.

11.

Travelling and daily allowances.--

(1) Every member, not being an officer of the Government, performing journeys to attend meeting of the Council or in connection with any work relating to the Council shall be entitled to travel, at his discretion, by air or by rail in first class or in second class AC coach wherever available.

(2) Every such member shall be entitled to the following travelling and daily allowances, namely:--

Travelling Allowance:

(*a*) By Air

(i) One standard air fare;

(ii) Incidental expenses subject to a maximum of rupees fifty.

(*b*) By Rail

(i) First Class/II AC coach rail fare, as the case may be;

(ii) Incidental expenses subject to a maximum of rupees fifty.

Note:--

I. In case of air journeys involving overnight halt (either due to nonavailability of connective service or due to the cancellation of connective service) at intermediary stations, for which the Airlines does not provide, at its expense, any facility for boarding or lodging to the touring member, he shall be entitled in respect of such overnight halt, one-half of the daily allowance admissible to him in addition to the incidental expenses.

II. While performing journeys by air, he shall purchase return ticket/wherever it is available, when it is expected that the return journey can be performed before the expiry of the period for which the return ticket is available.

III. In respect of journeys by road from residence to the air booking office or railway station and from these points to the place where a meeting of the Council is being held, he shall also be entitled to a road mileage at rupees eight per kilometre.

Daily Allowance:

(a) For each day of the meeting, he shall be entitled to a daily allowance of rupees five hundred, per day.

(b) In addition to the daily allowance for the days of the meeting, he shall be entitled to full day allowance for the day preceding and the day following the day of the meeting if--

(i) he arrives in the forenoon of the day immediately preceding the day of the meeting or on an earlier day;

(ii) he departs in the afternoon of the day following the day of the meeting or on a later day:

Provided that he shall be entitled to only one-half of the daily allowance for the day preceding the day of the meeting and the day following the day of the meeting if--

(i) he arrives in the afternoon of the day preceding the day of the meeting; or

(ii) he departs in the forenoon of the day following the day of the meeting.

(3) When a person attends any meeting of the Council or its Committee as an invitee, he may be paid travelling allowance and daily allowance at the rates admissible to a member of the Council.

(4) A claim of the member travelling by his own transport shall be restricted to rail fare by II Class AC coach by the shortest route.

(5) Notwithstanding anything contained in sub-rules (1), (2) and (3), if a member of the Council, is a Member of Parliament, or a State Legislature, he shall not be entitled to any remuneration other than the allowances, defined in clause (*a*) of section 2 of the Parliament (Prevention of Disqualification) Act, 1959 (10 of 1959), or, as the case may be, other than the allowances, if any, which a member of the Legislature of the State may, under any law for the time being in force in the State relating to the prevention of disqualification for Membership of the State Legislature, receive without incurring such disqualification.

12.

Travelling and daily allowances to members who are officers of Government.--

(1) Every member, being an officer of the Government, shall be entitled to such travelling allowance and daily allowance as are admissible under the rules applicable to him for journeys performed on official duty.

(2) Where any travelling or daily allowance is paid to a member being an officer of the Government, the Council shall make necessary arrangements for the reimbursement of the amount so paid to the authority employing such officer.

[10] ["13.

Recruitment and service conditions of Secretary and employees of the Council.--

(1) The Council shall, from time to time, recommend for the creation of such posts to the Central Government for approval as are necessary for the efficient performance of the functions of the Council.
(2) The Chairperson shall make appointments to the post of the Council, which shall be equivalent to Group A and Group B posts of the Central Government, on such terms and conditions as may be determined by the Central Government.
(3) The Secretary shall make appointments to. the posts of the Council, which shall be equivalent to Group C posts of the Central Government, on such terms and conditions as may be determined by the Central Government.
(4) The appointing authority of the employees of the Council shall be the disciplinary authority and shall be competent to impose all kinds of punishments including dismissal as per the Central Civil Services (Classification, Control and Appeal) Rules, 1965, as amended from time to time.
(5) In case of disciplinary proceedings against the employees of the Council, where the disciplinary authority is the Chairperson, the Council shall be the appellate authority and where the disciplinary authority is the Secretary, the Chairperson shall be the appellate authority.
(6) Except as otherwise provided by the Central Government, the scales of pay and terms and conditions of service of the various posts of the Council shall be the same as are applicable to the officers and other employees of the equivalent rank holding posts with corresponding scales of pay under the Central Government."]

14.

Control of the Fund.--

(1) The Secretary shall receive all payments to the fund and pass receipts on behalf of the Council.
(2) All monies received by the Council shall be deposited in the name and with the approval of the Council in the State Bank of India or any other nationalised bank as per instructions and guidelines of the Ministry of Finance issued in this regard from time to time:

Provided that for the purpose of disbursement of salary to the staff of the Council, an account of the Council shall also be opened in a branch of a nationalised bank in the vicinity of the Council's office.

15.

Power to sanction expenditure by Chairperson and Secretary.--

(1) Subject to the provisions made in the budget in this regard--
  (a) The Chairperson may sanction a recurring expenditure up to Rs. 10,000 (Rupees ten thousand only) and a non-recurring expenditure of Rs. 50,000 (Rupees fifty thousand only) on an item per annum.
  (b) The secretary may sanction a recurring expenditure up to Rs. 4,000 (Four thousand rupees only) and a non-recurring expenditure up to Rs. 8,000 (Eight thousand rupees only) on an item per annum.

(2) The Secretary or in his absence an officer subordinate to him, if so authorised, may draw cheques for the sanctioned expenditure.
(3) The officer, so authorised by the Secretary, may supervise the maintenance of all registers in the Council's office and certify the entries made therein.

16.

Annual Statement of Accounts.--

The Council shall maintain accounts and other records and cause its books of accounts to be balanced on the last working day of the month of March in each financial year and the annual statement of accounts shall be as set out in the Form appended to these rules.

17.

Powers of the Secretary in respect of staff and contingent expenditure.--

(1) The Secretary shall, in respect of all the staff of the Council under his control and supervision, have the power to sanction,--

(i) Increment;

(ii) Leave;

(iii) Allowances and advances as admissible to the Government employees. (2) The Secretary shall have the power to sanction,--

(i) expenditure up to Rs. 2,000 (two thousand rupees only) for repairs of furniture, typewriter, bicycle, clock, water-cooler, electric heater, which are on the stock register of the Council office and an expenditure up to Rs. 500 (five hundred rupees only) if any of the aforesaid article needs servicing;

(ii) expenditure up to Rs. 2,000 (two thousand rupees only) for arranging, entertainment such as dinner, lunch or at home for members and invitees of the Council or its Committees.[11] [* * *]

[12] [* * *]

[Forms]

FORM

[See rule 6]

CENTRAL WAKF COUNCIL NEW DELHI

Receipt and Payment Account for the Year ending on 31st March.....

Receipts	Amount (Rs.)	Payments	Amount (Rs.)
(1)	(2)	(3)	(4)
PART I—WAKF ACCOUNT:		ESTABLISHMENT EXPENDITURE:	
Opening Balance			
Cash in hand		Salary and Allowances	
Cash in Bank			
Cash in Bank (General Investment Account)		Travelling Allowance	
Grants-in-aid from Government of India		Leave Travel Concession	
Loans from Government of India		Overtime Allowance	
Loans and Advances from other sources		Honorarium	
Donations		Bonus	
Benefactions		Contributory Provident Fund (Employer's Contribution and Interest thereon)	
Contribution (1%) from State Wakf Boards		TRAVELLING ALLOWANCE AND DAILY ALLOWANCE TO MEMBERS:	
		(*a*) Central Wakf Council	
		(*b*) Planning and Advisory Committee	
		(*c*) Wakf Development Committee	
		(*d*) Monitoring Committee	
		(*e*) Education and Women Welfare Committee	
Dividend on Investment (including interest on Savings Bank Account)			
		RENT, RATES AND TAXES:	
		Rent of Office	
Encashment of Fixed Deposit Receipts		Rent of Secretary's Residence	
RECOVERIES OF ADVANCES:			
Festival Advance			
House Building Advance		OTHER CONTINGENCIES AND OFFICE EXPENSES:	
Motor Car/Scooter Advance		Printing and Stationery	

(1)	(2)	(3)	(4)
Cycle Advance		Postage and Telegram	
		Telephone	
Leave Travel Concession/ Travelling Allowance Advance			
Temporary Advances (to be specified)		Books and periodicals	
Other Receipts:		Conveyance Charges	
		Liveries	
Central Government Health Scheme		Bank Charges	
Contribution		Maintenance and Repairs	
Recovery of Rent		Entertainment/Hospitality	
Miscellaneous Receipts		Legal Expenses	
Sale proceeds of obsolete assets		Audit Fee	
		Advertisement	
		Other Miscellaneous Expenditure	
OTHER RECOVERIES:			
Recovery of Contributory		NON-RECURRING:	
Provident Fund subscription			
Recovery of Contributory			
Provident Fund Advance			
Income Tax		Furniture and Fixture	
		Office Machinery and Equipment (Including typewriters, duplicators, computer, etc.)	
General Provident Fund		Land and Building	
Central Government Employees Group		Vehicles	
Insurance Scheme (CGEGIS)			
Security Deposits		LOANS AND ADVANCES:	
		House Building Advance	
		Festival Advance	
		Scooter Advance	
		Cycle Advance	
		Travelling Allowance / Leave Travel Concession	
		Advance to staff	
		Travelling Allowance/Daily Allowance to Secretary and Staff	
		Temporary Advances	
		INVESTMENT:	
		Loans to State Wakf Boards	
		Amount of repaid loans Transferred to Revolving Fund	

(1)	(2)	(3)	(4)
		Donations	
		OTHER PAYMENTS:	
		Contributory Provident Fund subscription	
		Contributory Provident Fund—Refund of loans	
		Income Tax	
		General Provident Fund recoveries	
		Security Deposits	
		CLOSING BALANCE:	
		Cash in Hand	
		Cash at Bank	
		Cash at Bank (General Investment Account)	
Total (Part I)			
PART II—REVOLVING FUND:			
OPENING BALANCE:		Loans to State Wakf Boards for development and other schemes	
Cash in Hand		Investment in Fixed Deposits	
Cash at Bank		Other Payments	
Repayment of loans transferred to Revolving Fund		CLOSING BALANCE:	
Encashment of Fixed Deposit Receipts		Cash in Hand	
Other Receipts		Cash at Bank	
Total (Part II)			
PART III—EDUCATION FUND:			
OPENING BALANCE:			
Cash in Hand		Payment of scholarship for Technical Education	
Cash in Bank		*Ad hoc* assistance to students	
6% donation from Loanee Wakfs		50% matching grant to vocational institutions	
Other donations for educational schemes		Grants for Reading Room/ Library Scheme	
Dividend on investments (Interest on Fixed Deposit Receipts)		Expenditure on other educational schemes	
Encashment of Fixed Deposit Receipts		Investment in Fixed Deposits	
Refund by students		Other Payments	
Refund of scholarship by State Wakf Boards			
		CLOSING BALANCE:	

(1)	(2)	(3)	(4)
Refund of grants given under Career Guidance Scheme/ Reading Rooms/Library		Cash in Hand Cash at Bank	
Recovery of *ad hoc* grants from students			
Miscellaneous Receipts			
Total (Part III)			
Total Part I			
Total Part II			
Total Part III			
Grand TOTAL			

CENTRAL WAKF COUNCIL

Receipt and Payment Account for the Year ending on 31st March....

CONTRIBUTORY PROVIDENT FUND

Receipts	Amount (Rs.)	Payments	Amount (Rs.)
(1)	(2)	(3)	(4)
Opening Balance Cash in Hand Cash at Bank			
Employees subscription to Contributory Provident Fund		Advances to Staff	
Refund of Advances		Final Withdrawals	
Employer's contribution and interest thereon		Final payment	
		Investment	
Interest received on investment		Surplus interest transferred to Council's Account	
Deficient to interest account on Provident Fund Account met by Council		CLOSING BALANCE:	
		Cash in Hand	
Investment matured		Cash in Bank	
TOTAL			

CENTRAL WAKF COUNCIL NEW DELHI

Income and Expenditure Account for the Year ending on 31st March.....

Expenditure	Amount (Rs.)	Income	Amount (Rs.)
(1)	(2)	(3)	(4)
ESTABLISHMENT:			
Salary and Allowances		1% contribution from State Wakf Boards	
Travelling Allowances			

(1)	(2)	(3)	(4)
Leave Travel Concession		Government Grant/Loan	
Over Time Allowance			
Bonus		Donations	
Contributory Provident Fund—		Benefaction	
Employer's Contribution and interest thereon			
Honorarium to Staff			
TRAVELLING ALLOWANCE/ DAILY ALLOWANCE TO COUNCIL'S MEMBERS, ETC.			
Central Wakf Council			
Planning and Advisory Committee			
Wakf Development Committee			
Education and Women		Dividend on investments	
Welfare Committee			
Monitoring Committee		Part I	
Office Contingencies:		Part II	
Printing and Stationery		Part III	
Rent, Rates and Taxes		Recovery of Central Government Health	
Telephone		Scheme Contribution	
Postage and Telegram			
Liveries		Recovery of Rent	
Wages		Miscellaneous Income	
Conveyance charges		Less: Non-recurring expenses	
Maintenance and Repairs:		(Capital nature)	
(*a*) Building		Furniture and Fixture	
(*b*) Office Equipments		Office Machinery and	
Journals and Periodicals		Equipment (including	
Bank Charges		typewriters, duplicators and computers)	
Entertainment Expenses		Library Books	
Legal Charges		Vehicles	
Audit Fee			
Advertisements			
Other Expenditure		Excess of expenditure over income	
Part I			
Part II			
Part III			
SURPLUS TRANSFERRED TO WAKF FUND			
Excess of Income over Expenditure)			
TOTAL			

CENTRAL WAKF COUNCIL NEW DELHI

Balance Sheet as on 31st March....

Liability	Amount (Rs.)	Assets	Amount (Rs.)
(1)	(2)	(3)	(4)
PART I-WAKF FUND			
Capital Fund—As per last Balance Sheet (Equal to Assets)		Fixed Assets:	
Addition during the year		Land and Building—	
Written off during the year		As per last Balance Sheet	
Reserve and Surplus:		Addition during the year	
Excess of Income over		Furniture and Fixture—	
Expenditure		As per last Balance Sheet	
As per last Balance Sheet		Addition during one year	
Add during the year		Machinery and Equipments —As per last Balance Sheet	
Less deficit during the year		Adding during the year	
		Less: Written off	
		Vehicles: As per last Balance Sheet	
		Addition during the year	
		Less: Written off	
		Loans and Advances to State Wakf Boards:	
Grants utilised for Development			
Loan:			
As per last Balance Sheet		As per last Balance Sheet	
Paid during the year		Paid during the year	
Less recovered during the year		Recovered during the year	
Security/Earnest Money Deposit		Investment Wakf Fund	
		Account:	
Current Liabilities:		As per Balance Sheet	
		Deposit during the year	
Contributory Provident Fund (contra)		Encashed during the year	
Balance as per last Balance Sheet			
Add Subscription during the year		Loans and Advances:	
Add Employer's Contribution		Travelling Allowance/	
		Leave Travel Concession	
Add Dividend (interest)		—As per last Balance Sheet	
allowed during the year		Addition	
		Adjusted	
		House Building Advance	
		Motor Car/Scooter Advance	
		Cycle Advance	
		Festival Advance	

(1)	(2)	(3)	(4)
		Flood Advance	
		Other Advances	
		Security paid	
		Sundry Debtors:	
		Advance to Suppliers	
		Advance to Central Public	
		Works Department, etc.	
		Contributory Provident Fund	
		Investment	
		Advance to staff	
		Closing Balance	
		Closing Balance:	
		Cash in hand/Bank (General	
		Investment Account	
		Cast at Bank	
		Cash in Hand	
TOTAL			
PART II—RE VOLVING FUND			
Balance as per last Balance Sheet		Investment as per last Balance Sheet	
Add during the year		Add during the year	
Less loans paid during the year		Less Encashment	
Add Dividend on investment		Loans and Advances to	
		Wakf Board, etc.	
		Closing Balance:	
		Cash in Hand	
		Cash at Bank	
TOTAL			
PART III—EDUCATION FUND			
Balance as per Last Balance Sheet		Investments:	
Add 6% Donation		As per last Balance Sheet	
Add other Donation		Add during the year	
Add Dividend on Investments		Less encashed during the year	
Less payments made during		Advance to Students	
the year		Advance to Others	
		Closing Balance:	
		Cash in Hand	
		Cash at Bank	
TOTAL			

1 *Vide* G.S.R. 593(E), dated 30-9-1998, published in the Gazette of India, Ext., Pt. II, S. 3(i), dated 30-9-1998.

2 Ins. by G.S.R. 240(E), dated 22-3-2012.

3 Subs. by G.S.R. 240(E), dated 22-3-2012.

4 Subs. by G.S.R. 240(E), dated 22-3-2012, for the word &uot;staff&uot;.

5 Ins. by G.S.R. 240(E), dated 22-3-2012.

6 Subs. by G.S.R. 240(E), dated 22-3-2012, for the words &uot;there is quorum present&uot;.

7 Subs. by G.S.R. 240(E), dated 22-3-2012.

8 Subs. by G.S.R. 240(E), dated 22-3-2012, for the word &uot;person&uot;.

9 Subs. by G.S.R. 240(E), dated 22-3-2012.

10 Subs. by G.S.R. 240(E), dated 22-3-2012.

11 Rule 18 omitted by G.S.R. 240(E), dated 22-3-2012.

12 Rule 19 omitted by G.S.R. 240(E), dated 22-3-2012.

APPENDIX VI - THE WAKF ACT, 1954 [1]

(29 OF 1954)

[21st *May* , 1954.]

An Act to provide for the better administration and supervision of wakfs .

BE it enacted by Parliament in the Fifth Year of the Republic of India as follows:-

CHAPTER I

PRELIMINARY

1.

Short title, extent and commencement.--

(1) This Act may be called the Wakf Act, 1954.
(2) It extends to the whole of India except the State of Jammu and Kashmir.
(3) It shall come into force in a State to which this Act extends on such date [2] as the Central Government may, by notification in the Official Gazette, appoint in this behalf for that State; and different dates may be appointed for different States:

Provided that in respect of any of the States of Bihar, [3] [***] Uttar Pradesh and West Bengal, no such notification shall be issued except on the recommendation of the State Government concerned:

[4] [*Provided further* that where on account of the territorial changes brought about by the States Reorganisation Act, 1956, (37 of 1956) this Act is, as from the 1st day of November, 1956, applicable only to a part of a State, the Central Government may, by notification in the Official Gazette, bring this Act into force in the remaining part of that State with effect from such date[5] as may be specified in the

notification.]

2.

Application of the Act.--

Save as otherwise expressly provided under this Act, this Act shall apply to all wakfs whether created before or after the commencement of this Act :

Provided that nothing in this Act shall apply to Durgah Khawaja Saheb, Ajmer, to which [6] [the Durgah Khawaja Saheb Act, 1955, (36 of 1955.) applies].

3.

Definitions.--

In this Act, unless the context otherwise requires,--

(a) &uot;beneficiary&uot; means a person or object for whose benefit a wakf is created and includes religious, pious and charitable objects and any other objects of public utility [7] [sanctioned by he Muslim law];

(b) &uot;benefit&uot; does not include any benefit which a mutawalli is entitled to claim solely by reason of his being such mutawalli;

(c) &uot;Board&uot; means a Board of Wakfs established under [8] [subsection (1), or as the case may be, under sub- section (1A) of section 9];

(d) &uot;Commissioner&uot; means a Commissioner of Wakfs appointed under section 4 and includes any additional or assistant commissioner of wakfs;

[9] [(dd) &uot;Council&uot; means the Central Wakf Council established under section 8A;]

(e) &uot;member&uot; means a member of the Board and includes the Chairman;

(f) &uot;mutawalli&uot; means any person appointed either verbally or under any deed or instrument by which a wakf has been created or by a competent authority to be the mutawalli of a wakf and includes any naib-mutawalli, khadim, mujawar, sajjadanishin, amin or other person appointed by a mutawalli to perform the duties of a mutawalli and, save as otherwise provided in this Act, any person or Committee for the time being managing or administering any wakf property as such;

[10] [(g) &uot;net annual income&uot;, in relation to a wakf, means the gross income thereof from all sources in a year excluding only--

(i) land revenue, cess, rates and taxes payable to the Government or any local authority; and

(ii) donations given or offerings made with a specific direction that they shall form part of the corpus of the wakf:

Provided that the interest or income, if any, accruing from such donations or offerings shall be taken into account in calculating the gross annual income;]

(h) &uot;person interested in a wakf&uot; means any person who is entitled to receive any pecuniary or other benefits from the wakf and includes,--

(i) any person who has a right to worship or to perform any religious rite in a mosque, idgah, imambara, dargah, khangah, maqbara, graveyard or any other religious institution connected with the wakf or to participate in any religious or charitable institution under the wakf;

(ii) the wakif and any descendant of the wakif and the mutawalli;

(i) &uot;prescribed&uot;, [11] [except in Chapter IIA], means prescribed by rules made by the State Government under this Act and includes the regulations made by the Board under this Act ;

(j) &uot;Shia wakf&uot; means a wakf governed by Shia law;

(k) &uot;Sunni wakf&uot; means a wakf governed by Sunni law;

(l) &uot;wakf&uot; 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;

[12] [(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 &uot;wakif&uot; means any person making such dedication;

(m) &uot;wakf deed&uot; means any deed or instrument by which a wakf has been created and includes and valid subsequent deed or instrument by which any of the terms of the original dedication have been varied.

CHAPTER II

SURVEY OF WAKF

4.

Preliminary survey of wakfs.--

(1) The State Government may, by notification in the Official Gazette, appoint for the State a Commissioner of Wakfs and as many additional or assistant commissioners of wakfs as may be necessary for the purpose of making a survey of wakf properties existing in the State at the date of the commencement of this Act.

(2) All additional and assistant commissioners of wakfs shall perform their functions under this Act under the general supervision and control of the Commissioner of Wakfs.

(3) The Commissioner shall, after making such inquiry as he may consider necessary, submit his report [13] [in respect of wakfs existing at the date of the commencement of this Act in the State or any part thereof], to the State Government containing the following particulars, namely:--

(a) the number of wakfs [14] [in the State, or as the case may be, any part thereof], showing the Shia wakfs and Sunni wakfs separately;

(b) the nature and objects of each wakf;

(c) the gross income of the property comprised in each wakf;

(d) the amount of land revenue, cesses, rates and taxes payable in respect of such property;

(e) the expenses incurred in the realisation of the income and the pay or other remuneration of the mutawalli of each wakf; and

(f) such other particulars relating to each wakf as may be prescribed.

(4) The commissioner shall, while making any inquiry, have the same powers as are vested in a civil court under the Code of Civil Procedure. 1908 (5 of 1908) in respect of the following matters, namely:--

(a) summoning and examining any witness;

(b) requiring the discovery and production of any document;

(c) requisitioning any public record from any court or office;

(d) issuing commissions for the examination of any witness or accounts;

(e) making any local inspection or local investigation;

(f) any other matter which may be prescribed.

(5) If, during any such inquiry, any dispute arises as to whether a particular wakf is a Shia wakf or Sunni wakf and there are clear indications in the deed of wakf as to its nature, the dispute shall be decided on the basis of such deed.

5.

Publication of list of wakfs.--

(1) On receipt of a report under sub-section (3) of section 4, the State Government shall forward a copy of the same to the Board.

(2) The Board shall examine the report forwarded to it under sub-section (1) and publish, in the Official Gazette, a list of wakfs [15] [existing in the State, or as the case may be, the part of the (State retrospective effect). to which the report relates, and] containing such particulars as may be prescribed.

6.

Disputes regarding wakfs.--

(1) If any question arises [16] [whether a particular property specified as wakf property in a list of wakfs published under sub- section (2) of section 5 is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf], the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a civil court of competent jurisdiction for the decision of the question and the decision of the civil court in respect of such matter shall be final:

Provided that no such suit shall be entertained by the civil court after the expiry of one year from the date of the publication of the list of wakfs under sub- section (2) of section 5:

[17] [Provided further that in the case of the list of wakfs relating to any part of the State and published or purporting to have been published before the commencement of the Wakf (Amendment) Act, 1969, (38 of 1969.) such suit may be entertained by the civil court within the period of one year from such commencement.]

(2) Notwithstanding anything contained in sub-section (1), no proceeding under this Act in respect of any wakf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.

(3) The Commissioner shall not be made a party to any suit under sub-section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules made thereunder.

(4) The list of wakfs published under sub- section (2) of section 5 shall, unless it is modified in pursuance of a decision of the civil court under sub-section (1), be final and conclusive.

7.

Recovery of costs of survey.--

(1) The total cost of making a survey [18] [including the cost of [19] [publication of the list or lists of wakfs]] under this Chapter shall be borne [20] [by all the mutawallis of the wakfs the net annual income whereof exceeds one hundred rupees, in proportion to the net annual income accruing in the State to such wakfs], such proportion being assessed by the Commissioner.

(2) Notwithstanding anything contained in the deed or instrument by which the wakf was

created, any mutawalli may pay from the income of the wakf any sum due from him under subsection (1).

(3) Any sum due from a mutawalli under sub-section (1) may, on a certificate issued by the State Government, be recovered from the property comprised in the wakf in the same manner as an arrear of land revenue.

8.

Chapter II not to apply to certain States.--

The provisions of this Chapter shall not apply to any State where a survey of wakf properties existing in the State has, before the commencement of this Act, been made under any law in force in that State.

[21] [CHAPTER IIA

CENTRAL WAKF COUNCIL

8A.

Establishment and constitution of the Central Wakf Council.--

(1) For the purpose of advising it, on matters concerning the working of Boards and the due administration of wakfs, the Central Government may, by notification in the Official Gazette, establish a Council to be called the Central Wakf Council.

(2) The Council shall consist of a Chairman, who shall be the Union Minister in charge of wakfs, and such other members not exceeding twenty in number, as may be appointed by the Central Government.

(3) The term of office of, the procedure to be followed in the discharge of their functions by, and the manner of filling casual vacancies among, members of the Council shall be such as may be prescribed by rules made by the Central Government.

8B.

Finances of the Council.--

(1) Every Board shall pay from its Wakf Fund annually to the Council such contribution as is equivalent to one per cent. of the aggregate of the net annual income [* * *] [22] of the wakfs in respect of which contribution is payable under sub-section (1) of section 46:

Provided that where the Board in the case of any particular wakf has remitted under sub- section (2) of section 46 the whole of the contribution payable to it under sub-section (1) of that section, then for calculating the contribution payable to the Council under this section, the net annual income [* * *] [23] of the wakf in respect of which such remission has been granted shall not be taken into account.

(2) All monies received by the Council under sub-section (1) and all other monies received by it as donations, benefactions and grants shall form a fund to be called the Central Wakf Fund.

(3) Subject to any rules that may be made by the Central Government in this behalf, the Central Wakf Fund shall be under the control of the Council and may be applied for such purposes as the Council may deem fit.

8C.

Accounts and audit.--

(1) The Council shall cause to be maintained such books of account and other books in relation to its accounts in such form and in such manner as may be prescribed by rules made by the Central Government.

(2) The accounts of the Council shall be audited and examined annually by such auditor as may be appointed by the Central Government.

(3) The costs of the audit shall be paid from the Central Wakf Fund.

8D.

Power of Central Government to make rules.--

(1) The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:--

(a) the term of office of, the procedure to be followed in the discharge of their functions by, and the manner of filling casual vacancies among, the members of the Council;

(b) control over and application of the Central Wakf Fund;

(c) the form and manner in which accounts of the Council may be maintained.

(3) Every rule made by the Central Government under this Chapter shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days, which may be comprised in one session or [24] [in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid,] both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.]

CHAPTER II

ESTABLISHMENT OF BOARDS AND THEIR FUNCTIONS

9.

Incorporation.--

(1) With effect from such date as the State Government may, by notification in the Official Gazette, appoint in this behalf, there shall be established a Board of Wakfs under such name as may be specified in the notification.

[25] [(1A) Notwithstanding anything contained in sub-section (1), if the Shia wakfs in any State constitute in number more than fifteen per cent. of all the wakfs in the State or if the income of the properties of the Shia wakfs in the State constitutes more than fifteen per pent. of the total income of the properties of all the wakfs in the State, the State Government may, by notification in the Official Gazette, establish a Board of Wakfs each for Sunni Wakfs and for Shia Wakfs under such names as

may be specified in the notification and in such a case, the provisions of this Act shall, in their application to the State, have effect as if the amendments specified in the Schedule had been made.]

(2) [26] [The Board] shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property and to transfer any such property subject to such conditions and restrictions as may be prescribed and shall by the said name sue and be sued.

10.

Composition of the Board.-- [27]

[(1) The Board shall consist of--
(a) eleven members, in the case of a State and the Union Territory of Delhi ; and
(b) five members, in the case of any other Union Territory.]

(2) There shall be a Chairman of the Board who shall be elected by the members from amongst themselves.

11.

Appointment of members.--

The members of the Board shall be appointed by the State Government, by notification in the Official Gazette, from any one or more of the following categories of persons, namely:--

(a) members of the State Legislature and members of Parliament representing the State;
(b) persons having [28] [* * *] knowledge of Muslim law and representing associations such as State Jamiat-ul-Ulama-i-Hind (whether such persons are Hanafi, Ahle-Hadis or Shefai) or State Shia Conference;
(c) persons having [29] [* * *] knowledge of administration, finance or law;
(d) mutawallis of wakfs situate within the State:

Provided that in no case more than one mutawalli shall be appointed to the Board:

Provided further that in determining the number of Sunni members or Shia members in the Board, the State Government shall have regard to the number and value of Sunni wakfs and Shia wakfs to be administered by the Board.

12.

Term of office.--

The members of the Board shall hold office for five years :

Provided that a member shall, notwithstanding the expiration of his term of office, continue to hold office until the appointment of his successor is notified in the Official Gazette.

13.

Disqualifications for being appointed, or for continuing as, a member of the Board.--

A person shall be disqualified for being appointed, or for continuing as, a member of the Board--

(a) if he is not a Muslim and is less than twenty-one years of age;

(b) if he is found to be a person of unsound mind;
(c) if he is an undischarged insolvent;
(d) if he has been convicted of an offence involving moral turpitude;
(e) if he has, on any previous occasion, been removed from the office of a member or has been removed by order of a competent court from any position of trust either for mismanagement or corruption.

14.

Meetings of the Board.--

(1) The Board shall meet for the transaction of business at such times and places as may be prescribed.
(2) The Chairman, or in his absence, any member chosen by the members from amongst themselves, shall preside at a meeting of the Board.
(3) Subject to the provisions of this Act, all questions which come before any meeting of the Board shall be decided by a majority of votes of the members present, and in the case of equality of votes, the chairman or, in his absence, any other person presiding shall have a second or casting vote.

15.

Functions of the Board.--

(1) Subject to any rules that may be made under this Act, the general superintendence of all wakfs in a State shall vest in the Board established for the State ; and it shall be the duty of the Board so to exercise its powers under this Act as to ensure that the wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such wakfs were created or intended:

Provided that in exercising its powers under this Act in respect of any wakf, the Board shall act in conformity with the directions of the wakif, the purposes of the wakf and any usage or custom of the wakf sanctioned by the Muslim law.

(2) Without prejudice to the generality of the foregoing power, the functions of the Board shall be--
(a) to maintain a record containing information relating to the origin, income, object and beneficiaries of every wakf;
(b) to ensure that the income and other property of wakfs are applied to the objects and for the purposes for which such wakfs were created or intended;
(c) to give directions for the administration of wakfs;
(d) to settle schemes of management for a wakf:

Provided that no such settlement shall be made without giving the parties affected an opportunity of being heard;
(e) [30] [to direct--
(i) the utilization of the surplus income of a wakf consistently with the objects of the wakf;
(ii) in what manner the income of a wakf, the objects of which are not evident from any written instrument, shall be utilized;
(iii) in any case where any object of a wakf has ceased to exist or has

become incapable of achievement, that so much of the income of the wakf as was previously applied to that object shall be applied to any other object which shall be similar, or as nearly as practicable similar, to the original object:

Provided that no direction shall be given under this clause without giving the parties affected an opportunity of being heard.]

Explanation .--For the purposes of this clause, the powers of the Board shall be exercised,--

(i) in the case of a Sunni wakf, by the Sunni members of the Board only ; and

(ii) in the case of a Shia wakf, by the Shia members of the Board only :

Provided that where having regard to the number of the Sunni or Shia members in the Board and other circumstances, it appears to the Board that its power should not be exercised by such members only, it may co-opt such other Muslims being Sunnis or Shias, as the case may be, as it thinks fit, to be temporary members of the Board for exercising its powers under this clause;

(f) to scrutinise and approve the budgets submitted by mutawallis and to arrange for the auditing of accounts of wakfs;

(g) to appoint and remove mutawallis in accordance with the provisions of this Act ;

(h) to take measures for the recovery of lost properties of any wakf;

(i) to institute and defend suits and proceedings in a court of law relating to wakfs;

[31] [(j) to sanction in accordance with the Muslim law, any transfer of immovable property of a wakf by way of sale, gift, mortgage, exchange or lease, as required by section 36A:

Provided that no such sanction shall be given unless at least two-thirds of the members of the Board vote in favour of such transaction;]

(k) to administer the Wakf Fund;

(l) to call for such returns, statistics, accounts and other information from the mutawallis with respect to the wakf property as the Board may, from time to time, require;

(m) to inspect, or cause inspection of, wakf properties, accounts or records or deeds and documents relating thereto;

(n) to investigate and determine the nature and extent of wakfs and wakf property ; and to cause, whenever necessary, a survey of the wakf properties;

(o) generally do all such acts may be necessary for the due control, maintenance and administration of wakfs.

(3) Where the Board has settled any scheme of management under clause (d) of sub-section (2) or given any direction under clause (e) of sub- section (2), any person interested in the wakf or affected by such settlement or direction may institute a suit in a civil court of competent jurisdiction for setting aside such settlement or directions and the decision of the civil court thereon shall be final.

16.

Committees of the Board.--

(1) The Board may, whenever it considers necessary, establish either generally or for a particular purpose or for any specified area or areas committees for the supervision of wakfs.

(2) The constitution, functions and duties of such committees shall be determined from time to time by the Board :

Provided that it shall not be necessary for the members of such committees to be members of the Board.

17.

Resignation of Chairman and members.--

The Chairman or any other member may resign his office by writing under his hand addressed to the State Government :

Provided that the Chairman or the members shall continue in office until the appointment of his successor is notified in the Official Gazette.

18.

Removal of Chairman and members.--

(1) The State Government may, by notification in the Official Gazette, remove the Chairman of the Board or any member thereof if he--

(a) is or becomes subject to any disqualifications specified in section 13; or

(b) refuses to act or is incapable of acting or act s in a manner which the State Government, after hearing any explanation that he may offer, considers to be prejudicial to the interests of the wakfs; or

(c) fails, without excuse sufficient in the opinion of the Board, to attend three consecutive meetings of the Board.

(2) Where the Chairman of the Board is removed under sub-section (1), he shall also cease to be a member of the Board.

19.

Filling of a vacancy.--

When the seat of a member becomes vacant by his removal, resignation, death or otherwise, a new member shall be appointed in his place and such member shall hold office so long as the member whose place he fills would have been entitled to hold office, if such vacancy had not occurred.

20.

Vacancies amongst members of defect in the constitution not to invalidate acts or proceedings of the Board.--

No act or proceeding of the Board shall be invalid by reason only of the existence of any vacancy amongst its members or any defect in the constitution thereof.

21.

Secretary and other officers of the Board.--

(1) There shall be a Secretary to the Board who shall be a Muslim and shall be appointed by the State Government, in consultation with the Board.
(2) The Secretary shall be the Chief Executive Officer of the Board and shall be under its administrative control.
(3) The Board may appoint such other officers and servants as it may consider necessary for the efficient performance of its functions under this Act.

22.

Delegation.--

The Board may, by a general or special order in writing, delegate to the Chairman or any other member or to the Secretary or any other officer or servant of the Board [32] [or any committee thereof], subject to such conditions and limitations (if any) as may be specified in the order, such of its powers and duties under this Act as it may deem necessary.

23.

Inspection of records and issue of copies.--

(1) The Board may allow inspection of its proceedings or other records in its custody and issue copies of the same on payment of such fees and subject to such conditions as may be prescribed.
(2) All copies issued under this section shall be certified by the Secretary of the Board in the manner provided in section 76 of the Indian Evidence Act, 1872. (1 of 1872.)
[33] [(3) The powers conferred on the Secretary by sub- section (2) may also be exercised by such other officer or officers of the Board as may either generally or specially be authorised in this behalf by the Board.]

24.

Prevention of disqualification for membership of Parliament.--

It is hereby declared that the offices of Chairman and members of a Board shall not disqualify, and shall be deemed never to have disqualified, the holders thereof for being chosen as, or for being, members of Parliament.

CHAPTER IV

REGISTRATION OF WAKFS

25.

Registration.--

(1) Every wakf whether created before or after the commencement of this Act shall be registered at the office of the Board.
(2) Application for registration shall be made by the mutawalli :

Provided that such applications may be made by the wakif or his descendants or a beneficiary of the wakf or any Muslim belonging to the sect to which the wakf belongs.

(3) An application for registration shall be made in such form and manner and at such place as the Board may prescribe and shall contain the following particulars, so far as possible--

(a) a description of the wakf properties sufficient for the identification thereof;

(b) the gross annual income from such properties;

(c) the amount of land revenue and cesses, and of all rates and taxes annually payable in respect of the wakf properties;

(d) an estimate of the expenses annually incurred in the realisation of the income of the wakf properties;

(e) the amount set apart under the wakf for--

(i) the salary of the mutawalli and allowances to individuals;

(ii) purely religious purposes;

(iii) charitable purposes; and

(iv) any other purposes;

(f) any other particulars prescribed by the Board.

(4) Every such application shall be accompained by a copy of the wakf deed or if no such deed has been executed or a copy thereof cannot be obtained, shall contain full particulars, as far as they are known to the applicant, of the origin, nature and objects of the wakf.

(5) Every application made under sub- section (2) shall be signed and verified by the applicant in the manner provided in the Code of Civil Procedure, 1908 (5 of 1908.) for the signing and verification of pleadings.

(6) The Board may require the applicant to supply any further particulars or information that it may consider necessary.

(7) On receipt of an application for registration, the Board may, before the registration of the wakf, make such inquiries as it thinks fit in respect of the genuineness and validity of the application and the correctness of any particulars therein and when the application is made by any person other than the person administering the wakf property, the Board shall, before registering the wakf, give notice of the application to the person administering the wakf property and shall hear him if he desires to be heard.

(8) In the case of wakfs created before the commencement of this Act, every application for registration shall be made, within three months from such commencement and in the case of wakfs created after such commencement, within three months from the date of the creation of the wakf.

26.

Register of wakfs.--

The Board shall maintain a register of wakfs which shall contain in respect of each wakf copies of the wakf deeds, when available and the following particulars, namely:--

(a) the class of the wakf;

(b) the name of the mutawalli;

(c) the rule of succession to the office of mutawalli under the wakf deed or by custom or by usage;

(d) particulars of all wakf properties and all title deeds and documents relating thereto;

(e) particulars of the scheme of administration and the scheme of expenditure at the time of registration;

(f) such other particulars as may be prescribed.

27.

Decision if a property is wakf property.--

(1) The Board may itself collect information regarding any property which it has reason to believe to be wakf property and if any question arises whether a particular property is wakf property or not or whether a wakf is a Sunni wakf or a Shia wakf, it may, after making such inquiry as it may deem fit, decide the question.

(2) The decision of the Board on any question under sub-section (1) shall, unless revoked or modified by a civil court of competent jurisdiction, be final.

28.

Power to cause registration of wakf and to amend register.--

The Board may direct a mutawalli to apply for the registration of a wakf, or to supply any information regarding a wakf or may itself cause the wakf to be registered or may at any time amend the register of wakfs.

29.

Notification of change in registered wakfs.--

(1) In the case of any change in the management of a registered wakf due to the death or retirement or removal of the mutawalli, the incoming mutawalli shall forthwith, and any other person may, notify the change to the Board.

(2) In the case of any other change in any of the particulars mentioned in section 25, the mutawalli shall, within three months from the occurrence of the change, notify such change to the Board.

30.

Savings.--

Notwithstanding anything contained in this Chapter, where any wakf has been registered before the commencement of this Act under any law for the time being in force, it shall not be necessary to register the wakf under the provisions of this Act and any such registration made before such commencement shall be deemed to be a registration made under this Act .

CHAPTER V

MUTAWALLIS AND WAKF ACCOUNTS

31.

Budget.--

Every mutawalli of a wakf shall in every year prepare, in such form and at such time as may be prescribed, a budget for the next financial year showing the estimated receipts and expenditure during that financial year and submit it to the Board for approval.

32.

Submission of accounts of wakfs.--

[34]

[(1) Every mutawalli shall keep regular accounts.]

[35] [(2)] Before the 1st day of May next following the date on which the application referred to in section 25 has been made and thereafter before the 1st day of May in every year, every mutawalli of a wakf shall prepare and furnish to the Board a full and true statement of accounts, in such form and containing such particulars as may be prescribed by the Board, of all moneys received or expended by the mutawalli on behalf of the wakf during the period of twelve months ending on the 31st day of March or, as the case may be, during that portion of the said period during which the provisions of this Act have been applicable to the wakf:

Provided that the date on which the annual accounts are to be closed may be varied at the discretion of the Board.

33.

Audit of accounts of wakfs.--

(1) The accounts of wakfs submitted to the Board under section 32 shall be audited and examined annually or at such other intervals as the Board may determine by an auditor appointed by the Board.

(2) The auditor shall submit his report to the Board and the report of the auditor shall, among other things, specify all cases of irregular, illegal or improper expenditure or of failure to recover money or other property caused by neglect or misconduct and any other matter which the auditor considers it necessary to report ; and the report shall also contain the name of any person who, in the opinion of the auditor, is responsible for such expenditure or failure and the auditor shall in every such case certify the amount of such expenditure or loss as due from such person.

(3) The costs of the audit of the accounts of a wakf shall be paid from the Wakf Fund.

34.

Board to pass orders on auditor's report.--

The Board shall examine the auditor's report, and may call for the explanation of any person in regard to any matter mentioned therein, and shall pass such orders on the report as it thinks fit.

35.

Sums certified due recoverable as arrears of land revenue.--

(1) Every sum certified to be due from any person by an auditor in his report under section 33 unless such certificate is modified or cancelled by an order of the Board made under section 34, and every sum due on a modified certificate shall be paid by such person within sixty days after the service of a demand for the same issued by the Board.

(2) If such payment is not made in accordance with the provisions of sub-section (1), the sum payable may, on a certificate issued by the Board after giving the person concerned an opportunity of being heard, be recovered in the same manner as an arrear of land revenue.

36.

Duties of mutawallis.--

It shall be the duty of every mutawalli

(a) to carry out the directions of the Board;
(b) to furnish such returns and supply such information or particulars as may from time to time be required by the Board;
(c) to allow inspection of wakf properties, accounts or records or deeds and documents relating thereto;
(d) to discharge all public dues ; and
(e) to do any other act which he is lawfully required to do by or under this Act.

[36] **[36A.**

Transfer of immovable property of wakfs.--

Notwithstanding anything contained in the wakf deed, no transfer of any immovable property of a wakf by way of--

(i) sale, gift, mortgage or exchange ; or
(ii) lease for a period exceeding three years in the case of agricultural land, or for a period exceeding one year in the case of non-agricultural land or building,

shall be valid without the previous sanction of the Board.

36B.

Recovery of wakf property transferred in contravention of section 36A.--

(1) If the Board is satisfied, after making an inquiry in such manner as may be prescribed, that any immovable property of a wakf entered as such in the register of wakfs maintained under section 26, has been transferred without the previous sanction of the Board in contravention of the provisions of section 36A, it may send a requisition to the Collector within whose jurisdiction the property is situate to obtain and deliver possession of the property to it.
(2) On receipt of a requisition under sub-section (1), the Collector shall pass an order directing the person in possession of the property to deliver the property to the Board within a period of thirty days from the date of the service of the order.
(3) Every order passed under sub- section (2) shall be served--
  (a) by giving or tendering the order or by sending it by post to the person for whom it is intended; or
  (b) if such person cannot be found, by affixing the order on some conspicuous part of his last-known place of abode or business, or by giving or tendering the order to some adult male member or servant of his family or by causing it to be affixed on some conspicuous part of the property to which it relates:

  Provided that where the person on whom the order is to be served is a minor, service upon his guardian or upon any adult male member or servant of his family shall be deemed to be service upon the minor.

(4) Any person aggrieved by the order of the Collector under sub- section (2) may, within a period of thirty days from the date of the service of the order, prefer an appeal to the district court within whose jurisdiction the property is situate and the decision of the district court on such appeal shall be final.

Explanation .--In this sub-section, &uot;district court&uot; means, in any area for which there is a city civil court, that court, and, in any other area, the principal civil court of original jurisdiction.

(5) Where an order passed under sub- section (2) has not been complied with and the time for appealing against such order has expired without an appeal having been preferred or the appeal, if any, preferred within that time has been dismissed, the Collector shall obtain possession of the property in respect of which the order has been made, using such force, if any, as may be necessary for the purpose and deliver it to the Board.

(6) In exercising his functions under this section, the Collector shall be guided by such rules as may be made in this behalf by the State Government.]

37.

Mutawalli entitled to pay certain costs from income of wakf property.--

Notwithstanding anything contained in the wakf deed, every mutawalli may pay from the income of the wakf property any expenses properly incurred by him for the purpose of enabling him to furnish any particulars, documents or copies under section 25 or any accounts under section 32 or any information or documents required by the Board or for the purpose of enabling him to carry out the directions of the Board.

38.

Power of the Board to pay dues in case of default by mutawalli.--

(1) Where a mutawalli refuses to pay or fails to pay any revenue, cess, rates or taxes due to the Government or any local authority, the Board may discharge the dues from the Wakf Fund and may recover the amount so paid from the wakf property and may also recover damages not exceeding twelve and a half per cent. of the amount so paid.

(2) Any sum of money due under sub-section (1) may, on a certificate issued by the Board after giving the mutawalli concerned an opportunity of being heard, be recovered in the same manner as an arrear of land revenue.

39.

Creation of reserve fund.--

For the purpose of making provision for the payment of rent and of revenue, cess, rates and taxes due to the Government or any local authority, for the discharge of the expenses of the repair of the wakf property and for the preservation of the wakf property, the Board may direct the creation and maintenance, in such manner as it may think fit, of a reserve fund from the income of a wakf.

40.

Extension of time.--

The Board may, if it is satisfied that it is necessary so to do, extend the time within which any act is required to be done by the mutawalli under this Act.

41.

Penalties.--

(1) If a mutawalli fails--
(a) to apply for the registration of a wakf;
(b) to furnish statements of particulars or accounts or returns as required by this Act ;
(c) to supply information or particulars as required by the Board;
(d) to allow inspection of wakf properties, accounts or records or deeds and documents relating thereto;
(e) to deliver possession of any wakf property, if ordered by the Board or the court;
(f) to carry out the directions of the Board; [37] [* * *]
(h) to discharge any public dues; or
(i) to do any other act which he is lawfully required to do by or under this Act,

he shall, unless he satisfies the court that there was reasonable cause for his failure, be punishable with fine which may extend to one thousand rupees.

(2) No court shall take cognizance of an offence punishable under this Act save upon complaint made by the Board or an officer duly authorized by the Board in this behalf.
(3) No court inferior to that of a presidency magistrate or a magistrate of the first class shall try any offence punishable under this Act .

42.

Power to appoint mutawallis in certain cases.--

When there is a vacancy in the office of the mutawalli of a wakf and there is no one to be appointed under the terms of the deed of the wakf, or where the right of any person to act as mutawalli is disputed, the Board may appoint any person to act as mutawalli for such period and on such conditions as it may think fit.

43.

Removal of mutawallis.--

(1) Notwithstanding anything contained in any other law or the deed of wakf, the Board may remove a mutawalli from his office if such mutawalli--
(a) has been convicted more than once of an offence punishable under section 41; or
[38] [(b) has been convicted of an offence of criminal breach of trust or any other offence involving moral turpitude; or
(c) misappropriates or deals improperly with the properties of the wakf; or
(d) is of unsound mind or is suffering from other mental or physical defect or infirmity which would render him unfit to perform the functions and discharge the duties of a mutawalli; or
(e) has failed to pay, without reasonable excuse, for two consecutive years, the contribution payable by him under section 46.]

(2) Where a committee is appointed by the Board [39] [or any person or authority not being a court of law] to act as a mutawalli for managing or administering any wakf property and the committee, in the opinion of the Board, is unable to perform, or has persistently made default in the performance of, the duty imposed on it by or under this Act or has exceeded or abused its powers, the Board may supersede the committee and appoint any other person or committee to act as the mutawalli of the wakf property.
(3) For the removal of doubts it is hereby declared that the removal of a person from the office of the mutawalli shall not affect his personal rights, if any, in respect of the wakf

property either as a beneficiary or in any other capacity or his rights, if any, as a sajjadanishin.

(4) No act ion shall be taken by the Board under sub- section (1) or sub- section (2), unless it has held an inquiry into the matter in the prescribed manner and the decision has been taken by a majority of not less than three-fourths of the members of the Board.

[40] [(4A) A mutawalli who is aggrieved by an order passed under any of the clauses (c) to (e) of sub- section (1) or under sub- section (2) may, within one month from the date of the receipt by him of the order, appeal against the order to the State Government and the decision of the State Government on such appeal shall be final and shall not be questioned in any court of law.]

(5) Where a mutawalli has been removed from his office under sub- section (1) or sub-section (2), the Board may, by order, direct the mutawalli to deliver possession of the wakf property to the Board or any officer thereof duly authorised in this behalf or to any person or committee appointed to act as the mutawalli of the wakf property; and the order of the Board shall be deemed to be a decree of a civil court and shall be executed by the civil court as if it had passed the decree.

[41] [(6) A mutawalli of a wakf removed from his office under this section shall not be eligible for appointment as a mutawalli of that wakf for a period of five years from the date of such removal.]

[42] [43A.

Assumption of direct management of certain wakfs by the Board.--

(1) Where no suitable person is available for appointment as a mutawalli of a wakf under section 42 or under sub section (2) of section 43, the Board may, by notification in the Official Gazette, assume direct management of the wakf for such period or periods, not exceeding in the aggregate five years, as may be specified in the notification.

(2) Notwithstanding anything contained in section 33, the accounts of every wakf under the direct management of the Board shall be audited annually by an auditor to be appointed by the Board, from among chartered accountants in practice within the meaning of the Chartered Accountants Act, 1949.] 38 of 1949.

44.

Application for inquiry.--

Any person interested in a wakf may make an application to the Board supported by an affidavit to institute an inquiry relating to the administration of the wakf and if the Board is satisfied that there are reasonable grounds for believing that the affairs of the wakf are being mismanaged, it shall take such action thereon as it thinks fit.

45.

Inquiry by the Board.--

[43] [(1) The Board may, either on an application received under section 44 or on its own motion--

(a) hold an inquiry in such manner as may be prescribed; or

(b) authorise any person in this behalf to hold an inquiry,

into any matter relating to a wakf and take such act ion as it thinks fit.]

(2) For the purposes of any inquiry under this Act, the Board or any person authorised by it in this behalf shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908.) for enforcing the attendance of witnesses and production of documents.

CHAPTER VI

FINANCE OF THE BOARD

46.

Annual contributions payable to the Board.--

(1) The mutawalli of every wakf shall pay annually to the Board such contribution not exceeding [44] [six] per cent. of the [45] [net annual income accruing in the State to the wakf] as the Board may, subject to the sanction of the State Government, from time to time, determine:

Provided that no such contribution shall be payable by the mutawalli of a wakf of which the net annual income does not exceed one hundred rupees.

(2) The Board may in the case of any particular wakf reduce or remit such contribution for such time as it thinks fit.

(3) The mutawalli of a wakf may realise the contributions payable by him under sub-section (1) from the various persons entitled to receive any pecuniary or other material benefits from the wakf, but the sum realisable from any one of such persons shall not exceed such amount as shall bear to the total contribution payable the same proportion as the value of the benefits receivable by such person bears to the entire net annual income of the wakf:

Provided that if there is any income of the wakf available in excess of the amount payable as dues under this Act, other than as the contribution under sub-section (1), and in excess of the amount payable under the wakf deed, the contribution shall be paid out of such income.

(4) The contribution payable under sub-section (1) in respect of a wakf shall, subject to the prior payment of any dues to the Government or any local authority or of any other statutory first charge on the wakf property or the income thereof, be a first charge on the income of the wakf and shall be recoverable, on a certificate issued by the Board after giving the mutawalli concerned an opportunity of being heard, as an arrear of land revenue.

(5) If a mutawalli realises the income of the wakf and refuses to pay or does not pay such contribution, he shall also be personally liable for such contribution which may be realised from his person or property in the manner aforesaid.

47.

Power of the Board to borrow.--

For the purpose of giving effect to the provisions of this Act, the Board may, with the previous sanction of the State Government, borrow such sum of money and on such terms and conditions as the State Government may determine and the Board shall repay the money borrowed, together with any interest or costs due in respect thereof, according to the terms and conditions of the loan.

48.

Wakf Fund.--

[46] [(1) All monies received or realised by the Board under this Act and all other monies received as donations, benefactions or grants by the Board shall form a fund to be called the Wakf Fund.

(1A) All monies received by the Board as donations, benefactions and grants shall be deposited and accounted for under a separate sub-head.]

(2) Subject to any rules that may be made by the State Government in this behalf, the Wakf Fund shall be under the control of the Board.

(3) The Wakf Fund shall be applied to

(a) repayment of any loan incurred under section 47 and payment of interest thereon;

(b) payment of the cost of audit of the Wakf Fund and the accounts of wakfs;

(c) payment of the salary and allowances of the Secretary and staff of the Board;

(d) payment of travelling allowances to the Chairman, members, Secretary and staff of the Board;

(e) payment of all expenses incurred by the Board in the performance of the duties imposed, and the exercise of the powers conferred, by or under this Act.

(4) If any balance remains after meeting the expenditure referred to in sub-section (3), the Board may use any portion of such balance for the preservation and protection of wakf properties or for such other purposes as it may deem fit.

49.

Budget of the Board.--

The Board shall in every year prepare, in such form and at such time as may be prescribed, a budget for the next financial year showing the estimated receipts and expenditure during that financial year and forward a copy of the same to the State Government.

50.

Accounts of the Board.--

The Board shall cause to be maintained such books of account and other books in relation to its accounts in such form and in such manner as may be prescribed.

51.

Audit of accounts of the Board.--

(1) The accounts of the Board shall be audited and examined annually by such auditor as may be appointed by the State Government.

(2) The auditor shall submit his report to the State Government and the report of the auditor shall, among other things, specify all cases of irregular, illegal or improper expenditure or of failure to recover money or other property caused by neglect or misconduct and any other matter which the auditor considers it necessary to report; and the report shall also contain the name of any person who, in the opinion of the auditor, is responsible for such expenditure or failure and the auditor shall in every such case certify the amount of such expenditure or loss as due from such person.

(3) The cost of the audit shall be paid from the Wakf Fund.

52.

State Government to pass orders on auditor's report.--

The State Government shall examine the auditor's report and may call for the explanation of any person in regard to any matter mentioned therein, and shall pass such orders on the report as it thinks fit.

53.

Sums certified due recoverable as arrears of land revenue.--

(1) Every sum certified to be due from any person by an auditor in his report under section 51 unless such certificate is modified or cancelled by an order of the State Government made under section 52, and every sum due on a modified certificate shall be paid by such person within sixty days after the service of a demand for the same issued by the State Government.

(2) If such payment is not made in accordance with the provisions of sub-section (1), the sum payable may, on a certificate issued by the Board after giving the person concerned an opportunity of being heard, be recovered in the same manner as an arrear of land revenue.

54.

No financial liability of Government.--

[*Repealed by the Wakf (Amendment) Act, 1964 (34 of 1964.), s. 18*].

CHAPTER VII

JUDICIAL PROCEEDINGS

[47] **[55.**

Institution of suits under section 92 of the Code of Civil Procedure , 1908.--

(1) A suit to obtain any of the reliefs mentioned in section 92 of the Code of Civil Procedure , 1908, (5 of 1908.) relating to any wakf may, notwithstanding anything to the contrary contained in that section, be instituted by the Board without obtaining the consent referred to therein.

(2) No suit to obtain any of the reliefs referred to in section 92 of the Code of Civil Procedure , 1908, relating to any wakf shall be instituted by any person or authority other than the Board without the consent in writing of the Board and for the institution of any such suit, it shall not be necessary to obtain the consent referred to in that section, notwithstanding anything contained therein:

Provided that nothing in this sub-section shall apply in relation to any such suit against the Board.]

56.

Notice of suits by parties against the Board.--

No suit shall be instituted against the Board in respect of any act purporting to be done by it in pursuance of this Act or of any rules made thereunder, until the expiration of two months next after notice in writing has been delivered to, or left at, the office of the Board, stating the cause of act ion, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

57.

Notice of suits, etc., by courts.--

(1) In every suit or proceeding relating to a little to wakf property or the right of a mutawalli, the court shall issue notice to the Board at the cost of the party instituting such suit or proceeding.

(2) Whenever any wakf property is notified for sale in execution of a decree of a civil court or for the recovery of any revenue, cess, rates or taxes due to the Government or any local authority, notice shall be given to the Board by the court, collector or other person under whose order the sale is notified.

(3) In the absence of a notice under sub-section (1), any decree or order passed in the suit or proceeding shall be declared void, if the Board, within one month of its coming to know of such suit or proceeding, applies to the court in this behalf.

(4) In the absence of a notice under sub- section (2), the sale shall be declared void, if the Board, within one month of its coming to know of the sale, applies in this behalf to the court or other authority under whose order the sale was held.

58.

Proceedings under the Land Acquisition Act, 1894.--

(1) If, in the course of proceedings under the Land Acquisition Act, 1894 (1 of 1894.) it appears to the Collector before an award is made that any property under acquisition is wakf property, a notice of such acquisition shall be served by the Collector on the Board and further proceedings shall be stayed to enable the Board to appear and plead as a party to the proceeding at any time within three months from the date of the receipt of such notice.

(2) Where the Board has reason to believe that any property under acquisition is wakf property, it may at any time before the award is made appear and plead as a party to the proceeding.

(3) When the Board has appeared under the provisions of sub section (1) or sub- section (2), no order shall be passed under section 31 or section 32 of the Land Acquisition Act, 1894 (1 of 1894.) without giving an opportunity to the Board to be heard.

(4) Any order passed under section 31 or section 32 of the Land Acquisition Act, 1894 without giving an opportunity to the Board to be heard shall be declared void, if the Board, within one month of its coming to know of the order, applies in this behalf to the authority which made the order.

59.

Board to be made a party to a suit or proceeding regarding a wakf on its application.--

In any suit or proceeding in respect of a wakf or any wakf property by or against a stranger to the wakf or any other person, the Board may appear and plead as a party to the suit or proceeding.

60.

Bar to compromise of suits by or against mutawallis.--

No suit or proceeding in any court by or against the mutawalli of a wakf relating to title to wakf property or the rights of the mutawalli shall be compromised without the sanction of the Board.

61.

Power to make application to the court in case of failure of mutawalli to discharge his duties.--

(1) Where a mutawalli is under an obligation to perform any act which is recognised by Muslim law as pious, religious or charitable and the mutawalli fails to perform such act, the Board may apply to the court for an order directing the mutawalli to pay to the Board or to any person authorised by the Board in this behalf the amount necessary for the performance of the Act .

(2) Where a mutawalli is under an obligation to discharge any other duties imposed on him under the wakf and the mutawalli willfully fails to discharge such duties, the Board or any person interested in the wakf may make an application to the court and the court may pass such order thereon as it thinks fit.

CHAPTER VIII

MISCELLANEOUS

62.

Directions by the Central Government.--

[48] [(1) The Central Government may issue such directions, as it may think fit, on questions of policy to be followed by a Board and for issuing such directions it may call for any periodic or other report or information from any Board through the Government of the State concerned.]

(2) In the performance of its functions under this Act, the Board shall be guided by the directions issued under sub-section (1).

63.

Directions by the State Government.--

Subject to any directions on questions of policy issued under section 62, the State Government may, from time to time, give to the Board such general or special directions as the State Government thinks fit and in the performance of its functions, the Board shall comply with any such directions.

64.

Power to supersede the Board.--

(1) If the State Government is of opinion that the Board is unable to perform, or has persistently made default in the performance of, the duty imposed on it by or under this Act or has exceeded or abused its powers, the State Government may, by notification in the Official Gazette, supersede the Board for such period as may be specified in the notification:

Provided that before issuing a notification under this sub- section, the State Government shall give a reasonable time to the Board to show cause why it should not be superseded and shall consider the explanations and objections, if any, of the Board.

(2) Upon the publication of a notification under sub-section (1) superseding the Board,--
- (a) all the members of the Board shall, as from the date of supersession, vacate their offices as such members;
- (b) all the powers and duties which may, by or under the provisions of this Act, be exercised or performed by or on behalf of the Board shall, during the period of supersession, be exercised and performed by such person or persons as the State Government may direct; and
- (c) all property vested in the Board shall, during the period of supersession, vest in the State Government.

(3) On the expiration of the period of supersession, specified in the notification issued under subsection (1), the State Government may--
- (a) extend the period of supersession for such further period as it may consider necessary; or
- (b) reconstitute the Board in the manner provided in section 10 and section 11.

65.

Protection of action taken in good faith.--

No suit or other legal proceeding shall lie against the Board or the Commissioner or any other person duly appointed under this Act in respect of anything which is in good faith done or intended to be done under this Act.

66.

The Commissioner, auditor, etc., to be deemed to be public servants. (45 of 1860).--

The Commissioner, every auditor, every officer and servant of the Board and every other person duly appointed to discharge any duties imposed on him by this Act or rule or orders made thereunder shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code .

[49] [66A.

Special provision for reorganisation of certain Boards.--

(1) Where on account of the reorganisation of States under the States Reorganisation Act, 1956, (37 of 1956.) the whole or any part of a State in respect of which a Board was, immediately before the 1st day of November, 1956, functioning has been transferred on that day to another State and by reason of such transfer, it appears to the Government of a State in any part of which the Board is functioning that the Board should be dissolved or that it should be reconstituted and reorganised as an intra-State Board for the whole or any part of that State, the State Government may frame a scheme for such dissolution or such reconstitution and reorganisation, as the case may be, including proposals regarding the transfer of the assets, rights and liabilities of the Board to any other Board or State Government and the transfer or re-employment of employees of the Board and forward the scheme to the Central Government.

(2) On receipt of a scheme forwarded to it under sub-section (1), the Central Government may, after consulting the State Governments concerned, approve the scheme with or without modifications and give effect to the scheme so approved by making such order

as it thinks fit.

(3) An order under sub- section (2) may provide for all or any of the following matters, namely:--

(a) the dissolution of the Board;

(b) the reconstitution and reorganisation in any manner whatsoever of the Board including the establishment, where necessary, of a new Board;

(c) the area in respect of which the reconstituted Board or new Board shall function and operate;

(d) the transfer, in whole or in part, of the assets, rights and liabilities of the Board (including the rights and liabilities under any contract made by it) to any other Board or State Government and the terms and conditions of such transfer;

(e) the substitution of any such transferee for the Board, or the addition of any such transferee, as a party to any legal proceeding to which the Board is a party; and the transfer of any proceeding pending before the Board to any such transferee;

(f) the transfer or re-employment of any employees of the Board to, or by, any such transferee and subject to the provisions of section 111 of the States Reorganisation Act, 1956, (37 of 1956.) the terms and conditions of service applicable to such employees after such transfer or re-employment;

(g) such incidental, consequential and supplemental matters as may be necessary to give effect to the approved scheme.

(4) Where an order is made under this section transferring the assets, rights and liabilities of any Board, then, by virtue of that order, such assets, rights and liabilities of the Board shall vest in, and be the assets, rights and liabilities of, the transferee.

(5) Every order made under this section shall be published in the Official Gazette and this Act and the notifications issued there under shall have effect subject to the provisions of the order.

(6) Every order made under this section shall be laid before each House of Parliament, as soon as may be, after it is made.

66B.

Special provision for establishment of Board for part of a State.--

(1) Where on account of the territorial changes brought about by the States Reorganisation Act, 1956, (37 of 1956.) this Act is, as from the 1st day of November, 1956, applicable only to any part or parts of a State but has not been brought into force in the remaining part thereof, then, notwithstanding anything contained in this Act, it shall be lawful for the Government of the State to establish one or more Boards for such part or parts in which this Act is in force and in such a case, any reference in this Act to the word &uot;State&uot; in relation to a Board shall be construed as a reference to that part of the State for which the Board is established.

(2) Where any such Board has been established and it appears to the Government of the State that a Board should be established for the whole of the State, the State Government may, by order notified in the Official Gazette, dissolve the Board established for the part of the State or reconstitute and reorganise such Board or establish a new Board for the whole of the State and thereupon, the assets, rights and liabilities of the Board for the part of the State shall vest in, and be the assets, rights and liabilities of the reconstituted Board or the new Board, as the case may be.]

[50] [66C.

Application of Act to properties given or donated by persons not professing Islam for support

of certain wakfs.--

Notwithstanding anything contained in this Act where any movable or immovable property has been given or donated by any person not professing Islam for the support of a wakf being--

(a) a mosque, idgah, imambara, dargah, khangah or a maqbara;
(b) a Muslim graveyard;
(c) a choultry or a musafarkhana,

then such property shall be deemed to be comprised in that wakf and be dealt with in the same manner as the wakf in which it is so comprised.]

67.

Power to make rules.--

(1) The State Government may, by notification in the Official Gazette, make rules to carry out the [51] [purposes of this Act other than those of Chapter IIA].

(2) In particular, and without prejudice to the generality of the foregoing power such rules may provide for all or any of the following matters, namely:--

(a) the particulars which a list of wakfs published under sub- section (2) of section 5 may contain;
(b) the conditions and restrictions subject to which the Board may transfer any property;
(c) the regulation of the functions of the Board;
(d) the terms and conditions of service of the Secretary of the Board;
(e) the manner in which any inquiry may be held under this Act ;
(f) the powers vested in a civil court which may be exercised by the Board or the Commissioner or any other person while holding an inquiry under this Act;
(g) the form in which a register of wakfs may be maintained and the further particulars which it may contain;
(h) the form in which, and the time within which, the budget of the Board may be prepared and submitted by the Board [52] [* * *];
(i) the manner in which the accounts of the Wakf Fund may be kept and audited and the contents of the auditor's report;
(j) the payment of moneys into the Wakf Fund, the investment, custody and disbursement of such moneys;
(k) the circumstances under which, and the terms and conditions on which, the Board may be allowed to borrow;
(l) the circumstances in which, and the conditions subject to which, the Board may reduce or remit the contribution payable in respect of a wakf;
(m) the procedure to be followed in the recovery of any sum due under this Act as an arrear of land revenue;
(n) any other matter which has to be, or may be, prescribed.

68.

Power to make regulations.--

(1) The Board may, with the previous sanction of the State Government, make regulations not inconsistent with this Act or the rules made thereunder for carrying out its functions under this Act .

(2) In particular, and without prejudice to the generality of the foregoing powers, such regulations may provide for all or any of the following matters, namely:--

(a) the time and place of the meetings of the Board and the number of members required to form a quorum at its meetings;
(b) the procedure and conduct of business at the meetings of the Board;
(c) the constitution and functions of committees of the Board and the procedure for transaction of business at the meetings of such committees;
(d) the allowances or fees to be paid to the Chairman or members of the Board or members of committees;
(e) terms and conditions of service of the officers, and servants of the Board;
(f) the form of application for registration of wakfs, further particulars to be contained therein and the manner and place of registration of wakfs;
(g) further particulars to be contained in the register of wakfs;
(h) the books to be kept at the office of the Board;
(i) the form in which, and the time within which, the budgets of wakfs may be prepared and submitted by the mutawallis and approved by the Board;
(j) the manner in which the accounts of wakfs may be kept and audited and the contents of the auditor's report;
(k) the method of calculating the income of a wakf for the purpose of levying contributions under this Act;
(l) fees payable for inspection of proceedings and records of the Board or for issue of copies of the same;
(m) persons by whom any order or decision of the Board may be authenticated;
(n) any other matter which has to be, or may be, prescribed.

(3) All regulations made under this section shall be published in the Official Gazette and the regulations shall have effect from the date of such publication.

[53] **[&uot;68A.**

Laying of rules and regulations before State Legislature.--

Every rule made under section 67 and every regulation made under section 68 shall be laid, as soon as may be after it is made, before the State Legislature.&uot;]

69.

Repeal and savings.--

(1) The following enactments, namely;--

(1) The Bengal Charitable Endowments, Public Buildings and Escheats Regulation, 1810; (Ben. Reg. XIX of 1810.)
(2) [54] [* * *] The Religious Endowments Act, 1863; (20 of 1863.)
(3) The Charitable Endowments Act, 1890; (6 of 1890.)
(4) The Charitable and Religious Trusts Act, 1920; (14 of 1920.)
(5) The Mussalman Wakf Act, 1923; (42 of 1923.)

shall not apply to any wakf to which this Act applies.

(2) If, immediately before the commencement of this Act in any State, there is in force in that State any law which corresponds to this Act [other than an enactment referred to in sub-section (1)] that corresponding law shall stand repealed:

Provided that such repeal shall not affect the previous operation of that corresponding law, and subject thereto, anything done or any action taken in the exercise of any power conferred by or under

the corresponding law shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act were in force on the day on which such things was done or act ion was taken.

[55] [70. Removal of difficulties. If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the purposes of this Act, as appear to it to be necessary or expedient for removing the difficulty.

THE SCHEDULE

[*See* section 9 (1A)] **LIST OF AMENDMENTS**

1. In sub- section (2) of section 5, for the words &uot;a list of wakfs&uot;, the words &uot;a list of Sunni wakfs or, as the case may be, Shia wakfs&uot; shall be substituted.
2. In section 11,--
   (a) for clause (b), the following clause shall be substituted, namely:--

   &uot;(b) persons having knowledge of Muslim law and representing, in the case of a Sunni Board of Wakf's, associations such as State Jamiat-ul-Ulama-i-Hind (whether such persons are Hanafi, Ahle-Hadis or Shefai) and in the case of a Shia Board of Wakfs, associations such as State Shia Conference;&uot;;
   (b) the second proviso shall be omitted.
3. In clause (e) of sub- section (2) of section 15, the Explanation shall be omitted.
4. For section 27, the following section shall be substituted, namely:--

Decision if a property is wakf property. &uot;27. (1) The Board may itself collect information regarding any property which it has reason to believe to be wakf property and if any question arises whether a particular property is wakf property or not or whether a wakf is a Sunni wakf or a Shia wakf, it shall refer the question to a civil court of competent jurisdiction.

(2) The decision of the civil court on any question referred to it under sub-section (1) shall be final.&uot;]

1 Supplemented by Madras Act 19 of 1961; Am. in Kerla by kerla Act 18 of 1972; Am. in Bihar by Bihar Act 3 of 1975; Am. in Kerla by Kerla Act 18 of 1972; Am. in Bihar by Bihar Act 3 of 1975; Am. in Mysore by Mysore Act 52 of 1976; Am. in Mysore by Mysore Act 52 of 1976. The Act has been extended to Pondicherry by Act 26 of 1968, s. 3 and Sch.

2 15th January 1955--Ajmer, Andaman and Nicobar Islands, Coorg, Hyderabad, Kutch, Madhya Bharat, Madras, Mysore, Patiala and East Punjab States Union, Tripura and Vindhya Pradesh-- Notification No. SRO 53, dated the 4th January, 1955, Gazette of India, Extraordinary, Pt. II, Sec. 3, p. 7; 1st February, 1955--Assam and Travancore-Cochin, 1st April 1955-- Andhra and Rajasthan-- Notification No. SRO 282. dated the 22nd January, 1955, Gazette of India, Extraordinary, 1955, Pt. II, Sec. 3, p. 199; 20th December, 1955--Bhopal--Notification No. SRO 3696, dated the 20th December, 1955, Gazette of India, Extraordinary, Pt. II, Sec. 3. p. 2501; 1st June, 1958--Orissa--Notification No. G.S.R. 428, dated the 23rd May, 1958, Gazette of India, Pt. II, Sec. 3(i), p. 319; 1st October, 1962--Union territory of Delhi--Notification No. G.S.R. 1283, dated the 24th September, 1962, Gazette of India, Pt. II, Sec. 3(i), p. 1464. 12th April, 1973--Bihar--Notification No. G.S.R. 197(E), dated the 7th April, 1973, Gazette of India, Extraordinary, Pt. II, Sec. 3(i), p. 539.

3 The word &uot;Delhi,&uot; omitted by Act 30 of 1959, s. 2.

4 Ins. by s. 2,*ibid* .

5 10th October, 1959--In the remaining parts of Punjab--Notification No. G.S.R. 1126, dated the 1st October, 1959, Gazette of India, 1959, Pt. II, Sec. 3(i), p. 1401. [Footnote No. 5 Contd.] [Footnote No. 5 Contd.] 1st November, 1959--In the remaining part of Rajasthan-- Notification No. G.S.R. 1204, dated the 26th October, 1959, Gazette of India, 1959, Pt. II Sec. 3(i), p. 1500. 1st January, 1960--In the remaining part of Madhya Pradesh. Vide Notification No. G.S.R. 40, dated the 2nd January, 1960, Gazette of India, 1960, Pt. II Sec. 3(i), p. 46. 1st December, 1961--In the remaining part of Mysore, vide Notification No. G.S.R. 1431, dated the 20th November, 1961, Gazette of India, Pt. II,

Sec. 3(i), p. 1761. 20th November, 1967--In that part of the Union territory of Himachal Pradesh in which it is not already in force; vide S.O. 4062, dated the 8th November, 1967, Gazette of India, Pt. II, Sec. 3(ii), p. 4235.

6 Subs. By Act 38 of 1969, s.2, for certain words and figures.

7 Subs. by Act 34 of 1964, s. 2, for &uot;established for the benefit of the Muslim community&uot;.

8 Subs. by s. 2,*ibid* ., for &uot; section 9&uot;.

9 Ins. by s. 2,*ibid* .

10 Subs. by Act 38 of 1969, s. 3, for the former clause (with retrospective effect).

11 Ins. by Act 34 of 1964, s. 2.

12 Subs. by s. 2,*ibid* ., for sub-clause (ii).

13 Ins. by Act, 38 of 1969, s. 4 (with retrospective effect).

14 Subs. by Act 38 of 1969, s. 4, for &uot;in the State&uot; (with retrospective effect).

15 Subs. by s. 5,*ibid* ., for &uot;existing in the State&uot; (with retrospective effect).

16 Subs. by Act 38 of 1969, s. 6, for certain words (with retrospective effect).

17 Ins. by s. 6,*ibid* .

18 Ins. by Act 34 of 1964, s. 3.

19 Subs. by Act 38 of 1969, s. 7, for certain words.

20 Subs. by Act 38 of 1969, s. 7, for certain words.

21 Ins. by Act 34 of 1964, s. 4.

22 Certain words omitted by Act 38 of 1969, s. 8.

23 Certain words omitted by Act 38 of 1969, s. 8.

24 Subs. by Act 4 of 1986, s. 2 and sch. (w.e.f. 15.5.1986).

25 Ins. by Act 34 of 1964, s. 5.

26 Subs. by s. 5,*ibid* ., for &uot;The said Board&uot;.

27 Subs. by Act 30 of 1959, s. 3, for sub-section (1).

28 The word &uot;special&uot; omitted by Act 34 of 1964, s. 6.

29 The word &uot;special&uot; omitted by Act 34 of 1964, s. 6.

30 Subs. by Act 34 of 1964, s. 7, for certain words.

31 Subs. by Act 34 of 1964, s. 7, for cl. (j).

32 Ins. by Act 34 of 1964, s. 8.

33 Ins. by s. 9,*ibid* .

34 Ins. by Act 34 of 1964, s. 10.

35 S. 32 re-numbered as sub- section (2) of that section by s. 10. *ibid* .

36 Ins. by Act 34 of 1964, s. 11.

37 Cl. (g) omitted by Act 34 of 1964, s. 12.

38 Subs. by. s. 13,*ibid* ., for cl. (b).

39 Ins. by Act 34 of 1964, s. 13.

40 Ins. by Act 34 of 1964, s. 13.

41 Ins. by Act 34 of 1964, s. 13.

42 Ins. by Act 34 of 1964, s. 14.

43 Subs. by s. 15,*ibid* ., for sub-section (1)

44 Subs. by s. 16,*ibid* ., for &uot;five&uot;.

45 Subs. by Act 38 of 1969, s. 9. for certain words (with retrospective effect).

46 Subs. by Act 34 of 1964, s. 17, for sub-section (1).

47 Subs. by Act 34 of 1964, s. 19, for s. 55.

48 Subs. by Act 34 of 1964, s. 20 for sub-section (1).

49 Ins. by Act 30 of 1959, s. 4.

50 Ins. by Act 34 of 1964, s. 21.

51 Subs. by s. 22,*ibid* . for &uot;purposes of this Act&uot;.

52 The words &uot;and approved by the State Government&uot; omitted by s. 22, ibid.

53 Ins. by Act 4 of 1986, s. 2 and Sch. (w.e.f. 15.5.1986).

54 The words and figure &uot; Section 5 of&uot; omitted by Act 34 of 1964, s. 23.

55 Ins. by Act 34 of 1964, s. 24.

APPENDIX VII - STATEMENT OF OBJECTS AND REASONS OF WAKF (Amendment) Act, 1984

The Wakf Act, 1954, (29 of 1954) provides for the better administration and supervision of*wakf*s, the working of the Wakf Boards establishes under the Wakf Act is, however, not satisfactory and in most cases these Boards have failed to achieve the very purpose for which they have been established. Further, the financial position of most of these Boards is also not happy. The question of toning up the administration of*wakf*s so as to protect and properly manage *wakf*properties by taking necessary measures, including legislation, have been engaging the attention of the Central Government. A committee known as the Wakf lnquiry Committee was accordingly constituted by the Central Government for the purpose of evaluating the working of the Wakf Act and for making an inquiry into the administration of*wakf*s at all levels in respect of States to which the provisions of the Wakf Act are applicable.

2. The Wakf Inquiry Committee made a large number of recommendations which envisage a thorough re-structuring of *wakf* administration designed to improve the financial position of the *wakf*institutions and to plug the loopholes noticed in the working of the Wakf Act. The Report of the Wakf Inquiry Committee was examined by the Central Government in consultation with the State Governments, the Central Wakf Council, Chairman of the Wakf Boards, Muslim MPs. and the Minorities Commission. Various views and different shades of opinion on the subject were expressed at different forums. The Bill, which is mainly based on the recommendations of the Wakf Inquiry Committee, takes into consideration the various views expressed in this behalf.
3. The Bill seeks to make, *inter alia*, amendments to the Wakf Act, 1954, in relation to the

following matters, namely:

(i) to ensure uniformity of the *wakf* legislation throughout India and in particular, in the State of part of the State in which the Act is not in force;

(ii) the Wakf board shall consist of eleven members, of which two shall be members of Parliament to be elected from amongst themselves by the Muslim members elected to Parliament from the State, two shall be elected by the Muslim members of the State Legislature from amongst themselves, the Wakf Commissioner, who shall be the ex officio Member-Secretary, and six other Muslim members to be nominated by the State Government from amongst the different categories of persons specified in Sec. 10. The Chairman of the Wakf Board shall be elected by the members thereof from amongst themselves. The Wakf Commissioner shall not, however, be elected as the Chairman;

(iii) to provide for the appointment of Wakf Commissioners in the States from amongst persons professing Islam who are holding any post in the Government of the concerned State in the senior scale of the Judicial Service of the State or any post in the senior scale of any Administrative Service in the State;

(iv) to enlarge the powers of the State Government with regard to the control and supervision of *wakf*s;

(v) to strengthen the provisions of accounting and audit of the accounts of the *mutawallis* and to make it obligatory for the Wakf Commissioner to carry out at least once in two years a detained inspection of the *wakf*s in the State having an annual income of not less than twelve thousand rupees;

(vi) to impose restrictions with regard to the alienation of *wakf* property;

(vii) to provide for the appointment of Tribunals for the speedy determination of the disputes, question or other matters relating to *wakf*s; every such Tribunal is to consist of one person who shall be member of the State Judicial Service holding a rank not below than that a District Judge or a Civil Judge, First Class;

(viii) to bring all *wakf-alal-aulad*within the purview of the Act and to provide that a *wakf* by user shall not cease to be a *wakf* by reason of non-user for any length of time;

(ix) imposing restriction on the powers of *mutawalli* to grant leases of immovable properties of *wakf*s. It has been provided that no lease of any immovable property for any period exceeding three years shall be made and that lease or sub-lease exceeding a period of one year but not exceeding a period of three years shall be void unless it is made with the previous sanction of the Board;

(x) Wakf Commissioner shall be empowered to frame schemes for the proper administration of *wakf*s and to take over, in certain cases, the direct management of *wakf*s;

(xi) the Central Government is also being empowered--

- (a) to lay down general principles and policies of *wakf* administration in so far as they relate to the secular activities of the *wakf*s;
- (b) to co-ordinate the functions of the Central Wakf Council, the Wakf Commissioners and the Boards, an so far .as they relate to their secular functions of the *wakf*;
- (c) to review administration of the secular act ivities of the *wakf*s generally and to suggest improvements, if any.

The other amendments proposed in the bill are of a minor, incidental and consequential nature.

The Wakf Inquiry Committee made a large number of recommendations. The Report of the Inquiry Committee was examined by the Central Government. The Bill is mainly based on the recommendations of the Wakf Inquiry Committee. The Bill wants to make amendments to the Wakf Act, 1954, in relation to ensure uniformity of the*wakf* Legislation. The Bill wants to provide for the appointment of Wakf Commissioner in the States from among Mussalmans. Power of the State

Government and Central Government will be enlarged with regard to control and supervision of *wakf.* There shall be Tribunals for deciding the disputes. The Bill seeks to impose restrictions in relation to alienation of *wakf* property. Instead of the above proposed amendments there are many other amendments which are of a minor nature.

The Wakf (Amendment) Act, 1984 (Act No. 69 of 1984) not included here.

APPENDIX VIII - THE DISSOLUTION OF MUSLIM MARRIAGE ACT, 1939[1]

(**8 of 1939)**

[17th *March*, 1939]

STATEMENT OF OBJECTS AND REASONS

There is no proviso in the Hanafi Code of Muslim law enabling a married Muslim woman to obtain a decree from the Court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi Jurists, however, have clearly laid down that in cases in which the application of Hanafi law causes hardship, it is permissible to apply the provisions of the &uot;Maliki, Shafi's or Hambali law&uot;. Act ing on this principle the Ulemas have issued fatwas to the effect that in cases enumerated in clause 3, Part A of this Bill [now *see* section 2 of the Act] a married Muslim woman may obtain a decree dissolving her marriage. A lucid exposition of this principle can be found in the book called &uot;Heelatum Najeza&uot; published by Maulana Ashraf Ali Sahib who has made an exhaustive study of the provisions of Maliki law which under the circumstances prevailing in India may be applied to such cases. This has been approved by a large number of Ulemas who have put their seals of approval on the book.

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

* * *

One more point remains in connection with the dissolution of marriages. It is this. The Courts in British India have held in a number of cases that the apostasy of a married Muslim woman *ipso facto* dissolves her marriage. This view has been repeatedly challenged at the bar but the Courts continue to stick to precedents created by rulings based on an erroneous view of the Muslim law. The Ulemas have issued Fatwas supporting non-dissolution of marriage by reason of wife's apostasy. The Muslim community has, again and again, given expression to its supreme dissatisfaction with the view held by the Courts. A number of articles have been appearing in the press demanding legislation to rectify the mistake committed by the Courts; hence clause 5 [now *see* section 4] 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.

An Act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie.

WHEREAS it is expedient to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie;

It is hereby enacted as follows:--

1.

Short title and extent.--

(1) This Act may be called THE Dissolution of Muslim Marriages Act, 1939.
(2) It extends to the whole of India[2] [[3] [except the State of Jammu and Kashmir]].

State Amendment

Pondicherry.--In s. 1, after sub-s. (2), insert the following proviso, namely:--

&uot;*Provided*that nothing contained in this Act shall apply to the Renoncants of the Union Territory of Pondicherry.&uot;--Act 26 of 1968, s. 3 and Sch. (w.e.f. 1-8-1968).

2.

Grounds for decree for dissolution of marriage.--

A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:--

(i) that the whereabouts of the husband have not been known for a period of four years;
(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;
(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;
(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
(v) that the husband was impotent at the time of the marriage and continues to be so;
(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated;
(vii) that the husband treats her with cruelty, that is to say,--
(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
(b) associates with women of evil repute or leads an infamous life, or
(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or
(e) obstructs her in the observance of her religious profession or practice, or
(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;

(ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

Provided that--
(a) no decree shall be passed on ground (iii) until the sentence has become final;
(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and
(c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

Comments

DISSOLUTION OF MUSLIM MARRIAGES ACT S. 2(ii) and (iii) compared

A husband's failure to provide for the maintenance of the wife for the period of 2 years mentioned in Cl. (ii) of S. 2 entitles the wife to a decree for dissolution of marriage whether or not the husband has reasonable cause for withholding such maintenance.

Clause (ii) of S. 2 should be read in contradistinction with Cl. (iv) as per with which the wife is entitled to a decree for dissolution of her marriage on the ground that the husband has failed to perform "without reasonable cause" his marital obligations for a period of three years. The words, "without reasonable cause" are significantly absent in Cl. (ii). The duty to provide maintenance to the wife is only self-imposed to keep the relationship intact and it is not a duty corresponding to the right of the wife to claim maintenance against the husband. As against the arbitrary power of the husband to liquidate the marriage, the wife gets a right for dissolution of marriage on the husband's neglect or failure to provide for her maintenance for a period of 2 years. This construction of Cl. (ii) of S. 2 is in consonance with the Islamic law on the subject. There is, therefore, no justification in introducing the words "without reasonable cause" into Cl. (ii). The Legislature in its wisdom, by providing those words in Cl. (iv) has not thought it necessary to provide this restriction in Cl. (ii). A.I.R. 1978 Andh. Pra. 417 and A.I.R. 1971 Cal. 218, Dissented from AIR. 1971 Ker. 261, Foll. *Ittoochalil Meethal Moossa v. Pachiparambath Meethal Fathima,* A.I.R. 1983 Kerala 283.

In a suit brought by a wife for dissolution of marriage on the ground that her husband was impotent at the time of the marriage and continued to be so that facts were as follows. Marriage was celebrated on June 12,1960 and the suit was brought on Oct. 3,1960. The husband asked for and was granted one year to prove that he had ceased to be impotent. On the expiry of the period the Court granted a decree on the application of the wife.

The requirement of Sec. 2(v)(c) is that the husband is not only impotent at the time of the marriage but that he continues to be impotent when the suit is filed. The evidence in the case was held to establish

impotence at both the points of time.

On the question raised that during the period of grace, the husband was denied the company of his wife in his own house, the Court held that after the Act, the rule of Mahomedan Law about the duty of the wife did not apply. The Act requires an opportunity to satisfy the Court about the cessation of the condition and that opportunity is available only on application to Court. The provisions of the Act abrogated the rule of Mahomedan Law. It is not the rule that the acquisition of virility can be proved only by sexual act with the wife. Such a procedure is likely to subject the wife to queer predicaments and some peril.

Abdul Azeem v. Fahimunnisa Begum ('69) A. Mys. 22-6.

In this case the wife sued the husband for dissolution of her marriage for failure to maintain her for two years. She was married in 1952. In 1955 she went away to her parents. The husband then performed a second marriage. The suit failed. It was held that under the Mahomedan Law polygamy was allowed and could not be a ground for living apart and claiming maintenance in the absence of other grounds which would justify the wife to follow this course. The amendment to Sec. 488Cr. P.C. was not considered as an application lay to a different forum.

The wife left the marital house and stayed away without any justifiable cause and then asked for the dissolution of marriage on the ground that the husband was not maintaining her; it was held that the wife was not entitled to relief under S. 2(ii) of the Dissolution of Muslim Marriages Act, 1939.

Mst. Mabiya Khatun Bibi v. Shaikh Anwar Ali ('71) A. Cal. 218.

Syed Abbas Ali v. Nazerunnessa Begum (1939) 43 C.W.N. 1059.

Mst. Noor Bibi v. Pir Bux ('50) A. Sind 8.

See also: A.I.R. 1983 Ker. 283. *Ittoachalil Meethal Moosa v. Pachiparambath Meethal Fathima & Pathumma* .

3.

Notice to be served on heirs of the husband when the husband's whereabouts are not known.--

In a suit to which clause (*i*) of section 2 applies,--

(a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint,
(b) notice of the suit shall be served on such persons, and
(c) such persons shall have the right to be heard in the suit:

Provided that paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

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.

5.

Rights to dower not to be affected.--

Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.

6.

Repeal of section 5 of Act 26 of 1937.--

[*Rep. by the Repealing and Amending Act*, 1942 (25 of 1942), *s. 2 and Sch. I*.]

1 The Act has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act (30 of 1950). Manipur and Tripura are full-fledged States now, *see* Act 81 of 1971.

2 Subs. by the Adaptation of Law (No. 3) Order, 1956, for &uot;Part B States&uot;.

3 Subs. by Act 48 of 1959, S. 3 and Sch. I (w.e.f. 1-2-1960).

Mulla: Mahomedan law, Updated 20th edition/APPENDIX/APPENDIX IX - THE MUSSALMAN WAKF ACT, 1923

APPENDIX IX - THE MUSSALMAN WAKF ACT, 1923 [1]

(42 of 1923)

[15th *August* , 1923]

STATEMENT OF OBJECTS AND REASONS

The object of the present Bill is sufficiently indicated by the Preamble to the Bill. For several years past, there has been a growing feeling amongst the Mahomedan community, throughout the country that the numerous endowments which have been made or are being made daily by pious and public-spirited Mahomedans are being wasted or systematically misappropriated by those into whose hands the trusts may have come in the course of time. Instances of such misuse of trust property are unfortunately so very common that a wakf endowment has now come to be regarded by the public as only a clever device to tie up property in order to defeat creditors and generally to evade the law under the cloak of a plausible dedication to the Almighty. In some cases the mutawallis are persons who are utterly unfit to carry on the administration of wakf and who, by their moral delinquencies bring discredit not merely on the endowment but on the community itself. It is believed that the feeling is unanimous that some step should be taken in order that incompetent and unscrupulous mutawallis may be checked in their career of waste and mismanagement, and that the endowments themselves may be appropriated to the purposes for which they had been originally dedicated.

In some cases difficulties have arisen in finding out whether any particular properties are really subject to wakf or not. There are numerous wakf properties all over the country unknown to the public which the mutawallis are treating as their own private property and dealing with in any way they think fit or necessary. It, therefore, seems that there should be a system of compulsory registration requiring a mutawalli to notify to some responsible officer not merely about the fact of the wakf, of which he is the mutawalli, but also the nature and extent and other incidents of the endowment. Further, even where a wakf is well-known and mutawalli is obviously thoroughly incompetent to carry on his duties, the public find a difficulty in instituting suits to remove him from his post by reason of the cumbrous procedure laid down in the Code of Civil Procedure. It is with a view to facilitate the institution of such suits that a provision has been made in the Bill. Lastly, there appears to be a general consensus of opinion amongst the Mahomedans throughout the country that there should be some responsible officer, who may go about and find for himself whether the various wakf properties scattered throughout the country are being properly managed or not. It is not intended that Government should be called upon to bear the burden of appointing such an officer or his staff, and a provision has, therefore, been made in the Bill authorising the Central Committee (to be appointed in pursuance of the provisions of the Bill) to levy a rateable contribution from the mutawallis for the purpose of meeting the cost on entertaining such an officer and his staff.

An Act to make provision for the better management of wakf property and for ensuring the keeping and publication of proper accounts in respect of such properties .

WHEREAS it is expedient to make provision for the better management of wakf property and for ensuring the keeping and publication of proper accounts in respect of such properties; It is hereby enacted as follows:--

State Amendment

Gujarat and Maharashtra.-- In its application to the Bombay area, after the Preamble the heading "Part I" shall be inserted--Bombay Act 18 of 1935, s. 2 (w.e.f. 23-9-1935); Act 11 of 1960, s. 87 (w.e.f. 1-5-1960).

PRELIMINARY

1.

Short title, extent and commencement.--

(1) This Act may be called THE MUSSALMAN WAKF ACT, 1923.

[2] [(2) It extends to the whole of India, except [3] [the territories which, immediately before the 1st November, 1956, were comprised in Part B States].]

(3) This section shall come into force at once.

(4) The State Government may, by notification in the Official Gazette, direct that the remaining provisions of this Act, or any of them which it may specify, shall come into force in the State, or any specified part thereof, on such date [4] as it may appoint in this behalf.

2.

Definitions.--

In this Act, unless there is anything repugnant in the subject or context,--

(a) "benefit" does not include any benefit which a mutawalli is entitled to claim solely by reason of his being such mutawalli;

(b) &uot;Court&uot; means the Court of the District Judge or, within the limits of the ordinary original civil jurisdiction of a High Court, such Court, subordinate to the High Court, as the State Government may, by notification in the Official Gazette, designate in this behalf;

(c) &uot;mutawalli&uot; means any person appointed either verbally or under any deed or instrument by which a wakf has been created or by a Court of competent jurisdiction to be the mutawalli of a wakf, and includes a naibmutawalli or other person appointed by a mutawalli to perform the duties of the mutawalli, and, save as otherwise provided in this Act, any person who is for the time being administrating any wakf property;

(d) &uot;prescribed&uot; means prescribed by rules made under this Act; and

(e) &uot;wakf&uot; means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable, but does not include any wakf, such as is described in section 3 of the Mussalman Wakf Validating Act, 1913 (6 of 1913), under which any benefit is for the time being claimable for himself by the person by whom the wakf was created or by any of his family or descendants.

Comment

Section 129 of the Transfer of Property Act saves Mahommedan gifts from the application of the provisions of Chapter VII of the Transfer of Property Act . The result is that the oral gift made by Mahommedan in favour of his wife in lieu of her dower is valid.[5]

State Amendment

Gujarat and Maharashtra.-- In its application to the Bombay area--

(1) in s. 2--

(i) after cl. (b), insert the following clause, namely:--

&uot;(bb) &uot;District&uot; means a district constituted under section 3 of the Bombay Civil Courts Act, 1869, and includes the Greater Bombay.&uot;

(ii) after cl. (e), add the following clause, namely:--

&uot;(ee) &uot;Wakf Committee&uot; means a committee constituted under section 6-L&uot;.

(2) after s. 2, the heading &uot;Part II&uot; shall be inserted--Bombay Act s 18 of 1935, s s. 3, 4 (w.e.f. 23-9-1935) and 17 of 1945, s. 9, Sch. E; Act 11 of 1960, S. 87 (w.e.f. 1-5-1960).

STATEMENT OF PARTICULARS

3.

Obligation to furnish particulars relating to wakf.--

(1) Within six months from the commencement of this Act every mutawalli shall furnish to

the Court within the local limits of whose jurisdiction the property of the wakf of which he is the mutawalli is situated or to any one of two or more such Courts, a statement containing the following particulars, namely:--

(a) a description of the wakf property sufficient for the identification thereof;

(b) the gross annual income from such property;

(c) the gross amount of such income which has been collected during the five years preceding the date on which the statement is furnished, or of the period which has elapsed since the creation of the wakf, whichever period is shorter;

(d) the amount of the Government revenue and cesses, and of all rents, annually payable in respect of the wakf property;

(e) an estimate of the expenses annually incurred in the realisation of the income of the wakf property, based on such details as are available of any such expenses incurred within the period to which the particulars under clause (c) relate;

(f) the amount set apart under the wakf for--

(i) the salary of the mutawalli and allowances to individuals;

(ii) purely religious purposes;

(iii) charitable purposes;

(iv) any other purposes; and

(g) any other particulars which may be prescribed.

(2) Every such statement shall be accompanied by a copy of the deed or instrument creating the wakf, or, if no such deed or instrument has been executed or a copy thereof cannot be obtained, shall contain full particulars, as far as they are known to the mutawalli, of the origin, nature and objects of the wakf.

(3) Where--

(a) a wakf is created after the commencement of this Act, or

(b) in the case of a wakf such as is described in section 3 of the Wakf Validating Act, 1913 (6 of 1913), the person creating the wakf or any member of his family or any of his descendants is at the commencement of this Act alive and entitled to claim any benefit thereunder,

the statement referred to in sub-section (1) shall be furnished, in the case referred to in clause (a), within six months of the date on which the wakf is created or, if it has been created by a written document, of the date on which such document is executed, or, in the case referred to in clause (b), within six months of the date of the death of the person entitled to such benefit as aforesaid, or of the last survivor of any such persons, as the case may be.

Comment

Mutawalli means a person who either under a deed or *wakf* or by appointment under order of a competent court manages the *wakf* property. [6]

State Amendment

Uttar Pradesh.-- In its application to the State of Uttar Pradesh, s. 3 shall be repealed.--U.P. Act, 13 of 1936, s. 70 (w.e.f. 1-7-1941).

4.

Publication of particulars and requisition of further particulars.--

(1) When any statement has been furnished under section 3, the Court shall cause notice of the furnishing thereof to be affixed in some conspicuous place in the Court-house and to be published in such other manner, if any, as may be prescribed, and thereafter any person may apply to the Court by a petition in writing, accompanied by the prescribed fee, for the issue of an order requiring the mutawalli to furnish further particulars or documents.

(2) On such application being made, the Court may, after making such inquiry, if any, as it thinks fit, if it is of opinion that any further particulars or documents are necessary in order that full information may be obtained regarding the origin, nature or objects of the wakf or the condition or management of the wakf property, cause to be served on the mutawalli an order requiring him to furnish such particulars or documents within such time as the Court may direct in the order.

Comment

The Court shall cause notice of the furnishing statement to be affixed in some conspicuous place in the Court-house and to be published in .such other manner as may be prescribed. Any person can apply for the issue of any order requiring the *mutawalli* to furnish further documents. But such petition must be in writing and it should be accompanied by the prescribed fee. The Court may direct to furnish any particular if it thinks necessary to do after making due enquiry.

State Amendment

Uttar Pradesh.-- In its application to the State of Uttar Pradesh, s. 4 shall be repealed.--U.P. Act 13 of 1936, S. 70 (w.e.f. 1-7-1941).

STATEMENT OF ACCOUNTS AND AUDIT

5.

Statement of accounts.--

Within three months after the thirty-first day of March next following the date on which the statement referred to in section 3 has been furnished, and thereafter within three months of the thirty-first day of March in every year, every mutawalli shall prepare and furnish to the Court to which such statement was furnished a full and true statement of accounts, in such form and containing such particulars as may be prescribed, of all moneys received or expended by him on behalf of the wakf of which he is the mutawalli during the period of twelve months ending on such thirty-first day of March or, as the case may be, during that portion of the said period during which the provisions of this Act have been applicable to the wakf:

Provided that the Court may, if it is satisfied that there is sufficient cause for so doing, extend the time allowed for the furnishing of any statement of accounts under the section.

6.

Audit of accounts.--

Every statement of accounts shall, before it is furnished to the Court under section 5, be audited--

(a) in the case of a wakf the gross income of which during the year in question, after deduction of the land revenue and cesses, if any, payable to the Government, exceeds two thousand-rupees, by a person who is the holder of a certificate granted by the Central Government under section 144 of the Indian Companies Act, 1913 (6 of 1913),[7] or is a member of any institution or association the members of which have been declared under that section to be entitled to act as auditors of companies throughout the [8] [territories to which this Act applies]; or

(b) in the case of any other wakf, by any person authorised in this behalf by general or special order of the said Court.

State Amendment

Gujarat and Maharashtra.-- In its application to the Bombay area--

(1) After s. 6, insert the following Parts, namely:--

PART III

POWERS OF THE COURT TO CALL FOR PARTICULARS AND STATEMENT OF ACCOUNTS

6-A.

Power of Court to call upon the mutawalli to submit statement.--

(1) Notwithstanding anything contained in section 3, it shall be competent to the Court, on failure of a mutawalli to furnish a statement as required under the said section, to require the mutawalli to furnish, within such time as the Court shall fix, a statement containing all or any of the particulars referred to in the said section, including a copy of the deed or instrument, if any, creating the wakf.

(2) The provisions of section 4 shall apply to a statement furnished under this section as if such statement had been furnished under section 3.

6-B.

Power of Court to require statement of accounts at any time.--

(1) Notwithstanding anything contained in section 5, it shall be competent to the Court, on failure of a mutawalli to furnish a statement of accounts as required under the said section, to require the mutawalli to prepare and furnish, within such time as the Court may fix, a statement of accounts of the nature described in the said section and for such period as the Court may think fit.

(2) The provisions of section 6 shall apply to any statement of accounts required to be furnished under this section as if such statement of accounts were a statement of accounts furnished under section 5.

PART IV

POWERS OF THE COURT TO ENQUIRE

6-C

Power of Court to enquire.--

(1) The Court may, either on its own motion or upon the application of any person claiming to have an interest in a wakf, hold an enquiry in the prescribed manner at any time to ascertain--
(i) whether a wakf exists;
(ia) whether such wakf is a wakf to which this Act applies;
(ii) whether any property is the property of such wakf and whether the whole or any substantial portion of the subject-matter of such wakf is situate within the local limits of the jurisdiction of the Court; and
(iii) who is the mutawalli of such wakf.

(2) If it comes to the knowledge of the Court that a suit has been instituted in any civil Court in regard to any of the matters mentioned in sub-section (1), it shall stay the enquiry so far as it relates to, or is likely to be affected by, the Court's findings or order in regard to such matters, until the suit is finally decided in that Court.
(3) The Court shall, from time to time, ascertain whether such suit has been finally decided and after the final decision of the suit, it shall proceed with the enquiry in regard to such matters, if any, as may not have been decided in such suit.
(4) On completion of the enquiry provided for in sub-sections (1) and (3), the Court shall record its findings as to the matters mentioned in the said sub-sections, except such matters as may have been decided in the aforesaid suit.
(5) Save as provided in this section, the Court shall not, when acting under this section, try or determine any question of the title of any person claiming adversely to the wakf.

PART V

REGISTRATION OF WAKFS, WAKF ACCOUNTS AND WAKF ADMINISTRATIONS FUNDS

6-D.

Registration of Wakfs.--

(1) The Court shall, after the submission of a statement under section 3 or section 4 or section 6-A and an enquiry, if necessary, held under section 6-C, or merely after an equiry held under section 6-C, record in such form as may be prescribed in a register called the Register of Wakfs, the following particulars:--
(a) a description of the wakf property sufficient for the identification thereof;
(b) the gross annual income from such property;
(c) the gross amount of such income which has been collected during the five years preceding the date on which the statement is furnished, or during the period which has elapsed since the creation of the wakf, whichever period is shorter;
(d) the amount of the Government revenue and cesses and of all rents annually

payable in respect of the wakf property;

(e) an estimate of the expenses annually incurred in the realisation of the income, of the wakf property, based on such details as are available of any such expenses incurred within the period to which the particulars under clause (c) relate;

(f) the amount set apart under the wakf for--

(i) the salary of the mutawalli and allowances to individuals;

(ii) purely religious purposes;

(iii) charitable purposes;

(iv) any other purposes;

(g) the name of the mutawalli; and

(h) such other particulars as may be prescribed.

(2) Statements, if any, furnished under sections 3, 4 and 6-A shall be filed with the said Register of Wakfs.

6-E.

Amendment of entries in Register of Wakfs.--

(1) When any change occurs in any of the particulars recorded in the Register of Wakfs, the mutawalli shall, within three months of the occurrence of such change, report to the Court such, change in the prescribed form, accompanied by the prescribed fee. The provisions of sections 3 and 4 shall, so far as may be, apply to any such statement.

(2) For the purpose of verifying the correctness of the entries in the Register of Wakfs or ascertaining any change which may have occurred in such register, the Court may hold an enquiry in the prescribed manner. The provisions of section 6-C shall, so far as may be, apply to any such inquiry.

(3) If the Court, after receiving a report under sub-section (1) and holding an enquiry, if necessary, under sub-section (2), or merely after an enquiry held under sub-section (2), is satisfied that a change has occurred in any of the particulars recorded in the Register of Wakfs with regard to a wakf, it shall amend in the prescribed manner the entry or entries affected by such change and shall file the report furnished under sub-section (1) alongwith the statement, if any, relating to the said wakf filed under section 3.

6-F.

Entries in the Register of Wakfs and findings recorded under section 6-C to be final subject to section 6-G.--

The entries made by the Court in the Register of Wakfs and the findings recorded under section 6-C shall, subject to the provisions of section 6-G, be final for the purposes of this Act .

6-G.

Making or amendment of entries in Register of Wakfs by order of Court.--

A Civil Court of competent jurisdiction deciding any question relating to any wakf may direct that the Court shall make such entries or amendments of entries in the Register of Wakfs relating to the said wakf as are consequential upon its decision, and the Court shall make such entries or amendments of such entries accordingly.

6-H.

Maintenance of account and their audit.--

(1) Every mutawalli of a wakf in respect of which an entry has been recorded in the Register of Wakfs shall keep regular accounts of all movable and immovable property received, and of all payments and alienations made and incumbrances created by him on behalf of the wakf of which he is the mutawalli. Such accounts shall be kept in such form and shall contain such particulars as may be prescribed.

(2) The account shall be balanced on the thirty-first day of March in each year, and shall be examined and audited annually or at such other intervals, and in such manner as may be prescribed and by the persons referred to in section 6.

(3) Every auditor acting under sub-section (2) shall have access to the accounts and to all books, vouchers and other documents and records in the possession and under the control of the mutawalli:

Provided that, if it is proved to the satisfaction of the Court that the gross annual income of any particular wakf is less than two hundred rupees, the Court may by order in writing exempt such wakf from the provisions of this section.

6-I.

Annual contribution from wakfs.--

Every wakf shall, for the purpose of meeting the charges and expenses incidental to the registration, superintendence, administration and control of wakfs, the maintenance of the registers of wakfs, the scrutiny and audit ofaccounts of wakfs, the institution and defence of suits and proceedings relating to wakfs, and generally carrying into effect the purposes of this Act, be liable to pay to the Wakf Administration Fund of the district concerned annually such contribution, on such date and in such manner as may be prescribed:

Provided that the Provincial Government may, by rules made in this behalf, exempt from the provisions of this section any particular wakf or class of wakfs.

6-J.

Wakf Administration Fund.--

For each district there shall be created a fund to be called the Wakf Administration Fund of the district concerned, and there shall be placed to the credit thereof the following sums, namely:--

(a) any fee which may be levied under this Act,
(b) contributions under section 6-I,
(c) any sums received by the Wakf Administration Fund from private sources,
(d) any sums allotted by any Government or by any local authority to the Wakf Administration Fund.

6-K.

Application of Wakf Administration Fund.--

The Wakf Administration Fund of a district shall be under the control and management of the Court and shall be applicable to the payment of charges for and expenses incidental to the registration, superintendence, administration and control of wakfs, the maintenance of the Register of Wakfs, the scrutiny and audit of accounts of wakfs, the institution and defence of suits and proceedings relating to wakfs, and generally carrying into effect the purposes of this Act .

PART VI

SUPERVISION AND CONTROL

6-L.

Constitution and appointment of Wakf Committee.--

(1) There shall be constituted in each district a Wakf Committee to advise and assist the Court in all matters relating to the registration, superintendence, administration and control of wakfs.

(2) The Committee shall consist of:--

(a) the members of Parliament and the State Legislature,

(b) two members elected in the prescribed manner by the mutawallis of all wakfs in the district registered under the Act,

(c) two members elected in the prescribed manner by the members of each district local board in the district professing the Mussalman faith from among their number,

(d) one member elected in the prescribed manner by the members professing the Mussalman faith of each municipality in the district constituted under the Bombay District Municipal Act, 1901,

(e) two members elected in the prescribed manner by the members professing the Mussalman faith of each municipality in the district constituted under the City of Bombay Municipal Act, 1888, the City of Karachi Municipal Act, 1933, or the Bombay Municipal Boroughs Act, 1925, and

(f) such other members not exceeding one-fourth of the total number of the members of the Committee as the State Government may nominate:

Provided that no person who does not ordinarily reside in the district or does not profess the Mussalman faith shall be eligible to be a member of the Committee.

6-M.

Functions of Wakf Committee.--

(1) It shall be competent to the Court to refer at any time to the Wakf Committee or any three or more members thereof, for advice, opinion, enquiry, report or recommendation, within such time as the Court may direct, any matter relating to the registration, superintendence, administration and control of wakfs, and in particular any matter relating to--

(a) the conduct of a mutawalli or a trustee in the administration of a wakf or his fitness to continue as a mutawalli or a trustee,

(b) the settlement, cancellation or alteration of a scheme for the administration of a wakf, or

(c) the application of the funds of a wakf or any surplus thereof.

(2) When the Court has referred any of the matters mentioned in sub-section (1) to a Wakf Committee or any members thereof for advice, opinion, enquiry, report or recommendation, and the Committee or the members thereof, as the case may be, have, either unanimously or by a majority, made their recommendation in relation to the matter referred to them, the Court may pass orders as it thinks fit after giving due

consideration to such recommendation--

(i) suspending, removing or dismissing a mutawalli or trustee;

(ii) appointing a new mutawalli or trustee;

(iii) settling, cancelling or altering a scheme for the administration of a wakf;

(iv) directing the application, investment or deposit of the funds of a wakf or any surplus thereof in a particular manner or to a particular purpose;

(v) generally for carrying out the purposes of the Act :

Provided that nothing in this section shall be deemed to authorise the Court to pass any order which is inconsistent with the objects and purposes of the wakf:

Provided further that no order under this section shall be passed to the prejudice of any mutawalli or trustee without giving such mutawalli or trustee an opportunity to be heard.

(3) For the performance of any of the duties under sub-section (2) the Wakf Committee or any members thereof to whom the Court has referred any matter for advice, opinion, enquiry, report, or recommendation, the Committee or such members thereof may by order in writing require--

(a) the production of any document necessary for the purpose;

(b) the attendance of any person for the purpose of giving evidence or for the production of any document referred to in clause (a).

(4) The provisions of sub-sections (2) and (3) of section 6-C shall, so far as may be, apply to any inquiry under sub-section (1) or (2).

6-N

Court's power to authorise members of Wakfs Committee to institute suits, etc.--

Notwithstanding anything contained in section 92 of the Code of Civil Procedure , 1908, it shall be competent to the Court, after such enquiry as it may think fit, (a) to authorise any one or more of the members of a Wakf Committee to institute or defend any suit or proceeding for the purposes of the protection or recovery of the property of a wakf or for the application of the property of a Wakf to any public, charitable or religious purpose and (b) to allocate from the Wakf Administration Fund such sums as may, in the opinion of the Court, be necessary for the aforesaid purpose.

6-O.

Inspection of wakf property, records and accounts.--

(1) It shall be competent to the Court to direct one or more members of the Wakf Committee to undertake the inspection, in the prescribed manner, of the property, records and accounts of any wakf and to report to the Court, within such time as the Court may direct, the result of such inspection.

(2) It shall be competent to the Court to employ upon such terms and conditions as may be prescribed such persons as may in the opinion of the Court be necessary for carrying out the purposes of this Act and to pay them such remuneration from the Wakf Administration Fund as may be prescribed.

6-P.

Court's power to order special audit.--

It shall be competent to the Court at any time to order a special audit of the accounts of a Wakf by an accountant possessing the prescribed qualifications and to order the cost of such audit to be paid by the mutawalli from the income of the property of the wakf or out of the Wakf Administration Fund.

6-Q.

Publication of lists of wakfs.--

There shall be published annually on such date as the State Government may determine in the Official Gazette and if the State Government so directs in the principal vernacular of the district in a newspaper circulating therein a list of Wakfs and a statement of the sums standing to the credit of the Wakf Administration Fund, under the signature of the Court and in such form as the State Government may prescribe.&uot;--Bombay Act 18 of 1935, S. 5 (w.e.f. 23-9-1935) as amended by Bombay Acts 10 of 1944, 15 of 1945 and Act 11 of 1960, S. 87 (w.e.f. 5-5-1960).

(2) After section 6-Q inserted by Bombay Act 18 of 1935, the heading &uot;Part VII&uot; shall be inserted.--Bombay Act 18 of 1935, s. 6 (w.e.f. 23-9-1935); Act 11 of 1960, s. 87 (w.e.f. 1-5-1960).

GENERAL PROVISIONS

7.

Mutawalli entitled to pay cost of audit, etc., from wakf funds.--

Notwithstanding anything contained in the deed or instrument creating any wakf, every mutawalli may pay from the income of the wakf property any expenses properly incurred by him for the purpose of enabling him to furnish any particulars, documents or copies under section 3 or section 4 or in respect of the preparation or audit of the annual accounts for the purposes of this Act .

State Amendments

Gujarat and Maharashtra.-- In its application to the Bombay area, in s. 7, after the word and figure &uot; section 4&uot;, insert &uot; section 6-A or section 6-B or section 6-C or section 6-E&uot;.--Bombay Act 18 of 1935, s. 7 (w.e.f. 23-9-1935) and Act 11 of 1960, s. 87 (w.e.f. 1-5-1960).

8.

Verification.--

Every statement of particulars furnished under section 3 or section 4, and every statement of accounts furnished under section 5, shall be written in the language of the Court to which it is furnished, and shall be verified in the manner provided in the Code of Civil Procedure, 1908 (5 of 1908), for the signing and verification of pleadings.

State Amendments

Gujarat and Maharashtra.-- In its application to the Bombay area, in s. 8--

(a) after the word and figure &uot; section 4&uot;, insert &uot;or section 6-A or section 6-C

or section 6-E"; and

(b) after the word and figure " section 5", insert "or section 6-B or section 6-C".--Bombay Act 18 of 1935, S. 8 (w.e.f. 23-9-1935) and Act 11 of 1960 (w.e.f. 1-5-1960).

Orissa.-- In its application to the State of Orissa, in S. 8, the words "in Urdu or" shall be read after the word "written".--Bihar and Orissa Act 1 of 1926, S. 2 (w.e.f. 15-5-1926).

9.

Inspection and copies.--

Any person shall, with the permission of the Court and on payment of the prescribed fee, at any time at which the Court is open, be entitled to inspect in the prescribed manner, or to obtain a copy of, any statement of particulars or any document furnished to the Court under section 3 or section 4, or any statement of accounts furnished to it under section 5, or any audit report made on an audit under section 6.

State Amendments

Gujarat and Maharashtra.-- In its application to the Bombay area, in s. 9--

(a) after the word and figure " section 4", insert "or section 6-A or section 6-C or section 6-E";

(b) after the word and figure " section 5", insert "or section 6-B or section 6-C";

(c) after the word and figure " section 6", insert "or section 6-H or section 6-P or any entry in the Register of Wakfs or any statement, notice, intimation, report, accounts or any document filed under this Act ".--Bombay Act 18 of 1935, S. 9 (w.e.f. 23-9-1935); Act 11 of 1960, S. 87 (w.e.f. 1-5-1960).

Section 9-A

State Amendments

Gujarat and Maharashtra.-- In its application to the Bombay area--

(1) After s. 9, insert the following section, namely:--

"9-A. Provisions of Code of Civil Procedure to apply.--

(1) The provisions of the Code of Civil Procedure, 1908, relating to--

(a) the proof of facts by affidavits,

(b) the enforcing of the attendance of any person and his examination on oath,

(c) the enforcing of the production of documents, and

(d) the issuing of commissions,

shall apply to all proceedings held by the Court under this Act and provisions relating to the service of summons shall apply to the service of notices thereunder.

(2) The provisions of the said Code relating to the execution of decrees shall, so far as they are applicable, apply to the execution of orders passed by the Court under this Act .&uot;--Bombay Act 18 of 1935, s. 10 (w.e.f. 23-9-1935); Act 11 of 1960, s. 87 (w.e.f. 1-5-1960).

(3) After s. 9-A, inserted by Bombay Act 18 of 1935, the heading &uot;Part III&uot; shall be inserted.-- Bombay Act 18 of 1935, s. 11 (w.e.f. 23-9-1935) and Act 11 of 1960, s. 87 (w.e.f. 1-5-1960).

PENALTY

10.

Penalties.--

Any person who is required by or under section 3 or section 4 to furnish a statement of particulars or any document relating to a wakf, or who is required by section 5 to furnish a statement of accounts, shall, if he, without reasonable cause the burden of proving which shall lie upon him, fails to furnish such statement or document, as the case may be, in due time, or furnishes a statement which he knows or has reason to believe to be false, misleading or untrue in any material particular, or, in the case of a statement of accounts, furnishes a statement which has not been audited in the manner required by section 6, be punishable with fine which may extend to five hundred rupees, or, in the case of a second or subsequent offence, with fine which may extend to two thousand rupees.

Comment

Five hundred rupees has been provided as a punishment if anybody fails to furnish statement or document in due time or files a false and misleading statement of accounts. If the offence is repeated again the fine can be extended upto two thousand rupees.

State Amendments

Gujarat and Maharashtra.-- In its application to the Bombay area, in s. 10--

(a) after the word and figure &uot; section 4&uot;, insert &uot;or section 6-A or section 6-C or section 6-E&uot;;

(b) after the words and figure &uot; section 5&uot;, insert &uot;or section 6-B or section 6-C&uot;;

(c) after the word &uot;accounts&uot; insert &uot;or who is required by section 6-H to keep regular accounts&uot;;

(d) after the word &uot;document&uot; insert &uot;or to keep regular accounts&uot;.

(e) after the word &uot;statement&uot; insert &uot;or keeps accounts&uot;.--Bombay Act 18 of 1935, s. 12 (w.e.f. 23-9-1935) and Act 11 of 1960, s. 87 (w.e.f. 1-5-1960).

Sections 10-A to 10-D

State Amendments

Gujarat and Maharashtra.-- In its application to the Bombay area, after S. 10, insert the following section, namely:--

&uot;10-A.

Penalty for non-compliance with any other order.--

(1) If any person fails to comply with any order passed by the Court or by the Wakf Committee or any member thereof under or in pursuance of the provisions of this Act, such person shall, if such failure to comply is not punishable under any of the sections of this Act, be on conviction punishable with fine which may extend to one thousand rupees.

(2) A Criminal Court may, in passing an order of conviction for an offence under sub-section (1), specify the period within which the person convicted shall comply with the provisions of this Act which may be found to have been contravened by him, and may also prescribe a daily fine not exceeding Rs. 50 for every day for the period during which the default continues after the expiry of the period so specified:

Provided that, if the person failing to comply with any direction issued by such Court satisfies such Court that there is good reason for his failure to do so and applies for an extension of the period specified under this section, such Court may, if it thinks fit, extend the period and may remit the whole or any part of the fine paid or due.

10-B.

Cognizance of offences.--

(1) No prosecution under this Act shall be instituted except by or with the previous sanction of the Court given in the prescribed manner.

(2) No Criminal Court inferior to that of a Presidency Magistrate or of a Magistrate of the First Class shall try an offence under this Act .

10-C.

Prosecution of, and suits against, persons acting in good faith.--

No suit or prosecution or other proceeding shall be instituted against any person for anything which is in good faith done or intended to be done under this Act .

10-D.

Recovery of sums due under this Act.--

All sums due under this Act shall be recoverable as arrears of land revenue&uot;.--Bombay Act 18 of 1935, s. 13 (w.e.f. 23-9-1935); Act 11 of 1960, s. 87 (w.e.f. 1-5-1960).

RULES

11.

Power to make rules.--

(1) The State Government may, after previous publication, by notification in the Official Gazette, make rules to carry into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:--

(a) the additional particulars to be furnished by mutawallis under clause (g) of sub-section (1) of section 3;

(b) the fees to be charged upon applications made to a Court under sub-section (1) of section 4;

(c) the form in which the statement of accounts referred to in section 5 shall be furnished, and the particulars which shall be contained therein;

(d) the powers which may be exercised by auditors for the purposes of any audit referred to in section 6, and the particulars to be contained in the reports of such auditors;

(e) the fees respectively chargeable on account of the allowing of inspections and of the supply of copies under section 9;

(f) the safe custody of statements, audit reports and copies of deeds or instruments furnished to Courts under this Act ; and

(g) any other matter which is to be or may be prescribed.

[9] [Every rule made by the State Government under this Act shall be laid, as soon as may be after it is made, before the State Legislature.]

State Amendments

Gujarat and Maharashtra.-- In its application to the Bombay area--

(1) In sub-s. (2) of s. 11--

(a) in cl. (a), after the word and figure &uot; section 3&uot;, insert &uot;or under section 6-A or section 6-C&uot;;

(b) for cl. (b), substitute the following clause, namely;--

&uot;(b) the manner in which notice to be published under section 4 and the fees to be charged upon application made to the Court under sub-section (1) of section 4 or under section 6-A or section 6-B or section 6-C;&uot;

(c) in cl. (c), after the word and figure &uot; section 5&uot;, insert &uot;or section 6-B or section 6-C&uot;;

(d) in cl. (d), after the word and figure &uot; section 6&uot;, insert &uot;or section 6-H or section 6-P&uot;;

(e) in cl. (e), after the brackets and letter &uot;(e)&uot;, insert &uot;the manner of inspection and&uot;;

(f) after cl. (f), insert the following clauses, namely:--

&uot;(f-1) the manner in which subject to the provisions of section 9-A an inquiry shall be held by the Court and the Wakf Committee under section 6-C or section 6-M and the manner in which the parties shall be represented in such inquiry and the costs of such inquiry shall be borne,

(f-2) the manner in which the Register of Wakfs shall be prepared and maintained

under section 6-D,

(f-3) the form in which a change in any of the particulars recorded in the Register of Wakfs shall be reported and the amount of fee to accompany such report and the manner in which the inquiry shall be held and the entries in the Register of Wakfs shall be amended under section 6-E,

(f-4) the form in which the accounts shall be prepared, kept and furnished, the particulars to be entered therein, and the manner in which, and interval at which such accounts shall be audited under section 6-H,

(f-5) the amount of contribution, and the date on which and the manner in which it shall be paid and exemptions granted under section 6-I,

(f-6) the appointment and remuneration of auditors appointed under the Act,

(f-7) the management, custody, investment and disbursement of the Wakf Administration Fund,

(f-8) the purpose for which a Wakf Administration Fund shall be applied under section 6-K,

(f-9) the number of members who shall constitute a Wakf Committee, the period of offence of a Wakf Committee and the manner in which such committee shall hold its meetings and the procedure to be followed at their meetings,

(f-10) the manner in which the inspection of the property, records and accounts of a Wakf shall be carried out, the sum which shall be paid in respect of the costs of the members of the Wakf Committee undertaking such inspection, the terms and conditions on which persons shall be employed and the remuneration which shall be paid to such persons, under section 6-O,

(f-11) the qualifications of an accountant appointed under section 6-P,

(f-12) the form in which a list of Wakfs shall be published under section 6-Q.&uot; (2) After sub-S. (2) of s. 11, add the following new sub-section, namely:--

&uot;(3) Rules made under this section shall be laid before each of the Chambers of the State Legislature at the session thereof next following and shall be liable to be modified or rescinded by a resolution in which both the Chambers concur and such rule shall after notification in the Official Gazette be deemed to have been modified or rescinded accordingly:

Provided that when in the opinion of the State Government such modification or rescission is likely to defeat or frustrate any of the purposes of this Act, the State Government may by notification in the Official Gazette declare that the modification or rescission shall have no effect and thereupon the rules shall remain in force as if they had not been modified or rescinded.&uot;--Bombay Act 18 of 1935, s. 14 (w.e.f. 23-9-1935) and Act 11 of 1960, s. 87 (w.e.f. 1-5-1960).

12.

Savings.--

Nothing in this Act shall--

(a) affect any other enactment for the time being in force in the [10] [territories to which this Act applies] providing for the control or supervision of religious or charitable endowments; or

(b) apply in the case of any wakf the property of which--

(i) is being administered by the Treasurer of Charitable Endowments, the Administrator General, or the Official Trustee; or

(ii) is being administered either by a receiver appointed by any Court of competent jurisdiction, or under a scheme for the administration of the wakf which has been settled or approved by any Court of competent jurisdiction or by any other authority act ing under the provisions of any enactment.

13.

Exemption.--

The State Government may, by notification in the Official Gazette, exempt from the operation of this Act or of any specified provision thereof any wakf or wakfs created or administered for the benefit of any specified section of the Mussalman community.

1 This Act does not apply to any wakf to which the Wakf Act 29 of 1954 applies.*See* s. 69 of the latter Act. [This has been repealed by the Wakf Act, 1954 (43 of 1995).] This Act has been repealed in its application to Bengal by the Bengal Wakf Act, 1934. It has been repealed in part in the United Provinces by the U.P. Muslim Wakf Act, 1936. This Act does not apply to wakfs to which the Bihar Wakf Act 8 of 1948 applies. This Act has been extended to the new Provinces and merged States by the Merged States (Laws) Act 59 of 1949 and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act 30 of 1950. Manipur and Tripura are full-fledged States now, see Act 81 of 1971. Vindhya Pradesh is a part of the State of Madhya Pradesh now, see Act 37 of 1956.

2 Subs. by A.O. 1950, for sub-S. (2).

3 Subs. by the Adaptation of Laws (No. 3) Order, 1956.

4 Sections. 2 to 5 and 7 to 13 were brought into force in the Punjab with effect from the 14th May, 1924, see Punjab Gazette, 1924, Pt. I, p. 418. Sections 2 to 13 were brought into force in the Presidency of Bombay from the 1st June, 1925, see Bombay Government Gazette, 1925, Pt. I, p. 1414. All provisions of the Act were brought into force in Bihar and Orissa from the 3rd September, 1925, see Bihar and Orissa Gazette, 1925, Pt. II, p. 1192. Sections 2 to 13 were brought into force in the Presidency of Bengal with certain modifications from the 1st June, 1927, see Calcutta Gazette, Pt. I, p. 1008. Sections 2 to 13 were brought into force in Ajmer-Merwara from the 1st February, 1928, see Gazette of India, 1928, Pt. II-A, p. 20. Sections 2 to 13 came into force in the Madras Presidency on 1st July, 1931.

5 *Amini Bi v. Khamurunnissa,* A.I.R. 1974 Mad. 54 at p. 56

6 *Vide* Bindra's *Conveyancing* , 5th Ed., 1971. p. 114; *P.S. Abdul Kadir v. Mahlarathul Kadirya Sabha Kayalpatnam,* (1952) M.W.N. 941 at p. 944: A.I.R. 1953 Mad. 143.

7 Now see the Companies Act, 1956 (1 of 1956).

8 Subs. by A.O. 1950, for &uot;Provinces&uot;.

9 Ins. by Act 4 of 2005, s. 2 and Sch. (w.e.f. 11-1-2005).

10 Subs. by A.O. 1950, for &uot;Provinces&uot;.

THE MUSSALMAN WAKF VALIDATING ACT, 1913[1]

(**6 of 1913)**

[7th *March*, 1913]

STATEMENT OF OBJECTS AND REASONS

The object of this Bill is to remove disability and great hardship that has been created by the recent decisions of the Privy Council in *Abdul Fata Mahomad Ishak v. Russomoy Dhur Chowdhry,* LR 22 Ind App 76 and other cases. The power of a Mussalman to make a settlement for or in favour of his

family, children and descedants or what is known as wakf-alal-aulad to the Mussalman Law is paralysed.

In the case above cited it was held that under Mussalman Law is perpetual family settlement expressly made as wakf is not legal and valid merely because there is an ultimate gift to the poor and it confirmed the decision in *Ashanulla Chowdhry v. Amarchand Kundu* , reported in LR 17 Ind App 28 the principle of which was approved in the subsequent case of *Abdul Gafur v. Nizamuddin,* LR 19 Ind App 170, where it was laid down that a gift is not good as wakf unless there is a substantial dedication of the property to charitable uses at some period of time or other.

The decision does not fix any limit of time, it simply says &uot;some period of time or other&uot;. It does not define what is &uot;substantial dedication&uot;. Thus, it introduces the greatest uncertainty in the law and is generally opposed to the true principles and correct exposition of the Mussalman Jurisprudence. This Bill is intended only to reproduce the Mussalman law or wakf-alal-aulad in a codified form which (with) certain safeguards for the authenticity of the wakfnama and for prevention of fraud upon creditors or otherwise.

It is not intended to codify or define the general law of wakf which must be governed by the Mussalman Law.

An Act to declare the rights of Mussalmans to make settlements of property by way of &uot;wakf&uot; in favour of their families, children and descendants.

WHEREAS doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes; and whereas it is expedient to remove such doubts; It is hereby enacted as follows:--

1.

Short title and extent.--

(1) This Act may be called THE MUSSALMAN WAKF VALIDATING ACT, 1913.
(2) It extends to the whole of India except[2] [the territories which, immediately before the 1st November, 1956, were comprised in Part B States].

2.

Definitions.--

In this Act, unless there is anything repugnant in the subject, or context,--

(1) &uot;Wakf&uot; means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable.
(2) &uot;Hanafi Mussalman&uot; means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi School of Mussalman law.

3.

Power of Mussalmans to create certain wakfs.--

It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes:--

(a) for the maintenance and support wholly or partially of his family, children or descendants, and
(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

Comment

Wakf can be created by any Mussalman for the maintenance of his family, children or descendants. Hanafi Mussalman can create *wakf* for his own maintenance also or for the payment of debts out of the rents and profits of the property dedicated to such *wakf*. But it is necessary that the ultimate benefit should be to poor, pious or charitable purpose of a permanent nature.

4.

Wakfs not to be invalid by reason of remoteness of benefit to poor, etc.--

No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

Comment

The general result of the authorities seems to be that the *wakf* may lawfully change the *wakf* property, in other words, alter the investment provided he has reserved, at the time of dedication, power to that effect. Otherwise, no alteration can be effected without the leave of the *kazi* or Judge, who has the power to authorise a change of investment whenever he considers it beneficial for the *wakf*.[3]

5.

Saving of local and sectarian custom.--

Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect.

1 This Act was given retrospective effect by the Mussalman Wakf Validating Act 32 of 1930, s. 2,*ibid*, reads thus,--&uot;2. The Mussalman Wakf Validating Act, 1913, shall be deemed to apply to wakf created before its commencement:*Provided*that nothing herein contained shall be deemed in any way to affect any right, title, obligation or liability already acquired, accrued or incurred before the commencement of this Act .&uot; This Act has been declared to be in force in the Sonthal Parganas by Notification under s. 3 of the Sonthal Parganas Settlement Regulation (3 of 1872). It has been extended to the new provinces and merged States by the Merged States (Laws) Act (59 of 1949) and to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act (30 of

1950). Manipur and Tripura are full-fledged States now, see Act (81 of 1971). Vindhya Pradesh is a part of the State of Madhya Pradesh now, *see*Act (37 of 1956). This Act and the Act 32 of 1930 have been extended to the transferred territories, (*i.e.*), the Kanyakumari District and the Shencottah taluk of the Tirunelveli District in Tamil Nadu, by the T.N. Act (23 of 1960). It has now been extended to the Union territory of Dadra and Nagar Haveli by Regulation (6 of 1963).

2 Subs. by the Adaptation of Laws (No. 2) Order, 1956, for &uot;Part B States&uot;.

3 *P.S. Abdul Qadir v. Mahlarathul Kadirya Sabha, Kayalpatnam,* (1952) M.W.N. 911 at p. 944: A.I.R. 1953 Mad 143; see also *Mofizuddin Howalder v. Abdul Rashid* (1983) 35 Dhaka Law Reporter 36(A.D.) and *Jangli Bibi Mosque v. Latifa Chowdhurani* , 1984 Bangladesh Legal Decisions 240.

APPENDIX XI - THE MUSSALMAN WAKF VALIDATING ACT, 1930[1]

(32 of 1930)

[25th *July*, 1930]

STATEMENT OF OBJECTS AND REASONS

Muhammadan Law permits a perpetual bequest in the form of wakf-al-aulad, that is a bequest for the benefit of the testator's descendants. As such it contravenes the law against perpetuities as enacted in section 14 of the Transfer of Property Act and section 114 of the Indian Succession Act. A doubt was cast on this doctrine by the Privy Council in several cases in which their Lordships held such bequests illegal as obnoxious to the rule against perpetuities (*Abdul Fata v. Rasamaya,* 22 C 619(PC) ; *Abdul Gafur v. Nizamuddin,* ILR 19 Ind App 170; *Mujidun-nissa v. Abdul Rahim,* 23 A 233(PC) ; *Muhammad Munawar Ali v. Razia Bibi,* 27 A 320(PC) . Mr Jinnah introduced a Bill which became Act VI of 1913 restoring the validity of such wakfs.

But in several cases since decided this Act is held to be inapplicable to wakfs created before its enactment (*Khajeh Solehman v. Salimullah,* 49 C 820(PC) ; *Rahimunnissa v. Shaik Manik Jan,* 19 CWN 76; *Mahomed Bukht v. Dewan Ajman Reja,* 43 C 158; *Amirbibi v Azizabibi,* 39 B 563).

As Act 6 of 1913 was merely declaratory of the validity of such wakfs, it was understood that it would apply equally to all wakfs whether created before or since that enactment. But as the Courts have held otherwise, this Bill is framed to give that Act retrospective operations.

It is apprehended that Mussalman Wakf Validating Act (6 of 1913) was not intended to introduce a change in the old law being enacted to restore the old rule. This Bill will, if passed, carry out its intention by resolving a doubt resulting from recent cases.

An Act to give retrospective effect to the Mussalman Wakf Validating Act, 1913.

WHEREAS the Mussalman Wakf Validating Act, 1913, does not apply to wakfs created before its enactment;

AND WHEREAS it is expedient to validate such wakfs without infringing any rights contrary thereto which may have already accrued or been acquired;

It is hereby enacted as follows:--

1.

Short title.--

This Act may be called THE MUSSALMAN WAKF VALIDATING ACT, 1930.

2.

Act 6 of 1913 to apply retrospectively.--

The Mussalman Wakf Validating Act, 1913 (6 of 1913), shall be deemed to apply to wakfs created before its commencement:

*Provided*that nothing herein contained shall be deemed in any way to affect any right, title, obligation or liability already acquired, accrued or incurred before the commencement of this Act.

Comment

The Mussalman Wakf Validating Act, 1913 shall have a retrospective effect. The Act shall apply to*wakf*s which have been created before its commencement. But the retrospectivity has no effect to any right or liability accrued before the commencement of the Act.

1 This Act has been declared to be in force in the Sonthal Parganas by notification under s. 3(3)(a) of the Sonthal Parganas Settlement Regulation (3 of 1872). The Act has been extended to the new Provinces and Merged States, by the Merged States (Laws) Act (59 of 1949), to the States of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act (30 of 1950); Manipur and Tripura are full-fledged States now, *see* (81 of 1971). Vindhya Pradesh is a part of the State of Madhya Pradesh now, *see*Act 37 of 1956. The Act has been extended to the transferred territory in the State of Tamil Nadu, by the Madras (Transferred Territory) Extension of Laws Act (23 of 1960). The Act has been extended to the Union Territory of Dadra and Nagar Haveli by the Dadra and Nagar Haveli (Laws) Regulation (6 of 1963)

APPENDIX XII - THE PUBLIC WAKFS (EXTENSION OF LIMITATION) ACT, 1959

(29 of 1959)[1]

[1st *September*, 1959]

An Act to extend the period of limitation in certain cases for suits to recover possession of immovable property forming part of Public Wakfs.

Be it enacted by Parliament in the Tenth Year of the Republic of India as follows:

1.

Short title and extent.--

(1) This Act may be called the Public Wakfs (Extension of Limitation) Act, 1959.
(2) It extends to the whole of India except the State of Jammu and Kashmir.

2.

Definition.--

In this Act, &uot;public *wakf*&uot; means the permanent dedication by a person professing Islam of any immovable property for any purpose recognised by Muslim Law as a public purpose of a pious, religious or charitable nature.

Comment

The &uot;public *wakf*&uot; has been defined as a permanent dedication by a Mussalman of any immoveable property for the purpose recognised by Muslim law as a public purpose of a pious nature.

3.

Extension of period of limitation in certain cases for suit to recover possession of immovable property forming part of public wakfs.--

Where a person is entitled to institute a suit of the description referred to in Art. 142 or Art. 144 of the First Schedule to the Indian Limitation Act, 1908 (9 of 1908), for possession of any immovable property forming part of a public*wakf* or any interest therein has been dispossessed, or has discontinued the possession, at any time after the 14th day of August, 1947, and before the 7th day of May, 1954, or, as the case may be, the possession of the defendant in such a suit has become adverse to such person at any time during the said period, then, notwithstanding anything contained in the said Act, the period of limitation in respect of such a suit shall extend up to the[2] [31st day of December, 1970.]

State Amendments

The extended period of limitation under s. 3 of the Public Wakfs (Extension of Limitation) Act, 1959 in its application to the different States is as under:

Sl No.	*States*	*Extended period of limitation*
1.	**Bihar**	31st December, 1985, *vide* Bihar Act No, 65 of 1982, Sec. 2 (with retrospective effect)
2.	**Union Territory of Delhi**	31st December, 1985, *vide* Act No. 39 of 1982, Sec. 2 (w.e.f. 1st January, 1981)
3.	**Haryana**	31st December, 1975, *vide* Haryana Act 4 of 1975, Sec. 3.
4.	**Himachal Pradesh**	31st December, 1978, *vide* H.P. Act No. 13 of 1978, Sec. 2 (w.e.f. 1st January, 1975)
5.	**Madhya Pradesh**	31st December, 1983, *vide* M.P. Act No. 22 of 1982, Sec. 2 (w.e.f. 31st of December, 1982)
6.	**Orissa**	31st December, 1981, *vide* Orissa Act No. 12 of 1982, Sec. 2 (w.e.f. 1st January, 1982)
7.	**Rajasthan**	31st December, 1980 *vide* Rajasthan Act No. 21 of 1978. Sec. 2 (w.e.f! 1st January, 1975)
8.	**West Bengal**	31st December, 1976, *vide* West Bengal Act No. 33 of 1972. Sec. 3 (w.e.f. 1st January, 1971).

4.

Repeal and Saving.--

(1) The Public Wakfs (Extension of Limitation) Ordinance, 1959 (2 of 1959), is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under this Act as if this Act had commenced on the 20th day of July, 1959.

1 See now the Limitation Act, 1963.

2 Subs, by Act 9 of 1969, s. 2, for "the 31st day of December, 1968".

APPENDIX XIII - THE KAZIS ACT, 1880

(12 of 1880)

[9th *July*, 1880.]

An Act for the appointment of persons of the Office of Kazi.

WHEREAS by the preamble to Act No. XI of 1864[1] (*An Act to repeal the law relating to the offices of*

Hindus and Mahommedan Law officers and to the offices of Kazi-ul-kuzaat, and of kazi, and to abolish the former offices, it was (among other things) declared that it was inexpedient that the appointment of the *kazi-ul-kuzaat*, or of City, Town or Pargana *kazis* should be made by the Government, and by the same Act the enactments relating to the appointment by the Government of the said officers were repealed; and whereas by the usage of the Mahommedan community in some parts of[2] [India] the presence of *kazis* appointed by the Government is required at the celebration of marriages and the performance of certain other rites and ceremonies, and it is therefore expedient that the Government should again be empowered to appoint persons to the office of *kazi*; It is hereby enacted as follows:

Comment

Preamble.--The extracts from the Statement of Objects and Reasons and the preamble to the Kazis Act, clearly show that a*kazi* holds a position of considerable importance in Mahommedan community and that his presence at the celebration of marriages and at the performance of certain other rites and ceremonies is considered essential by Mahommedans. Therefore, the contention that a *kazi* performs not only secular duties but also certain religious duties, has to be upheld.[3]

1.

Short rule.--

This Act may be called the Kazis Act, 1880;[4] [* * * * * * *]

Local extent.--It extends, in the first instance, only to the territories administered by the Governor of Fort Saint George in Council.[5] [But the Government of any other State] may, from time to time, by notification in the Official Gazette, extend it to the whole or any part of the territories under its administration.[6]

2.

Power to appoint Kazis for any local area.--

Wherever it appears to the State Government that any considerable number of the Mahommedans resident in any local area desire that one or more *kazi*s should be appointed for such local area, the State Government may, if it thinks fit, after consulting the principal Mahommedan residents of such local area, select one or more fit persons and appoint him or them to the *kazis* for such local area.

If any question arises whether any person has been rightly appointed *kazi* under this section, the decision thereof by the State Government shall be conclusive.

The State Government may, if it thinks fit, suspend or remove any *kazi* appointed under this section who is guilty of any misconduct in the execution of his office, or who is for a continuous period of six months absent from the local area for which he is appointed, or leaves such local area for the purpose of residing elsewhere, or is declared an insolvent, or desires to be discharged from the office, or who refuses or becomes in the opinion of the State Government unfit, or personally incapable, to discharge the duties of the office.

Comment

Appointment of Kazi.--Power of the State Government--Under s. 2 of the Kazis Act, 1880, it is the State Government that has to appoint a*kazi* after consulting the principal Mahommedan residents of such local areas.[7]

3.

Naib Kazis.--

Any *kazi* appointed under this Act may appoint one or more persons as his naib or naibs to act in his place in all or any of the matters appertaining to his office throughout the whole or in any portion of the local area for which he is appointed, and may suspend or remove any naib so appointed.

When any *kazi* is suspended or removed under s. 2, his *naib or naibs* (if any) shall be deemed to be suspended or removed, as the case may be.

4.

Nothing in Act to confer judicial or administrative powers; or to render the presence of kazi necessary; or to prevent any one act ing as kazi.--

Nothing herein contained, and no appointment made hereunder, shall be deemed--

(a) to confer any judicial or administrative power on any *kazi* or *naib kazi* appointed hereunder; or
(b) to render the presence of a *kazi* or *naib kazi* unnecessary at the celebration of any marriage or the performance of any rite or ceremony, or
(c) to prevent any person discharging any of the functions of a *kazi*.

1 Rep. by Act 8 of 1868.

2 Subs, by the A.O. 1950, for "the Provinces".

3 *Khazi Mohd Abbas Ali v. Andhra Pradesh Wakf Board,* A.I.R. 1979 A.P. 116 at p. 120.

4 The words "and it shall come into force at once" rep. by Act 10 of 1914, s. 3 and Seh. II.

5 Subs. by Act 3 of 1951, s. 3 and Schedule for "But the Government of any other Part A State or the Government of a Part C State" (w.e.f. 1-4-1951).

6 The Act has been extended to certain places in the Bombay Presidency, West Bengal, U.P., Punjab, C.P. and Assam.

7 *Khan Mohd Abbas Ali v. Andhra Pradesh Wakf Board,* A.I.R. 1979 A.P. 116 at p. 120.

TABLE OF RESIDUARIES IN ORDER OF SUCCESSION --Sunni Law

(1) Sharers	(2) Normal Share		(3) Conditions under which the normal share is inherited	(4) *This column sets out*— (A) Shares of Sharers Nos. 3, 4, 5, 8 and 12 as varied by special circumstances; (B) Conditions under which Sharers Nos. 1, 2, 7, 8, 11 and 12 succeed as Residuaries.
	of one	of two or more collectively (b)		
1. FATHER	1/6	..	When there is a child or child of a son h.l.s.	[When there is no child or child of a son h.l.s, the father inherits as a residuary: see Tab. of Res., No. 3.]
2. TRUE GRANDFATHER [sec 62 cl. (a)].	1/6	..	When there is a child or child of a son h.l.s. and no father or nearer true grandfather	[When there is no child or child of a son h.l.s., the Tr. G.F. inherits as a residuary, provided there is no father or nearer Tr. G.F.: see Tab. of Res., No. 4]
3. HUSBAND	1/4	..	When there is a child or child of a son h.l.s.	1/2 when no child or child of a son h.l.s.
4. WIFE (*c*)	1/8	1/8	When there is a child or child of a son h.l.s.	1/4 when no child or child of a son h.l.s.
5. MOTHER	1/6	..	(a) When there is a child or child of a son h.Ls., or (b) when there are two or more brothers or sisters, or even one brother *and* one sister, whether full consanguine or uterine.	1/3 when no child or child of a son h.l.s., and not more than one brother or sister (if any); but if there is also a wife or husband *and* the father, then only 1/3 of what remains after deducting the wife's or husband's share
6. TRUE GRANDMOTHER [sec 62, cl. (c)].	1/6	1/6	A. *Maternal*—when no mother, and no nearer true grandmother either paternal or maternal. B. *Paternal*—when no mother, no father, no nearer true grandmother either paternal or maternal, and no intermediate true grandfather.	
7. DAUGHTER	1/2	2/3	When no son.	[With the son she becomes a residuary: see Tab. of Res., No. 1.]
8. SON'S DAUGHTER h.l.s [sec 62, cl. (f)]. ***e.g.***	1/2	2/3	When no (1) son, (2), daughter, (3) higher son's son, (4) higher son's daughter, or (5) *equal son's son*. (*d*)	When 'there is only one daughter, or higher son's daughter but no (1) son, (2) higher son's son, or (3) *equal son's son*, the daughter or higher son's daughter will take 1/2 and the son's daughter h.l.s. (whether one or more) will take 1/6, *i.e.*, 2/3—1/2] [With an equal son's son she becomes a residuary: see Tab. of Res., No. 2].
(i) Son's Daughter	1/2	2/3	When no (1) son, (2) daughter, or (3) *son's son.*	When there is only one daughter the son's daughter (whether one or more) will take 1/6, if there be no son or *son's son*. (With the son's. son she becomes a residuary: see Tab. of Res., No. 2].
(ii) Son's Son's Daughter	1/2	2/3	When no (1) son, (2) daughter, (3) son's son, (4) son's daughter, or (5) *son's son's.*	When there is only one daughter or son's daughter, the son's son's daughter (whether one or more) will take 1/6, if there be no (1) son, (2) son's son or (3) *son's son's son*. [With the son's son's son she becomes residuary: see Tab. of Res., No. 2.]
9. UTERINE BROTHER 10. or SISTER	1/6	1/3	When no (1) child, (2) child of a son h.l.s., (3) father of (4) true grandfather.	
11. FULL SISTER	1/2	2/3	When no (1) child, (2) child of a son h.l.s., (3) father (4) true grandfather, or (5) *full brother*.	[With the full brother she becomes a residuary: see Tab. of Res., No. 5.]
12. CONSANGUINE SISTER	1/2	2/3	When no (1) child, (2) child of a son h.l.s., (3) father, (4) true grandfather, (5) full brother, (6) full sister, or (7) *consanguine brother*.	But if there is only one full sister and she succeeds as a sharer, the consanguine sister (whether one or more) will take 1/6, provided she is not otherwise excluded from inheritance. [With the consanguine brother she becomes a residuary: see Tab. of Res., No. 7.]

(b) The collective share is always divided *equally* among those to whom it is allotted.

(c) A Mahomedan can have as many as four wives at a time.

(c) If there be a *son's son* and a *son's son's daughter*, the former is a *higher* son's son in relation to the latter. If there be a *son's son* and a *son's daughter* the former is a *lower* son's son in

relation to the latter. And if there be *a son's son* and *son's daughter* or a *son's son's daughter*, the former is in *equal* son's son in relation to the latter, both being equally removed from the deceased.

TABLE OF RESIDUARIES IN ORDER OF SUCCESSION --Sunni Law

I.-- DESCENDANTS:

1. **SON.**

   Daughter takes as a residuary with the son, the son taking a double portion.
2. **SON'S SON h.l.s--** the nearer in degree excluding the more remote. Two or more son's son inherit in equal shares. Son's daughter h.l.s. takes as a residuary with an *equal* son's son. If there be no *equal* son's son, but there is a *lower* son's son, she takes as a residuary with him, *provided she cannot inherit as a sharer* [(see ill. (k)]. In either case, each son's son h.l.s. takes double the share of each son's daughter h.l.s.

Note.--When the son's daughter h.l.s. becomes a residuary with a *lower* son's son, and there are son's daughters h.l.s. equal in degree with the *lower* son's son she shares equally with them, as if they were all of the same grade [sec ill. (m)].

II.--ASCENDANTS:

3. **FATHER.**
4. **TRUE GRANDFATHER** h.h.s.--the nearer in degree excluding the more remote.

III.--DESCENDANTS OF FATHER:

5. **FULL BROTHER.**

   FULL SISTER--takes as a residuary with full brother, the brother taking a double portion.
6. **FULL SISTER.--**In default of full brother and the other residuaries above-named, the full sister takes the residue if any, if there be (1) a daughter or daughters, or (2) a son's daughter or daughters h.l.s., or even if there be (3) *one* daughter *and* a son's daughter or daughters h.l.s. See *Sir*. pp. 24-25.
7. **CONSANGUINE BROTHERS.**

   CONSANGUINE SISTER--takes as a residuary with consanguine brother, the brother, taking a double portion.
8. **CONSANGUINE SISTER.--**In default of consanguine brother and the other residuaries above-named, the consanguine sister takes the residue, *if any*, if there be (1) a daughter or daughters or (2) a son's daughter or daughters h.l.s. or even if there be (3) *one* daughter *and* a son's daughter or daughters h.l.s. See *Sir*. pp. 24-25.
9. **FULL BROTHER'S SON.**

10. CONSANGUINE BROTHER'S SON.
11. FULL BROTHER'S SON'S SON.
12. CONSANGUINE BROTHER'S SON'S SON.

Then come remoter male descendants of No. 11 and No. 12, that is, the son of No. 11, then the son of No. 12, then the son's son of No. 1l, then the son's son of No. 12 and so on in like order.

IV.--DESCENDANTS OF TRUE GRANDFATHER h.h.s.:

13. FULL PATERNAL UNCLE.
13. FULL PATERNAL UNCLE.
14. CONSANGUINE PATERNAL UNCLE.
15. FULL PATERNAL UNCLE'S SON.
16. CONSANGUINE PATERNAL UNCLE'S SON.
17. FULL PATERNAL UNCLE'S SON'S SON.
18. CONSANGUINE PATERNAL UNCLE'S SON'S SON.