MUSLIM LAW NOTES

MUSLIM LAW IMPORTANT JUDGMENTS

By: LAWyersclubindia

A. IMAMBANDI AND OTHERS V. HAJI MUTSADDI AND OTHERS

(The father is considered to be the sole and supreme guardian of his minor child.)

Bench: Lord Shaw, Justice Sir John Edge, Justice Ameer Ali, Justice Walter Phillimore, Justice Bart, and Justice Lawrence Jenkins

Appellant: Imambandi

Respondent: Sheikh Haji Mutsaddi

Citation: Privy council Appeal No.73 of 1914

Issues:

- According to Muslim law how far a mother's dealings with her minor children's property were binding on the minors?

Facts of the Case:

- There was a property at issue before the Bombay high court which was claimed by three widows of a Muslim man who died intestate.
- The petitioner claimed that she was the mother of the child and hence, the legal guardian and thus, was entitled to the share of the property belonging to the child.
- The case deals with the concept of guardianship and division of property which is based on guardianship.

Appellant's Contention:

- A declaration of the title and status of the appellants' vendors.
- A decree in favor of the appellants for the possession of shares covered by the deed of sale.

Respondent's Contention:

- The respondents denied, as they had done in the Revenue Courts, that Zohra was one of Ismail Ali Khan's married wives and that her children were his legitimate issue, and they further contended that the shares the plaintiffs claimed to recover did not pass under the sale.
- The revenue courts had rejected the appellant's plea.

Judgment:

It was held by the council that the mother had no power to alienate the property for she wasn't the legal guardian. Ameer Ali in delivering the judgment of the Board laid down that the mother in Muslim law is merely entitled to the custody of a minor and isn't the natural guardian. The father is the sole and supreme legal guardian.

Relevant Paragraphs:

- **Paragraph 6:** The Lordship opinionated on the grounds of Mohammedan law "a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a "de facto guardian," and has no authority to convey any other right or interest on the immovable property which the transferee can enforce against the infant; nor can such transferee. If it is let into possession of the property, refuse an action in ejectment on behalf of the minor child as a trespasser. If follows that, without a title, he cannot recover the possession of the property of who's not equally entitled to it.

- As observed that in the absence of the father under Sunni law the custody vests in his executor. If the father dies without appointing an executor or if the father is alive, the custody of his minor child devolves on their grandfather. Also, should he be dead, or have left an executor, it vests in him. In De-jure guardians, judges as representative sovereign devolve the duty of appointing the guardianship to protect and preserve the infant's property. No person has the right or power to intrude with the minor's property except for some specified purpose, nature which is clearly defined.

- **Paragraph 1**: The question that was raised was that according to Mohammedan law, how far and under what circumstances a mother's dealing with her infant's property is binding on the child before the court. The decision was by no means uniform, and abandoned two different tendencies: one; a set of decisions implies to give such dealings a qualified force, and the other declares them altogether void and ineffective. In the former class of cases, the main test is to determine the validity of the particular transaction which benefits the

minor: to admit the absence of authority or power on behalf of the mother to alienate or encumber the minor's property.

B. MUHAMMAD MUIN-UD-DIN AND ANR. VS MUSAMMAT JAMAL FATIMA

(The Allahabad High Court in this case held that a pre-nuptial agreement between a wife and her husband was valid and enforceable in the court of law.**)**

***Court**:* Allahabad High Court

***Bench**:* Justices Lindsay, K Lal

***Parties**:* Appellant - Muhammad Muin-Ud-Din

Respondent - Musammat Jamal Fatima

***Issue**:*

- Whether a pre-nuptial agreement made between a woman and her potential husband and her father-in-law, providing for the payment of a certain maintenance in the event of future disagreements between her and her prospective husband, is moral and good in law and enforceable after her divorce or is opposed to public policy and void.

***Facts of the case**:*

- It was discovered that Mehdi Hasan, the husband, had married twice before and to each occasion he seems to have ill-treated his wife.
- The father of the plaintiff was, therefore, naturally anxious that something must be done in order to defend his daughter from similar ill-treatment and to secure for her a maintenance in case his daughter and Mehdi Hasan could not live happily together in their marriage.
- The pre-nuptial agreement in question offered that in case of disagreement or disunion the prospective husband and his father should be obliged to pay an allowance of Rs. 15 per month in addition to the dower-debt to the wife for her life and certain property was speculated to secure the disbursement of that payment.
- It should be noted that the plaintiff was divorced by her husband on the 14th of August 1917 and a ceremonial deed of divorce was completed and registered a few months later.

- But long before that date, differences had apparently swabbed up between them. The plaintiff had gone back to her father's house in 1912 and a notice was sent by the husband to the father of the plaintiff on the 30th of October 1912, phrased in impudent terms and demanding that the plaintiff should be sent back to his house with her jewelry.
- There was other evidence as well to show that there had been conflicts between the plaintiff and her husband from about that time. On that evidence the Court awarded to the plaintiff the allowance mentioned in the agreement from the 30th of October 1912.

Appellant's contentions:

- The learned Counsel for the appellants contends while referring to the decision that was held in the case of **Bai Fatma v. Ali Mahomed Aiyab**[1], that the agreement in question was held unenforceable; and that was a case in which an individual, who had a wife alive and wanted to marry another woman, had entered into an agreement with his first wife that he would pay her a certain payment as maintenance, if any alterations took place between her and her husband thereafter.
- The counsel prayed that a similar decision must be taken in this case and the contract should not stand as it cannot be enforceable.
- The Appellant further argued that such agreement in that case was treated as opposed to public policy, because it supported a separation between the husband and his wife and even engaged it.
- The appellant also claimed that agreements of this nature can be held against the husband and the wife can take advantage of such documents.

Respondent's contentions:

- The respondent argued that the agreement in the present case was executed before the marriage in order to restrain the prospective husband from ill-treating his wife or behaving inappropriately towards her or capriciously turning her.

[1] 17 Ind. Cas. 946: 37 B. 280: 14 Bom. L.R. 1178

- The dower-debt payable to the plaintiff was unquestionably a solid security against an unpredictable divorce, but that was clearly not enough to protect her from ill treatment.
- The Counsel also claimed that the agreement in question was obtained to secure the wife against ill treatment and to ensure for her a suitable amount of maintenance in case such ill treatment was faced by her.
- The counsel for the respondent also argued that such an agreement is not opposed to public policy and did not encouraged divorce in the slightest way possible.

Judgment:

The Allahabad High Court held that the said agreement between the woman and her potential husband was not opposed to public policy in any way and granted the wife a decree for the account claimed by her.

***Relevant Paragraphs**:*

1. The question for contemplation before the High Court in this case was whether a pre-nuptial agreement formed between a woman and her potential husband and her father-in-law, providing for the compensation of a certain maintenance in the event of future disagreements between her and her prospective husband, is fair in law and enforceable after her divorce or is does it oppose public policy and is void. The Court found that the agreement was not opposed to public policy and awarded the plaintiff an order for the account claimed by her. It appears that Mehdi Hasan, the husband, had married two times before and to each occasion he seems to have treated his wife badly. The father of the plaintiff was, therefore, instinctively concerned that something should be done in order to protect his daughter from similar ill-treatment from the husband and to ensure for her a maintenance allowance in case his daughter and Mehdi Hasan could not live happily together.

2. In view of the circumstances and facts established in this case, we do not consider that the pre-nuptial agreement in the present case violated the provisions of Section 23 of the Indian Contract Act or encouraged or simplified a separation between the plaintiff and her husband in any way, shape, or form. The marital rights obviously ended with the divorce; but the contract subsists till

the plaintiff dies or breaks it, and so long as the right to maintenance lasts, it cannot be regarded as lacking consideration or opposed to public policy in any way. The discovery of the Court that the disagreements existed from the 30th of October 1912 is conclusive and cannot be disturbed in second appeal. The appeal, therefore, fails and is dismissed with costs including in this Court fees on the higher scale.

C. MUKKATTUMBRATH AYISUMMA VS VAYYAPRATH PAZHAE BANGALAYIL

(The Court held that whether the husband had acknowledged his intent to get himself separated from tarwad or not, on his having died intestate, his right in the property would still be available to his legal heirs to distribute among themselves as per Muslim Personal law**)**

***Court**:* Madras High Court

***Bench**:* Hon'ble Basheer Ahmed Sayeed, J.

***Parties**:* Petitioner - Mukkattumbrath Ayisumma

Respondent - Vayyaprath Pazhae Bangalayil

***Issues**:*

- The primary question before the court was whether the claim for inheritance of property will be allowed or not.
- Whether the deceased husband's lack of acknowledgement to get separated from tarwad is essential or not.
- Whether the Subordinate Judge's order will be allowed or not.

Facts of the case-

- The present Civil Revision Petition is against the judgement of the Subordinate Judge of Tellicherry, dismissing the application which was filed by the petitioner.
- The Plaintiffs 1 to 5 on the file of the Subordinate Judge's Court, brought a suit for partition of Mopla Tarwad property which was believed to be regulated by the Marumakathayam law. The petitioner in this case is the widow of a member of the Tarwad community, namely, Kuttiatha Musaliar, who had died a short time before the filing of the partition suit.

- It is claimed that before the suit had been filed, he had conveyed no intention to separate from the Tarwad. Kuttiatha Musaliar died in July 1938, long before the Mapilla Marumakathayam Act (Madras Act 17) of 1939 came into force. Prior to the passing of this Act by the Madras Legislature, the Central Legislature had already passed an Act called the Muslim Personal law (Shariat) Application Act, (India Act 26 of 1937).
- It is observed that the husband of the petitioner in this case, died after the Muslim Personal law (Shariat) Application Act came into existence and before the Mapilla Marumakathayam Act (Madras Act 17 of 1939) was passed by legislature. The suit itself was filed in the year 1949, the petitioner made a submission to the court for being impleaded in the suit on the ground that she was eligible to the part of her deceased husband in the Tarwad properties which were at that time being segregated.
- The Muslim Personal law (Shariat) Act did not apply to agrarian lands; and, in order to eliminate the disability, the Madras Legislature approved Act 18 of 1949 which extended the possibility of the Muslim Personal law (Shariat) Application Act to agrarian lands as well within the then area of Madras.
- Preceding the Act in question, there were 2 other Acts which were passed by the Madras Legislature. The first one was Mapilla Succession Act, (Act 1 of 1918), which was enacted to amend and describe the rules of law related to intestate succession among Mapillas governed by the Marumakathayam Law of Inheritance. There was another Act present called the Mapilla Wills Act, (Act 7 of 1928), which was meant to define the law relating to testamentary dispositions by Mapillas governed by the Marumakathayam law of inheritance.

Petitioner's contentions:

- The Council for Petitioners claimed that Tarwad property remained impartible although the members of the Tarwad had an exclusive interest in the estate and therefore permitted to maintain the general Islamic law by which Muslims communities were governed in the rest of the country.
- This method of inheritance, as per Marumakathayam law, is a variation from the original Islamic laws and had been implemented by the Mapillas by logic of a custom which had

established out of certain historic circumstances and factors which it is not essential now to go into.

Respondent's contentions:

- The counsel for the respondents raised the question that, no member of a Mapilla tarwad has any distinct or exclusive interest in the tarwad, and, unless and until there was a private interest in the tarwad there was nothing that could decentralize on their heirs on their dying intestate.
- The council for respondent has relied upon the judgement in the case of **P.P. Kunhamod Hajee v. P.P. Kuttiah Hajee[2].** The most important question that arose in that case was that the grant of a very imprudent lease following on a course of conduct followed for some years, in which the interests of a tarwad were persistently ignored and it was held that such a grant was adequate ground for eliminating a karnavan from the organisation of the tarwad property.
- The Respondent's counsel has also referred to the decision in the case of **Moidin Kutti v. Krishnan[3]**. In that judgement, the suit was for a statement of debt for which the verdict was obtained was not a debt correctly due by the plaintiffs' tarwad and it seemed to be that the plaintiffs and defendants alone the members of the tarwad were parties to the suit and that there were some members of the tarwad not parties to the suit. It was also observed that the plaintiffs in their appeal did not intend to sue on behalf of the tarwad.

Judgement:

The court did not allow the Subordinate Judge's order and ruled against it. The Court also held whether the husband of the petitioner had acknowledged his intent to get himself separated or not, on his having died intestate, his right in the property would still be obtainable to his legal heirs to distribute according to the Muslim Personal law.

***Relevant Paragraphs**:*

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[2] 3 Mad 169
[3] 10 Mad 322

17. It was observed that at that time the Malabar tarwad was inseparable and it is only later that the right to separation was conferred to the members of the tarwad property under the newer legislations. Therefore, the Court do not see any point in the counsel's appeal arguing that when the junior member of the tarwad is permitted to is not an exclusive interest in the tarwad property but that he is just entitled to maintenance, in the sense in which such maintenance is obtainable by women in the Mitakshara family.

19. The counsel for the respondent further argued that Section 6 of Act 26 of 1937, Madras Act 1 of 1918 was not repealed in any capacity but only Section 16 of the Civil Courts Act, was repealed and that, because Section 2 of the said Madras Act and the elucidation thereof eliminated the tarwad property from intestate succession, it is argued that Muslim Personal Law (Shariat) Act does not apply to tarwad properties. The Court found it difficult to follow the force of this argument. As the Madras Act itself had the impact of divergence from the then present customary law applied to the Mapillas of North Malabar who were regulated by the Marumakathayam customary law and took the self-acquired properties.

21. The Court did not think that this contention by the respondent had any substance. I cannot approve with the Subordinate Judge in his view that the people through whom the petitioner claims a right to be impleaded as a party should have himself claimed partition during his lifetime, for as I have already detected, the interest of a member of a Mapilla tarwad is an exclusive interest in the property of the tarwad and that exclusive interest on his demise must be obtainable to be succeeded to or inherited by the heirs or successors. When once such right to succession by the customary law has been repealed by the Muslim Personal law and the Muslim personal law has been made applicable to all Muslims including the Mapillas, there can be no strength in the argument that the junior members of the tarwad should have claimed partition before the death in order that his heirs may later claim a right to his exclusive interest in the tarwad properties.

24. On a thorough consideration of all the facts and circumstances of the case and for the reasons that I have already given, I do not think that the Subordinate Judge was correct in the approach he has made towards the question in this issue. I am of the view that under the law as it now stands after the Muslim Personal Law (Shariat) Application Act whether the husband of the petitioner had acknowledged his intent to get himself separated or not, on his having died intestate, his right in the property would still be obtainable to his legal heirs to decentralise according to the Muslim

law and that the present petitioner was entitled to be brought on record as a party to the suit for partition in order that she might put forth her claim to her late husband's right or interest in the tarwad property left by him.

25. The counsel for respondents has implored that in view of the fact that this petition has raised some crucial questions of law the issue should be forwarded before a Bench for decision. I do not think that there is a satisfactory reason for me to direct this matter before a Bench. The matter appears to be quite straightforward and simple. The petition is allowed.

D. PUTHIYA PURAYIL ABDURAHIMAN VS. THAYATH KANCHEENTAVIDA AVOOMMA

(Legal Heir of the Tarwad Property)

Court: Madras High Court

Bench: Chief Justice Bajamannar, Justice Panchapakesa Ayyar

Appellant: Puthiya Purayil Abdurahiman

Respondent: Thayath Kancheentavida Avoomma

Citation: (1956) 1 MLJ 119

Issue:

I) Whether the Madras Shariat (Amendment) Act,1949 is ultra vires of Article 19 of the Indian Constitution?

II) Whether the property of the deceased shall lapse onto second tavazhi/widow and her heirs?

Facts:

- Abdulla Kalpha who was a member of a Marumakkathayam tarwad. On 30th October, 1918; the members of the tarward executed a Karar by which the main tarward was partitioned into three tavazhis.
- On 10th January 1952, Abdullah died and he was a member of the three tavazhis and one of the executants of the document. The document provided that if one tavazhi becomes extinct then the properties of the said tavazhi will pass on to the other tavazhi.
- The question is dispute was whether the property of the deceased Abdullah who was the third tavazhi will pass on to second tavazhi as per the Karar which was executed between the members or will it pass onto Abdullah's widow and his heirs.
- Thus, the widow of Abdullah filed a suit before the District Munsif for the partition of the property and other separate possession of certain properties as specified in the plaint of the Schedule A.

Appellant's Contentions:

- The plaintiff asserted that she and the other personal heirs or defendants, became entitled to the properties, due to the provisions of the Madras Shariat (Amendment) Act of 1949.

Respondent's Contentions:

- One of the defendants contended that the said Act was void because it was repugnant to the provisions of Article 19, Clause (1)(f) of the Constitution.

Judgment:

The Hon'ble court held that the surviving heirs of the deceased junior member would be entitled to claim partition of the property and have their share or shares separated from the property and also mentioned that the Madras Shariat (Amendment) Act,1949 is not repugnant to Article 19(1)(f) of the Constitution.

Relevant Paragraphs:

- On 10th January 1952, Abdullah Kalpha died and he was a member of the three tavazhis. On 30th October, 1918; the members of the tarward executed a Karar by which the main tarward was partitioned into three tavazhis. He was one of the executants of the document. The document provided that if one tavazhi becomes extinct then the properties of the said tavazhi will pass on to the other tavazhi. Abdulla Kalpha was a member of a Marumakkathayam tarwad.

  The question is dispute was whether the property of the deceased Abdullah who was the third tavazhi will pass on to second tavazhi as per the Karar which was executed between the members or will it pass onto Abdullah's widow and his heirs.

  The Hon'ble Court asserted that the Shariat Act including the Madras Amendment Act did not claim to nor did it restrain the rights and incidents of a Mappilla Marumakkathayam tarwad.

  Under the Muslim Personal Law (Shariat) Application Act, it could have been available to a junior member of the tarwad or his heirs to apply for a partition of the property of the tarwad. Also, objected that this enactment was, so far as at any rate the State of Madras was concerned,

that the Muslim Personal Law (Shariat) Application Act would administer the Muslims in all the matters without any reservation. And, it's not right to mention that when a junior member of a tarwad dies "his share" survives to the other members of the tarwad.

The Court held that the Muslim Personal Law has been made available to all the Muslims including Mappillas, there can be no weightage in the contention that the junior member of the tarwad ought to have claimed partition before his demise in order that his heirs may claim a right to an interest in the tarwad properties.

Regardless of whether the junior member did or didn't guarantee a privilege during his lifetime to partition, when his interest gets inheritable under the Muslim Personal Law (Shariat) Application Act, at that point, on his death, his beneficiaries would turn out to be naturally qualified for guarantee the correct which has been left by him to the extent that it has not been discarded by any testamentary disposition. He would be deemed as per to a pass on intestate in respect of his right or interest in the tarwad property and the enduring beneficiaries of the deceased junior member would be qualified for guarantee partition of the property and have their share or shares separated from the property. Further, no inquiry of the constitutional legitimacy of Madras Act XVIII of 1949 can emerge and the response to the reference is that the said Act isn't disgusting to Article 19(1)(f) of the Indian Constitution.

E. <u>ITWARI vs SMT. ASGHARI AND ORS.</u>

(Husband for restitution of conjugal rights only as a counter-blast to the wife's claim for maintenance under Section 488 CrPc)

Court: Allahabad High Court

Bench: S Dhavan

Appellant: Itwari

Respondent: Smt. Asghari And Ors.

Citation: AIR 1960 All 684

Issue:

- Whether the appeal is maintainable or not?
- Whether the husband has been guilty of cruelty?
- Whether the suit filed by husband for restitution of conjugal rights only as a counter-blast to the wife's claim for maintenance under Section 488 CrPc?

Facts:

- This is an appeal of a Muslim spouse against the choice of the learned District Judge, excusing his suit for restitution of conjugal rights against his first wife who wouldn't get back to him after he had taken a second wife and blamed him for remorselessness to her.
- The plaintiff was married to the defendant, Smt. Asghari about the year 1950 and lived with her for quite a while. At that point things turned out badly and the wife at last left him to live with her parents, however he didn't try to find a way to bring her back and wedded another lady.
- The first wife who is a respondent filed an application for maintenance under Section 488 Cr. P. C. Thereupon, the husband filed a suit against her for restitution of conjugal rights.
- It was alleged that she had been turned out by her husband who had formed an illicit union with another woman whom he subsequently married. She alleged that she is being accused of cruelty by him.
- The learned Munsif, decreed the husband's suit and also passed an order directing respondent's father and brother not to prevent her from going back to him. The Trial Court decreed the suit while the Appellate Court reversed the said decree.
- The matter was then taken to the Allahabad High Court in the second appeal.

Appellant's Contentions:

- The fact that was raised the husband had taken a second wife, Smt. Asghari had endured discriminatory treatment at his hands, and was impacted by the husband's behaviour, that he had not required his second wife to live in hid house with her.
- The view that if the wife felt abused, by her better half's second marriage she ought to have acquired an announcement for dissolution of marriage and communicated that she had not

done as such, consequently receiving the odd and conflicting perspective that the husband's direct in requiring a subsequent wife is a decent ground for the primary wife to sue for disintegration of her marriage and shut down every one of the privileges of the husband yet no ground for challenging the husband's suit for affirmation of similar rights under a similar marriage.

- The mere fact that the husband had taken a second wife is no proof of cruelty as every Muslim has the right to take several wives up to a maximum of four.

Respondent's Contentions:

- She had been turned out by her better half who had shaped an unlawful association with another lady whom he along these lines wedded. She affirmed that he had beaten her, denied her of her adornments and accordingly caused her physical and mental agony. He had additionally not paid her dower.
- Spouse recorded the suit for restitution of conjugal rights just as a counter-impact to the wife's case for maintenance under Section 488 CrPC.
- After the spouse had left him and been living with her parents for such many years, he didn't try to find a way to get her back and that his long quietness meant that he never truly cared for her.

Judgment:

The Court held that the appeal had filed and was thus dismissed. Considering the fact and circumstances of the case, there was no order as to costs.

Relevant Paragraphs:

- In para 6, A marriage between Mohammedans is a civil contract and a suit for restitution of conjugal rights is just a requirement of the privilege to consortium under this agreement. The Court helps the husband by a request convincing the wife to get back to dwelling together with the husband. "*Disobedience to the order of the Court would be enforceable*

by imprisonment of the wife or attachment of her property, or both". Moonshee Buzloor Ruheem v. Shumsoonissa Begum, 11 Moo Ind App 551 (609). Abdul Kadir v. Salima, ILR 8 All 149 (FB). Likewise, If the Court feels, on the basis of evidence before it, that he has not gone to the Court with clean hands or that his own direct as a gathering has been shameful, or his suit has been recorded with ulterior intentions and not in accordance with some basic honesty, or that it is crooked to force the wife to live with him, it might decline him help altogether. The Court will likewise be supported in rejecting explicit execution where the presentation of the contract would include some difficulty.

- Para 8, The husband in the current case stands firm on the privilege of each Muslim under his personal law to have a several wives all at once up to a limit of four. He fights that if the first wife is allowed to leave the husband only in light of the fact that he has required a second, this would be a virtual denial of his right. It is important to look at this contention.
- Para 9, The privilege to four wives seems to have been qualified by a 'superior not' guidance, and husbands were charged to confine themselves to one wife in the event that they couldn't be unbiased between a several wives - an unthinkable condition as per to a several Muslim legal advisers, who depend on it for their contention that Muslim Law in practice discourages polygamy.
- Para 10, A Muslim has the undisputed lawful right to take upwards of four spouses all at once. Yet, it doesn't adhere to that Muslim Law in India gives no privilege to the primary spouse against a husband who requires a subsequent wife, or that this law delivers her powerless when confronted with the possibility of imparting her significant other's consortium to another lady. In India, a Muslim spouse can separate from her significant other, under his designated power in case of his requiring a subsequent wife, Badu Mia v. Badrannessa, 40 Ind Cas 803: (AIR 1919 Cal 511 (2)).
- In para 10 again, If Muslim law had respected a polygamous husband's entitlement to consortium with the primary wife as fundamental and inviolate, it would have restricted such specifications by the wife as against Muslim public strategy. In any case, it has done 'nothing of the sort. On the opposite Muslim law has given upon the wife's specified option to break down her marriage on her significant other requiring a second wife a power superseding the holiness of the main marriage itself.

- Para 11, A Muslim husband has the legitimate right to take a second wife even while the primary marriage remains alive, yet on the off chance that he does as such, and looks for the help of the Civil Court to force the first wife to live with him against her desires on torment of extreme punishments including connection of property, she is qualified for bring up the issue whether the court, as a court of value, should constrain her to submit to co-residence with such a husband. All things considered the conditions in which his second marriage occurred are applicable and material in choosing whether his lead in requiring a second wife was in itself a demonstration of brutality to the first.
- Para 15, Today Muslim woman move in society, and it is impossible for any Indian husband with several wives to cart all of them around. He must select one among them to share his social life, thus making, impartial treatment in polygamy virtually impossible-under modern conditions.
- Para 16, Mr. Kazmi depended on a perception of the late Sir Din Shah Mulla in his Principles of Mohammedan Law, fourteenth release page 246, "*cruelty, when it is of such a character as to render it unsafe for the wife to return to her dominion, is a valid defence*".
- Para 18, Even without palatable verification of the spouse's mercilessness, the Court won't pass a declaration for compensation for the husband if, on the proof, it feels that the conditions are to such an extent that it will be low and unjust to constrain her to live with him. In Hamid Hussain v. Kubra Begum, ILR 40 All 332: (AIR 1918 All 235), a Division Bench of this Court excused a spouse's petition for compensation on the ground that the gatherings were on the most noticeably awful of terms, that the genuine justification the suit was the husband's longing to acquire ownership of the wife's property and the Court was of the assessment that by a re-visitation of her better half's authority the wife's wellbeing and security would be jeopardized however there was no acceptable proof of actual remorselessness.
- Para 19, these standards apply to the current case. The lower appellate court has tracked down that the litigant never truly focused on his first spouse and recorded his suit for compensation just to crush her application for maintenance. In the conditions, his suit was mala fide and appropriately dismissed.

F. <u>GOHAR BEGUM V. SUGGI ALIAS NAZMA BEGUM & ors.</u>

(Unmarried mother is entitled to the custody of her daughter, if it serves in the best interest of the child.)

Bench: Justice A.K. Sarkar, Justice Syed Jaffar Imam, and Justice K.N. Wanchoo

Appellant: Gohar Begum

Respondent: Suggi Alias Nazma Begum & ors.

Citation: 1960 AIR SC 93

Issues:

1. Whether husband or father holds the natural guardianship of the minor ill-conceived child under the Muslim law?
2. Was the child unlawfully detained?
3. Who was qualified for the custody of the child?

Facts of the Case:

- This case deals with the guardianship of the father if there should arise a case of occurrence of an ill-conceived child.
- The appellant is the mother of an ill-conceived child who has filed an application under Section 491 of Criminal Procedure Code to transfer the custody of the child from her husband to her.
- Illegitimacy of a child is a significant issue in Muslim law and prompts a few legitimate questions as in this case.

Appellant's Contention:

- The appellant made her application under s. 491 of the Code of Criminal Procedure on April 18, 1958. She stated that the respondent would remove Anjum from Pakistan any day and there was already a visa available for Anjum for this purpose. She also stated that insight into the relationship between the parties she had not taken the matter earlier to court.
- The appellant contended that on the date of the application the respondent was in Pakistan. However, she had not taken the child Anjum with her but had left her in her flat at Bombay in charge of her cousin Suggi and a maid, Rozi Bhangera.

- The appellant stated that the respondent had asked her sister Bibi Banoo and her husband Mahomed Yakub Munshi to look after the child.
- The appellant made these four persons the respondents to her application. Later, the respondent's arrival back in Bombay, she has made a party to the application.

Respondent's Contention:

- The respondent opposed the application rejecting the correctness of some of the allegations made by the petition in the appellant. She refused that Trivedi is not the father of the child Anjum and said that the father was a Shia Moslem called Samin Naqui. She claimed that the appellant's mother had given the appellant to her to: bring her up at very young age, she had not the means to do so herself and since then the appellant had been living along with her and left her flat in company with Trivedi only during her temporary absence in Pakistan in 1956.
- The respondent also refused that she didn't make the appellant live in the keeping of any person as alleged by recent. She argued that she had intended that the appellant would marry and live a clean and respectable life but others have influenced and operated upon her and she went to live with Trivedi as his mistress. She refused that she had prevented the appellant access to the child Anjum as the latter stated.
- The respondent argued that she was looking after the child Anjum with great care and solicitude, and had put her in a good school and kept a special maid for her. She also said that she was rich and had enough to seem after the child well. She contended that it had been not within the interest of the kid to measure with the appellant because she was living within the keeping of a person who might turn her out and she or he would then need to seek the protection of another man.
- The respondent said that she had no child of her own and was keen on Anjum whom she had been treating as her child. The Judges of the High court observed that this case has been raised various controversial questions especially on the paternity of the child, on whether the respondent had made the appellant sleep in the keeping of various persons, and also on whether she had prevented the appellant from having access to the child.

Judgment:

Here the court expressed, that the woman or the wife can be a natural guardian just to the ill-conceived child. It outfitted that in the case of an ill-conceived child the conditions are not quite the same as the legitimate child, here even the woman or the wife can be a natural guardian to the ill-conceived child, and non-transfer of custody of such child will certainly amount to illicit detention of the child under Section 491 of Criminal Procedure Code.

Relevant Paragraphs

- Under Muslim Law the mother of an ill-conceived baby child is qualified for its custody. The refusal to reestablish such a child to the guardianship of its mother would bring about an illegal detention of the child inside the significance of S. 491 of the Criminal Procedure Code. A question with regards to the paternity of the child is insignificant to the purpose of the application.

- Before making the request for the authority of the child the court is called upon to think about its welfare. The way that an individual has a remedy under the Guardian and Wards Act, is no justification for denying him the remedy under s. 491 Of the Criminal Procedure Code.

- In issuing writs of habeas corpus the courts have power in the case of a baby to guide its custody to a certain person.

G. C. MOHAMMED YUNUS VS. SYED UNISSA AND OTHERS

(Rejection of female members in the custom of the family)

Court: Supreme Court of India

Bench: J.C. Shah, J.L. Kapur, M. Hidayatullah

Appellant: C. Mohammed Yunus

Respondent: Syed Unissa And Others

Citation: 1961 AIR 808, 1962 SCR (1) 67

Issue:

- Whether the said female individuals were qualified to appreciate the properties and to perform the "Urs" celebration with the fact that the female were excluded by the custom of the family?

Facts:

- Under a scheme, a Board of Trustees was delegated for the administration of the Durga and a Masjid for the maintenance of which the Nawab of Carnatic had conceded two villages in Inam.
- The pay of the institution after disbursing the expenses had quite a while ago been shared by the descendants in four families in equivalent shares. The scheme additionally provided that the surplus income was to be distributed among the members of the said four families.
- One of the descendants died leaving his wife and two daughters behind who were discouraged in the performance of the "Urs" by the appellant's father.
- The said Muslim female members filed a suit for declaration that they were qualified to appreciate the properties and to manage the Durga, perform the "Urs" festival and receive all incomes, endowments and perquisites thereof once in every eight years as per their turn. The right to a share in the income was denied by the appellant arguing that by the custom in the family, females were not included from inheritance and that the claim was banned by the law of limitation and that, regardless, the suit for mere declaration was not maintainable.
- The trial Judge held and the appellate court agreed with him that there was an immemorial custom administering the organizations precluding the plaintiffs therefore the plaintiffs were not entitled to perform those services and enjoy the surplus income, and accordingly they were not qualified for the assertion or the injunction prayed for.
- In the second appeal, the High Court at Madras held that under the Shariat Act, 1937, the income received from the organisation had to be shared as per the personal law of the parties and that the plaintiffs' claim was not barred by the law of limitation nor was the suit open to the objection that it was as outlined not maintainable. Against the order passed by the Hon'ble High Court, this appeal with special leave under Article 136 of the Constitution is preferred.

Appellant's Contentions:

- The appellant denied the right of the respondents to a share in the income contending that by the custom in the family, females were rejected from an inheritance, that the office of

"Peshimam", "Khatib" and "Mujavar" could only be held by males and that females were prohibited from those offices, that the plaintiffs' claim was banned by the law of limitation and that in any event, the suit for a mere declaration was not maintainable.

Respondent's Contentions:

- Respondent in this appeal claimed for an assertion that they were entitled to enjoy the properties and to manage the Durga, perform the "Urs" festival and receive all incomes, endowments, and perquisites thereof once in every eight years as per their turn.

Judgment:

The Court held that the appeal by special leave was dismissed. Considering the fact and circumstances of the case, this appeal fails and is dismissed with costs.

Relevant Paragraphs:

In para 1, Under a scheme a Board of Trustees was appointed for administration of the Durga and a Masjid for the maintenance of which the Nawab of Carnatic had granted two villages in Inam. The pay of the institution after disbursing the expenses had since a quite a while ago been shared by the descendants in four families in equivalent shares. Additionally, the scheme provided that the surplus income was to be distributed amongst the members of the said four families. One of the descendants died leaving his wife and two daughters who were deterred in the performance of the "Urs" by the appellant's father.

In para 2, The said Muslim female members filed a suit for declaration that they were qualified to enjoy the properties and to manage the Durga, perform the "Urs" festival and receive all incomes, endowments and perquisites thereof once in every eight years as per their turn. The right to a share in the income was denied by the appellant arguing that by the custom in the family, females were not included from inheritance and that the claim was banned by the law of limitation.

Last Para, the plea raised by counsel for the challenging defendants that significantly under the Muslim Personal Law, females are barred from performing the duties of the offices of "Peshimam", "Khatib" and "Mujavar" and that they can't perform the duties of those offices even through deputies is one which was not raised before the Hon'ble High Court. The trial court has recognized that the duties of those offices could be performed through deputies. In any event, if the income was being distributed amongst the four families, one of the descendant's wife and two daughters who were discouraged in the performance of the "Urs" under the provisions of the Shariat Act, be

entitled to receive that pay. There is nothing on the record to suggest that the right to receive the income is conditional upon the performance of the "Urs" celebration. Considering the fact and circumstances of the case, this appeal fails and is dismissed with costs.

H. Moulvi Mohammed And Ors. vs S. Mohaboob Begum[4]

(The Madras High Court ruled in the favour that custom, once proved to be valid, will prevail over Personal law when there is no inconsistency between the two provisions in cases of adoption)

Court: Madras High Court

Bench: Justice N Sundaram

Parties: Petitioner - Moulvi Mohammed

Respondent - Mohaboob Begum

Issue:

- Whether a custom allowing adoption would prevail over Muslim Personal law in case of adoption.

Facts of the case:

- The appeal for revision in question was earlier rejected of by the same Judge on 21st of December 1982. At that point in time, the respondent was not represented. Consequently, pursuant to order in (C. M. P, No. 2461 of 1983), the order dated 21st of December 1982 was, dismissed because, the respondent offered persuasive explanation for absence at the time when the revision was heard before and the Court felt that it is better that the matter is disposed of after hearing all the parties.
- The petitioners, Zaina Bi (since deceased) were granted Ryotwari Patta under Tamil Nadu Act 30 of 1963 by the Settlement Officer, by order-dated 28th of April 1979.
- Zaina Bi filed an appeal (C. M. A. 57 of 1979) before the tribunal (Additional Subordinate Judge) of Chingleput and while the said appeal was pending, she died on 21st of July 1980. The petitioners herein are the respondents in the present appeal.

[4] AIR 1984 Mad 7, (1983) IIMLJ 357

- The respondent in this appeal is the daughter of Chotima Bi, sister of Zaina Bi and Chotima Bi predeceased Zaina Bi. Also, it is admitted that the respondent herein cannot, on the above-mentioned basis, assert herself to be an heir of the deceased, Zaina Bi. She later filed an appeal (I. A. 462 of 1980) make herself, on record, the legal representative of the deceased appellant, Zaina Bi, and to impeach the appeal.
- In spite of challenge by the petitioners herein, who are respondents in this appeal before the Court, that application has been allowed, and the present revision appeal is directed against the judgements of the Tribunal.

Petitioner's contentions:

- The counsel for the Petitioners argued that Muslim Personal Law does not recognize adoption as a mode of ancestries and the Court recognising, customs as enabling the respondent to plead and prove such a custom to validate her claim as the adopted daughter of the deceased appellant is against the Muslim Personal Laws.

Respondent's contentions:

- The learned counsel for the Respondent succumbs that even though the Muslim Personal Law does not identify adoption as a mode of ancestry, there is a custom that does. Recognising adoption, a mode of ancestry and that custom stands well-preserved despite of the Muslim Personal Law (Shariat) Application Act 26 of 1937.
- The counsel for the Respondent also drew the Court's attention towards Section 2, as amended by the Madras Shariat (Amendment) Act 18 of 1949 and Section 3 (1) of the Shariat Act, and they run as follows- 2. Notwithstanding any custom.....Muslim Personal Law. 3. (l). Any person who satisfies.....wills and legacies were also specified.
- The counsel further drew the Court's attention to a former judgment of a Bench of this Court, in the case of **Puthiya Purayil Abdurahiman v.T. K. Avoomma**[5], in support of their statements, that the above-mentioned provisions of the Shariat Act did not in terms totally abolish the custom and usage in respect of matters other than these enumerated in Sections, 2 and 3 thereof.

[5] AIR 1956 Mad244

Judgement:

The High Court observed that as per Section 16 of the Madras act, 1873, the status of custom, once proved to be valid, will prevail over Personal law. Also, there is no inconsistency between the provisions. The Court also upheld the case of Puthiya Purayil Abdurahiman claiming that the Shariat Act did not totally abolish the custom and usage in regards of matters other than those specified in Sections 2 and 3 (1) of the Act.

Relevant Paragraphs:

5. The court finds that Clause (b) of Section 16 of the Madras Act III of 1873 reflects that any custom having the power of law and governing the groups concerned shall form the rule of judgment in respect of subjects specified in the main part of the section unless such custom, by legislative enactment, has been reformed or abolished. The absence of other subjects such as adoption in regard of which valid custom could rule and be binding on the parties does not mean that it is not lawful for the parties to rely on such a valid custom if there is one. Section 6 of the Shariat Act was repealed, as it was not consistent with the provisions of the Shariat Act. This repeal is of no importance for the purpose of this case. First of all, because Section 16 of the Madras Act III of 1873 does not explicitly refer to adoption. Second of all, even in Sec. 2 of the Shariat Act, adoption is not one of the specified subjects, regarding which custom or usage is ruled out. Even if the present matter, has been brought within the horizon of Section 2 of the Shariat Act, by benefit of a declaration under Section 3 (1), in the instant case, there is no such pronouncement - there will be no inconsistency between the provisions. Hence, in the absence of any prohibition on custom, relating to adoption under 'the Shariat Act, in such instances, it is feasible to plead and establish such a custom or usage having, the force of law in the location and amongst the concerned parties. In this context the Court felt compelled to implement the ratio of the Bench in the Puthiya Purayil Abdurahiman case, that the Shariat Act did not totally abolish custom and usage in regards of matters other than those specified in Sections 2 and 3 (1) thereof.

6. The Respondent's counsel also claims that even if it is proved that there is a lack of proof of a valid custom in regards of adoption as per the said custom, the respondent can very well impeach the appeal as the individual in possession on the death of Zaina Bi and in this view, she can he

taken within the explanation of a 'legal representative'. In the supporting affidavit filed, the respondent has asserted that she is in possession and gratification of the property after the death of Zaina Bi. But this feature has not been examined by the Court below to provide a verdict one way or the other and the Court was content to receive the plea of custom regarding the adoption and is only based on the request by the respondent to come on record as the legal representative of the deceased Zaina Bi was permitted. This question also requires inquiry and arbitration by the Court based on the evidence already arranged and the parties may further place that. As stated before, The Court finds that even on the issue of proof of custom and the factum of adoption, there has not been a proper judgment and in the Court's view, all the questions require a proper investigation and verdict by the Court below. In this view, this review is allowed and the matter (1. A. No. 462 of 1980) will now stand submitted to the file of the Court for it to consider the same afresh in the light of the directions given and instructions and different observations made above.

There, will be no order as to costs in the present revision.

I. MOHAMMED AHMED KHAN vs. SHAH BANO BEGUM

(Section 125 of Cr.PC does not bar persons belonging to any religion to claim maintenance)

Bench: CJI Y.V Chadrachud, Justice Rangnath Misra, Justice D.A Desai, Justice Chinnappa Reddy, Justice E.S Venkataramaih.

Appellant: Mohammed Ahmed Khan

Respondent: Shah Bano Begum

Citation: AIR 1985 SC 945

Issue:

- Whether section 125 of Cr.PC which provides for maintenance of wives including a divorced wife who has not remarried applies to Muslim?

- Whether under Cr.PC if a divorced woman has received the entire amount payable to her under personal law, the maintenance allowed can be cancelled? In other words, Whether Mehr or Dower payable is an amount payable on divorce?

Facts of the case:

• A lawyer by profession Mohammed Ahmed Khan married Shah Bano Begum in the year 1932 and 5 children were born out of said wedlock.

• In the year 1975, Shah Bano Begum at the age of 60 years was thrown out of the house due to constant conflict and fights between Mohammed Ahmed Khan's 2nd wife who was 14 years younger than M.A Khan. He married his 2nd wife in the year 1946.

• In 1978, Shah Bano begum approached the magistrate's court under section 125 of Cr.PC that is criminal procedure code asking for maintenance of rupees 500 per month by stating that her husband's income was over rupees 5000 per month.

• In November 1978, Mohammed Ahmed Khan divorced his wife by pronouncing '*triple talaq.'*

• Mohammed Ahmed Khan argued before the bench that he was under no obligation to maintain his wife as she was no longer his wife and that he had already paid maintenance to her rupees 200 per month for 2 years.

• He had deposited a sum of rupees 3000 in the court by way of dower. However, in the year 1979, the magistrate ordered him to pay rupees 25 every month to his divorced wife.

• In an appeal, the High Court increased the maintenance amount up to rupees 179.20. Being aggrieved by the said order for increasing the amount of maintenance M.A Khan filed an appeal by way of a special leave petition in the Supreme Court of India contending that the maintenance amount ordered to be paid was excessive.

Appellant's Contentions:

• The appellant stated that according to the Muslim Personal Law, maintenance to a divorced wife is only up to the period of *iddat.*

• He further stated that if the divorced wife is capable of maintaining herself then there is no liability on the part of the husband to maintain her after the period of *iddat* ends.

• If the divorced wife is unable to maintain herself she can take recourse under section 125 of Cr.PC as there is no difference on the question of a husband responsibility to maintain both in Muslim Personal laws and section 125 of Cr.PC.

Judgment:

• The Supreme Court held that under section 125 of Cr.PC a wife who is not maintained by her husband is entitled to approach the court for maintenance. The term ‘wife’ includes a divorced woman who has not remarried.

• It was further stated by the religion followed by the spouse is not at all relevant in such a case as the code applies to all. Section 125 of this code is secular in character and it applies to all and even Muslims also.

• With regards to the second issue involved the court held that it cannot be said that under Muslim law dower/ Mehr is an amount payable on divorce. It is stated that the dower is an amount fixed at the time of marriage and part of it is payable on dissolution of marriage that is by death or divorce.

• However, this does not mean that the amount is payable on divorce. In fact, it is an obligation imposed by Muslim law on the husband as a mark of respect for his wife.

Relevant Paragraphs:

In my view, this case became a landmark judgement on the grounds that it raised many important questions like the need for a uniform civil code, are Muslim women entitled to maintenance under section 125 of the Criminal Procedure Code or the question relating to mehr. While the apex court made it amply clear that a Muslim divorced woman's right to maintenance cannot be taken away in cases where she is disowned or divorced by her husband and is unable to maintain herself and her kids.

The court further giving meaning to section 125 of the Criminal Procedure Code, said that the provisions of this section have nothing to do with which religion a person professes as it is irrelevant whether a person is a Hindu, Muslim, Christian, Sikh, Jain or Parsi. Also under section 125, the term ‘wife’ was defined by the apex court as including a divorced wife who has not remarried. This giving the term wife a broader interpretation. Any personal law applicable to a woman does not defeat the statutory rights available under this section. The court expanding its view on polygamy under Islamic law suggests that if there is any conflict between personal law and section 125 of the criminal procedure code then section 125 would override the personal laws.

Verses of the Holy Quran were referred to know the position of Muslim divorced women and their rights as a divorced woman and a husband’s duty towards his wife whom he divorced. Ayats 241,

242, 243 were referred wherein it stated that it is the obligation of husbands towards their wives to provide them after divorce. Furthermore, it states that there is an obligation upon God fearing people to give something to their divorced wives with regards to reasonable standards except if the wife leaves her husband's home on her own consent then there is no responsibility of husband neither he shall be answerable for whatever the wife chooses for herself.

Many cases were taken into consideration while deciding on this matter like *Hamida Bibi v. Zubaida Bibi (1916), Mst. Jagir Kaur & Another v. Jaswant Singh (1963), Syed Sabir Hussain v. Farzand Hasan (1938), Nanak Chand v. Chandra Kishore Aggrawal & Others (1970), Fuzlunbi v. K. Khader Vali & Another (1980).* But taking reference to another leading case which was once quoted by Justice Krishna Iyer in one of the cases was *Bai Tahira v. Ali Hussain Fissali Chothia & Another (1980)* taking note of the same case the apex court, in this case, concluded that 'Mehr' is not payable at the time of divorce under Muslim Personal Law. This, the payment of Mehr or Dower won't absolve a husband to pay maintenance to his divorced wife.

Further, in my view, this judgement paved way for a lump sum settlement amount instead of the old monthly payment method received from their husbands. Also, the maintenance amount was directed to be paid till the time the woman did not remarry. The case emphasised the need for a uniform civil code as the need of the hour.

J. SHAMSUNNISA BEGUM VS G. SUBBAN BASHA AND ANR.

(A maintenance order passed before the commencement of the Muslim Women (Protection of Rights on Divorce) Act of 1986 was held valid and the wife was held entitled to pursue her remedy in the Maintenance Case)

***Court**:* Andhra Pradesh High Court

***Bench**:* Justice D.J. Raju

***Parties**:* Petitioner - Shamsunnisa Begum

Respondent - G Subban Basha

***Issue**:*

- Whether the maintenance order that was passed prior to the commencement of the Muslim Women (Protection of Rights on Divorce) Act of 1986 still stand valid after the enforcement of the act or not.

Facts of the case:

- The petition for this case was filed under section 482 of CrPC against the order of Additional Sessions Judge, Kurnool (Cri. Petition No. 5 of 1992).
- The petitioner was married to the respondent in the year 1972. According to the record available, their marriage took place on 14th May 1992.
- After five years of marriage, there was disharmony and disagreement between the spouses and, hence, a maintenance case was filed, and the wife was granted rupees 100 per month and gradually it was increased to rupees 250 per month. It shall be noted that the husband was regularly paying the maintenance amount without default.
- In middle of all this, the Parliament passed a new act called Muslim Women (Protection of Rights on Divorce) Act 1986. The act received President's assent on 19th May 1986. As a result, to this law coming into force, the wife filed a maintenance case (Case No. 23 of 1989) under section 3 of the act.
- While the above-mentioned maintenance case was pending the husband filed a Criminal Miscellaneous Petition (No. 996 of 1990) praying for cancellation of maintenance order. The magistrate on 21st November 1991, cancelled the maintenance order from the date of enforcement of the act.

Petitioner's contentions:

- The wife felt aggrieved by the retrospective effect given for the cancellation order. As a result, the wife file Criminal Revision Petition (No. 5 of 1992). The learned Additional Sessions Judge delivered his order on 16th June 1993.
- While delivering the order, the judge concluded that with respect to the facts of this particular case, the order of maintenance is not liable to be cancelled on the date of enforcement of the act. But the judge also stated that it stands cancelled with effect from 3 months after the divorce was final (14 August 1989) giving due allowance to the Iddat

period. Aggrieved by the order of the Sessions Judge, this present petition was filed under section 482 of CRPC.

- The counsel for the petitioner contended that the decision of this court in the case of **Shaik Raj Mohd. v. Shaik Ameena Bee**[6], stated that any order for maintenance under section 125 prior to the commencement of this act, is final and valid and it cannot be affected after the enforcement of the act.

Respondent's contentions:

- The counsel for Respondent contended that the Magistrate Session Judge was justified in cancelling the maintenance order. A perusal of the above decision shows that in that particular case the bench was dealing with a very different case where the maintenance order was passed prior to the act.
- The principle laid down in the decision is not applicable to the circumstances of this present case because in this case there is a change of circumstances and change of status of the parties. The Respondent also contended that as all the amount specified under the provisions of the act are paid, the maintenance order that was passed before under section 125 should be cancelled.

Judgement:

The court held that the order passed by the Sessions Judge rightly modified the order which was passed in this case and the order of maintenance which was passed earlier would stand cancelled. Ultimately, the court decided that it cannot find any justification to interrupt with the order of the Additional Sessions Judge passed on 16th June 1993 (Cri. Revision Petition No.5 of 1989). As a result, the present petition was dismissed, and the petitioner wife is entitled to pursue remedy in maintenance order and obtain appropriate orders.

***Relevant Paragraphs**:*

5. After a careful analysis of the provisions of the above-mentioned act, it clearly shows that this act has an overriding effect. Section 3 starts with the words - "Notwithstanding anything contained in any other law for the time being in force". This act is also meant to protect the rights of Muslim

[6] 1993(1) A L.T. (Crl.) 579

women who have been divorced from their husbands. As the status of the parties changed after 14th May 1989 (due to divorce), the rights of the wife are now governed by the provisions of this enactment. As per the provisions mentioned in section 3 of the act, the wife is entitled to approach the court to seek the relief for a reasonable and fair provision and maintenance for the 'iddat' period. Maintenance for the children can also be claimed under this act.

The wife is also entitled to the amount that was agreed to paid at the time of marriage as dower and also for return of any property that was given to her before or at the time of marriage by her relatives or family members. Sub-section 2 of section 3 of this act also lays down the procedure which has to be followed by the divorced wife to obtain relief under this act. Section 5 of the act also gives an option to the divorced woman to be governed by the provisions of section 125 to 127 of CrPC in spite of this act.

6. The court observed that the order passed by the Additional Sessions Judge has clearly took into consideration all the facts and legal provisions and the judge drew the correct conclusions on the materials placed before him in this case. The Sessions Judge rightly modified the process order which was passed in this case and concluded that the order of maintenance which was passed earlier would stand cancelled.

7. Ultimately, the court decided that it cannot find any justification to interrupt with the order of the Additional Sessions Judge passed on 16th June 1993 (Cri. Revision Petition No.5 of 1989).

8. As a result, the present petition was dismissed, and the petitioner wife is entitled to pursue remedy in maintenance order and obtain appropriate orders. Taking into the consideration that the maintenance order was filed a long time ago, the court also directed the concerned magistrate to dispose the same with efficiency and urgency, within a period of four months from this date.

K. SARLA MUDGAL v. UNION OF INDIA

(2nd marriage solemnised by converting to Islam during the lifetime of the spouse attracts Section 494 of IPC)

Bench: Justice Kuldip Singh, Justice R.M Sahai

Petitioner: Smt. Sarla Mudgal

Respondent: Union of India

Citation: AIR 1995 SC 1531

Issue:

I) Whether Hindu husband by conversion into Islam can solemnize a second marriage?

II) Whether such marriage without having 1st marriage dissolve would be a valid marriage?

III) Whether the husband would be guilty of an offence punishable under section 494 of the Indian Penal Code?

Facts of the case:

• There are 4 petitioners under article 32 of the Constitution of India. The 2 main petitioners in this writ petition are petitioner no. 1 having writ petition no. 1079/ 89 is the president of Kalyani which is an organisation working for the welfare of needy families and women in distress.

• Petitioner no. 2 is Meena Mathur who was married to Jitendra Mathur on 27th February 1998. The petitioner was shocked to learn that her husband had solemnized second marriage with Sunita Narula alias Fatima. The said marriage was solemnized after they converted themselves to Islam and embraced the Muslim religion.

• According to the petitioner, conversion was only to marry Sunita and circumvent the provision of section 494 of the Indian Penal Code (IPC) I.e. Bigamy.

• The second petition was filed by Sunita Narula alias Fatima that is writ petition no. 347/ 90. She asserted in her petition that she along with Jitendra Mathur adopted Islam and thereafter got married. A son was born to her.

• She further stated that after marrying Jitendra Mathur, he gave an undertaking on 28th April 1988 under the influence of 1st wife that he converted back to Hinduism and thus agreed to maintain his 1st wife and children.

• Her grievance is that she has no protection under either of the personal laws as she converted herself to Islam and continues to be so and is not even maintained by her husband who converted back to Hinduism.

• The 3rd petition is filed by Geeta Rani that is 424/ 92. It is contended in her petition that she got married to Pradeep Kumar in 1988. Her husband used to ill-treat her after marriage.

• Further in her petition, she mentioned that on one occasion, she learnt that her husband ran away with one Deepa and after conversion to Islam married her. She stated that Islam was adopted only for the purpose of performing the second marriage.

• The 4th petition is filed by Sunita Ghosh that is 509/ 92. It is contended that the petitioner got married to G.C Ghosh in 1984. In the year 1992, the husband informed the petitioner that he would soon marry Vanita Gupta as he had obtained a certificate of conversion from Kazi.

• Thus the petitioner prayed that her husband should be restrained from entering into a second marriage.

Judgment:

• The Court held that conversion to another religion by one or both Hindu spouses did not dissolve the marriage.

• The court said that neither did the traditional Hindu Laws recognize that conversion to another religion would automatically dissolve the Hindu marriage nor did the codified or uncodified Hindu laws exempted a convert from his or her civil obligations.

• A marriage performed under the act that is Hindu Marriage Act, 1955 cannot be dissolved except on the grounds available under Section 13 of the act. In such a situation, parties do have solemnized marriage under the act and remain married even when the husband adopts Islam in order to perform 2nd marriage.

• Hence, 2nd marriage therefore would be illegal marriage and the wife who is married to a husband under the act continues to be a Hindu. That means a Hindu wife's religion does not changes with that of her husband even though he converts to another religion.

• Conversion to Islam and marrying again will not dissolve the Hindu marriage. A second marriage that is a bigamous marriage by a convert without having his 1st marriage dissolved under the law would therefore be in violation of the act and as such void in terms of section 494 of Indian Penal Code.

Relevant Paragraphs:

• The Hon'ble court had several times in its judgement pointed out the need to enact a uniform civil code (UCC). The court quoted article 44 of the Indian Constitution stating that – the State shall ensure that a uniform civil code is enacted throughout the territory of India for national consolidation. The Hon'ble court showing dissatisfaction about the scenario that no rulers in India have felt the need to secure a uniform civil code in our nation to unify all the personal laws for all the Indians.

• The court taking reference to the case *Ram Kumari* (1891) [ILR 18 CAL 266] stated where a Hindu wife converted into Islam and then married a Muslim, it was held that her marriage with a Hindu husband that was solemnized earlier will not dissolve by conversion. She was charged and convicted for committing the offence of bigamy under section 494 of IPC.

• Also, references to other cases wherein the Privy Council had through its verdict confirmed that a person of any religion embracing another religion cannot itself dissolve their 1st marriage. The court took reference to the following cases *Gul Muhammad v. Emperor* [AIR 1947 Nagpur 121] wherein a Mohammedan man took a Hindu wife converted her to Islam and married her. It was held that the marriage of the woman does not ipso facto dissolves during the lifetime of her 1st husband because of the woman's conversion to Islam. The Muslim man was thus convicted for the offence of adultery under section 497 of the Indian Penal Code.

• Even in the case of *Nandi alias Zainab v. The Crown* [ILR 1920 Lahore 440], A woman named Nandi her husband complained that she converted to Islam and married a Mohammedan man named Rukan Din. The court held that her marriage can be dissolved only by a decree of the court and not by conversion. Hence, she was convicted and charged for the offence under section 494 of the Indian Penal Code. Similarly, in the case of *Emperor v. Ruri* [AIR 1919 Lahore 389], A Christian wife renounced Christianity and adopted Islam to marry a Muslim man. The court held that as per the Christian Personal Laws conversion to another religion does not dissolve a person's 1st marriage.

• Many Hindus embrace Islam for the reason of escaping the consequences of bigamy obviously for the very reason as Islam permits a man to take as many as 4 wives. But many Islamic nations to check the growing misuse have either altered the Islamic law by putting restrictions or severely prohibited this practice of polygamy. Some of the Muslim countries prohibiting misuse of this practice are Iran, Tunisia, Morocco, Pakistan and Syria to be a few in this context. But religious

practices that are violative of a person's human rights and dignity a unified civil code is a solution for the protection of the oppressed and also for the promotion of national solidarity and unity.

L. NOOR SABA KHATOON v. MOHD. QUASIM

(Section 125 of Cr.PC allows maintenance to children of Muslim parents)

Bench: Justice A.S Anand, Justice K. Venkataswami

Appellant: Noor Saba Khatoon & Others.

Respondent: Mohd. Qasim

Citation: AIR 1997 SC 3280

Date of Judgement: 29th July 1997

Issue:

- Whether Muslim children are entitled to maintenance under section 125 of Cr.PC?

Facts:

• Noor Saba Khatoon married Mohammed Qasim on 27th October 1980 as per Muslim tradition. 3 children were born to them out of the said wedlock (i.e. 2 daughters and a son)

• One fine day due to some matrimonial discord, Mohd. Qasim threw the appellant and their 3 kids out from the matrimonial home and thereby refused to maintain them.

• He later had a 2nd marriage with one Shahnawaz Begum. At that time his 3 children were aged 6 years, 3 years and an infant girl just aged 1 ½ year respectively.

• Noor Saba Khatoon filed a petition on 13th February 1992 for maintenance for herself and on behalf of her children in the court of Judicial Magistrate 1st Class, Gopalganj.

• The respondent, Mohammed Qasim went on to divorce his 1st wife Noor Saba Khatoon just to modify the maintenance amount ordered by the trial court.

Appellant's Contentions:

• The appellant in her petition filed before the trial court pleaded for maintenance amount for herself and her 3 minor kids. She petitioned that each child should receive a monthly amount of Rupees 300 and also a monthly allowance of Rupees 400 for herself.

• She stated in her petition that her husband is a well off person who has farmland and also owns a business of electrical appliances. Whereas she has no means to maintain herself and their children and has no source of income.

Judgment:

• Trial Court Verdict:

The Trial Court observed that the respondent neglected his duty to maintain his children and wife. Thus, on 19th January 1993, The Judicial Magistrate ordered the maintenance amount to be paid to the wife at the rate of Rupees 200/- per month and to each of their children Rupees 150/- per month.

But after this order, Mohammed Qasim divorced his wife and asked the court to make changes in the maintenance amount as per section 3(1)(b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986.

The Judicial Magistrate modified the order and held that the wife will get maintenance only up to the period of iddat and whereas with regards to the children the maintenance amount ordered under section 125 of Cr.PC shall not be affected In any manner by the 1986 Act.

• Revision Court Verdict:

The respondent still was not satisfied by the order passed by the trial court and thus applied for revision but his application got dismissed by the 2nd additional judge.

• High Court Verdict:

The respondent then went on to appeal in the High Court. The single-judge bench of the High Court held that under section 3(1)(b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 a woman can seek maintenance for her children for 2 years from the date of birth.

Accordingly, the High Court ordered that only the infant girl aged 1 ½ year was eligible to get maintenance until she attains the age of 2 years and hence, the other 2 children were held ineligible

to receive any maintenance. Furthermore, the Court said that the children cannot claim maintenance under section 125 of Cr.PC.

• Supreme Court Verdict:

The appellant-mother filed an appeal in the Supreme Court of India against the impugned order by way of a special leave petition. The Supreme Court found an error in the judgement passed by the High Court and remarked that the order passed by the concerned High Court was misleading and improper. Thus, the order of the High Court was set aside and held the judgement passed by the trial judge and revision court judge to be correct.

The apex court observed that the provision under section 3(1)(b) of the 1986 Act allows additional maintenance to a mother to maintain the child for the fosterage period of 2 years from the date of birth of the infant. This section shall not override the provisions of section 125 of the Cr.PC that allows minor children to claim maintenance.

The rights of minor children unable to maintain themselves shall not be affected by section 3(1)(b) of the Act. Every Muslim child who is below the age of 18 years can obtain maintenance by invoking section 125 of the code in cases where the parents neglect or refuse to maintain.

The Court held that section 125 of the Criminal Procedure Code puts an obligation upon the father to maintain their children. Thus, the father was held liable to pay the maintenance amount to his children.

The apex court ordered Mohammed Qasim to pay the arrears of maintenance within 1 year from the date of this judgement in 4 equal quarterly instalments to the mother of his 3 children who had filed a petition on their behalf. Lastly, the Court said that the maintenance has to be paid till the children attain majority (i.e. 18 years of age) and in the case of daughters until they are married.

Relevant Paragraphs:

Given the provisions of section 3(1)(b) and a plain reading suggest that the 'Mahr' is to be paid at the time of divorce. Also, this section makes provisions for maintenance till the fosterage period i.e. 2 years from the date of birth of the infant. Even a provision is made in the section for a divorced Muslim woman that allows her to obtain maintenance from her husband during the period of iddat.

With regards to children, the right to claim maintenance under section 125 of the Cr.PC is different, independent and separate from the right of divorced women. Both the Muslim personal law as well as the statutory law requires a father to maintain his children. Section 3(1)(b) does not intend to take away the rights of Muslim children who claim maintenance under section 125 of the code.

M. AHMEDABAD WOMEN ACTION GROUP & ORS. V. UNION OF INDIA

(Muslim law which allows polygamy was challenged on the ground of violating Art 14 and 15 of the Indian Constitution.)

Bench: Justice A.M. Ahmadi (CJI), Justice Sujata V. Manohar, and Justice K. Venkataswami

Appellant: Ahmedabad women action group

Respondent: Union of India

Citation: AIR1997SC3614

Issues:

1. Whether the Court has the authority to meddle in the issue of the unification of Personal Laws or not?

Facts of the Case:

- Three Writ Petitions have been recorded for this situation as Public Interest Litigations looking to challenge different parts of Personal Laws.
- Muslim law permits Muslim men to have four relationships, alongside the option to separate, under the idea of Talaq, whereby, the husband has the authority to separate by the expression of the term 'Talaq', without judicial methods, and this may occur without the women's consent.

Appellant's Contention:

- To pronounce Muslim Personal Law which permits polygamy as void as infringing Articles 14 and 15 of the Constitution.

- To pronounce Muslim Personal Law which empowers a Muslim male to give one-sided Talaq to his wife without her assent and resort to the judicial cycle of courts as void, insulting Articles 13, 14, and 15 of the Constitution.
- To proclaim that the simple fact that a Muslim husband takes more than one wife is a demonstration of cruelty inside the significance of Clause VIII of Section 2 of the Dissolution of Muslim Marriages Act. 1939.
- To announce that the Muslim Women (Protection of Rights on Divorce) Act, 1986 is void as encroaching Articles 14 and 15 of the Constitution.
- To further announce that the arrangements of Sunni and Shia laws of legacy which discriminate females in their share when contrasted with the share of men of a similar status be void as discriminate females just on the ground of sex.

Respondent's Contention:

- It would be inadvisable and off base to feel that all laws must be made consistently relevant to all individuals in one go.
- The Legislature is comprised of the chosen representatives of individuals. They are liable for the welfare of the State and it is for them to set out the policy that the State should seek after. Subsequently, it is for them to figure out what legislation to set up on the statute book to propel the welfare of the State.

Judgment:

The Supreme Court didn't take comprehension and saw that the issues brought up include issues of state strategy with which the Judiciary doesn't have any concern. The cure lies with the Legislature and not the courts.

Relevant Paragraphs:

- **Para 3:** For the Court, the presiding judge, Venkataswami J. first commented that: "… these Writ Petitions don't deserve removal on merits since the arguments progressed before we completely include issues of State strategies which the Court won't usually have any concern. Further, we find that when comparable attempts were made, obviously by others, on prior events this Court (Maharishi Avadhesh v. Association of India, 1994) held that the cure lies elsewhere and not by knocking at the doors of the courts."

- In connection to the scope of laws assaulted by the petitions, he felt that it is off base to believe that all laws must be made consistently relevant to all individuals in one go, rather than growing continuously after some time to fulfill the needs of the Constitution. This was especially so in the circumstance where a wide scope of laws had been inactivity for a long time before the Constitution being implemented.
- The Court felt that various religions with long verifiable foundations could be viewed as various classes under the law and the Constitution permits, to a certain extent, for their varying general set of laws: "the two Muslims and the Hindus in this nation have their strict writings and which exemplify their unmistakable development and which are hued by their particular foundations. Article 44 perceives independent and unmistakable personal laws since it sets down as a mandate to be accomplished that inside a quantifiable time India ought to appreciate the advantage of a typical uniform Civil Code appropriate to every one of its residents regardless of race or religion."
- **Para 8:**He cited Gajendragadkar J. in a previous case (State of Bombay v. Narasu Appa Mali, AIR 1952 Bombay 84) who set out that: "The Constitution of India itself perceives the presence of these personal laws in wording when it manages the subject falling under personal law in item 5 in the Concurrent List. This item manages matters in regard of which parties in judicial procedures were preceding the commencement of this Constitution subject to their law … because, as I would see it, the designers of the Constitution needed to leave the personal laws outside the ambit of Part III of the Constitution. They probably know that these personal laws should have been transformed in numerous material specifics and truth be told they needed to cancel these diverse personal laws and to develop one regular code. However, they didn't wish that the arrangements of the personal laws ought to be tested because of the fundamental rights ensured in Part III of the constitution."

N. DANIAL LATIFI VS UNION OF INDIA

(A Muslim husband was held accountable to keep up his divorced wife just for the Iddat period and after such period the onus of keeping up the lady would move on to her relatives.)

Bench: Justice G.B Pattanaik, Justice S. Rajendra Babu, Justice D.P Mohapatra, Justice D.Raju and Justice Shivraj P. Patil

Appellant: Danial Latifi

Respondent: Union of India

Citation: 2001 SC SCC 740

Issues:

2. Whether a Muslim husband is responsible to make sensible and reasonable provision reaching out past the Iddat period regarding Sec. 3(1) (a) of The Muslim Women (Protection of Rights on Divorce) Act, 1986?
3. Whether the Muslim Women (Protection of Rights on Divorce) Act, 1986, is unconstitutional considering Articles 14, 15, and 21 of the Constitution of India, 1950?
4. Whether a husband under Muslim law is absolved from any duty towards his divorced wife past the payment of any Mahr because of her and add up to cover maintenance during the Iddat period and Sec. 127(3) (b) of CrPC, 1973?

Facts of the Case:

- The case follows its advantage from the well-known instance of Mohd. Ahmed Khan v. Shah Bano Begum, normally known as the Shah Bano case.
- Shah Bano, a Muslim mother of five, 62 years old, from Indore, Madhya Pradesh, was isolated (divorced) by her husband in 1978.
- She at that point stopped a criminal case under Section 125 of the CrPC, after appealing the Supreme Court of India, she got the right to alimony.
- However, later, she was denied her right, when the Parliament of India upset the judgment by establishing the Muslim Women (Protection of Rights on Divorce) Act, 1986.
- This Act watered down the Supreme Court choice and, it even denied alimony, to those ladies who can't look after themselves, from their past husbands.
- As indicated by Sec 3(1) (a) of the act, a divorced lady is qualified for sensible and reasonable provisions, and maintains inside the 'Iddat' period, therefore, denying the resulting and future support to such spouses from their divorced husbands.
- A Muslim woman was left to be kept up in the hands of their relatives after the Iddat period.
- Therefore, the established legitimacy of the Act was tested under the steady gaze of the Supreme Court for Danial Latifi through a writ appeal.

Appellant's Contention:

- Section 125 of the Criminal Procedure Code states to accommodate support just in some specific circumstance and not for each divorced Muslim lady. This doesn't consider Article 21 which is the right to life, to each individual and divorced wife who were reliant every day also have this right.
- Article14 which states for equity is disregarded by segregating the Muslim ladies. It is genuinely ridiculous to invalidate a Judgment given for Shah Bano because of some political pressing factor. The reality was segregated the full community of Muslim ladies getting maintenance and equivalent protection from Law.
- The marriages in Muslim Law are legally binding and a component of consideration is one of the primary necessities for a substantial or valid contract. In Muslim marriages, they give Mahr or Dower as the consideration. Similarly, divorce turns into a binding contract between both partners, and nothing being the consideration makes it invalid.
- Shah Bano's case was recorded in the Supreme Court under Section 125 of the Criminal Procedure Code where the Judgment was invalidated. Sec. 125 states for the support or maintenance of all divorced wife's from their husbands under specific conditions. The principle essence of Section 125 is to give support or maintenance to all the ladies regardless of religion. When there is such a law why would that be an obstruction to give maintenance for the situation?

Respondent's Contention:

- It was expressed discrimination and no equivalent treatment for Muslim women. Personal laws in our nation are diverse for every religion and become the reason for segregation. It has been acknowledged by the constitution and isn't violating Article 14. If Section 125 of the CrPC applies to the Muslims also, then the legislation needs to state it and make different provisions for that.
- Under Sec.3 of the Muslim Woman's Protection Act, 1986, the parliament has referenced fair and reasonable provision and maintenance to be given by the husband to the wife within the Iddat period. Then why the subject of lifetime maintenance or just within the Iddat period does emerge?

- Shah Bano's Judgment was denied simply because it didn't make equity to the Muslim personal law. It was additionally expressed that there was no segregation in the Judgment rather the decision made didn't legitimize or was in connection with personal law.
- Following what the personal law endorses and been acknowledged by the constitution can't be expressed as prejudicial. Personal laws are carried out as the specific community can follow them and has no clue for segregation. The Act carried out by the parliament was to protect the personal law and forestall any interference by different laws. The Act points not to acquire any quirk or contrast in the recommended personal law.
- It is to be noticed that the Muslim personal law has adequate provisions to protect Muslim women, and it isn't required that simply by broadening Section 125 the Muslim women are secured. Muslim law never expects to make the ladies endure, and it is to be noticed that Muslim law is made focusing on women's protection. In this way, the Act endorsed can't be expressed invalid or unconstitutional.

Judgment:

The Supreme Court while maintaining the legitimacy of the act, decided as follows:-

1. Muslim Husband is obligated to pay maintenance which may be reached out past the Iddat Period in terms of Sec 3(1) (a) and makes fair and reasonable provisions for the divorced wife for her future.
2. Whenever divorced Muslim women who have not remarried and who can't maintain themselves after the Iddat period can continue under Sec. 4 of the act, which says that she ought to be maintained by the relatives to the extent of her property which her relatives acquire after her death.
3. If relatives can't look after her, Magistrate may coordinate the State Wakf Board to balance out under the act to pay such maintenance.
4. Article 14, 15, and 21 of the Constitution of India isn't outraged by the provision of the act.

Relevant Paragraphs:

- **Paragraph 26:** A perusing of the Act will show that it arranges and directs the commitments because of a Muslim woman divorcee by putting them outside the extent of Section 125 CrPC as the "divorced woman" has been characterized as "Muslim woman

who was married according to Muslim law and has been divorced by or has gotten divorced from her husband as per the Muslim law". However, the Act doesn't have any significant bearing to a Muslim lady whose marriage is solemnized either under the Indian Special Marriage Act, 1954 or a Muslim lady whose marriage was disintegrated either under the Indian Divorce Act, 1869 or the Indian Special Marriage Act, 1954. The Act doesn't have any significant bearing on the abandoned and isolated Muslim spouses. The maintenance under the Act is to be paid by the husband for the term of the Iddat period and this commitment doesn't stretch out beyond the period of Iddat. When the relationship with the husband has concluded with the expiry of the Iddat period, the duty declines upon the relatives of the divorcee. The Act observes Muslim personal law in figuring out which relatives are capable under which conditions. On the off chance that there are no relatives, or no relatives can uphold the divorcee, at that point the court can arrange for the State Wakf Boards to pay the maintenance.

- **Paragraph 27:** Section 3(1) of the Act gives that a divorced woman will be qualified to have from her husband, fair and reasonable maintenance which is to be made and paid to her within the Iddat period period. Under Section 3(2) the Muslim divorcee can document an application before a Magistrate if the previous husband has not paid to her a fair and reasonable provision and maintenance or Mahr because of her or has not conveyed the properties given to her previously or at the time of the marriage by her relatives, or companions, or the husband or any of his relatives or companions. Section 3(3) accommodates system wherein the Magistrate can pass a request guiding the previous husband to pay such sensible and reasonable provision and maintenance to the divorced woman as he may suspect fit and appropriate having respect to the necessities of the divorced woman, the standard of life appreciated by her during her marriage and means for her previous husband. The legal enforceability of the Muslim divorced woman's right to provision and maintenance under section 3(1)(a) of the Act has been exposed to the state of the husband having adequate methods which, rigorously talking, is in opposition to the standards of Muslim law as the risk to pay maintenance during the Iddat period is unrestricted and can't be encircled by the monetary methods for the husband. The reason for the Act seems, by all accounts, to be to permit the Muslim husband to hold his

opportunity of staying away from payment of maintenance to his past wife after divorce and the period of Iddat.

- **Paragraph 20:** In deciphering the provisions where the marital relationship is included, we need to consider the social conditions predominant in our general public. In our general public, whether they have a place with the dominant part of the minority bunch, what is clear is that there exists an extraordinary dissimilarity in the matter of financial cleverness between a man and a woman. Our general public is male ruled, both financially and socially and women are appointed, constantly, a reliant job, regardless of the class of society to which she has a place. A woman on her marriage frequently, however profoundly taught, surrenders her any remaining diversions and altogether gives herself to the government assistance of the family, specifically, she imparts to her husband, her feelings, opinions, psyche, and body, and her interest in the marriage is as long as she can remember — a hallowed penance of her self and is extremely gigantic to be estimated regarding cash. At the point when a relationship of this nature separates, in what way we could repay her so particularly as far as passionate fracture or loss of speculation is worried, there can be no answer. It is a little comfort to say that such a woman ought to be repaid regarding cash towards her livelihood and such help which shares fundamental basic freedoms to get gender and social equity is all around perceived by people having a place with all religions and it is hard to see that Muslim law expects to give an alternate sort of obligation by giving something similar to those detached with the marital life, for example, the beneficiaries who were probably going to acquire the property from her or the Wakf Boards. Such a methodology appears to us to be a sort of bending of the social facts. Answers for such cultural issues of widespread size relating to skylines of fundamental basic freedoms, culture, pride and respectability of life and directs of need chasing social equity ought to be perpetually left to be settled on contemplations other than religion or strict confidence or convictions or public, partisan, racial or communal requirements. Remembering this viewpoint, we need to decipher the provisions of the Act being referred to.

- **Paragraph 33:** In the Shah Bano case this Court has disclosed concerning the reasoning behind Section 125 CrPC to make provision for maintenance to be paid to a divorced Muslim wife and this is plain to stay away from vagrancy or dejection concerning a Muslim

woman. The dispute set forth for the benefit of the Muslim associations who are interveners before us is that under the Act, vagrancy or desperation is tried to be stayed away from however not by rebuffing the blundering husband, if by any means, yet by accommodating maintenance through others. If under any condition the understanding put by us on the language of Sections 3(1) (a) and 4 of the Act isn't adequate, we should look at the impact of the provisions as they stand, that is, a Muslim woman won't be qualified for maintenance from her husband after the period of Iddat once the talaq is articulated and, if by any means, from that point maintenance must be recuperated from the different people referenced in Section 4 or from the Wakf Board. This Court in Olga Tellis v. Bombay Municipal Corpn. 1985 3 SCC 545 and Maneka Gandhi v. Association of India 1978 1 SCC 248 held that the idea of "right to life and individual freedom" ensured under Article 21 of the Constitution would incorporate the "right to live with respect". Before the Act, a Muslim woman who was divorced by her husband was allowed a right to maintenance from her husband under the provisions of section 125 CrPC until she may remarry and a right, if denied, would not be sensible, just, and reasonable. Subsequently, the provisions of the Act denying the divorced Muslim women of a right to maintenance from her husband and accommodating her maintenance to be paid by the previous husband just for the period of Iddat and from that point to make her run from column to post looking for her relatives in a steady progression and eventually to thump at the entryways of the Wakf Board doesn't seem, by all accounts, to be a sensible and reasonable substitute of the provisions of section 125 CrPC. Such hardship of the divorced Muslim women of their right to maintenance from their previous husbands under the valuable provisions of the Code of Criminal Procedure which is generally accessible to any remaining women in India can't be expressed to have been affected by a sensible, right, just and reasonable law and, if these provisions are less advantageous than the provisions of Chapter IX of the Code of Criminal Procedure, a divorced Muslim woman has been absurdly separated and escaped the protection of the provisions of the overall law as shown under the Code which is accessible to Hindu, Buddhist, Jain, Parsi or Christian women or women having a place with some other community. The provisions at first sight, along these lines, seem, by all accounts, to be violative of Article 14 of the Constitution commanding correspondence and equivalent protection of law to all people in any case correspondingly circumstanced and violative of

Article 15 of the Constitution which restricts any segregation on the ground of religion as the Act would apply to Muslim divorced women just and exclusively on the ground of their having a place with the Muslim religion. It is all around settled that on a standard of development, a given rule will become "ultra vires" or "unconstitutional" and, thusly, void, though, on another passable development, the rule stays powerful and usable the court will favour the last on the ground that the governing body doesn't plan to enact unconstitutional laws. We figure, the last understanding ought to be acknowledged and, in this way, the translation put by us brings about maintaining the legitimacy of the Act. It is all around settled that when by proper perusing of enactment the legitimacy of the Act can be maintained, such translation is acknowledged by courts and not the alternate path round.

- **Paragraph 32:** As on the date the Act came into power the law material to Muslim divorced women is as pronounced by this Court in Shah Bano case. For this situation to discover the individual law of Muslims concerning divorced women's rights, the beginning stage ought to be Shah Bano case and not the first messages or some other material — even more so while differing variants concerning the realness of the source are appeared to exist. Consequently, we have avoided alluding to them in detail. That statement was made in the wake of thinking about The Holy Quran and different analyses or different writings. At the point when a Constitution Bench of this Court broke down Suras 241-42 of Chapter II of The Holy Quran and other pertinent printed material, we don't think it is open for us to rethink that position and dive into an examination to arrive at another resolution. We consciously keep what has been expressed in that. All that requires to be considered is whether in the Act specific deviation has been produced using the individual laws as proclaimed by this Court in Shah Bano case without ravaging its basic proportion. We have painstakingly dissected something very similar and arrive at the resolution that the Act actually and as a general rule codifies what was expressed in the Shah Bano case. The learned Solicitor-General fought that what has been expressed in the items and reasons in the Bill prompting the Act is a fact and that we ought to dare to be right. We have investigated the facts and the law in the Shah Bano case and continued to discover the impact of something similar on the Act. If the language of the Act is as we have expressed,

the simple fact that the lawmaking body observed certain facts in enacting the law won't be of much materiality.

- **Paragraph 31:** Considerably under the Act, the parties concurred that the provisions of section 125 CrPC would, in any case, be attracted and surprisingly something else the Magistrate has been consulted with the ability to make proper provision for maintenance and, accordingly, what could be prior allowed by a Magistrate under Section 125 CrPC would now be conceded under the very Act itself. This being the position, the Act can't be held to be unconstitutional.

- **Paragraph 30:** The contention of the petitioners that a different plan being given under the Act which is similar or more advantageous on the translation set by us from the one given under the Code of Criminal Procedure deny them of their right loses its significance. The item and extent of Section 125 CrPC are to forestall vagrancy by convincing the individuals who are under a commitment to help the individuals who can't uphold themselves and that article being satisfied, we think that it's difficult to acknowledge the dispute encouraged for the benefit of the petitioners.

- **Paragraph 28:** A cautious perusing of the provisions of the Act would show that a divorced woman is qualified for a sensible and reasonable provision for maintenance. It was expressed that Parliament appears to plan that the divorced woman gets adequate methods for livelihood after the divorce and, subsequently, "provision" demonstrates that something is given ahead of time to addressing a few necessities. At the end of the day, at the hour of divorce, the Muslim husband is needed to consider the future necessities and make preliminary plans ahead of time for addressing those requirements. Sensible and reasonable provision may incorporate provision for her home, her food, her garments, and different articles. The articulation "inside" ought to be perused as "during" or "for" and this is impossible since words can't be understood in opposition to their importance as "inside" would signify "at the latest", "not past" and, accordingly, it was held that the Act would imply that at the very latest the termination of the Iddat period, the husband will undoubtedly make and pay maintenance to the wife and if he neglects to do so then the wife is qualified for recuperating it by documenting an application before the Magistrate

as given in Section 3(3) yet no place has Parliament given that sensible and reasonable provision and maintenance is restricted distinctly for the Iddat period and not past it. It would reach out to the entire life of the divorced wife except if she gets hitched briefly time.

- **Paragraph 29:** The significant section in the act is section 3 which gives that a divorced woman is qualified for getting from her previous husband "maintenance", "provision" and "Mahr", and to recuperate from his ownership her wedding presents and share and approves the Magistrate to arrange payment or reclamation of these aggregates or properties. The core of the matter is that the divorced woman will be qualified for a sensible and reasonable provision and maintenance to be made and paid to her within the Iddat period period by her previous husband. The phrasings of Section 3 of the Act seem to show that the husband has two discrete and particular commitments: (1) to make a "sensible and reasonable provision" for his divorced wife; and (2) to give "maintenance" for her. The accentuation of this section isn't on the nature or length of any such "provision" or "maintenance", yet on the time by which a game plan for payment of provision and maintenance ought to be closed, to be specific, "within the Iddat period period". If the provisions are so perused, the Act would avoid from responsibility for present Iddat period maintenance on a man who has effectively released his commitments of both "sensible and reasonable provision" and "maintenance" by paying these sums in a single amount to his wife, as well as having paid his wife's Mahr and reestablished her endowment according to Sections 3(1)(c) and 3(1)(d) of the Act. Correctly, the point that emerged for thought in Shah Bano case was that the husband had not made a "sensible and reasonable provision" for his divorced wife regardless of whether he had paid the sum concurred as Mahr 50 years sooner and gave Iddat maintenance and he was, accordingly, requested to pay a specified entirety month to month to her under Section 125 CrPC. This position was accessible to Parliament on the date it enacted the law, yet all things being equal, the provisions enacted under the Act are "a sensible and reasonable provision and maintenance to be made and paid" as given under section 3(1)(a) of the Act and these articulations cover different things, initially, by the utilization of two different action words — "to be made and paid to her within the Iddat period period" obviously a reasonable and sensible provision is to be made while

maintenance is to be paid. Besides, Section 4 of the Act, which engages the Magistrate to give a request for payment of maintenance to the divorced woman against different of her relatives, contains no reference to "provision". The right to have "a reasonable and sensible provision" in support of herself is a right enforceable just against the woman's previous husband, and notwithstanding what he is obliged to pay as "maintenance"; thirdly, the expressions of The Holy Quran, as interpreted by Yusuf Ali of "mata" as "maintenance" however might be off base and those different interpretations utilized "provision", this Court in Shah Bano case excused this perspective by holding that it is a differentiation without a difference. To be sure, whether "mata" was delivered "maintenance" or "provision", there could be no misrepresentation that the husband in Shah Bano's case had given anything at all via "mata" to his divorced wife. The dispute set forth for the benefit of the opposite side is that a divorced Muslim woman who is qualified for "mata" is just a solitary or onetime transaction which doesn't mean payment of maintenance ceaselessly by any stretch of the imagination. This conflict, aside from supporting the view that "provision" in section 3(1)(a) of the Act consolidates "mata" as a right of the divorced Muslim woman particular from and notwithstanding Mahr and maintenance for the Iddat period, likewise empowers "a sensible and reasonable provision" and "a sensible and reasonable provision" as given under Section 3(3) of the Act would be concerning the requirements of the divorced woman, the methods for the husband and the norm of life the woman appreciated during the marriage and there is no motivation behind why such provision couldn't appear as the ordinary payment of alimony to the divorced woman, however, it might look unexpected that the enactment proposed to invert the choice in Shah Bano case, actually codifies the very reasoning contained in that.

- **Paragraph 34:** The learned insight showing up for the Muslim associations battled in the wake of alluding to different sections from the course books which we have adverted to before to express that the law is exceptionally certain that a divorced Muslim woman is qualified for maintenance simply up to the phase of Iddat and not from thereon. What is to be given via mata is just a generous provision to be presented in defence of a divorced Muslim woman who can't keep up herself and that too via noble cause or consideration concerning her previous husband and not because of her right streaming to the divorced

wife. The impact of different translations put on Suras 241 and 242 of Chapter II of The Holy Quran has been alluded to in the Shah Bano case. Shah Bano's case articulated what the current law would be. It made a qualification between the provisions to be made and the maintenance to be paid. It was seen that the maintenance is payable simply up to the phase of Iddat and this provision is material if there should arise an occurrence of ordinary conditions, while in the event of a divorced Muslim woman who can't look after herself, she is qualified for getting mata. That is the premise on which the Bench of five Judges of this Court deciphered the different messages and held so. The enactment however implies to beat the view communicated in Shah Bano case corresponding to a divorced Muslim woman getting something via maintenance in the idea of mata is to be sure legally perceived by making provision under the Act with the end goal of the "maintenance" yet additionally for "provision". At the point when these two articulations have been utilized by the enactment, which implies that the lawmaking body didn't plan to decimate the significance ascribed to these two articulations by this Court in the Shah Bano case. In this manner, we are of the view that the conflicts progressed for the gatherings actually can't be maintained.

O. SHAMIM ARA V. STATE OF U.P. & ANR.

(The Hon'ble Supreme Court has invalidated arbitrary triple talaq.)

Bench: Justice R.C. Lahoti, Justice P.Venkatarama Reddi

Appellant: Shamim Ara

Respondent: State of U.P. & Anr.

Citation: (2002) 7 SCC 518

Issues:

Whether a written statement by the husband that he had separated from his wife (without imparting the separation to her) would add up to a divorce effective from the date of documenting of the written statement?

Facts of the Case:

- The wife (appellant) and Abrar Ahmed (respondent) were married in 1968.
- The appellant filed a petition in 1979 under Section 125 Criminal Procedure Code complaining of cruelty to her and her sons as well as desertion.
- The husband answered by asserting that he had separated from her on 11-7-1987, and therefore she is not entitled for maintenance.
- No statement of conditions, no justification by reasons, no confirmation of endeavors at compromise, and no proof of observers on the side of the talaq were showed.
- The Family Court had acknowledged an affidavit by the husband (for some situation where the appellant was not so much as a party) as evidence of the talaq and in like manner dismissed the wife's suit for maintenance.
- The wife appealed to the High Court. The High Court of Allahabad held that though the supposed separation had not been conveyed to the appellant, the separation stood finished in 1990 when the husband documented a written statement to her allure.
- The appellant has further filed this appeal by special leave before the Hon'ble Supreme Court.

Appellant's Contention:

- None of the ancient Holy books or sacred writings of Muslims specifies in its content such a type of separation as has been acknowledged by the High Court and the Family Court.
- No such content has been brought to our notification which gives that a recital in any report, regardless of whether arguing or an affidavit, incorporated a statement by the husband that he has effectively separated from his wife on an unspecified or specified date regardless of whether not imparted to the wife would turn into a powerful separation on the date on which the wife ends up learning of such statement.

Respondent's Contention:

- The respondent has dubiously made certain generalized allegations against the wife (appellant).
- He states that since the time of the marriage he discovered his wife to be sharp, shrewd, and wicked.

- The specifics of the claimed talaq are not argued nor the conditions under which and the people, if any, in whose presence talaq was articulated have been expressed.
- There are no reasons validated in justification of talaq and no plea or evidence that any effort at compromise went before the talaq.

Judgment:

The Supreme Court held that a simple plea of talaq in answer to the procedures filed by the wife for maintenance can't be treated as a proclamation of talaq and the responsibility of the husband to pay maintenance to his wife doesn't conclude such correspondence. For separation to be substantial, talaq must be articulated according to the Quranic injunction.

Relevant Paragraphs:

- **Paragraph 7:** The statement of law by Mulla as contained in para 310 and references thereunder depends on specific decisions of the Privy Council and the High Courts. The choice of the A.P High Court in (1975) 1 APLJ 20 has additionally been referred to by Mulla on the side of the suggestion that the statement by the husband in pleadings documented in response to appeal to for maintenance by the wife that he had effectively separated from the candidate (wife) sometime in the past works as separation.

- **Paragraph 16:** We are also of the assessment that the talaq to be powerful must be pronounced. The expression "pronounce" signifies to announce, to absolute officially, to absolute logically, to proclaim, to absolute, to verbalize). There is no verification of talaq having occurred on 11-7-1987. What the High Court has maintained as talaq is the plea taken in the written statement and its correspondence to the wife by conveying a duplicate of the written statement on 5-12-1990. We are extremely clear in our mind that a simple plea taken in the written statement of separation having been articulated at some point in the past can't without anyone else be treated as effectuating talaq on the date of conveyance of the duplicate of the written statement to the wife. Respondent should have shown proof and demonstrated the pronouncement of talaq on 11-7-1987 and if he failed in demonstrating the request brought up in the written statement, the plea should have been treated as fizzled. We disagree with the view propounded in the chose cases alluded to by Mulla and Dr. Tahir Mahmood in their particular critiques, wherein a simple request of

past talaq taken in the written statement, however unverified, has been acknowledged as verification of talaq finishing the conjugal relationship with impact from the date of documenting of the written statement. A request of the previous divorce from taken in the written statement can't at all be treated as a pronouncement of talaq by the husband on the wife on the date of documenting of the written statement in the Court followed by conveyance of a duplicate thereof to the wife.

P. CHAND PATEL v. BISMILLAH BEGUM. MARRIAGE WITH SISTER'S WIFE IRREGULAR NOT VOID

(Section 125 of Criminal Procedure Code allows maintenance to a wife unless an irregular marriage is held to be void.)

Bench: Justice Kabir Altamas, Justice J.M Panchal

Appellant: Chand Patel

Respondent: Bismillah Begum & Another.

Citation: AIR 2008 SC 1915

Issue:

- Whether in Islam the marriage with wife's sister shall be held void?
- If the marriage with the wife's sister may be irregular or void is she entitled to maintenance after divorce?

Facts of the case:

• The appellant Chand Patel married Mushtaq Bee the elder sister of the respondent. During the existence of his 1st wife, he decided to marry his wife's sister Bismillah Begum.

• With the consent of his 1st wife Mushtaq Bee he married his wife's younger sister Bismillah Begum. It was stated by the respondent that they consummated the marriage and hence a child was born to them out of wedlock.

• The daughter named Taheman Bano was born after 2 years of their marriage who was still a minor at that time and was made respondent no. 2 in this case.

• Bismillah Bano said that she was legally wedded wife of Chand Patel for the past 8 years and a '*Nikahnama'* was executed but was misplaced. She stated in her petition that she and her daughter lived under the same roof with Chand Patel's 1st wife and that the respondent accepted the daughter and was brought up by him.

• But after few years in that marriage, her relationship with her husband started deteriorating with time to the extent that he started neglecting her and their minor daughter. But the irony was that Chand Patel denied any marriage taking place between the two.

Appellant's Contentions:

• The appellant in the petition filed before the trial court denied that he married the respondent.

• When he appeared before the apex court his counsel contended that Muslim personal law does not allow unlawful conjunction. Further, the advocate stated that from the initial stage of this case, he denied being married to Bismillah Begum moreover he even denied having any sexual relations with her that directly questioned the daughter's paternity.

• Also, the advocate representing the appellant took reference to the judgement passed in the case of Savitaben Somabhai Bhatiya v. The State of Gujarat wherein the court said that the legislative intent of section 125 of Cr.PC does not intend to include a woman who is unlawfully married under the expression of the term 'wife.'

• The advocate asserted that with regards to the interpretation of section 125 made in the above case, the lower courts have made an error by passing an order for maintenance when the marriage itself was void from its inception.

Respondent's Contentions:

• The respondent Bismillah Begum pleaded in her petition that she and her minor daughter Taheman Bano should receive a monthly maintenance amount of Rupees 1,000 for each of them.

• The advocate representing the respondents said that despite both the parties were aware of the existing fact that it is an unlawful marriage still the marriage was solemnized.

• Furthermore, the advocate argued that the appellant was already married to the respondent's elder sister but still went on to marry the respondent and to avoid paying maintenance amount he is taking resource to the technicalities.

Judgment:

• Trial Court Verdict:

Although Chand Patel denied any marriage taking place between the two, this contention did not go well with the trial court and the court thus rejected his stance as the prima face evidence pointed out otherwise. The court observed that Bismillah Begum was his wife and the minor girl was his daughter and both the persons were not maintained by him.

Hence, the trial court ordered Chand Patel to pay a monthly allowance of Rupees 1,000 to Bismillah Begum & their minor daughter until she reached adulthood.

• Sessions Court Verdict:

The Sessions Court in Gulbarga upheld the decision passed by the trial court and held that until his marriage with Bismillah Begum is not declared by a competent court as void or is not nullified, the wife and daughter are liable to receive the maintenance amount fixed by the trial court.

• High Court Verdict:

When the matter came before the High Court, the court dismissed the petition on the ground that it found no merits in the petition.

When the Trial court, Sessions court and even the High court agreed that Chand Patel was liable to pay maintenance he went for an appeal before the Supreme Court of India.

• Supreme Court Verdict:

The Supreme Court held that a Muslim man who marries a wife's sister during the existence of his marriage with his 1st wife, such marriages shall be deemed to be irregular and not illegal or void.

The apex court upheld the decision passed by the lower court and held that the unlawful marriage would still subsist and the Muslim man shall be liable to pay maintenance to his wife until his marriage is declared void by a competent court.

The court ordered Chand Patel to pay maintenance within 6 months from the date of the judgement and was also ordered to pay the respondent's cost of litigation.

Relevant Paragraphs:

• The court observed that although the law that applies, in this case, is the Muslim personal law it has many similarities to the definition of void marriages provided under section 11 and 12 of the Hindu Marriage Act, 1955. As the term void marriages under the said section do not declare a marriage void from its very inception unless by a decree of the competent court. Until such a decree is not received which declares such unlawful marriages void it shall continue to subsist.

• Also, the judgement stresses that while granting an order for maintenance to the wife and the children of a man, the Magistrate should not decide upon the validity of the marriage unless the marriage is declared to be void or is nullified by a court. Hence, the validity or legality of the marriage cannot be decided under section 391 or section 125 of the code.

• Even though a marriage is irregular or is prohibited under personal law it shall not deprive a wife of her right to maintenance. The personal laws shall never come in the way of a party who prays for maintenance under section 125 of Cr.PC. It is to be noted that it applies to persons of all religions and has nothing to do with personal laws of any religion. Also, section 125 can never be struck down in such cases when there is a conflict between the provisions of this section and the personal laws. With regards to Muslims in India, under the Hanafi law, an irregular continues to exist unless it is terminated and the wife and the child is entitled to get maintenance.

Q. <u>VISHWA LOCHAN MADAN VS. UNION OF INDIA & ORS.</u>

(No Parallel Judicial System aimed to administer justice to Muslims)

Bench: Chandramauli Kr. Prasad, Pinaki Chandra Ghose

Appellant: Vishwa Lochan Madan

Respondent: Union of India & Ors.

Citation: Writ Petition (Civil) No. 386 of 2005

Issue:

- Whether Dar-ul-Qaza is a parallel court and Fatwa has any legal status?

Facts of the case:

- The allegation of the petitioner that Dar-ul-Qazas, spread everywhere in the nation are working as a parallel legal framework intended to manage equity to Muslims living in this nation as according to Shariat i.e., Islamic Canonical Law dependent on the lessons of the Quoran and the traditions of the Prophet.
- The petitioner to file this writ petition is in the abundance of upsetting Fatwas including a Fatwa given by Dar-ul-Uloom of Deoband.

Appellant's Contentions:

- The Petitioner asserts that every one of these Fatwas have the support of All India Muslim Personal Law Board and it is making progress toward the foundation of Parallel Muslim legal framework in India.
- Further statement looked for is that the decisions and fatwas articulated by specialists have no bearing in the Indian Constitutional framework, and the equivalent are unenforceable being entirely non-est and void ab-initio.
- The applicant needed that the powerful strides to disband and diffuse all Dar-ul-Qazas and the Shariat Courts and to guarantee that the equivalent don't capacity to settle any matrimonial-disputes under the Muslim Personal Law.
- The petitioner further contended that limit the respondents from setting up a Parallel Muslim Judicial System, between interfering with the marital status of Indian Muslims and to pass any judgments.
- Further, contended that All India Muslim Personal Law Board (Respondent No.9), Dar-ul-Uloom Deoband, and other Dar-ul-Ulooms in the country, not to train or choose Qazis, Naib-Qazis or Mufti for delivering any legal administrations of any sort.

Respondent's Contentions:

- Dar-ul-Qaza can be seen as an alternative dispute resolution mechanism, which endeavours to settle disputes outside the courts expeditiously in an amicable and inexpensive manner and, in fact, have no power or authority to enforce its orders and, hence, it can't be named as either in struggle with or corresponding to the Indian Judicial System.

- Few bad examples may not justify abolition of system, which in any case is discovered valuable and powerful.
- It is an informal Justice delivery system aimed to achieve about amicable settlement of matrimonial disputes between the parties. According to this respondent, Dar-ul-Qazas have no position, means or force to get their Fatwas executed and the writ petition depends on obliviousness as well as misguided judgment that they are equal courts or the legal framework.
- Dar-ul-Uloom, Deoband concedes issuing Fatwa in Imranas case according to Fiqah-e-Hanafi, which depends on Quaran and Hadith yet declares that it has no agency or powers to uphold its Fatwas. It is within the discretion of the people or the parties who get Fatwas to abide by it or not.

Judgment:

From the pleadings of the parties there does not appear to be any dispute that several Dar-ul-Qazas directed by the Qazis exist and they issue Fatwas. We would like to advise the Dar-ul-Qaza or besides anyone not to give any reaction or issue Fatwa concerning an individual, except if requested by the individual involved or the individual having an immediate interest in the matter. The Court held that the petition filed and was thus dismissed. Considering the fact and circumstances of the case, there was no order as to costs.

Relevant Paragraphs:

In para 1, According to the petitioner, the Board, Imarra-e- Sharia of various States and Imarra-e-Sharia, Phulwari Shariff have set up Dar-ul-Qazas, spread everywhere on the country. Camps are being coordinated to train Qazis and Naib Qazis to direct justice as per Shariat. Dar-ul-Qaza and Nizam-e-Qaza are exchangeable terms. It is the claim of the applicant that Dar-ul-Qazas, spread everywhere in the nation are working as parallel judicial system aimed to regulate justice to Muslims living in the nation as per Shariat i.e., Islamic Canonical Law dependent on the teachings of the Quoran and the traditions of the Prophet. What maybe incited the applicant to record this petition is the aplenty of unpleasant Fatwas including a Fatwa given by Dar-ul-Uloom of Deoband.

In para 4, Petitioner affirms that every one of these Fatwas have the support of All India Muslim Personal Law Board and it is taking a stab at the foundation of parallel Muslim judicial system in India.

In para 5, the petitioner has looked for a statement that the development/exercises being sought after by All India Muslim Personal Law Board and other comparative associations for foundation of Muslim Judicial System and setting up of Dar-ul-Qazas (Muslim Courts) and Shariat Court in India are totally illicit, ill-conceived and unlawful. Further affirmation looked for is that the decisions and fatwas articulated by specialists have no bearing in the Indian Constitutional framework, and the equivalent are unenforceable being completely non-est and void ab-initio.

In para 6, The stand of the Union of India is that Fatwas are advisory in nature and no Muslim is bound to follow those. Further, Dar-ul-Qaza does not regulate criminal justice and it truly works as an arbitrator, mediator, negotiator or conciliator in matters pertaining to family dispute or any other dispute of civil nature between the Muslims. According to the Union of India, Dar-ul-Qaza can be seen as an alternative dispute resolution mechanism, which endeavours to settle disputes outside the courts quickly in an amicable and inexpensive manner and, in fact, have no power or authority to uphold its orders and, subsequently, it cannot be termed as either in struggle with or parallel to the Indian Judicial System.

In para 7, All India Muslim Personal law Board doesn't deny the allegations that it had

Set up Dar-ul-Qazas and training Qazis and Naib Qazis and the act of issuing Fatwas but claims that Dar-ul- Qaza/Nizam-e-Qazas are not parallel judicial systems set up in derogation of or in conflict with the recognised judicial system. It is informal justice delivery system aimed to bring about amicable settlement of matrimonial disputes between the parties. According to this respondent, Dar-ul-Qazas have no authority, means or force to get their Fatwas carried out and the writ petition depends on ignorance and/or misconception that they are parallel courts or judicial system.

Last second para, A Fatwa is an opinion, just a specialist is required to give. It is not a decree, not restricting on the court or the State or the individual. It is not authorized under our constitutional scheme. Yet, this doesn't imply that presence of Dar-ul-Qaza or besides practice of giving Fatwas are themselves unlawful. It is an informal justice conveyance framework with a target of achieving agreeable settlement between the gatherings. It is within the circumspection of the people concerned either to acknowledge, overlook or reject it.

Last para, In the light of what we have seen over, the supplication made by the candidate in the terms looked for cannot be granted. Nonetheless, we see that no Dar-ul-Qazas or besides, anyone or foundation by any name, will give a decision or issue Fatwa addressing the rights, status, and commitment, of an individual except if a particular individual has requested it. On account of the inadequacy of a particular individual, any individual inspired by the government assistance of such an individual might be allowed to address the reason for the concerned person. Regardless, the choice or the Fatwa gave by whatever body being not radiating from any legal framework perceived by law, it isn't restricting on anybody including the individual, who had requested it. Further, such arbitration or Fatwa doesn't have a power of law and, thusly, can't be authorized by any interaction utilizing the coercive method. Any individual attempting to authorize that by any method will be illicit and must be managed as per law.

R. SHAUKAT ALI SON OF SOMU KHAN VS UNION OF INDIA THROUGH THE GENERAL…

(Concept of Adoption in Muslim Law)

Court: Central Administrative Tribunal - Jodhpur

Bench: Hon'ble Dr. Murtaza Ali, Hon'ble Ms. Praveen Mahajan

Appellant: Shaukat Ali Son of Somu Khan

Respondent: Union of India through the General...

Citation: Original Application No. 290/00318/15

Issue:

III) Whether Muslim law permit adoption?

IV) Whether the denial of appointment to the applicant's son in terms of LARSGESS Scheme on the ground that there is no provision of adoption in Muslim Law is valid?

Facts of the case:

- Under Section 19 of the Administrative Tribunals Act, 1985; the original application has been filed for quashing the impugned order dated 25.09.2014 and seeking a direction for the defendant to consider the adoption deed for granting the advantage of LARSGESS Scheme dated 01.01.2014 to the applicant.

- The applicant is working on the post of Key-man and he adopted Shekh Mohammad as his son vide registered adoption deed as per customs prevailing in the society. It has been affirmed that the applicant applied for an intentional retirement just for an appointment of his adopted son on compassionate grounds regards to the LARSGESS Scheme, 2014 but the defendants have wrongly dismissed his original application on the ground that there is no provision of adoption in Muslim Law.
- It has been admitted that the applicant preferred an application for expanding the benefit of Liberalized Active Retirement Scheme for Guaranteed Employment for Safety Staff and prayed for the appointment of his adopted son Shekh Mohammed. It has also been argued that the application has appropriately been dismissed on the ground that Muslim Law doesn't allow adoption.

Appellant's Contentions:

- On the behalf of the applicant that the customs of adoption are prevailing in his society and accordingly he adopted Shekh Mohammed as his son by a registered adoption deed dated 11.07.2012 (Annex. A/2). He also enclosed some other adoption deeds (Annex. A/3) executed by the other members of a community.
- Applicant depended upon the decisions of S.B.C.W.P. No. 5745/2006 Mukhtar Ahmed v. State of Rajasthan & Ors. and LRs of Alladeen v. B.O.R. & Ors reported in [2004] 0 Supreme (Raj) 689.

Respondent's Contentions:

- Learned Counsel for the respondents has argued that the benefit of LARSGESS Scheme cannot be stretched out to the applicant as the said adoption deed dated 11.07.2012 was got arranged distinctly to claim the benefit under the Scheme.
- The respondents likewise depended upon the judgment delivered in Shabnam Hashmi's case and furthermore contended that the topic of legitimacy of said adoption deed can't be gone by this Tribunal as it is not a service matter.

Judgment:

The Court held that the original application had filed and the impugned order was set aside and quashed. Considering the fact and circumstances of the case, there was no order as to costs.

Relevant Paragraphs:

- S.B.C.W.P. No. 5745/2006 Mukhtar Ahmed v. State of Rajasthan & Ors. in which it was held by the Hon'ble Rajasthan High Court that if by virtue of customs, Muslims have a concept of adoption and if it has been proved as per the law, such adoption can be taken as valid adoption.
- In the case of Alladeen, the applicant claimed to be Khatedar of the land of the deceased being his adopted son. The trial court dismissed the suit but the Appellate Court held that the custom of adoption among Muslims of the space was prevailing and the adoption of the appellant was held legitimate. The matter went up to the Division Bench of the Board of Revenue and it was held that by virtue of custom, the Mohammadan likewise have the system of adoption and the Division Bench of the Board has additionally held that regardless of the fact that witnesses in their assertions have affirmed that the custom of adoption was prevalent in their community but in absence of independent witnesses the adoption was not acknowledged. The matter went up to the Supreme Court and Hon'ble Supreme Court while depending on the previous judgements has categorically held as under:

  Undoubtedly, the Muslim Law in its pure form governed of Shariat or Hidaya does not perceive the principle of adoption. However, wherever there exists a custom amongst the Muslim community whether via a family custom or via a community custom or via a regional custom allowing adoption among Muslims, such adoption has been perceived by the courts in India.

- Accordingly, the Original Application is permitted and the impugned order dated 25.09.2014 is set aside and suppressed. The respondents are directed to look for the proof or evidence from the applicant in regard to the custom of adoption prevailing in his community and after fulfilling this impact, they are directed to reconsider the original application preferred by the applicant under LARSGESS Scheme within a period of three months from the date of receipt of this order. There is no order as to costs.

S. SHAYARA BANO BEGUM v. UNION OF INDIA. TRIPLE TALAK HELD TO BE UNCONSTITUTIONAL

(Triple Talaq is unconstitutional under Article 14,15, 21 and 25 of the Indian Constitution.)

Bench: Chief Justice of India Jagdish Singh, Justice Kurain Joseph, Justice Uday Lalit, Justice Rohiton Fali Nariman, Justice J. Abdul Naseer.

Petitioner: Shayara Bano Begum

Respondent: Union of India & Others.

Citation: W.P (C) 118/2016

Issue:

V) Whether the fundamental rights are violated due to the practice of triple talaq?
VI) Whether the practice of triple talaq I.e. talaq-e-biddat is an important practice in Islam to divorce a woman?

Facts of the case:

• The petitioner in this case is 36 years old Shayara Bano Begun who was married to Rizwan Ahmed for 15 years. She had 2 children out of this wedlock a boy and a girl aged 13 and aged 11 respectively.

• On 10th October 2015 Rizwan Ahmed sent a deed of divorce stating that due to irreconcilable differences between the two and on account of his wife Shayara Bano Begum not coming back to her matrimonial home after repeated requests he thus decided to give her triple talaq to free her from the matrimonial bond and pronounced a written triple talaq '*I give talaq'* 3 times on the deed of divorce sent to her via speed post.

• Thus she first approached a cleric who declared that this divorce is valid. The dower amount Rupees 10,151 I.e. *Mahr* was paid to her after divorce. Also, the expenses of *Iddat* of Rupees 5,500 I.e. amount given during the waiting period was sent to her with the divorce letter.

• The thing which triggered Shayara Bano to file a writ petition was not at all the amount but the way the divorce was given which she found to be unfair and unjust. Hence she filed a petition in the Supreme Court to ban the 3 practices that are –

1. '*Talaq-e-biddat'* I.e. triple talaq,

2. '*Halala'* I.e. a practice in Muslims in order to marry one's previous spouse the woman needs to marry another man, then consummate the marriage with his 2nd husband who would then

divorce her after consummating the marriage and thus becomes eligible to remarry her 1st husband.

3. Polygamy – In Islam, it allows a man to have 4 wives. It allows a Muslim man to marry during the lifetime of his wife without the need to divorce her.

• She pleaded in her petition to hold these 3 practices in Islam as unconstitutional under Articles 14, 15, 21 & 25. The writ petition was accepted by the apex court which constituted a constitutional bench.

Petitioner's Contentions:

• The petitioner was represented by Senior Advocate Amit Chadha and Salman Qureshi (amicus curiae in this case).

• Firstly, the senior advocate pointed out the fact that many high courts and Supreme Court judges have held in their decisions that the practice of triple talaq has no Quranic sanction and has also been criticised by the courts.

• He said that the practice of triple talaq should be banned as this form of talaq allows a Muslim man to divorce women which violates the rights of a woman under article 14 and 15 of the Indian Constitution.

• The counsel also reminded the court that the Holy Quran specifies the need for reconciliation before divorcing a person based on a reasonable cause.

• Furthermore, these practices pleaded in the petition to be abolished does not hold to be of great importance as it is quite evident from the fact that many Muslim nations have scrapped this practice from their personal laws. For example, Pakistan & Bangladesh.

• Striking down this way of divorce (triple talaq) will allow Muslims of any gender to divorce as per the provisions of the Dissolution of Muslim Marriage Act, 1939 which makes them come under a single umbrella regardless of them belonging to different Muslim communities.

• He said that it is quite amusing to know that on one hand the All India Muslim Personal Law Board (AIMPLB) accepts that the practice of triple talaq is bad, sinful and patriarchal and on the other hand they wish for its continuance stating that it is an essential part of their religion.

• Advocate Anand Grover who represented one of the other petitioners part of this case Bharatiya Muslim Mahila Andolan **(**BMMA) contended by explaining different types of divorce under Muslim Law and clarifying that neither in *The Holy Quran* nor in *Hadith* this form of divorce is recognized and even triple talaq is not included in Sharia law that is followed by Indian Muslims.

• Senior Advocate Indira Jaising who acted as an intervener said that whether they are codified or uncodified personal laws they come under the ambit of Article 13 of our Constitution and can be struck down to the extent it violates the fundamental rights and can be declared void regardless of any community.

• She further pointed out this practice to be discriminatory in nature pointing out the inequality of this practice which allows a man to give instant divorce while a woman needs to approach the court to get a divorce.

• It was asserted that unilateral divorces and divorces without judicial backing (I.e. proper divorce sanctioned from a court of law) violates articles 14, 15 and 21 of our Indian Constitution.

Respondent's Contentions:

• The counsel representing the respondents were Attorney General of India (AGI) Mukul Rohatagi and Senior Advocate Kapil Sibal.

• The AGI by taking examples of Muslim countries like Pakistan, Afghanistan, Morocco, Bangladesh, Tunisia and Indonesia stated that rather than stripping down the triple talaq as a whole they can refer to such Islamic states who still allow this form of talaq in a modified manner by restricting instant talaq or irrevocable divorce.

• Further arguing on this matter he contended that to include the principles of gender equality and gender neutrality the term morality should be construed as 'constitutional morality' as Muslim women face discrimination at the hands of Muslim men at many phases in life.

• He said that Muslim women in Islamic nations are given legal protection and privileges while Muslim women in our nation are not.

• He mentioned that all three forms of talaq that is *Talaq-e-Biddat, Talaq Hasan and Talaq Ahsan* should be struck down as they are unilateral forms of divorce and further assuring that the government will take the initiative to make new law relating to divorce in Muslims.

• While representing the All India Muslim Personal Law Board senior advocate Kapil Sibal argued that unless a uniform civil code under Article 44 is not constituted no personal laws or customs of any community should be struck down rather they should be protected.

• He diverted the issue by saying that it is not a matter of triple talaq but it is the question of patriarchy that has spread through all the religions.

• He lastly concluded his argument by saying that Muslim women can be told to add a clause that they cannot be divorced by way of triple talaq in their *'nikahnama'* by issuing an advisory to all the *'Quazis'* and also said that this is a matter of a small fraction of the Muslim community that practices divorce in this manner and the same can be sorted by themselves.

Judgment:

• The Court mainly focused on the question of triple talaq. The trial for this landmark judgement on triple talaq started on 11th May 2017 and ended on 22nd October 2017 with passing a sweeping judgement with a majority of 3:2 holding the practice of triple talaq as unconstitutional.

• The CJI instructed the All India Muslim Personal Law Board to send such an advisory as pointed out by Kabil Sibal and also directed the legislation to takes steps against abolishing the practice of triple talaq.

Relevant Paragraphs:

• When advocate Goel representing Shayara Bano's husband contended that when a divorce is between 2 private persons how can the State interrupt by judging the constitutional validity of triple talaq to which Justice Nariman explained that the State gets involved because the Shariat act, 1937 authorized the courts to apply the Muslim Personal law.

• AGI Mukul Rohatgi responded by counter-arguments to the claims by senior advocate Kapil Sibal who said triple talaq is an essential part of Islam religion, the AGI reminded that triple talaq was never an essential part of Islam and the one which was itself held by the Supreme

Court to be an optional practice can never hold the status of being integral. Further, the AGI also said that though triple talaq is protected under Article 25 of the Indian Constitution it is subjected to other fundamental rights guaranteed under Article 21, 15 and 14. He contended an argument which felt to be out of the blue and something new that once the Muslim Personal Laws come under the Shariat Act, 1937 it becomes secular and no more a personal law and hence ineligible to be protected under Article 25 of the Constitution. However, the CJI and Justice Nariman said that marriage is a personal activity and not purely secular.

• Senior advocate Indira Jaising said that the constitution is above personal laws and are capable of being challenged if they violate any fundamental rights. She threw light on the judgement passed by the Constitutional Court of South Africa wherein the court struck down such discriminatory customs that violated the Right to Equality.

• The judgement as per the majority of 3:2 declared the practice of triple talaq also known as talaq-e-biddat as unconstitutional. Furthermore, the Parliament passed a legislature to this effect declaring triple talaq as illegal given in any form is punishable with a term that extends up to 3 years + fine that came into force on 19th September 2018.

Sameena Begum vs Union of India[7]

(The Supreme court declared the practices of Polygamy and Nikah-Halala as unconstitutional and violative of Fundamental Rights of Muslim women)

***Court**:* The Supreme Court of India

***Bench**:* Hon'ble Mr. Justice Dipak Mishra

***Parties**:* Petitioner - Sameena Begum

Respondent - Union of India

***Issues**:*

- Whether Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 is constitutional or not.

[7] PETITION (CIVIL) NO 222 OF 2018

- Whether the practices of Polygamy and Nikah-Halala inconsistent with Fundamental rights guaranteed under Part 3 of the Indian Constitution or not.
- Does the India Constitution has primacy over the Common Laws and Personal Laws.
- Can some actions that are Offences under the IPC be allowed for specific groups or communities, if their Personal law does not discourage such actions.

***Facts of the case**:*

- The petitioner in this Petition, filed the petition under Article 32 of the Indian Constitution, in the nature of a PIL, being the victim of polygamy herself and also motivated by the problems faced by thousands of Muslim women across India suffering due to these harsh and severe practices of 'Polygamy' and 'Nikah- Halala' that are widespread in the Muslim society.
- The Petitioner got married in 1999 to Mr. Javed Anwar. Later, two sons were born out of the said marriage. When she was at her marital home, she was tormented, harassed, beaten, and was asked to bring cash from her parent's house. After the recurring tortures, she filed a complaint under Section 498 A of the IPC. Angered with this, petitioner's husband sent a memo giving her 'Triple Talaq'.
- The Petitioner resided with her parents till she was married again in 2012 to Mr. Riyaz, who was already married before and had another wife. The petitioner got pregnant again and shortly after the birth of her third son, she was given 'Triple Talaq' over phone. Ever since, she is living alone with her three children. Aggrieved by her own situation and of many other Muslim women throughout the country, the petitioner came before this Court praying to pronounce practices of 'Polygamy' & 'Nikah Halala' violative of the basic rights protected under Part III of the Indian Constitution.
- India identifies a plural legal system, where different religious groups are allowed to be governed by distinct personal laws. It is accepted, that there could be no argument that distinct religious groups can have different laws, but the said Personal Laws must meet the test of constitutional validity and constitutional decency, in as much as, they cannot be violative of Articles 14, Article 15, and Article 21 of the Constitution.

Petitioner's contentions:

- The Petitioner's council submitted that she has no personal interests, personal gain, secret motive, or implicit reasons in filing this petition. It is not driven by gain of any other individual, institution or body.
- The council for the Petitioners also referred to the case of **Shayara Bano Vs. Union of India**[8], in which, the Supreme Court declared the custom of Triple Talaq as unconstitutional by a majority of 3:2 ratio as it was held to be violative of Article 14, 15, and 21 of the Indian Constitution.
- It is further submitted by the Council that Muslim Marriage Dissolution Act, 1939 provides nine grounds for termination of marriage, but there is no required pre-condition for marriage. There is also no prerequisite whatsoever, for Muslim husband that the consent of the first wife is to be taken before executing another marriage. As a result, Muslim male is out of horizon of the offence of Polygamy.
- The Petitioner also claimed that the evil practices such as Triple Talaq, Polygamy and Nikah Halala are violative of Fundamental Rights guaranteed under Part 3 of the Indian Constitution.

Respondent's contentions:

- The council for the respondent claimed that the practices of 'Polygamy' and 'Nikah-Halala' were validated by Muslim Personal law and are considered as ancient customs of the community hence, it shall not be meddled with in the court.
- The Muslim Personal law have different practices and provisions when it comes to laws relating to Marriage, succession, adoption, maintenance, divorce etc.
- Article 25 of the Indian Constitution states that all individuals are equally eligible for freedom of conscience and the right to freely profess, practice, and propagate religion subject to public order, morality, and health. Such practices shall be protected under Article 25 of the Indian Constitution.
- If the Court interferes with the Provisions of Muslim Personal Laws, it will violate Article 15 of the Indian Constitution which states that the State shall not deny any person equality before the law or the equal protection of the laws within the territory of this

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country. Article 15 secures the citizens from every sort of discrimination by the State, on the grounds of religion, race, caste, sex or place of birth.

Judgment:

The Section 2 of the Muslim Personal Law Application Act, 1937, was found arbitrary and violative of Fundamental Rights guaranteed under Part 3 of the Indian Constitution under Articles 14, 15 and 21. Also, it was found to be injurious to public order, morality, and health, to that degree as it pursues to recognize and validate the evil practice of 'Polygamy' and 'Nikah-Halala'. Hence the practices of 'Polygamy' and 'Nikah-Halala' were declared unconstitutional.

***Relevant Paragraphs**:*

15. Matters of faith and belief are safeguarded by the Article 25 of the Indian Constitution but the laws concerning marriage, divorce, inheritance, and succession are liable to be examined on grounds of public order, morality, and health, as well as, on the hallmark of the other provisions of Part III of the Indian Constitution.

21. The Indian Constitution envisions a secular society. Article 44 (Mentioned in the Directive Principles of State Policy) of the Constitution of India stipulates that the State shall strive to ensure for the citizens a **Uniform Civil Code** throughout the country. To be treated equally before law and get equal protection of law (Article 14: Right to Equality) is a treasured right of every person under the Constitution of India.

22. As per Article 13 of the Indian Constitution, all laws in force or to be made must be in line with the Provisions of Part III on Fundamental Rights and law includes any custom, or tradition, or usage which has the force of law in India. Thus, matrimonial laws also must not be violative of or inconsistent with the fundamental rights, particularly the Articles 14, Article 15, and Article 21.

24. In the landmark case of **Khursheed Ahmad Khan versus State of U.P.**[9], it has been held by this Court that even though the Personal Laws of Muslims allows having as many as 4 wives, but it cannot be argued that having more than one wife is a part of religious practices. Neither is it made mandatory by religion nor is it a matter of ethics. Any law in favour of monogamy does

[9] (CA No- 1662/2015)

not meddle with right to profess, practice, or propagate religion and does not entail violation of Article 25 of the Constitution of India or any other Fundamental Right.

26. It is also stated that as per the understanding of Article 21 of the Constitution (right to live a decent life and right to live with dignity), the practice of Polygamy will also not stand its rigorous test.

29. The practices of Triple Talaq, Polygamy, and Nikah-Halala are discriminatory and violative of the Articles 14, 15 and 21 of the Constitution of India and injurious to public order and morality also. Thus, can be supplanted by the State just as it prohibited human sacrifice or practice of sati in certain Hindu communities. Triple Talaq, Polygamy and Nikah Halala are offences under Sections 498A, 375 and 494 of IPC, respectively. Nevertheless, Executive is inactive in this regard. Hence, this writ petition is in larger public interest.

33.The Laws dealing with marriage and succession are not a part of religion, and are subject to change with time, and international agreements and treaties could be referred to examine their validity and fairness.

35. This Court in Triple Talaq Case has held that traditions permitted or not forbidden by religion do not become a religious practice or a constructive principle of the religion and an immoral practice does not obtain the sanction of religion simply because it has been in practice for a long time.

39. It is further submitted that the inability to safeguard the same equal rights and life of dignity for Muslim women contravenes their most basic human rights and fundamental right to life of dignity unblemished by gender discrimination, which surely have a serious influence on their **social and economic rights** as well.

42. The freedom guaranteed under Article 25 (Freedom of conscience and free profession, practice, and propagation of religion) of the Constitution is not at all absolute and, in terms of Article 25(1), **"subject to public order, morality and health and to the other provisions of this Part".** It is submitted that a harmonious reading of Part III of the Constitution clarifies that the freedom guaranteed by Article 25 is subject to the fundamental rights guaranteed by Articles 14, 15, and 21.

51. The Fundamental rights guaranteed in Part 3 of the Indian Constitution are supreme and have dominance over any Personal Laws. Hence, this Supreme Court may declare that **"Nikah-Halala is Rape under Section 375 and Polygamy is an offence under Section 494 of IPC".**

52. The actions of religious groups, bodies and leaders that permit and propagate practice of Triple Talaq, Polygamy and Nikah-Halala must be proclaimed unconstitutional and an offence under the Indian Penal Code.