Allahabad High Court
Rahmat Ullah And Khatoon Nisa vs State Of U.P. And Ors. on 15 April, 1994
Equivalent citations: II (1994) DMC 64
Author: H N Tilhari
Bench: H N Tilhari
JUDGMENT Hari Nath Tilhari, J.

1. These two a writ petitions arise out of same judgment and order and the petitioners have challenged the orders dated 28.6.1986, passed by the Prescribed Authority (Ceiling) Balrampur and order dated 27.4.1993, delivered by Upper Aayuktya (Addl. Commissioner), Faizabad Division, Faizabad in Ceiling Case No. 387 under Section 10 of the Imposition of Ceiling on Land Holdings Act and the two appeals arising out of the order of the Prescribed Authority, Ceiling, passed in that case, i.e., Ceiling Appeal No. 333/679 and Ceiling Appeal No. 335/680, Gonda under Section 13 of the U.P. Imposition of Ceiling on Land Holdings Act. As the two writ petitions involve same questions of law and arise from same order and involve same fact, both the writ petitions have been heard together and are being disposed off by one common Judgment. Writ Petition No. 45 of 1993 is being made leading case.

2. It may also be mentioned here that the petitioner Rahmatullah of Writ Petition No. 45 of 1993 is the respondent in the writ petition, filed by Smt. Khatoon Nisa i.e., Writ Petition No. 57 of 1993 while Smt. Khatoon Nisa has been arrayed as opposite party no. 4 in Writ Petition No. 45 of 1993. The petitioner of Writ Petition No. 45 of 1993 and Smt. Khatoon Nisa, petitioner in writ petition no. 57 of 1993 have been related to each other as husband and wife.

3. The facts of the case, in brief, are. that under the provisions of U.P. Imposition of Ceiling on Land Holdings Act in the year 1974 a notice was issued to the tenure-holder Rahmatullah, the petitioner in Writ Petition No. 45 of 1993 who is arrayed as opposite party No. 4 in the Writ Petition No. 57 of 1993, filed by Smt. Khatoon Nisa. The tenure-holder initially filed a writ petition, i.e. Writ Petition No.608 of 1975 in this Hon'ble Court, challenging the validity of the Act as well as notice issued to him and obtained an order of stay on 10.3.1975. The aforesaid writ petition was finally dismissed by this Court. The proceedings under the Act were again commenced in 1978 and by an ex parte order dated 12.1.1979 the Prescribed Authority declared an area of 40.3.65 acre of irrigated land to be the surplus area of the tenure-holder. That having felt aggrieved from ex parte order dated 12.1.1979 the tenure-holder i.e., Sri Rahmatullah. his wife Smt. Khatoon Nisa (petitioner in Writ Petition No. 57 of 1993) and another person moved an application for setting aside of the ex parte order dated 12.1.1979, which application had been rejected and dismissed by the Prescribed Authority vide its order dated 23.8.1979. The appeals were filed, challenging that order and the District Judge allowed the appeals and remanded the case for decision afresh. It may be mentioned here that the petitioner Rahmatullah had filed the objection in pursuance of the notice under Section 10(2) of the Act and his objection is dated 27.11.1974. In the original objections, filed by Rahmatullah, the petitioner, a number of pleas were taken and one of the pleas taken, has been to the effect that in the Form 3 land, measuring 24.970 are of Khata No. 40 has wrongly been clubbed, included and shown as the holding of or as part of the holding of tenure-holder Rahmatullah. It was alleged in paragraph 2 of the objection that this 24.970 acre land of Khata No. 40 belonged to Smt. Khatoon Nisa and that the

objector tenure-holder, i.e., the petitioner Rahmatullah had no concern with Smt. Khatoon Nisa or any of the land belonging to her. It was further asserted in paragraph 2 of the objection, a copy of which has been annexed as Annexure No. 4 to the Writ Petition No. 45 of 1993, that the objector Rahmatullah had divorced Smt. Khatoon Nisa, according to the Shariyat Law and that Smt. Khatoon Nisa is separate from the objector. According to the petitioner objector Smt. Khatoon Nisa had been divorced according to Shariyat Law and the objector-petitioner had no concern with the land of Smt. Khatoon Nisa but the Area Lekhpal on account of ill-will and Ranjish included Smt. Khatoon Nisa's land erroneously and illegally with the holding of the objector Rahmatullah and as such the same should be excluded from Form-3.

4. After the remand of the case by the District Judge the Prescribed Authority heard the parties and by order dated 27,8.1982 declared 16.561 Acres of land in terms of irrigated land to be the surplus land in terms of irrigated land to be the surplus land of petitioner Rahmat Ullah. Feeling aggrieved from the order dated 27.8.1982 Rahmat Ullah (the petitioner of Writ Petition No. 45 of 1993) as well as Smt. Khatoon Nisa (petitioner in Writ Petition No. 57 of 1993) filed the two appeals under Section 13/13-A of U.P. Imposition of Ceiling on Land Holdings Act. These two appeals were allowed by the learned Civil Judge, Gonda by judgment and order dated 7.8.1984. That while allowing the appeal and setting aside the order dated 27.8.1982, passed by the Prescribed Authority the Court remanded the case for trial afresh. The Appellate Court ordered that the record is being sent for trial and decision afresh in accordance with the observations and comments made in the order. In Hindi it reads as under:

"Appealswikar Kee Jati Hai, Niyat Pradhikari Balrampur Ka Nirnaya Dinak 27.8.82 Nirsta Kiya Jata Hai. Patrawali is Nirnaya Men Dee Gayee Tipani Ke Anusar Parikshan Hetu Vapas Kee Jati Hai. Prarthi Appliarthi Tarikh 1.9.84 Ko Ukta Nyayalya Agrim Karvahi Hetu Hazir Hoga."

5. It will be just and proper to refer the comment and Tippani of the Court, The Appellate Court observed that the principal point in issue as appears from the record as well as after hearing the Counsel for the parties, which has been the basis of the decision of the Prescribed Authority is "Kya Khatoon Nisa Rahmat Ullah Ki Talak Shuda Patni Hai Ya Talaq Ka Vad Kewal Ceiling Act Ke Pravidhanon Se Bachne Ke Liya Gaya Hai ? In English it may be translated as under; "Whether Smt. Khatoon Nisa is the divorced wife of Rahmat Ullah or the plea of the case of divorce has been taken only with the object, purpose, and motive of saving the land from the clutches of the Ceiling Act ?

6. The Appellate Authority has further observed in its order dated 7.8.84 that the Prescribed Authority has simply observed that the alleged divorce is not the judicial one. The Appellate Authority further observed that the point in issue had to be decided on the basis of consideration of material evidence produced and thereafter at the end the learned Civil Judge in his order has observed that there is some evidence on record which may be helpful to decide the matter and so in the circumstances, referred to above in his order the Appellate Court considered it fit that the case be remanded to decide the point in issue, that is, whether Smt. Khatoon Nisa was the divorced wife of Rahmatuliah and its effect or the plea of divorce was taken only to save the land from the clutches of the Ceiling Act ? The learned Civil Judge further observed" because until the Prescribed Authority decides that the alleged divorce was a legal and valid divorce and has been real divorce in law, or not

or that in order to save the property from the clutches of the Ceiling Act a wrong plea has been raised that the decision of the case has got no meaning". The Court further observed that this is so because in order to decide the subject matter of dispute the principal basis is the question of the validity of the alleged divorce. I may quote those observations of the learned Civil Judge which are contained at page 27 of the paper book of Writ Petition No. 45 of 1993 i.e., inner page 2 of order dated 7.8.84, passed by Civil Judge, Gonda in appeal No. 61 of 1982. The said observations reads as under :

"Isliye in paristhiyon mai visay vastu ko punah vivaran hetu bhaja jana aniwarya hai. Qyonki jab tab niyat pradhikari yeh tai nahin karate hai ki abhikathit talaq sahi talaq hoi yeh kewal seiling act ka pravdhano sa bachane ka liye galat aadhar banaya gay a hai tab tak unake nirnaya ka iss vastu ko tai karana ka sambhand mai koye arth nonin laiga. Kyonki iss vishay vastu ko tai karane ka liye mukhya aadhar iss abhikathit talag ki vaidhata hai.

Atha in paristhitiyon mai iss apeel ko swikar karke niyut pradhikari ka yahan iss vishay vastu ki ukat tiopani ka anusar tai karane ko punah prishan hetu bhajna uchit samjhta hun.

7. Thus a perusal of order of remand dated 7.8.1984 very clearly specified the point and the question that was required to be decided after remand i.e., whether the petitioner Rahmat Ullah had divorced his wife Smt. Khatoon Nisa legally and according to law and whether a valid divorce has been established and proved and if yes its effect ? After the remand the Prescribed Authority Ceiling held that there has been no valid and legal divorce between Rahmat Ullah and his wife Smt. Khatoon Nisa and that the plea of divorce has been taken to save the land. There being neither the judicial decree of divorce nor being any substantial proof of divorce between Rahmat Ullah and his wife Smt. Khatoon Nisa the land of the two, i.e. the land of Khatoon Nisa was rightly clubbed with the land of her husband, the tenure-holder Rahmat Ullah, i.e. the petitioner in writ petition No. 45 of 1993 or i.e., to say opposite party No. 4 in writ petition No. 57 of 1993. The Prescribed Authority as such held and declared 24.141 acre of land in terms of unirrigated land i.e., 16.561 acre of land in terms of irrigated land to be the surplus area of the tenure-holder, namely Rahmat Ullah, the petitioner vide the order dated 28.6.1986.

8. That having felt aggrieved from the order dated 28.6.1986, passed by the Prescribed Authority Balrampur District Gonda the two petitioners, namely, Rahmat Ullah and his wife Smt. Khatoon filed appeals Nos. 333/679 and 335/680 respectively. That by order dated 27.4.1993 the Addl. Commissioner, Faizabad Division opposite party No. 2 dismissed both the appeals as being without substance. The learned Addl. Commissioner-opposite party No. 2 in both the writ petitions in his judgment has observed that the cheif point involved in both the appeals in this "whether there has been a divorce or a judicial separation or not between Rahmat-Ullah and Smt. Khatoon Nisa and if either is proved and established according to law then its effect ? After having referred to the above mentioned question in paragraph 6 of its judgment, certified copy of which is Annexure No. 1 to the writ petition, the Addl. Commissioner held that though a document alleged to be the Talaqnama has been produced but the documents on record, i.e. the Parivar Register and the voter list show that Khatoon Nisa resides in the same house and in the same village in which her husband i.e., the tenure-holder Rahmat Ullah reside and are living as husband and wife after the divorce in the same

house and this makes the theory of divorce rather suspicious and doubtful and further until under the law there is no proof of judicial dissolution of marriage or judicial separation. The holdings of the wife even if the wife has been divorced or separated otherwise than by a judicial process, the holding of the wife has got to be clubbed with that of the husband and so the order of the Prescribed Authority, Ceiling did not suffer from any error of law or fact and did not require any interference. The Appellate Court has further observed that so far as the other points in dispute are concerned as the earlier appeal had been allowed on the point of divorce or judicial separation only and the scope of the remand had been circumscribed by order dated 7.8.1984, it is not necessary to go into those questions nor it was open to the Prescribed Authority to deal with those questions. With these observations and findings the Addl. Commissioner opposite party No. 2 dismissed both the appeals and maintained the order of the Prescribed Authority holding that it did not suffer from any error of fact or law. The copy of the order dated 27.4,1993 is Annexure No. 1 to the writ petition in the case of Rahmat Ullah i.e. Writ Petition No. 45 of 1993 (Ceiling). It is also Annexure No. 1 to the Writ Petition No. 57 of 1993. Feeling aggrieved from the above mentioned order dated 27.4.1993 passed by the Addl. Commissioner Faizabad in the above mentioned ceiling appeals, affirming the order of the Prescribed Authority (Ceiling) dated 28.6.1986 Rahmat Ullah, the tenure-holder has filed Writ Petition No. 45 of 1993 and another Writ Petition No. 57 of 1993 has been filed by his wife Smt. Khatoon Nisa. Writ Petition No. 45 of 1993 had been admitted on 5.7.1993 and an interim order had been granted by a learned Single Judge of this Court. Writ Petition No. 57 of 93 was filed on 17.8.93 and after hearing the learned Counsel for the petitioner it was directed to be put up on 18.8.93. Taking notes of the questions involved as well as exchequered long history of the case the State was required vide the order dated 18.8.93 to file the counter-affidavit by or before 2nd September, 1993 on one hand the Counsel for the petitioner Sri Mohammad Hanif was given some further time to satisfy the Court about the merit of the case. It was also brought to the notice of the Court that another writ petition i.e., W.P. No. 45 of 1993, filed by Rahmat Ullah is pending and it would be necessary that both the cases may be disposed of earlier. So the two writ petitions were connected and the learned Standing Counsel was directed to produce the lower Court record for perusal of the Court on 9.11.93 and the orders impugned were stayed for the next date fixed for further hearing.

9. In Writ Petition No. 45 of 1993 the State had already moved an application for vacation of the stay order dated 7.10.93 alongwith the counter-affidavit. Rejoinder-affidavit had also been filed in Writ Petition No. 45 of 1993 on 29.10.93. In Writ Petition No. 57 of 1993 also counter-affidavit had been filed on behalf of the State (O.Ps. Nos. 1 to 3) on 7 10 93 alongwith the application for vacation of the stay order. The rejoinder-afidavit had also been filed by the petitioner. True copies of the statements of Khatoon Nisa and Rahmatullah had been filed by the Standing Counsel on 3.12.93 for perusal of the Court. Petitioner in Writ Petition No 45 of 1993 moved an application for amendment of the writ petition and by amendment paragraph 12-A and grounds, f, g and 'h' as well as relief (b) were sought to be added and original reliefs 'b' and 'c' were sought to be re-numbered as relief Nos. C and D. The application for amendment was allowed by this Court in course of hearing on 7.10.93 and that is how the petitioner has raised the plea, challenging the vires of Section 3(7) of the Act and prayed for quashing or declaring Section 3(7) of U.P. Imposition of Ceiling on Land Holdings Act to be ultra vires of the Constitution being violative of Articles 14, 15 and 25 whereof on one hand and on the other hand sought a direction to be issued to the opposite parties 1 to 3 to treat even an orally divorced Muslim woman to be entitled to the same benefit of expression' judicially separated or

divorced wife as is to a Hindu woman and to exclude them from the definition of family member as given in Section 3(7) of U.P. Imposition of Ceiling on Land Holdings Act.

10. The case of the petitioners as per allegation of paragraph 6 of the Writ Petition No. 45 of 1993 has been that Smt. Khatoon Nisa was at a time married to the petitioner Rahmatullah and she was duly and legally divorced en 15.9.69 and since then she did not remain the wife of the petitioner nor for any purpose she could have been treated nor could have been deemed to be the wife of the petitioner Rahmat Ullah and so according to the petitioner Rahmat Ullah 24.97 acres of land, held by Smt. Khatoon Nisa in her name, as per petitioner's case, was wrongly clubbed in the holding of the petitioner Rahmatullah for the purpose of determining the ceiling area and the surplus area. The petitioner's case is that since the divorced wife does not remain the wife of the former husband she could not be treated to be the member of the family nor her holding can be clubbed with the holding of her former husband and the opposite parties, according to the petitioner, have wrongly held and treated a divorced Muslim wife to be the wife of her former husband and member of his family. The case of the petitioner in paragraph 15 of the writ petition has been that the opposite parties Nos. 2 and 3 overlooked certain material documentary and other evidence and has illegally proceeded on improper assumption and presumption in holding that opposite party no. 4 Khatoon Nisa is not the divorced wife of the petitioner Rahmatullah. In paragraph 11 of the writ petition of Rahmatullah, it has been asserted that under Muslim Law there is no specific form for dissolving the marriage and a valid Talaq can be pronounced and made effective even orally and the effect of the valid Talaq is to finally determine the marriage and its result is that for all purposes the lady ceases to be the wife of the husband from the date of the Talaq. In addition thereto the petitioner has challenged the vires of Section 3(7) of the Act.

11. In the counter-affidavit, filed on behalf of the opposite parties Nos. 1 to 3 in both the writ petitions is to the effect that there had been on valid Talaq or divorce between Rahmatullah and Smt. Khatoon Nisa. The documents relied on as Talaqnama by the petitioner is a document prepared for the purpose of saving the land from ceiling operation and both live together as husband and wife. The case of the opposite parties Nos. 1 to 3 vide paragraph 11 of the counter-affidavit is that under Ceiling Law no special benefit or exemption has been granted on the grounds of Hindu Law or Muslim Law and under Ceiling Law it is only the separation brought between the two i.e., husband and wife by the process of the Court, i.e., by the decree of the Court is recognized and not otherwise and there being no judicial decree of the Court, separating the two i.e., Rahmatullah petitioner of Writ Petition No. 45 of 93 from Khatoon Nissa his wife either by dissolution of the marriage or separation otherwise under Court's decree the alleged divorce firstly is malafide and secondly there is no valid proof of the same and thirdly is not recognized under Ceiling Law. So the orders of the Prescribed Authority and the appellate authority do not suffer from any error of law. jurisdictional or otherwise. It has also been stated in the counter-affidavit that at the stage when the order dated 7.8.1984, setting aside the Prescribed Authority's order was passed no plea other than the plea relating to divorce was pressed and the appeal was allowed and the case was remanded for decision afresh only with reference to that plea and that order dated 7.8.84 not having been challenged at any stage it was not open to the petitioner to raise any other plea before the Prescribed Authority and so any other plea like the one, referred to in paragraph 6 of the petition or raised under ground 'D' is not open to challenge. Same defence was taken by opposite parties 1 to 3 in Writ

Petition No. 57 of 1993.

12. I have heard Sri O.M. Haq, Counsel for the petitioner in Writ Petition No. 45 of 1993 and Sri Mohammad Hanif, Advocate on behalf of the petitioner in Wric Petition No. 57 of 1993. I have heard Sri Umeshwar Prasad, the learned Standing Counsel in the first instance on behalf of the State and later on the learned Advocate General Sri S.S. Bhatnagar for the State. I have also heard Sri Abdul Mannan and Sri Zafar Yab Zillani and Hargur Gharan Sri Abid Ali as Amicus Curiae. The learned Counsels appearing as amicus curiae also submitted their notes of arguments in writing.

13. Sri Quzi Mustafizul Haq (hereinafter referred to as Sri Haq), Counsel for the petitioner Rahmatullah in support of the claim made in his Writ Petition i.e. Writ Petition No. 45 of 1993 as well as in his capacity as Counsel for Sri Rahmat Ullah as an opposite party in the Writ Petition filed by Khatun Nissa i.e. Writ Petition No. 57 of 1993 (Ceiling) made the following submissions;

Sri Haq very strenuously, with all availability at his command, submitted that the order impugned suffers from the error of law and jurisdiction as the opposite parties Nos. 2 and 3 the case i.e., the Prescribed Authority (O.P, No. 3) and the Addl. Commissioner, Faizabad (O.P. No. 2). the Appellate Authority failed to appreciate the law under the provisions of Imposition of Ceiling on Land Holdings Act and in particular the provisions of Sections 5, 3(7) and Section 3(17) of the Act as well as the principles of Muslim Law regarding divorce or Talaq including the triple Talaq and its importance under Muslim Law and the resultants effect thereof including the status of divorced wife or a divorced woman under Muslim Law in the proper and correct prospective. Sri Haq elaborating his argument submitted that under Section 5 of the Act it has been provided that no tenure-holder shall be entitled to hold in aggregate throughout the State any Sand in excess of the ceiling area applicable to him and in determining ceiling area applicable to a tenure-holder of land held by him in his own right whether in his own name or ostensibly in the name of any other person shall be taken into account. He submitted that in the present case the Prescribed Authority as well as the Appellate Authority wrongly clubbed the land of Smt. Khatun Nissa who was the wife of the petitioner and had been divorced in September, 1969 by the petitioner. Sri Haq submitted that Smt, Khatun Nissa. who was once upon time the wife of the petitioner, having been divorced according to the Muslim Law applicable to petitioner and Smt. Khatun Nissa, on September 15, 1969 i.e., before the date of commencement of U.P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1972 (O.P. Act No. 13 of 1972) i.e., earlier to June 8, 1973 as is exhibited by and proved by the document, i.e., Talaqnama dated 15.9.1969, filed by the petitioner before the Prescribed Authority and a copy of which has been annexed as Annexure No. 6 to the Writ Petition No. 45 of 1993 or a copy of which has been annexed as Annexure No. 5 to the Writ Petition, filed by Khatun Nissa. The land of Khatun Nissa i.e., the land of the divorced wife of the petitioner could not be clubbed with that of the tenure-holder i.e., the petitioner Rahmatullah. Sri Haq contended that Khatun Nissa could neither be treated to be the wife of the petitioner nor she could be treated to be the member of the family of the petitioner Under Section 3(7) of the Act.

14. Sri Haq submitted that the learned Prescribed Authority as well as the Appellate authority were wrong in taking the view that when no decree for separation having been passed by a Court of law judicially separating the petitioner from his wife or resulting in divorce the holding recorded in the

name of Khatun Nissa, the petitioner's divorced wife had to be clubbed with the holding of the petitioner (Rahmat Ullah). Sri Haq submitted that when divorce had taken place and has been proved by evidence in accordance with Muslim Law Khatun Nissa, petitioner's wife till before 15.9.69, ceased to be the member of the family of the petitioner on account of divorce irrespective of the fact that there was no decree of the Court either of divorce or of judicial separation. Sri Haq submitted that under Muslim Law oral divorce is permitted as 'Talaq-Sunnat' as well Talaq Biddat'. He further submitted that under Talaq Sunnat there are two modes of divorce : One is called Talaq Ahsan and other is called Talaq Hasan. These two modes of Talaq are popularly known as Talq Sunnat, the third is known as Talaq-ul-Biddat or as ialaq-i-Badai. Sri Haq submitted that Talaq Sunnat either as Talaq Ahsan or as Talaq Hasan as well as Talak-ul-Biddat are the two recognised kinds of Talaq. Talaq Sunnat is one which is according to the Rules, laid down in Sunnat i.e., the traditions of Prophet. The other mode i.e., giving, Talaq irrevocably during one Sitting or Tuhr has been Talaq-ul-Biddat may be an irregular Talaq but it is also recognized. He submitted that Talaq may be given orally by pronouncement of Talaq made during Tuhr i.e., the period between the mensurations and followed by abstinence from Ruzu i.e., from sexual intercourse during Iddat. He submitted that in case of Talaq Hasan three pronouncements are made successively during the Tuhrs with abstinence from sexual intercourse during this period of three Tuhrs. There is no requirement of any writing or decree, it may be done orally under Muslim Law. He submitted that Talaq-ul-Biddat consists of three pronouncements made during a single Tuhr either in one sentence or in separate sentences. He submitted that so far as Talaq Sunnat is concerned which is an Ahsan form on the completion period of Iddat it becomes irrevocable and Talaq Hasan mode also becomes irrevocable on the third pronouncement of Talaq and Talaq-ul-Bidai mode i.e. Talaq-ul-Biddat becomes irrevocable Talaq or Talaq-i-Bain. As soon as three pronouncements are made during a single Tuhr, it becomes irrevocable irrespective of the period of Iddat. He submitted that under Muslim Law oral Talaq is permitted and it is the right of the husband to give Talaq in either of these modes without any interference of the Court even. What is necessary is intention of divorce and its becoming irrevocable under Muslim Law on the expiry of the period of Iddat in case of Talaq Ahsan, Talaq Hasan and in the case of Talaq-ul-Biddat Talaq becomes irrevocable on the pronouncement of third Talaq. A person can pronounce Talaq three times at one sitting or more than one sitting but it must be only within one Tuhr and the moment the Talaq is pronounced third time marriage becomes irrevocable immediately and the wife ceases to be the wife whether there is decree of the Court or not. He further submitted that firstly on Talaq becoming irrevocable relationship of marriage having stood dissolved by Talaq given by the husband the woman who till before giving of Talaq was the wife ceases to be the wife of a man and the man ceases to be the husband of that lady and they become separate under Muslim Law and except for the payment of dower and for payment of maintenance during Iddat period and thereafter the liability to maintain even wife ceases. Under Muslim Law marriage is a contractual matter no doubt but it is part of Muslim religion or Islam. Sri Haq submitted that once divorce has taken place between husband and wife or between the petitioner-tenure-holder and his wife even in Bidai form the property of Khatun-Nissa could not be included. He submitted that emphasis on the part of opposite parties Nos. 1 and 3 that there is no decree and their view that it cannot be recognized on account of want of judicial decree of separation or decree of divorce the land held by Khatun Nissa had to be clubbed with that of the petitioner and thereafter the petitioner's land had to be declared as surplus land, that so the result of misinterpretation of the expression "Judicially separated wife" as well as of judicially separated

husband, use in Section 3(7) of the Ceiling Act. Sri Haq further submitted that the expression used in the Act is "Judicially separated wife". There is no such thing as judicial separation. Except the divorce under Muslim Law and that divorce does not require any interpretation of the Court so far as the husband's right to divorce his wife is concerned. The concept of the judicial separation or decree for judicial separation may be found in Hindu Marriage Act. This concept is also available or this relief is also available in the form of decree for judicial separation to a husband or wife under Special Marriage Act, 1954 but Muslim Personal Law or Shariat Law does not know or does not conceive of any such thing as judicial separation. Under Muslim Law there is Talaq-ul-Bain (irrevocable Talaq) and Talaq Rajai i.e. revocable Talaq. Talaq Rajai becomes Talaq Bain on the expiry of the period of Iddat. Sri Haq submitted that judicially separated wife may be interpreted, if the expression "wife" includes a divorced wife, a wife separated by husband even by a divorce lawfully given or legally given, may it be under the decree of the Court or otherwise i.e., even without judicial pronouncement. He further submitted that any way ordinarily wife means a married woman and married to some one and whose marriage subsists under Muslim Law and not the one whose marriage with her husband has ceased by dissolution of marriage by divorce. In alternative Sri Haq submitted that a woman who has been divorced by her husband whether under Muslim Law or any other law and particularly under Muslim law cannot be termed to be a 'wife' of that person or tenure-holder. Expression "wife and Husband", used in the Act connotes the idea and notion of existence and continuance of marriage. Once the marriage is dissolved by Talaq or divorce the two divorced persons cease to be the husband or wife of each other and in case where divorce is proved as in the present case the divorced woman i.e., present Khatun Nissa, the opposite party in this writ petition or to say the petitioner in Writ Petition No. 57 of 1993 was not the wife of the petitioner and could not be deemed to be the wife of the petitioner in terms of Section 3(7) of the Act and so the holding of Khatun Nissa could not be clubbed with that of petitioner Rahmat Ullah's holding in order to determine the ceiling area and surplus area of the petitioner.

15. Sri Haq further submitted that the findings regarding divorce or Talaq recorded by the Prescribed Authority and the Additional Commissioner i.e. opposite parties 3 and 2 respectively in Writ Petition No. 45 of 1993 suffer from error of law, apparent on the face of the record as opposite parties 2 and 3 without applying their mind and without giving consideration to the evidence of the witnesses including the Talaqnama which has material effect and bearing as well on the question involved and as such the finding that there has been no divorce is a finding vitiated by error of law apparent on the face of the record. Sri Haq invited my attention to Annexure 6 which has been described as Talaqnama but what is the actual nature of that document will be considered later on. Sri Haq further invited my attention to the statement of the two witnesses who have been examined before the Prescribed Authority from the original record of the case which had been summoned for the purpose of hearing and decision of the case and submitted that neither the Prescribed Authority nor the Appellate Court applied its mind to the statement of O.P.W. 2 Khatum-Nissa and submitted that Smt. Khatun-Nissa herself admitted that she had been divorced eleven years ago by the petitioner finally and according to Shariyat. She has also stated that she was not the wife of the petitioner and that she has further stated that in presence of Qasim, Jhagroo, Bhau, Maqbool Ahmad as well as her father, Talaq was recited and pronounced thrice and thereafter on that day the document Ext. Kha-1 was scribed by Maqbool Ahmad at the instance of Rehmatullah. Sri Haq also referred to the statement of Rahmatullah and particularly to the portion to the effect that eleven

years ago there had been Talaq of myself with my wife in the presence of Quesim etc. Sri Haq also referred to Annexure 6 and submitted that the finding to the effect that there had been no Talaq is as such vitiated by error of law. He further reiterated his arguments that the Appellate Authority erred in taking the view that judicial separation or divorce under judicial decree was necessary.

16. Lastly, Sri Haq submitted that marriage and divorce are matters of religious faith and the mode thereof are also matters of religious faith or matters of religion or religious mandate and law. He submitted that in view of Article 26 of the Constitution the Musalmans are entitled to iron cast shield of religious protection and they#have been conferred thaw protecvion. Thgir religious rives cannnt be interfered with and as suci Sectioo 3(7) hbs got tje tendemcy of ddrecognixing rigjts of Muslims im India which they are eltitled under thgir relidious lau, the Mtslim Law as well as Musoim faiti in the"matter of marricge and eivorce,!in pre-Aonsvitution!days thjs right was"recmgnized wnder Muslim"Perqonal Law (Skariyat)!Appnication"Act. 1927. Tndep Muplim Perronal Law (Skarict) Applicatkon Bct,"1935 ane on the!coming jnto"forae og the Constitution every religious community has been given the freedom of conscience and right to practice religion. Section 3(7) having tendency of interfering with the practice under Muslim religion, faith and law as such is hit by Article 26 unless it is held that the wife does not include a divorced wife or unless it is held that judicially separated wife means the legally separated wife i.e., a wife separated according to law of the person including the personal law whether there be a decree of the Court or not but if it is not taken like that there is tendency of its being hit by Article 26 as well as its being hit Article 14 read with Article 15 of the Constitution. He submitted that judicial decree for separation or concept of decree for judicial separation are known to Hindus and Hindu Law. It is also known and provided under Special Marriage Act but there is no concept of judicial separation as is prevalent under Hindu Marriage Act or under Special Marriage Act wherein the husband and wife under Court's decree may live separately as judicially separated without marriage ties being broken and a Hindu wife or a Christian wife may succeed in protecting and saving her holding from the clutches of its being clubbed with that of her husband without breaking the marriage ties but a Muslim or Musalman husband or wife even if the marriage ties has been broken, their holdings have got to be clubbed into one and they are being subjected to deprivation of their holdings under the garb of Ceiling Act. So in such situation the provision can be said to be hit by Article 15 of the Constitution. Mr. Haq made specific reference to Aayat Nos. 226, to 229, 230, 231 and 232 of Soora Baqar from Holy Quran and supplied a photostat copy of pages Nos. 57 and 58 of the Running Commentary of the Holy Quran by R.K. Noori and placed before me certain photostat copies of certain parts of the Hadeeth apart from the case law on the subject while dealing with question of divorce. I will make reference of those documents where and whenever they are needed.

17. Sri Hanif, the learned Counsel for the petitioner in the Writ Petition No. 57 of 1993 also who is opposite party in Writ Petition No. 45 of 1993 argued the matter on behalf of his client Smt. Khatun Nissa, wife of Rahmat Ullah. He submitted that oral Talaq is permissible and Talaq-ul-Biddat is recognised form of divorce. Under this mode of Talaq husband utters divorce thrice and the moment the Talaq is pronounced third time during one Tuhr or one sitting the divorce becomes irrevocable and thereafter husband and wife cease to be husband and wife. Any marital relationship or marital cohabitation between the two, after the Talaq had become irrevocable, is illegal and sin. The two i.e., the divorced wife and husband cannot re-marry unless there is Halal i.e., the wife gets married-after

the Iddat period or after the requisite period-with some other person than her previous husband and gets hereself i.e., her marriage consummated by sexual intercourse by the husband with whom she enters into subsequent marriage relationship and then thereafter the fresh process of divorce between the lady and her subsequent husband takes place i.e., her second or subsequent husband divorces her or the second "husband dies then and then only she can remarry her first husband. Sri Hanif submitted that this being the position of law under Muslim Personal Law or Shariat Law once divorce has been recited thrice even in the mode known as Talaq-ul-Biddat which may be either called sinful or irregular, that form of marriage being recognized one the divorce becomes irrevocable on three Talaq being pronounced may be at one sitting but it is on the pronouncement of last of three utterances of Talaq husband and wife cease to be the husband and wife. They become stranger and thereafter each becomes Haram for each other. Any marital relation or cohabitation after divorce is pronounced thrice and particularly after the pronouncement of third Talaq becomes sinful under Muslim Law. As such wife ceases to be the wife irrespective of there being no judicial decree, but Talaq at the dissolution of that marriage is legally effective, resulting into complete separation of the two who prior to that occurrence were husband and wife. Therefore, the judicially separated wife may be interpreted as' legally separated wife or atleast it may be taken that expression "wife" used in Sub-section (7) of Section 3 or in Section 3(17) of the Act does not take within its clutches a wife or woman who had been divorced by her husband nor do the expression "husband and wife" cover within their framework the divorced husband or wife i.e., to say divorcees. Muslim Personal Law is religious law and petitioner is entitled to that law. Sri Hanif made reference to the decision of their Lordships of Privy Council in the case of Rashid Ahmad v. Mst. Anisa Khatun reported in AIR 1932 Privy Council page 25 and referred and strongly relied to the following passage.

"Their Lordships are of the opinion that the pronouncement of the Triple by Ghiyasuddin constituted an immediately effective divorce" and submitted that when Talaq in Biddat form is pronounced thrice it immediately becomes effective and operative as completely irrevocable and he submitted that according to Privy Council in above case, the Talaq in Bidai form actually pronounced even under compulsion or in just is valid and effective to completely dissolve the marriage ties and marriage relationship and when those ties stand dissolved neither the man remains the husband of her earlier wife or dissolved wife nor the wife remains the wife of her husband dissolving and so divorced woman cannot be included within the framework of expression "wife" of person who has dissolved the marriage. Sri Hanif further adopted other contentions of Sri Haq, the petitioner's Counsel in Writ Petition No. 45 of 1993. Mohammad Hanif, learned Counsel for Smt. Khatun Nissa also referred to Aayat Nos. 229, 230 and 232 of Soora Baqar from the Holy Quran as well.

18. Sri Mohammad Abid Ali, a learned Counsel of the standing in the High Court Bar graciously appeared to place his point of view for consideration and assistance of the Court and without taking much time he submitted a written note of address, arguments and submitted that it may be taken as his entire submission on the subject particularly the question of Talaq or divorce involved. According to written submission of Sri Aabid Ali recitation of three Talaq at one Tuhr or at one single sitting has been a bone of contention between different thoughts which is prevalent for the last about 1200 years or more, Sri Aabid Ali submitted that faith is absolutely a personal affair of a

person. He further submitted that Talaq-according to Quara-B-Hakim Holy Prophet Mobammad (P.B.H.) including the Theologists-has not been treated as a good act but when in between husband and wife the life becomes a hell and they are not able to pull on and the separation is the only way out and then that has been accepted by Shariyat and is known as Talaq.

19. Sri Aabid Ali has further submitted vide his written submission that Islam is a religion which gives full consideration to human nature. Islam is Din-E-Fitrat. He submits that Shariyat means the Command of the Almighty in Koran Sharif arid contained in Hadith of Prophet Mohammad (P.B.H.). He has further submitted that nothing in any Hadith which is against the tenets of Quran Sharif can be acceptable. It means, Sri Abid Ali submitted, that Quran Sharif is the Constitution and that any law which is repugnant to the Constitution is void as is known to the lawyers and the jurists, in the same way in law or Hadith which is repugnant to Quran Sharif is void. Sri Abid Ali further submitted that by saying this he did not mean that what Holy Prophet Mohammad Sahib (P.B.H.) said is against Koran. He explains that various Hadiths is incorporated in different books may not be authentic and in this background Sri Aabid Ali submitted vide his written contention that any Hadith has to be analysed whether or not the same is in accordance with the tenet of Koran Sharif and if it is not in accordance with the Commands of the Koran Sharif it must be rejected and be treated that same is not the Hadith of Holy Prophet (P.B.H.) but a concocted one.

20. Sri Aabid Ali further submitted that there is no Hadith where Prophet has permitted three Talaqs at a time. Sri Aabid Ali further submitted that the question is what is the Command of the Almighty in Quran Sharif about the Talaq and in particular about the recitation of three Talaqs at a time. Sri Aabid Ali further submitted that in Soora-E-Baqar there is Aayat No. 229 according to which Talaq can be given twice and during this period the parties can unite and there can be Razu but if they cannot come to terms and Ruzu does not take place third Talaq can be pronounced and then on the pronouncement of the third Talaq the Nikah or marriage comes to an end and Talaq becomes irrevocable. He has submitted that reference to Third Talaq finds place in Aayat No. 230 in Soora-E-Baqar. He has further submitted in his written arguments that the sum and the substance of two Aayats is that three Talans cannot be pronounced in one breath. In order to substantiate the effect of above two Aayats of Sura-E-Baqar and to elaborate that recitation of three Talaq is not permissible at one time, Sri Abid Ali submitted that once you pronounce Talaq to your wife, it must be done during the period when she is pure i.e., during the period of one Tuhr i.e., the period between two menstruations. He submitted that fourth Aayat in said Soora provides three months period for pronouncing Talaq i.e., one Talaq in each consecutive months during the purity of the woman. According to Sri Aabid Ali the reading of two Aayats i.e., Aayats Nos. 229 and 230 very well reveals that Talaq is not permissible by recitation of Talaqs three times at one single sitting or during one single Tuhr. Sri Aabid Ali has further elaborated this aspect of the matter and made reference to Aayat No, 251 of Soora-E-Baqar and submitted that it provides and ordains one not to take Allah's message for a mockery and that it directs one to be careful to his duty to Allah as Allah is knower of all things. Sri Aabid Ali submitted that no doubt Talaq is permissible but it should not be treated as a mockery for every thing done which is against the Command of the Allah or God Almighty is sin. He submitted that according to the Commands of Quran Sharif and Hadith of Prophet Mohammad Talaq must be treated as a bad thing. What has been treated as bad definitely is against the Commands of Almighty and as well as Hadith of the Prophet. He submitted that Talaq is

permitted and has been permitted only in case of necessity and has been provided to be made use of stringently and in very strict conditions and stringent conditions i.e., when the conditions of the life of couple have become so much intolerable, unamicable that they are unable to live peaceably then and then only resort to Talaq is permissible. Sri Aabid Ali has further referred in his written argument to Aayat No. 35 to Sura-E-Nisa and has submitted that it provides that, "If you fear a breach between the two, then appoint a Judge from his people and a judge from her people if they both desire agreement, Allah will effect harmony between them surely Allah is knowingly aware". Sri Aabid Ali submitted that pith and substance of this Aayat is co-related with the time factor of three months for completion of Talaq during which period if there is a settlement and understanding is possible the couple may re-unite as pronouncement of third Talaq has got and effect of making the Talaq irrevocable and resulting in complete dissolution of marriage. He submitted that this is the reason why the emphasis is on the provision of three months period being provided for intervening the completion of Talaq so that parties may have opportunities of sorting out misgivings or misunderstandings or causes for giving rise to Talaq removed and ruled out and to retrace their steps for leading happy and good matrimonial life. He further referred to Aayat 228 Sura-E-Baqar In this connection as well and submitted that Sura-E-Baqar requires the divorced women to keep themselves in waiting for three courses and this is a period of temporary separation and during this period before the pronouncement of third Talaq conjugal relation may be re-established and this serves as a check upon divorce as if there is or has been any love in the union of the two, the love will make its own pangs and may help in bringing out reconciliation and difference may go to oblivion. So Sri Aabid Ali submitted that this is a psychological, the natural process which is in consonance with human nature and thus according to Islamic Law Sri Aabid Ali submitted that the provision of Talaq thrice once in each period of Tuhr separately really makes the provision for every possible feeling of love and affection to assert and to seek a way for itself and its existence and context by providing the parties opportunity to attempt to reconciliation. He has further submitted that under Islamic Law women have also equal rights to men. No doubt their right to seek divorce is not in same manner and mode in which the husband is entitled to divorce her. The method under which a woman may seek a divorce, Sri Aabid Ali submitted that according to Islamic Theology when a woman finds that it is not possible for her to live with her husband she can refer the matter to Haqim-E-Sharah who after conducting necessary enquiries, if finds it just and proper that her request is necessary then the Hakim may pronounce Talaq on her behalf and such a Talaq is known as Talaq-E-Faq. Sri Aabid Ali thus has contended in brief that recitation of three Talaq at one time in his opinion is neither provided in Hadith nor under Holy Koran. Sri Aabid Ali submitted that he never desires to comment on the matter of faith which is a personal matter but the point in issue is to elect between good and bad according to his reading and understanding of Hadith Talaq must be treated as a bad thing and what has been treated as a bad, Sri Aabid Ali submitted that, doing the same is definitely against the Commands of Almight and that of Holy Prophet, and same is permissible only under very exceptional circumstances that is circumstance in which Talaq becomes necessary, i.e., the conditions between the couple are such that they are unable to live peacefully and life without separation or Talaq is likely to become hell for them and so it can be permissible only in very strict circumstances fulfilling the requirement. He submitted that three months' period is required to enable the parties to find out ways and means to remove misgivings and to improve the relations. It is only where reconciliation is not possible then third pronouncement may be made to make the falaq irrevocable. He referred to Aayat No. 256 of Soora Baqar "La-ek-rahafiddin" and

submitted that it means there is no compulsion in religion and he further elaborated it in his written submission that it would mean that cruelty is not permitted in religion. Sri Aabid Ali further submitted that personal freedom and dignity of individual specifically weaker Section and weaker sex must be a matter of great concern for the Hon'ble Judges. Law must bold the dignity of the so-called weaker Section which finds place in Islam as well as under Article 51A(e) of the Constitution enshrined in Chapter IV-A of the Constitution. Public interest and interest of people in general and the nation in general should be a matter of paramount consideration.

21. Sri Abdul Mannan has also been pleased to place his submission in view of the question involved in the case touching the Muslim Law relating to divorce. Sri Mannan initially submitted that the proceedings giving rise to. the present writ petition are primarily limited proceedings under special Law, i.e., the U.P. Imposition of Ceiling on Land Holdings Act and are to be decided on the basis of the various authorities and the law defining the family, tenure-holder and the definition of the terms "family and the "tenure-holder" given in the Imposition of Ceiling on Land Holdings Act Sri Mannan further submitted that it appears from the judgment of the Prescribed Authority and the Appellate Authority that the question before the Prescribed Authority was whether Rahmatullah and his wife remained husband and wife after the so-called Talaq on the basis of the statement of the witnesses from both the sides. He submitted that witnesses of written Talaqnama were examined raising the allegations that even after so-called Talaq both live together and other witnesses were also examined and on the basis of that evidence it was decided that they constituted one family for the purpose of Ceilng Act. Sri Mannan further submitted that a Court acquires a jurisdiction to decide the controversy or an issue two ways, i.e., (a) in larger convess i.e., Statute or the law under which the Court it created and by which jurisdiction is conferred. Jurisdiction on this Court is conferred in the larger convess by the letters patent as well as under the provisions of the Constitution of India in particular Articles 226 and 227. (b). In the, as regards, smaller convess the Court has jurisdiction to decide the question and controversies and the Court will decide and will have to decide only the controversy or the questions in dispute raised before it, keeping in view the latter and spirit of Order XIV Rules 1 and 2 of the Code of Civil Procedure, though it may not directly apply. He submitted that the question of triple divorce or recitation of triple divorce or that of legally valid mode of divorce or the question of the validity or legality of the mode of divorce adopted by the parties is not directly in issue and the Court has no jurisdiction to decide. It is the question of triple divorce or its constitutional validity or the question if it is in accordance with the tenets of Koran is not open to be decided by this Court because it is part of religion and religious rites. The reason is that, the learned Counsel submitted, neither the Court knows the language, i.e., Arabic in which Quran is nor the learned Counsel himself. Sri Mannan said he himself does not know Arabic and therefore the Islamic religion in that sense is alien to us and being foreign or alien to this country, this Court has no jurisdiction to interpret religions tenets. They can only be interpreted by Ulema and the persons of faith in Islam with efficient knowledge in Arabic. Sri Mannan submitted that if the question aries the Court has only to follow what persons learned and well versed in Arabic, in Koran, in Hadith and in the Shariat Law have laid down otherwise none including this Court has jurisdiction to interpret it. Law of Shariat has to be followed as it is. On further being questioned whether he means to say that no Court in India, High Courts of the States of the Country and the Apex Court i.e., the Supreme Court has jurisdiction to consider the question relating to determination of legal position in the matters of divorce or Talaq under Muslim Law and in the context of the basic scriptures or in the

content of the Constitution and the Constitutional Law and the provisions of the Constitution, Sri Mannan modified himself a bit and submitted that he only meant to say unless absolutely necessary the Courts should not indulge in those questions like the question of three Talaq in one sitting as being a legally effective mode of divorce under Muslim Law or not or that it is illegal. The Court may proceed with the assumption that the said system of divorce is in accordance with the law and the Constitution as it is covered by Article 372 of the Constitution of India and the provisions of Shariyat Application Act, 1937. Sri Mannan further submitted that the marriage and divorce are the subjects and the questions relating thereto and their validity affect the status and the said matters are part of religion and the religious practices protected under Article 25(1) of the Constitution. He further submitted that in any case the question of pronouncement of Talaq thrice in one transaction has not been raised in the writ petition itself or any of the grounds and so Sri Mannan submitted that keeping in view the norms of the judicial discipline that only those questions may be decided by a Court which are raised by the parties and which are in controversy between the parties. He submitted that the Court assumes the jurisdiction to decide a question or controversy which arises out of a case before it and not otherwise. He further submitted that the question whether the pronouncement of Talaq thrice in one transaction is in accordance with Islamic Law or not i.e., not a question relevant for the purpose of Ceiling Act and same is beyond the scope of Ceiling Act.

22. Sri Mannan lastly submitted that Islamic Law or Shariat Law being foreign law in the sense of its origination and development in Arabic and he not being well versed with the language of Holy Koran or Hadith he was not in a position to state or to submit anything which may be of any assistance of the Court on the question if thrice a Talaq at one sitting or its being specifically provided or not provided under Koran on account of lack of knowledge but as per faith of each Muslim, it is also one of the recognized modes or prevalent mode of Talaq or divorce, may it be called Talakul Biddat and it is taken to be a Talaq which is irrevocable and it is prevalent amones Hanifis but not amongs Shias. This mode may be called an irregular Talaq or a condemned Talaq. It is prevalent and is recognized as an effective mode of dissolution of marriage irrevocably.

23. Sri Z. Jilani made certain submission in view of the importance of the question involved and he was allowed to argue the matter. Sri Z. Jilani submitted as per oral argument as well as written argument that in view of the provisions of Articles 25 and 26 of the Constitution of India and the protection provided thereunder it is not permissible as well as it will not be justified to consider the question of validity of triple divorce at once sitting. He submitted that it is settled opinion of the Muslim Jurists based on tradition of Prophet and Commentaries on relevant Quranic verses and of the Founders of the four Schools of Muslim Law it is not at all desirable and permissible to examine the question of pronouncement of triple divorce in one sitting or its validity as a part of Muslim Law on the basis of the translation of the verses of the Holy Qur'an nor it would be justifiable to take any view contrary to the settled view of law as to the validity of such a mode of divorce. Sri Jilani has made reference in this regard t o some Supreme Court decisions including the decision reported in the case of Bijee Emmanuel v. State of Kerala reported in AIR 1987 SC page 748 (equal to 1986 (3) S.C.C. 615) and in particular Sri Jilani referred to the following observations of their Lordships :--

"We only wish to add our traditions, teach tolerance, our philosophy teaches tolerance, our Constitution practices tolerance. Let us not dilute it."

24. Sri Jilani submitted that matters of conscience, though better left alone, are sensitive and emotionally evocative. The religious beliefs which may appear strange or even bizarre are entitled to be protected by the Constitution. The matters of religion include practices which a religious denomination regards as part of its religion and what constitutes the essential part bf a religion is primarily to be ascertained with referenee to the doctrines of that religion and no outside authority has any jurisdiction to interfere with their decisions in such mattrrs. Part III of the Constitution also does not touch upon the personal laws of the parties. In applying the personal law of the parties the Judge cannot introduce his own concepts of modern times but should enforce the law as derived from recognised and authoritative sources of the Personal Law. Sri Jilani submitted that Muslim Law as administered by the Courts in India in the British regime as well in the post Independence era has always been held to be the law derived from the four recognised sources of Muslim Law, namely, (i) Qur'an (ii) Hadith (iii) Izma and (iv) Qiyas.

25. He further submitted that according to the recognised doctrine of Taqlid of Mohammadan Judisprudence Jurists have been classified into six categories. The great Jurists Sadrush, Shariyat who have been called Abu Hanifa; second has been given place amongst Jurists who have authority to say whether a particular version of law which has come down from eminent Jurists of particular school is strong or week. The lawyers have to accept what the Jurists of Mohammeddan Jurisprudence have laid down and if on any question jurists of higher classes have not dealt with then those questions have got to be proceeded upon the analogy of what has been laid down in similar matters, taking into account the changes in the customs and affairs of man. It would be wrong for the Courts to attempt to put their own construction on the Quran in opposition to the express rulings of commentators of such great antiquity and authority as the Hedaya and Fatwa Alamgiri.

26. Sri Jilani has submitted that the Courts cannot judge or interpret Qur'an or test validity or legality of tenets of Muslim Personal Law. The Courts have to administer the Shariat Law or Personal Law without in any way deviating from the original Texts and the law as promulgated by Islamic Law giver and Courts are not at liberty to refuse to administer any portion of tenets even though one may think from present modern notions them to be unsound. Sri Jilani's written note of arguments reads as under :--

"It is dangerous to depart from the view of the law which has remained unchallenged for atleast over a century.

The Courts have sounded a note or warning against entertaining new and novel interpretations of the text of Qur'an and Hadith.

The Courts have to administer, without in any way circumventing or deviating from the original text, the law as promulgated by the Islmaic law givers. The Courts are not at liberty to refuse to administer any portion of those tenets even though in certain respect they may not sound quite modern."

27. Sri Jilani submitted that unless it is very necessary it may not be desirable to the Courts to go into the question of validity or legality of triple divorce in one sitting and he submitted that he never meant to challenge the authority of the Court to determine the question when it necessarily arises for decision of the Court.

28. Sri Jilani submitted that though there is no express provision of the best of his knowledge in Qur'an permitting the pronouncement of three Talaqs at one sitting or in one Tuhr, but same can be inferred to be permitted as there is no bar to that. Anyway Sri Jilani submitted that according to him triple divorce may at one sitting or during one Tuhr is a recognized form of Muslim Law under Koran and under the traditions of Prophet Mohammad. He has placed reliance on the following authorities :--

(i) Translation of Quran by Shakhul Hind Maulana Mahmoodul Hasan with commentary by Maulana Shabbir Ahmad Usmani.

(ii) Tafheem-ul-Qor'an (Commentary of Quran) by Maulana Abul Ala Maududi,

(iii) Bukhari Sharif Volume III,

(iv) Fatwa-I-Kazee Khan by Imam Fakhruddin Hassan Bin Man-sur-Al-Uzjandi Al Farghani,

(v) The Hedaya or Gude by Charles Hamilton,

(vi) Hukooquzzauj ain (Rights of the Spouse) by Syed Abul Ala Maududi,

(vii) Meaning and Message of the Traditions by Maulana Mohammad Manjoor Nomani.

(Vol. I) translated by Mohammad Asif Kidwai, and submitted that it is fully established from these authorities that pronouncement of three divorce in one sitting can in no way be said to be either against the Qur'an or unrecognized or invalid mode of divorce even if such pronouncement of divorce is a disapproved form of divorce.

29. Lastly Sri Jilani submitted as under :

"In view of the submissions made above, it would be just and appropriate not to enter into the question of validity of triple divorce in one sitting and not to examine this question merely on the basis of translation of some of the verses of Qur'an as the consistent opinion of Muslim jurists and specially those belonging to Hanifi sect has all along been in favour of treating such a divorce as irrevocable. It is a part of the religious practice of the Muslims and guaranteed under Articles 25 and 26 of the Constitution of India.

30. On behalf of the State of Uttar Pradesh initially the argument was open by the learned Standing Counsel Sri Umeshwar Prasad and from him at a later stage the thread was taken over and held by the learned Advocate General Sri S.S. Bhatnagar. Sri Umeshwar Prased submitted that in the

revenue records from 1378° F. to 1380° F. the name of the husband of Khatun Nissa, petitioner in Writ Petition No. 57 of 1993 has been mentioned and is recorded as Rahmat Ullah, the petitioner in Writ Petition No. 45 of 1993. The learned Standing Counsel invited my attention to the order of the Commissioner as well as other documents including the document Annexure No. 6 which is Annexure No. A-5 to the Counter-affidavit. The document bears the title 'Talaq-Nama' and statements of Khatun Nissa and Rahmatullah. He submitted that Talaqnama did not contain the name of the witnesses, referred to in the statement of Khatun Nissa or Rahmatullah. He further submitted that only the separation that is only result of a decree of the Court is recognized under the relevant ceiling law. A woman, say, wife who has been separated from her husband temporarily or permanently under a decree of the Court is entitled to be taken and considered as a judicially separated wife and if there is no decree of the Court resulting in separation may be temporary or permanent of the two i.e., the husband and wife then in that case even if a wife or a woman has been residing separately under customary low or even under personal law she is not be considered to be a judicially separated wife and in that case the wife is to be taken and considered to be the member of the family of the tenure-holder for her land being clubbed with that of the male tenure-holder for the purpose of determination of ceiling area and the surplus area under Section 5 of the Act read with Section 3(7) and 3(17) of the Act. He submitted really in order to avoid all sorts of complication as well as in order to make the process of ceiling running fastly and expeditiously with an object to implement the Constitutional objectives that the means of production which includes the land, i.e. Agricultural land or the like may not be allowed to remain concentrated in a few hands, the law has provided the judicial decree to be the admissible piece of evidence to recognize a woman who has separated from her husband or a husband who has separated from his wife. It has got another purpose, the learned Standing Counsel submitted and it is this that no one should be allowed to play fraud with the social and economic laws, enacted to implement the Socialist programme of common good enshrined in the Constitution and therefore the only mode legally admissible to prove separation between husband and wife whether short term or wrong term, the law provides is nothing less but a degree of the Court separating the two and that is why the Legislature has used the words "Judicially separated wife or the husband". In support of his contention the learned Standing Counsel made a reference to the decision of this Court in the case of Mohammad Farooq and Ors. v. Prescribed Authority Celling, Kaiserganj Bahraich, 1984 L.C.D. page 158 wherein Hon'ble Sagir Ahmad, J. laid down the law to the effect that a woman who has been divorced by the act of the parties though in accordance with Mohammedan Law would not cease to be a member of tenure-holder's family.

31. Lateron the thread of arguments on behalf of the State was held and taken over by the learned Advocate General Sri S.S. Bhatnagar.

32. The learned Advocate General submitted that as regards the question of vires or challenge to the vires of Ceiling Act is concerned, the said question is not open to the petitioner. Sri Bhatnagar, the learned Advocate General, submitted that so far as the agricultural laws like Zamindari Abolution Act or the Imposition of Ceiling on Land Holdings Act are concerned the question of validity or invalidity the vires or otherwise thereof on the ground that the same is hit by any of the Articles of Part III of the Constitution i.e., on the ground of violation of Fundamental Rights is concerned it is not open to challenge and the petitioners are not entitled to rise that challenge in view of the

provisions of Article 31B of the Constitution of India read with Schedule IX of the Constitution as this Act along with all its amending Acts have been placed in the IX Schedule. The learned Advocate General in this connection had been pleased to refer to the Supreme Court decisions in Latafat Ali v. State of U.P. reported in AIR 1973 Supreme Court page 2070 and has submitted that Hon'ble the Supreme Court has upheld the validity and vires of the Imposition of Ceiling on Land Holdings Act. The learned Advocate General further submitted that as regards the agricultural property i.e. the tenancy rights in agricultural land and succession to those rights it is the Statutory Law that is applicable and not the personal law of the parties in ordinary course of things. Succession to agricultural land is controlled and governed by Sections 171 to 174 of the U.P.Z.A. & L.R. Act. The learned Advocate General further submitted that marriage confers a status which status creates vested right of cohabitation procreation of children, the status of motherhood, a status in society, right to succession and maintenance. It is also a phase of life with certain dignity and status which both husband and wife acquire when they enter into the relationship or ties of marriage.

33. The learned Advocate General has further submitted that under Personal Law there was a time when among Hindu ordinarily concept of divorce was unknown as husband and wife were taken to be related to each other with sacramental ties as to conceive themselves or to consider themselves as inseparable from each other not only in this life but in lives after death i.e., in future birth, generation after generation, but the concept of divorce ordinarily entered into Hindu Law and amongst Hindus in the year 1955-56 after the passing of Hindu Marriage Act. Divorce was made permissible in certain specified condition being fulfilled and established and the law provided that efforts for reconciliation are to be made first and when it is not possible to reconcile and the grounds are established the decree may be passed. So under the Hindu Law learned Advocate General submitted the law is codified about marriage and divorce. As regards the Christian and other Communities there is Special Marriage Act which makes provision for divorce on specified ground or which provides for a decree for judicial separation under that law, as under Hindu Marriage Act. The decree for judicial separation is also provided apart from decree for divorce. The learned Advocate General elaborating his argument further submitted that under Muslim Shariyat Law there is only divorce and Talaq. One may be said to be revocable and the other till it becomes irrevocable remains revocable but there is no such remedy provided--to a husband or to a wife--as provided under Hindu Law or Special Marriages Act in the form of decree of judicial separation, under Muslim Personal Law and it is divorce that is only provided.

34. The learned Advocate General submitted that in view of the provisions of Section 2 of Muslim Personal Law (Shariyat) Application Act, 1937 (Act No. 26 of 1937) it has been provided that all questions relating to marriage, dissolution of marriage including Talaq, Ila, etc. where parties are Muslims, the rule for decision of those cases shall be Muslim Personal (Shariat) Law. He further submitted that as regards agricultural land inview of the expression" save questions relating to agricultural land used in that Section indicates that the decisions of the question relating to agricultural land personal law will not apply."

35. The Advocate General further submitted that expression 'wife' means and includes a woman married to a man and she continues to be wife till there is complete separation by breaking up marriage ties by divorce and so after the divorce takes place wife ceases to be wife and expression

'wife' will not include a divorced woman or a woman who has been divorced by her husband or tenure-holder. He submitted that the holding of a married woman shall be clubbed with the holding of her husband and vice versa but holding of married woman living separately or separated woman, from her husband under the decree of the Court for separation, cannot be clubbed with that of her husband. The holding of a married woman shall be clubbed with her husband so long as the woman enjoys the status of wife i.e., her marriage has not been dissolved. The intent behind the expression is, the learned Advocate General submitted, the separation of a woman from her husband under the decree of the Court. Muslim Shariat Law though it is Indian or foreign law in the sense that it has developed in Arab and in arabic the Advocate General submitted, has continued under Article 372 of the Constitution, as it has been made applicable under Section 2 of the Act of 1937 and it is immune from judicial scrutiny to the extent it is covered by the fundamental rights provided under the Constitution and not beyond that and is not in conflict with any of provisions of the Constitution. While exercising powers under Article 226 of the Constitution this Court has to enforce the Fundamental Rights, enshrined in Part-Ill of the Constitution and there has to be an harmonious reading of Part III with Part IV and IV-A of the Constitution. The Directive Principles of State policy enshrined in Part IV and Fundamental Duties provided under Chapter IC-A are very important. They are valuable in their nature and provided a guideline for the State in the matter of approaching towards the basic goal and objective of the Constitution. They no doubt specify the ideals which are required to be present in the minds of the two authorities of the State when they are required to discharge their function, he it the Executive function or the legislative or a high judicial duty.

36. A question was placed before the Advocate General. Is it not the duty cast on a Judge to decide a case in accordance with the law which runs in consonance with the Constitution, its provision, and spirit to declare the law and interpret the provisions of an act in a manner that keeps it in conflict, but if the conflict appears unavoidable in the sense such as constitutional mandate imposes certain fundamental duties of a citizen while codified or uncodified personal law or statutory law encourages something to be done which is in conflict with basic and fundamental duties or of citizen or State under Chapter IV-A is it not the duty of the Judge to declare that law uncodified or codified or customary is not to be deemed to be operative or be continued to that Article 372 of Constitution and to uphold the Constitution as per his oath as well. The learned Advocate General submitted that it is in the conscience of the Judge and he has no doubt to be true to the oath. He submitted that the Court has jurisdiction to decide the question relating to the declaration of law as well as in case of conflict between the Constitution and the personal law it is for the Court to prefer the Constitutional Law but every effort should be made to find out in the first instance--the harmony between the Constitutional provision and the personal law. If the conflict is not avoidable then in that case the provisions of the Constitution will definitely have to prevail and to that extent statutory law or the personal law or customary laws may be said to be not operative, otherwise ordinarily the personal law of a party may prevail to only the extent it is covered by Article 25.

37. In the course of argument in rejoinder the Counsel for the petitioners submitted that wife does not include a woman that has been divorced and so in Section 3(7) of the Act a woman who had been divorced should not be read or taken to be included as covered by expression "wife" whether divorce is under Hindu Law or Muslim Law and under Muslim Law when divorce is pronounced thrice it results in irrevocable dissolution of marriage. Marriage is a contract under Muslim Law and after

dissolution husband and wife cannot live together i.e., a divorced woman cannot live with her husband. She can only be married again OH the performance of Halala i.e. something like second marriage after the expiry of the necessary period leading consumation of marriage and then Talaq by the second husband and thereafter following of the same process when Talaq has become final. Iddat period has expired then she can re-marry with her first husband. Marriage being contractual matter and husband has been given full right. It is religious rite and it is valid. It is not in any way damaging to the woman or her status and dignity.

38. When the arguments were about to close certain lady lawyers present in the Court-Room stood up and in very brief submitted that un-bridded right given under any law to a husband or a male to divorce his wife, irrespective it being personal law of any, resulting irrevocable divorce and not permitting the reconciliation or retracing of the step taken even in heat of temper or on the basis of whims or like, until thing like Halala or in other words second marriage of the woman with some one else, its consumation and divorce of that woman by subsequent husband in case he becomes ready to divorce, is nothing but a penalty and curse of womanhood for the action of husband a man and further it results in loss of status and dignity in case where the weak woman is deprived of her right of maintenance from her husband and is required to move and claim maintenance from one relation or other, having capacity to pay or maintain that lady and in absence of such relation lady be asked to run for the same to religious endowments or Boards of religious endowment like Waqf or to be compelled to be married and divorced as her fate and desting. If such is the law, is such law in consonance with the theme of Constitution particularly the concept of dignity of individual, and dignity of women and policies and spirit of Constitution running against exploitation of the weaker sex, i.e., wife and does it not run counter to Articles 15, 23 and 51A of the Constitution. They appealed the Court to keep in mind while deciding matter and not be obsessed by rules of technicalities. I may mention here that in his written argument Sri Aabid Ali has also made a critical submission as above.

39. I have applied my mind to the contentions of the learned Counsels for the parties as well as that of the other Counsel who appear in the matter to assist the Court. I have also applied my mind to the allegations made in the two writ petitions and the counter-affidavits and rejoinder-affidavits as well as annexures thereto respectively. Following questions arise for consideration of the Court:--

(i) Whether the Ceiling Authorities, including the appellate authority acted in accordance with law, and did they not exceed their jurisdiction nor did they commit any error of law apparent on the face of the record in clubbing the holding Smt. Khatoon Nissa petitioner of Writ Petition No. 57 of 1993 with that of Rahmat Ullah, petitioner of Writ Petition No. 45 of 1993, treating the former to be the wife of the latter ?

(ii) Whether in view of the provisions of Sections 3(7) and 3(17) of the Imposition of Ceiling on Land Holdings Act the Ceiling authorities have committed error of law in treating Khathun Nissa as the wife of the petitioner Rahmat Ullah, the tenure-holder and in declaring the surplus land after clubbing the holdings of the two ?

(iii) Whether and in what circumstances a married woman's holding can be clubbed with that of her husband who is also a tenure-holder and what is the meaning of the two expressions i.e. "wife or husband" at one hand and of 'judicially separated wife or husband' used in Section 3(7) on the other and whether the expression judicially separated wife or husband include and conceive a divorced wife or a divorced husband, or this expression is confined to wife or husband separated by judicial decree in the sense that by Court decree two are allowed to live separately but the ties of marriage continue to exist ? If so, its effect ?

(iv) If expression "wife" does not include in itself the divorced wife and it means and indicates a married woman whose marriage ties subsists with her husband or vice versa, if yes, whether personal law of the parties will be applicable to determine the question of status of woman or man as the wife or husband or to determine the question of dissolution of marriage by divorce?

(v) Whether the U.P. Imposition of Ceiling on Land Holdings Act and in particular Sections 3(7) and 3(17) of the Act is ultra vires of Articles 15 and 26 of the Constitution as alleged in Writ Petition No. 45/93 vide paragraph 12-A and grounds Nos. (f), (g) & (h) thereof ?

(vi) (a) What is the legal mode of divorce permissible under Muslim Law as applicable in India under Article 372 of the Constitution read with Section 2 of Muslim Personal Law (Shariat Application Act).

(b) Whether a husband is entitled to divorce his wife by reciting divorce thrice in one sitting in irrevocable manner according to his own whims as and when he desires and without assigning any reason according to Muslim Law and Shariyat as applicable in India under Section 2 of Shariat Act read with Articles 25 and 372 of the Constitution as well as Article 13 thereof.

(vii) Whether in case of conflict between the personal law or customary law of a party on one hand and the provisions of the Constitution including concept of dignity of individual and woman enshrined in Part III and Part IV and IV-A of the Constitution the personal law of a party is to prevail over the Constitutional Law or it is the Constitutional Law that will operate and to the extent of inconsistency the personal law whether codified or uncodified law shall not be operative and shall be deemed to have never been operative ?

(viii) Whether it is within the jurisdiction of this Court while exercising power under Article 226 of the Constitution to decide the above mentioned question Nos. 5, 6 & 7.

40. Before proceeding to examine and to answer the above mentioned questions it will be just and proper to mention that in the interest of the community as well as to ensure the increased agricultural production and to provide for landless agricultural labourers and for other public purposes so as to best serve the common good as well as for more equitable distribution of the land it was considered essential and expedient by the State Legislature to impose ceiling on land holdings in Uttar Pradesh. The enactment of U. P. Imposition of Ceiling and Land Holdings Act, 1960 had been enacted to attain the above mentioned purpose and matters connected therewith. Keeping this object in view a perusal of certain other provision of the Act material for the purpose of this case is

necessary.

41. Section 5 of the Act provides for the imposition of ceiling. Sub-section (1) of Section 5 of the Act reads as under :--

(i) On and from the commencement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972 no tenure holder shall be entitled to hold in the aggregate, throughout Uttar Pradesh, any land in excess of the ceiling area applicable to him.

Explanation I: In determining the ceiling area applicable to a tenure-holder, all land held by him in his own right, whether in his own name, or ostensibly in the name of any other person, shall be taken into account.

Explanation II : If on or before January 24, 1971, any land was held by a person, continues to be in its actual cultivatory possession and the name of any other person is entered in the annual Registers after the said date either in addition to or to the exclusion of the former and whether on the basis of a deed of transfer or licence or on the basis of a decree, it shall be presumed unless the contrary is proved to the satisfaction of the Prescribed Authority that the first mentioned person continues to hold the land and that it is so held by him ostensibly in the name of the second mentioned person."

Sub-section (2) of Section 5 is not relevant for the purpose of the present case. But Sub-section (3) has got the relevance only to this extent that it defines the ceiling area for the purpose of Sub-section (1) of Section 5. According to Sub-section (3) Clause (1) in case of a tenure-holder having a family of not more than five members it is provided that ceiling area shall be 7.30 Hectares of irrigated land plus two additional Hectares of irrigated land or such additional land which together land held by him aggregates to two hectares for each of his adult sons provided the son is not a tenure-holder or holds land less than two hectares of irrigated land. But this additional land shall not exceed the maximum limit of six hectares. Sub-section (2) deals with the case of a tenure-holder having a family of more than five members. It provides that in such case the ceiling area shall consist of 7.30 hectares of irrigated land plus the additional land for each member exceeding five and for each of the adult sons who is not a tenure-holder or who holds less than two hectares of irrigated land, two additional hectares of irrigated land or such additional land which together with the land held by such adult son aggregates to two Hectares and subject to maximum of six hectares of additional land.

42. Section 3 of the Act is the definition clause and it defines the various expressions used in the Act. Section 3 provides that unless the context otherwise requires the various expressions used in the Act shall bear the meaning defined and given in the Act. The expression 'tenure-holder' has been defined in Clause (17) of Section 3 as under :--

3(17) 'tenure-holder' means a person who is the holder of a holding but (except in Chapter III), does not include :

(a) a woman whose husband is a tenure-holder,

(b) a minor child whose father or mother is a tenure-holder.

43. Expression 'family' which has been used in Section 5 has been defined by Section 3 Sub-section 7 as under :--

3(7) 'Family' in relation to a tenure-holder means himself or herself and his wife or her husband, as the case may be (other than a judicially separated wife or husband), sons and daughters (other than married daughters).

44. The question that has been posed in the present case, as mentioned earlier, is whether the ceiling authorities exceeded their jurisdiction as well as acted not in accordance with law in clubbing the holding of Smt. Khatun Nissa, wife of Rahmat Ullah, the petitioner of Writ Petition No. 43 of 1993 and in treating Khatun Nissa, the petitioner of Writ Petition No. 57 of 1993 to be Rahmat Ullah's wife and in clubbing the holding of Smt. Khatun Nissa with the holding of Rah mat Ullah for the purposes of determining the ceiling area and the surplus area of Rahmat Ullah as a tenure-holder and did not the act according to the letters and spirit and principles of law defining tenure-holder and the family. The case of the two petitioners is that Khatun Nissa was admittedly the wife of Rahmat Ullah but Rahmat Ullah had divorced her on 15th September, 1969 and so according to the case of the petitioner she did not remain the wife of petitioner Rahmat Ullah nor Rahmat Ullah remained the husband of Smt. Khatun Nissa and so according to the petitioner's case 24.97 hectares of land held by Khatun Nissa was wrongly clubbed. The definition clause used in an Act has got its own importance. The object of definition clause in an Act is to declare that unless the context otherwise requires the words and expressions used in the Act shall have the meaning assigned to them in the said clause. Definition clause is also called as an interpretation clause. Dealing with the importance of the definition clause in the Treaties on "Construction of Statutes" by Earl. T. Crawford at page 361/362 i.e. Section 10-B it has been observed and mentioned as under :

"The Legislature has the power to embody in the Statute itself a definition of its language as well as rules for its constructions. These are usually binding upon the Courts, since they form a part of the Statute, even though in the absence of such a definition or rule of Construction, the language would convey a different meaning. But the meaning of the Legislature, as revealed by the Statute considered in its entirety, if contrary to the expression of the interpretation clause or legislative definition, will prevail over them. That is, the interpretation clause will control in the absence of anything else in the act opposing the interpretation fixed by the clause."

45. In the Legislation and interpretation by Babu Jagdish S war up IV Edition the learned Author observed at page 242 as under :

"The Legislature has the power to embody in a Statute itself a definition of its own language and when any phrase or word or ex-expression in an enactment is explained by the legislature, the Act is to be applied with the authoritative expression. In other words as a part of its legislative function a Legislature may enact law and define its meaning. Where the Legislature defines the meaning of the words used, it expresses more authoritatively its intent and its definition and construction is binding on the Courts. Such internal legislative construction is of the highest value must necessarily prevail

over other extrinsic aids to the construction."

46. A reading of Section 5(3) provides that except as provided by Sub-section (2) and Section 6(1) that is exemption clause, the ceiling area of different categories of tenure-holders is to range between 7.30 hectares to 13.30 hectares irrigated land. As per Sub-section 17 where there is a male tenure-holder having the holdings of land with him has got his wife and minor children, even if they might be holding the land in their names but for the purpose of the Act that woman or wife or the minor children shall themselves be not treated as tenure-holder instead the male tenure-holder will be considered to be the tenure-holder except for the purpose of Chapter XIII of the Act and for the purpose of Ceiling and determining the Ceiling area the holding of the woman whose husband and the holding of the minor children whose father or mother is a tenure-holder shall be clubbed with that male tenure-holder or with that of the father and the mother as the case may be. The definition of expression "family" quoted above and as given in Section 3(7) of the Act shows that in relation to a tenure-holder the family shall mean to consist of the tenure-holder himself or herself and his wife as the case may be and the minor sons and daughters but the use of expression within the bracket "other than the judicially separated wife or husband" and "other than the married daughters" clearly 'indicates or is clearly indicative of the legislative intent as per definition clause that exception is made with reference to judicially separated wife or judicially separated husband and the married daughters that they are not to be treated as the members of the family of the tenure-holder. In other words judicially separated wife or husband is not to be treated nor is intended to be treated to be the member of the family of the tenure-holder nor the married daughters to be treated to be the members of the family of the tenure-holder.

47. The expression "wife or husband" having not been define in the Act nor has the expression "judicially separated wife" or husband been defined in the Act. These two expressions has been the subject matter of much controversy at the hearing of the petition. It had been contended at the bar that if the judicially separated wife is supposed to convey the idea of separation of wife or husband by and under the decree of the Court in the sense it is understood or it has been used under Hindu Marriage Act and the Special Marriage Act then it connotes the idea of continuance of ties of marriage but separate living or separation of husband and wife under the decree for judicial separation then such a conception may not be in consonance with the doctrine of equality instead it has a tendency of conferring benefit to women folk not belonging to Muslim community as firstly, under Muslim Law there is no such concept of judicial separation or separation by judicial decree as is available under Hindu Law or under Special Marriage Act and secondly as per its effect a Muslim woman governed by Muslim Law where divorce or Talaq is the only mode of separation which may be even without Court's decree and may be given orally by the husband and if the lady's, i.e., divorced woman's property will be clubbed with that of her former husband who has orally divorced her and then she may be sufferer when the Ceiling area of the divorcer husband and the surplus area will be determined after clubbing the land of the two in such circumstances the law not be given affect, as being hit by Article 15 and Article 26 as resulting in illegal discrimination of Muslim divorced woman. It was as such submitted that the expression 'Judicially separated' 'should be interpreted to mean' legally separated that is separated in accordance with the law relating to husband and wife prevalent and applicable to parties.

48. The contention of the learned Counsel for the petitioner that if the expression 'judicially separated wife or husband' is read and interpreted as legally separated wife or husband that is separated in accordance with law it may include the case of the divorced woman irrespective of the fact that the divorce is permissible orally among Muslim. The contention in alternative has been to the effect that expression 'wife or husband' used in the Section 3 of the Act that is in definition clause be taken not to include within their scope the divorced persons, i.e., expression 'wife' is indicative of a married woman and her status as a married woman to the tenure-holder arid till the time marriage ties continue she remains the wife, and as soon as she has been divorced that very woman who had been wife till before divorce ceases to be the wife of the tenure-holder on the divorce having taken place. As such it was submitted that once divorce having been given to a woman like Khatun Nissa she ceased to be the wife of the tenure-holder and so she ceased to be the member of the family of her husband within case the petitioner Rahmatullah. This argument had been advanced with the particular object of meeting and getting rid of the decision of this Court delivered by Hon. S. Saghir Ahmad, J. in the case of Mohammad Farooq and Ors. v. Prescribed Authority, Ceiling, Kaiserganj Bahraich and Ors. reported in 1984 L.C.D. 158.

49. In Mohammad Farooq' case (supra) this Hon'ble Court had been pleaded to hold that Smt. Hashmatun Nisa had been divorced by Musharraf Ali on the date alleged by him (i.e., 7.5.70) and she continued to be his wife and therefore a member of his family on the relevant date i.e., on 8.7.1973 and held the Prescribed Authority to be justified in including the holding of Smt. Hashmatun Nisa of that case. The Court further took the view that the fictional divorce would also not be available as the objections in that case were filed by Musharraf Ali in 1974 i.e., after the relevant date. The learned Judge has further observed that the question whether a wife who had been divorced by her husband without intervention of the Court as is permissible under Mohammedan Law, can she be treated to be the judicially separated wife within the meaning of the definition 'family' contained in Section 3(7) of the Act did not arise in that case but as the arguments were raised in that case Hon'ble S. Saghir Ahmad, J. proceeded to decide controversy. After having made reference two earlier decisions of this Court i.e., Sarju Prasad v. IV Addl. District Judge and Ors., 1980 A.L.J. 515 and single Judge decision of this Court in the case of feet Singh v. The State of U.P. and Ors. (1980 ALJ (NOC) 115) Hon'ble S. Saghir Ahmad, J. in paragraph 34 observed as under :

"In the Allahabad decision in Sarju Prasad's case (supra) which is a Division Bench decision and is binding on me, the Court was primarily concerned with a customary divorce through the intervention of Panchayat. The position under Mohammedan Law is altogether different. The marriage under Mohommedan Law is a contract, not a sacrament. The husband can divorce his wife unilaterally by the pronouncement of 'Talaq' and the marriage stands dissolved without the intervention of the Court. The wife has also a right to obtain divorce from her husband through a Court of Law under the provisions of the Dissolution of Muslim Marriages Act, 1939. In such a case, the marriage comes to an end on a decree of divorce being passed in favour of the wife. There is thus an obvious anomally. If a husband divorces his wife by an oral pronouncement to 'Talaq', she, for purposes of ceiling Act, would still be a member of his family. But a wife who obtains divorce through a Court under the provisions of the above Act of 1939, will be excluded from her husband's family on account of her being a 'judicially' separated wife. If the definition of 'family' is left as it is

and the legislature does not intervene to amend the definition so as to cover the genuine cases of divorce by 'Talaq' as permissible under Mohammedan Law, a wife who has been divorced orally, would still be subject to the principle of clubbing of her land with that of her husband although after divorce, she otherwise would be entitled to hold her property independently of her husband. In the above situation the salutary purpose of the Act which is to help the weaker Section of the society to which a woman and that too, a divorced woman, definitely belongs would stand defeated unless the woman divorced by 'Talaq' under the Mohammedan Law is also brought within the ambit of the exception to the definition of the 'Family'.

50. The above reading of the decision and in particular the following sentence "But a wife who obtains divorce through Court under the provision of the above Act of 1939 will be excluded from her husband's family on account of her being a judicially separated wife" leads to an idea that judicially separated wife means and it indicates separated between husband and wife temporarily (that is separation without break of the marriage ties) or permanently i.e., separation with complete break of ties of marriage i.e., Talaq). The expression 'judicially separated' consists of two expressions i.e., "separated" and the others "judicially". Separation may bepermanent by complete breaking of the ties or it may be provisional or temporary that is the temporary separation and step towards the process of complete breaking of ties of marriage by divorce and complete separation from each other. The temporary separation may be revocable or condonable or it may lead to permanent separation.

51. In Black's Law Dictionary V Edition at page 762 expression 'judicial separation' has been defined as under :--

"A separation of man and wife by decree of Court, less complete than an absolute divorce. A "Limited divorce" or a divorce & mensa et thoro".

"The expression "Divorce" has been defined in the Black's Law Dictionary Vth Edition as under :--

Divorce: The legal separation of man and wife effected by the judgment or decree of a Court and either totally dissolving the marriage relation or suspending its effects so far as concerns the cohabitation of the parties Divorce a mensa et thoro/(In Latin) a divorce from table and bed, or from bed and board. A partial or qualified divorce by which the parties are separated and forbidden to live or cohabit together without affecting the marriage itself.

Divorce a Vinculo matrimoni:

A divorce from the bond of marriage. A total divorce of husband and wife dissolving the marriage tie and releasing the parties wholly from their matrimonial obligations.

52. The expression 'separated' is the past tense of separate. Separate means to disunite or to divide or to sever as per dictionary meaning.

53. The use of expression 'judicially' before separated qualifies the nature and the mode how separated in brought about. When we concentrate on this expression 'judicially' it lead to the necessity of involvement of an act of exercise of jurisdiction and discretion and judgment of judicial forum i.e., Court of Law. It means that separation must be the result of an act which involves the exercise of Court's judicial power and grant of decree of the Court after application of its mind. The expression 'Legal' is a term of wide connotation. Legal means in conformity with the law. Thus considered in my opinion the expression 'judicially separated wife or husband' means and connotes the idea of a wife or husband separated judicially i.e., by under the act of the Court resulting into decree passed by the Court separating the two i.e. wife and the husband and as such the Ceiling Act does not recognise the separation of the wife or husband be it limited separation of bed or board or separation from the bond of marriage totally dissolving the marriage. The expression 'judicial separated' wife recognises the judicial decree as the proof of separation and not otherwise. The other question that remains is whether the term 'judicially separated as used in the Act is to be interpreted as including or not complete break of marriage by divorce. The expression, "judicial separation" has been defined in the same dictionary I.e. Black's Dictionary at page 762 to mean the separation of man and wife by decree of Court less complete than absolute divorce.

54. Whether the case of a divorced woman is included within the framework of judicially separated wife or not ? This question had arisen in the case of Darshan Prasad v. Civil Judge reported in AIR 1992 S.C. 967 i.e., 1992 Supplement Volume 2 S.C.C. page 87 as to how the expression "judicially separated" wife should be interpreted and their Lordships observed as under :--

"It is important to note that the Hindu Marriage Act, 1938 had come into force on May 18, 1955. Section 10 of this Act provided for the judicial separation. Under Section 10 of the Hindu Marriage Act either party to a marriage was entitled to present a petition to the District Court praying for a decree for judicial separation on any of the grounds specified in Sub-section (1) of Section 13 and in the case of wife also on any of the grounds specified in Sub-section (2) thereof as grounds on which a petition for divorce might have been presented. Thus in order to get a judicial separation, it was necessary to obtain a decree under the above provision and then alone it could be recognised as a judicial separation. The Ceiling Act, 1960 was enacted and brought into operation long after Hindu Marriage Act and as such the Legislature was fully aware of the meaning of judicially separated wife or husband while using this term in definition of "family" under Section 3(7) of Ceiling Act, 1960. It is further important to note that Sub-section (3) of Section 5 of the Ceiling Act, 1960 prescribes, while determining the Ceiling area, the land of adult son/sons who were themselves tenure-holders being excluded, but no such land is allowed to be excluded in the case of wife, even though she might be a separate tenure-holder. Thus, it is abundantly clear from a persual of the above provision that in the case of determining Ceiling area of the land belonging to a person, the land even if owned or possessed by his wife in her own right would have to be included in the land of the husband treating the wife as a member of his family. The only exception has been made in the case of judicially separated wife. It was contended by the learned Counsel for the appellant that a 'wider meaning should be given to the term 'judicially separated" wife to include a wife who may be living separately from her husband and agricultural land owned or possessed in lieu of her right of maintenance should be excluded from the ceiling limit of her husband- It is difficult for us to accept this contention in view of the clear provisions of the Ceiling Act, 1960 which apart from being a

beneficial act for the landless has used the term 'judicially separated' wife after coming into force of the Hindu Marriage Act, 1955. This cannot be given a meaning to include a wife merely living separately from the husband but having not obtained a decree for judicial separation under the provisions of the Hindu Marriage Act, 1955."

55. Similar question arose relating to construction of expression "judicially separated" as used in Section 3(7) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 in the case of Jeet Singh and Ors. v. State of U.P. reported in (1993) 1 SCC page 325. Their Lordships of the Hon'ble Supreme Court in this case have been pleased to over rule the decision of this Court in Gangotri Devi's case reported in 1982 ALJ page 103. In the case of Jeet Singh (supra) their Lordships of Hon'ble the Supreme Court have been pleased to observe as under :--

"By the time the Ceiling Act was enacted the words "judicial separation" had acquired a definite meaning. Section 10 of Hindu Marriage Act, 1955 provides for "judicial separation" among Hindus. Under this provision read with Section 19 only a District Court (Civil Court) has jurisdiction to grant a decree for judicial separation. Parties governed by the Indian Divorce Act, 1869 may file a petition under Section 23 thereof for judicial separation before a District Court or the High Court. Mohammedan Law also recognizes a right to live separately without an obligation to have cohabitation with her husband though such claim can be made only in rare circumstances tike cruelty or that her life is unsafe or other strong grounds."

Their Lordships further observed as under :

"The obvious intention of the provision in Section 3(7) of the Ceiling Act therefore is that a wife who is judicially separated shall have a right to keep the properties given to her as and in lieu of maintenance or otherwise during her separate living and correspondingly it shall not be included in the holding of her husband. But in order to have the benefit of this provision the parties shall prove that the wife is "judicially separated".

Dealing with the expression judicially separated their Lordships further observed as under :--

"The word "separated" is qualified by the word "judicially". Unless the separate living was a judicially ordered or recognized one it would not qualify for exclusion under the provision. The word "judicial" according to Webster's New Twentieth Century Dictionary, means "allowed, enforced or set by order of a Judge or Law Court". According to Shorter Oxford Dictionary, the word judicial means "of (used as an adjective of) or belonging to judgment in a Court of law, or to Judge in relation to his function; pertaining to the administration of justice; proper to a legal Tribunal; resulting from or fixed by a judgment in Court." In the context, therefore it means an act done in pursuance of an order or direction of a Court of competent jurisdiction. It is used in contrast to separate living by agreement of parties or at the intervention of mediators without the intervention of a judicial proceeding in a Competent Court of Law."

Over-ruling the Gangotri Devi's case and the view taken therein that judicial separation cannot be understood in technical sense of grant of decree under Section 10 of Hindu Marriage Act the word

'judicial' meant arising from the process of law as compared to administrative ministerial or executive their Lordships of Supreme Court observed as under :--

"As already stated it is not correct to say that there are no provisions for Muslims or the Christians for obtaining orders of judicial separation in a Court of Law. Apart from that if under any personal law the person is not entitled to get any order of a Court for a judicial separation it would only mean that they would not be entitled to the benefit of exclusion provided under the definition. We are unable to agree with the learned Judge that separation other than the one which was in pursuance of an order of Court could be recognized for the purpose of Section 3(7).

56. From a reading of the above decision of Hon'ble the Supreme Court of law declared appears to be that as regards the family for the purpose of Ceiling Act consists of tenure-holder, his wife and minor sons and minor daughters and the wife's land is to be clubbed with that of the husband unless the wife is separated from her husband under a decree of the Court and that does not dissolve or severe the marriage. The used of expression with reference to decree for judicial separation is that "the decree however does not sever or dissolve the marriage. It affords an opportunity for reconciliation and adjustment, though indicial separation after certain period may become a ground for divorce. It is not necessary and parties are not bound to have recourse to that remedy. The parties can live keeping their status as wife and husband till their life time".

The learned Counsels for the two petitioners submitted that the expression "wife" has been used in the sense of continuance of ties of marriage between the two and it does not include the woman who has been divorced in accordance with the law applicable to him. There appears some substance in the contention of the learned Counsel for the parties.

57. The learned Counsel for the petitioner had submitted that a woman once she has been divorced or proved to have been divorced cannot be considered to be the wife for the purpose of the Act and they submitted that the interpretation of expression "judicially separated wife" meant, as held by the Supreme Court, to be the wife whose marriage has not been dissolved by divorce or decree for divorce or by decree of annulment of marriage she is to be considered to be the member of the family of her husband, the tenure-holder and if she living separately from her husband without a decree for judicial separation she is to be considered to be a member of the family. It is only in case where decree for judicial separation has been granted by the Court without annulment of marriage or divorce she may be entitled to the benefit of expression "other than the judicially separated wife". So the contention of the learned Counsel for the petitioners has been that a woman divorced by her husband according to the law applicable to the parties under the decree of the Court or otherwise cannot be deemed or considered to be the wife of a person or a tenure-holder and term 'wife' or 'husband' should be interpreted to mean a woman united to a man by marriage and vice versa and during the continuance of the ties of marriage i.e., husband of the woman or the wife of the man must be living i.e., alive and undivorced.

58. The expression 'wife' has been defined in Black's Law Dictionary Vth Edition at page 1433 as under :--

Wife : A woman united to a man by marriage; a woman who has a husband living and undivorced. Correlative term is 'husband'.

In Stroud's Judicial Dictionary V Edition Volume 5 under head wife and items 7 and 8 it has been provided as under :--

(item 7) "Wife does not, for the purpose of a power of appointment including a divorced wife (Re Slaughter-Trustees Corporation v. Slaughter, (1945) Ch. 355).

(8) "Any wife who may survive the appointer" did not include a wife who had been divorced from the appointer (Re Allan, Allan v. Midland Bank Executor & Trustee Co., (1954) Ch. 295).

59. Thus considered in my opinion and particular in view of the law laid down by their Lordships of the Supreme Court the intention of the legislature being that persons living as husband and wife may not play fraud on the legislation or the Socialist scheme of equitable distribution of land by pretending separation among themselves as wife and husband to deprive the State of acquiring the essential surplus land with them and mar the social objects the Legislature provided that husband and wife, not necessarily breaking their ties of marriage by decree of annulment of marriage or divorce, yet for reasons, living separately as separated wife and husband and that the separation is the result of not their own act of volition but is resultant from the decree of the Court granting judicial separation on the ground of law such judicially separated wife or husband though their marriage ties may continue and survive may get the benefit of expression of the judicially separated wife or husband and such a wife or husband who has been judicially separated is not to be considered to be the member of the family of either for the purpose of determination of ceiling area of the tenure-holder or for declaration of surplus land. The intention of the framers of law appears to be that the judicially separated wife's property may not be subjected to any adverse effect by being clubbed with that of her husband and similarly the husband in such a case where there has been judicial separation under the decree of the Court may not be deprived of his holding merely by the clubbing of the wife's holding with his holding and on the basis thereof his or his wife's holding being declared as surplus. Then that is the intention then a question arises whether it would have been the intention of the Legislature to deprive a divorced woman of her holdings or to make her holding subject matter of its being clubbed and being declared as the part of surplus land of her husband, the tenure-holder and thereby she herself being deprived of her holding or property. The plight of poor woman, divorced by her husband under Muslim Law or under customary law if any, by oral divorce has been to certain extent expressed and placed by Hon'ble S. Saghir Ahmad, J. in the Judgment of Mohammad Farooq and Ors. v. Prescribed Authority (Supra) asunder :--

"If the definition of "family" is left as it is, the legislature does not intervene to amend the definition so as to cover the genuine cases of divorce by 'Talaq' as permissible under Mohammedan Law, a wife who has been divorced orally, would still be subject to the principle of clubbing of her land with that of her husband although after divorce, she otherwise would be entitled to hold her property independently of her husband, In the above situation the salutory purpose of the Act which is to help the weaker section of the society to which a woman and that too, a divorced woman, definitely belongs would stand defeated unless the woman divorced by Talaq' under the Mohammedan Law is

also brought within the ambit of the exception to the definition of the 'Family."

60. The plight of a divorced woman can be realised and has been realised by learned Judge of this Court. Marriage is a status which creates vested rights and interest of cohabitation, succession and maintenance. It brings a bloom to the life. The divorce brings a plight of vagaries of life and upheaval in the life of a woman at times in the life of man. Under Hindu Law the concept of divorce had not been known till before the introduction of Hindu Marriage Act and it was for the first time the concept of divorce stepped in. Howsoever strained relation between husband and wife would have been it was and has been a social and legal obligation of the husband under the law known as Hindu Law to maintain his wife all through his and her life. The introduction of Hindu Marriage Act introduced concept of divorce and a divorced woman or a judicially separated woman had been declared entitled to claim maintenance from her husband vide Sections 24 and 25 of the Hindu Marriage Act uptill the time she does not remarry or does not become subject to disqualification under Sub-section 3 of Section 25 of Hindu Marriage Act. Under Criminal Procedure Code as well it has been provided that a divorced woman would be entitled to claim maintenance from her husband as per Explanation (b) to Section 125 Cr.P.C.

61. Under Muslim Law the plight of a Muslim woman, divorced by her husband is more pathetic particularly the weak one. As the state of affairs in India under Muslim Law is claimed to exist and operate, it is the husband who has got a free hand to divorce his wife as and when he desires and even orally by reciting Talaq thrice or by reciting three Talaq in one sentence. Whether that law is in consonance with the Constitution or spirit of the Constitution. The poor Muslim woman has been held to be entitled to maintenance for a limited period of three months and then is left to the vagaries of fate after the expiry of period of three months unless she succumbs to the circumstances of re-marrying someone, as a divorced Muslim woman who may be entitled for the maintenance of the Iddat period of three months has been subjected to statutorily directed litigation against such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay reasonable and fair maintenance. The divorced woman and the Magistrate are required to locate affluent relative of indigent divorcee forgetting the reality of the life that a poor woman has ordinarily got poor relatives with insufficient means to support and maintain her. Whether it will be just and proper to subject such a lady to duel misery i.e.. of loss of right of maintenance from diversing husband on one hand and on the other depriving her of her holding by clubbing those holdings with that of her husband simply on technical ground to the effect that she has not got a decree for divorce and on that ground by treating her to be the family member of the husband who has already divorced her. Law has got to be interpreted keeping in view the basic and fundamental principles of the law of the Constitution of India and in particular the concept of justice social and economic and political enshrined in the Constitution and principle of equality before law and equal treatment of law keeping pace with rationality or to say the reason and free from any type of bias or discrimination on the ground of sex or religion.

62. Considered in this light and as mentioned above the expression "wife" used in Section 3(7) of the Act carries with itself the idea of man and woman united and tied with the bonds and relationship of marriage for the period or during the period the ties subsist and continue. The expression "wife" does not include within itself a woman whose husband is dead i.e., a widow of tenure-holder nor

does it include a divorcee i.e., a divorced woman who has been divorced by the tenure-holder. Thus in my opinion a divorced woman till she is not remarried ceases to be the wife and ceases to be the member of the family of the tenure-holder.

63. The divorced woman not being included within the four corners of the expression "wife" as used in the Act and interpreted in the context of the Act it makes a plea available to a woman to assert that she not being the wife is not the member of the family of the tenure-holder. This plea also becomes available to the tenure-holder concerned that with his holding, the holding of a woman who was his wife at one time but the marriage ties with whom had been broken by divorce either under the decree of a Court or otherwise under customary law, should not be clubbed and should not have been clubbed with his holding-in order to determine the ceiling area and the surplus area of the tenure holder concerned. That such plea has got to be decided by the authorities in the light of the law of marriage and divorce of the parties by the law statutory and codified or be it uncertified law such as Muslim Law or customary law, but law of the Constitution that is the Constitutional Law being the fundamental law and the Supreme Law of the country as such to the extent the said persona! law of marriage or divorce codified or uncodified or customary is not inconsistent with or in conflict with the provision of the Constitution including the provision relating to Fundamental Rights and Directive Principles of State Policy and the provisions of the Constitution forming the basic structure of the Constitution as well as Fundamental Duties enshrined therein shall be operative and in governing the matters of marriage and divorce

64. That in the present case, the case of the two petitioner's is that Rahmatullah, the tenure-holder had divorced his wife Smt. Khatun Nissa on 15th September, 1969. Both the petitioners are placing the said plea in order to claim that declaration of ceiling area and surplus area of the tenure-holder after clubbing the land of the two has been illegal act, an act suffering from error of law and jurisdiction. In order to claim and establish the plea based on divorce and benefit thereof the tenure-holder i.e., the petitioner had to establish that the divorce had been given in accordance with the law as in operation under the scheme of the Constitutional Law and the Statutory Law read with Personal Law.

65. The case of the parties has been that Rahmatullah had divorced her on 15.9.1969 and that two are living separately. The bare allegation to the effect that Rahmatullah had divorced his wife i.e., Smt. Khatun Nissa in September, 1969 by itself is not sufficient to establish the plea of divorce. The parties alleging the divorce have got to establish the necessary ingredients and fulfilment of the conditions of law applicable in the matter of divorce under the personal law, Hindu Law or Muslim Law but here the parties being Muslim according to Muslim Law to the extent it is operative and it is not in conflict with the provisions of the Constitution. My attention has been invited by the learned Counsel for the petitioner as well as the learned Advocate General to the provisions of Muslim Personal Law (Shariat) Application Act, 1937 (hereinafter referred to as Act No. 26 of 1937). The learned Advocate General as well as Counsel for the parties invited my attention to Section 2 of the Act No. 26 of 1937. Section 2 of the Act No. 26 of 1973 reads as under:

Application of Personal Law to Muslims. Notwithstanding any customs or usuage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate, succession, special

property of females, including personal property inherited or obtained under contract or gift or any other provision or personal law, marriage, dissolution of marriage including Talaq, Ila Zihar, lian, Khula and Mubaraat, maintenance, dower, guardianship, gifts' trust and trust properties and Waqfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslim shall be the Muslim Personal Law (Shariat).

66. A perusal of Section 2 of the Act No. 26 of 1937 per se shows that by this Section Muslim Personal Law (Shariat) has been provided and made applicable in regard to matters referred to therein and in particular the marriage and dissolution of marriage in various forms including Talaq, Ha, Zihar, Khula, Mubaraat, maintenance and dower. Section 5 of that Act of 1937 had made provision for dissolution of marriage by Court in certain circumstances but with the enactment of Dissolution of Muslim Marriage Act 1937, which made provisions entitling the Muslim women to obtain decree for dissolution of marriage had certain grounds, Section 5 of Muslim Personal Law (Shariat) Application Act, 1937 had been repealed. This Act of 1937 its primarily confined to the dissolution of marriage by a woman married under Muslim Law and its further object has been to remove doubts as to the effect of renunciation of Islam by the married Muslim woman on her marriage ties.

67. The question posed before the Court has been that the finding recorded by the Ceiling Authorities i.e., opposite parties Nos. 2 and 3 on the question of Talaq is vitiated by error of law as the opposite parties Nos. 2 and 3 did not consider the statement of the witnesses and have not considered the documents specially Talaqnama and that he has failed to appreciate the principles of Muslim Law to the effect that there is no specific form to dissolve marriage or to pronounce the Talaq. It was submitted that a valid Talaq can be pronounced orally and in any form, at any time.

68. The learned Counsel for the petitioner invited my attention to the statement of the witnesses particularly Smt. Khatun Nissa and Sri Rahmatullah as well as to the document bearing title Talaqnama dated 15.9.69, copy of which is Annexure 6 to the writ petition. The two copies of the statements of the witnesses Rahmatullah and Khatun Nissa have been filed alongwith the copy of the rejoinder affidavit in the case of Smt. Khatun Nissa. Sri Haq and Sri Mohammad Hanif invited my attention to the following portions of the statements of Khatun Nissa;

Meri shadi Rahmat Ullah Hazi ke sath hui thee. Magar arsa gyarah sal huaa Rahmat Ullah ne mujhe saree va katai talak de diya. Tab se main Rahmat Ullah Khan kee bibi nahin hun aur na main unke sath rahti hun Talak Kasim, Jhugnu niwast Pokhar Bhitwa tatha Bhaun niwasi Kusamahar wa Makbul Ahmad niwasi Ajmadi ka samane teen baar diya. Talak ke samaya meri Valid Bismilla aur main bhee maujeed thee. Talak dene ke bad Rahmat Ullah ne Makbul Ahmad se Talaknama likhakar mujhe de diya aur aaj main dakhil kar rhee haun.

He further referred to the statement of Rahmatullah which reads as under;

"Shree mail Khatun nisa meri bibi thee lakin aab mera unaka dono aadmi mai talak ho chuka hai. Talak ki likha-padi hui hai. Lakin kagaj mare paasnahln hai.....Mera meri bibi se pahale talak hua tha. Kasim vaghera ka samane hua tha.

69. Having made reference to these statements the learned Counsel for the petitioner submitted that among the Muslim there is no specific form of divorce. It may be oral. It may be done by pronouncing Talaq in one sitting finally. It may be done by a written document. The learned Counsel has submitted that once Talaq is pronounced or uttered thrice it operates into final irrevocable divorce and so under the personal law of Muslims Shariat law as applicable in India Talaq became operative to completely dissolve the relationship of marriage and Khatun Nissa ceased to have the status of wife on 15.9.69 even if there was no judicial decree. He further submitted that document Annexure-6 was another proof of Talaq and as such the learned Counsel submitted that the findings recorded to the contrary by the Prescribed Authority and the Appellate Authority that Talaq has not been established and proved nor it can be held to be proved is vitiated by error of law apparent on the face of the record as opposite parties according to the learned Counsel for the petitioner ignored the above evidence from consideration on no vaid ground as well as on misunderstanding of the opposite parties of the principles of law regarding marriage and divorce.

70. The learned Standing Counsel in this regard had submitted that the document Annexure 6 of Writ Petition No. 45 of 1993 or Annexure 5 cannot be termed to be Talaqnama nor can it be considered to be operating as an act of divorce. It is simpliciter, if it has got any authenticity at the most as a document or as a memoranda of something alleged to have taken place, earlier to the execution of the document so as to operate, or be available to be used as a piece of evidence. The learned Standing Counsel further submitted that a perusal of cross-examination of Smt. Khatun Nissa reveals the evil motive. He submitted that Imposition of Ceiling on Land Holdings Act had come into operation in 1960 and in order to circumvent the Ceiling Law the parties have taken the plea of divorce. The learned Standing Counsel Sri Umeshwar Erased invited my attention to the following statement:

"Talak issliye hua ki Rahmat Ullah mera naam kaa khaith bachna chahta tha aur maine inkar kiya."

71. The learned Standing Counsel further submitted that necessary ingredients of a valid Talaq under Muslim Law of namely, recitation of three Talaqs with the intervention of three successive Tuhrs and there is no evidence nor the least statement that no intercourse did take place during the three Tuhrs, have not been established at all. The learned Standing Counsel further submitted that divorce or divorce-deed has not been proved according to law and the authorities have recorded a finding to the effect that evidence on record clearly shows that the tenure-holder Rahmat Ullah and his wife Smt. Khatun Nissa live together in one house and there has been no dissolution of marriage and that Khatun Nissa continues to be the wife of the tenure-holder Rahmat Ullah and this finding cannot be said to be vitiated by error of law as necessary ingredients of valid Talaq under Muslim Law have not been established.

72. In view of the above the material question that crops up is what are necessary ingredients of legally permissible mode of divorce under Muslim Law and whether a husband is entitled to divorce his wife by reciting Talaq thrice in one sitting in irrevocable manner as and when he desires according to his own whims and notions and without assigning any valid reason under the Muslim Law/Shariat law as applicable in India under Section 2 of Shariat Act read with the provisions of Arts. 372 and 13 of the Constitution of India.

73. What is Shariat Law on the subject of marriage or divorce and to what extent it is applicable in the context of Shariat Application Act read in the light of the provisions of the Constitution in Article 372 of the Constitution of India and whether divorce in single sitting by recitation thereof thrice without any rhyme or reason if it is the part of Shariat Law is applicable in India ? If yes ? Then if other ingredients if any are required to be established, such as abstinence from intercourse during the period of Iddat alongwith the recitation of Talaq thrice in one sitting, the petitioner may have some case for consideration and it may be said that the findings recorded by the opposite parties are vitiated by error of law. That being the position there is no substance in the contentions made by Amicus Curiae Sri. Z. Zilani or Sri Abdul Mannan that the questions of validity of Talaq by recitation thereof at one sitting does not arise and so should not be gone into or that the Court has no jurisdiction to determine those issues. Sri Mannan and Zilani had submitted that the Shariat Law is a foreign law in the sense in particular that it is in the foreign language Arabic and none who is not well versed in Arabic or one who is non-believer in Islam should decide such questions. It is Imam of as well as the persons well read in Arabic and Qu'ran who may say something with authority and their verdicts are to be binding, as such this Court though technically may have some jurisdiction really is not entitled to determine these questions as they relate to religion. They are matters of faith and every body is entitled to that faith completely under Article 26. Courts have to follow what has been declared as law or stated as a law under Koran or Hadith or Ijma by persons who are Imanwala or Court should adopt the process of recording the evidence of Ulema on the subject and the Treatise in Arabic. Mr. Mannan had stated that so far as he is personally concerned he not having been student of Arabic he is not in a position to state anything on the subject matter of law of marriage and divorce on that basis. Sri Zilani has submitted, as mentioned earlier, that directly and expressly there may not be any such thing as providing for divorce by recitation of Talaq at one sitting but that can be derived from Holy Qo'ran.

74. As regards submission or argument as to the jurisdiction of this Court to the effect that this Court is not competent to decide and determine what is the Shariyat Law or the law under the Holy Qo'ran or Hadith the question arises whether the highest Court of the State or the Apex Court of the country can be said to be incompetent to declare the law or to decide the question of existence or validity of certain prevailing custom or mode to be in accordance with Shariat Law as applicable in India in the context of the Basic tenets of a religion, the Act No. 26 of 1937 read with and in the light of the provision of Article 372 of the Constitution and other provision thereof and if yes then who will decide. Under the Constitution of India sovereign power of the state has been divided in three organs : executive, judicature consisting of High Courts and the Supreme Court and the Courts subordinate to the High Court and the Legislature which has got power to legislate and amend. The Courts and judiciary and in particular the Courts of Record in the Court, that is Supreme Court of India and the High Courts have been established with full power to determine and to decide the question coming before them. The powers of the High Courts are unlimited. The High Courts have unlimited jurisdiction including the jurisdiction to determine question as to their own powers subject only to any other provision to the contrary if any in the Constitution. When I so observed I find support for my view mentioned above from the following observations of the Supreme Court in the case of M. V. Elisabeth v. Harwan Invetsment & Trading reported in 1993 Supplement (Vol. 2) S.C.C, page 423. Hon'ble Thomen, J. in paragraph 66 at page 466 of the report has been pleased to observe as under :--

"High Courts in India are superior Courts of record. They have original and appellate jurisdiction. They have inherent and plenary powers. Unless expressly or implidely barred and subject to the appellate or discretionary jurisdiction of this Court, the High Courts have unlimited jurisdiction including the jurisdiction to determine their own powers (See Naresh Shridhar Mirajkar v. State of Maharashtra, (1966) 3 S.C.R. 744 : AIR 1967 SC 1) as stated in Halsbury's laws of England 4th Edition Volume 10 Para 713).

"Prima facie no matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so while nothing is within the jurisdiction of an inferior Court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular Court."

Hon'ble Thomman, J. in the above case of M. V. Elizabeth has further been pleased to observe and held in para 88 as under :--

"The judicial power of this country, which is an aspect of National Sovereignty is vested in the people and is articulated in the provisions of the Constitution and laws and is exercised by the Courts empowered to exercise it. It is absurd to confine that power to the provisions of imperial statutes of by gone days."

His Lordship quoted with approval the following words of Chief Justice Marshell:

"The jurisdiction of Courts is a branch of that which is possessed by the Nation as an independent sovereign power. The jurisdiction of Nation within its own territory is necessarily exclusive and absolute. It is susceptible to no limitation not imposed by itself."

75. Hon'ble R.M. Sahai, J. in that very case of M.V. Elizabeth (supra) at pages 485 and 486 has been pleased to observe as under :

"Without entering into any comparative study of the jurisdiction of High Court of England and the High Courts of our country the one basic difference that exists today is that the English Courts derive their creation, constitution and jurisdiction from Administration of India Act or Supreme Court Act but the High Courts in our country are established under the Constitution. Under Article 225 preserved the jurisdiction, including inherent jurisdiction which existed on the date the constitution came into force and Article 226 enlarged it by making it not only a custodian of Fundamental Rights of a citizen; but as a repository of power to reach its arms to do justice.....The construction of law has to be in consonance with the sovereignty of a State."

His Lordship Hon'ble R.M. Sahai, J. further observes :--

"The High Courts in Indian being Courts of unlimited jurisdiction, repository of all judicial powers under the Constitution except what is excluded are competent to issue directions for arrest of foreign ship in exercise of statutory jurisdiction or even otherwise to effectuate the exercise of jurisdiction."

In the case of Delhi Judicial Service Association v. State of Gujarat reported in (1991) 4 S.C.C. 406 (453) i.e. AIR 1991 S.C. 406) Hon'ble K.N. Singh, C.J, has been pleased to observe and lay down as under :--

"It is true, the Courts constituted under a law enacted by Parliament or the State Legislature, have limited jurisdiction and they cannot assume jurisdiction in a matter not expressly assigned to them, but that is not so in the case of a superior Court of record constituted by Constitution. Such a Court does not have limited jurisdiction, instead it has power to determine its own jurisdiction. No matter is beyond the jurisdiction of a superior Court of Record unless it is expressly shown to be so under the provision of the Constitution. In the absence of any expression provision in the Constitution, the Apex Court being a Court of Record has jurisdiction in every matter or if there be any doubt the Court has power to determine its jurisdiction. If such determination is made by the High Court the same would be subject to appeal to this Court but if the jurisdiction is determined by this Court it would be final."

76. In case of State of Tamilnadu v. State of Karnataka reported in (1991) 1 Supplement S.C.C. page 240 at page 245 it has been laid down by their Lordships as under :--

"It is the judiciary i.e. the Courts alone that have been function of determining authoritatively the meaning of a statutory encroachment and to lay down the frontiers of jurisdiction of anybody or Tribunal under the Statute."

77. Thus considered I am of the opinion that the High Courts in India being superior Courts of record with original, appellate and supervisory jurisdiction, subject to the appellate jurisdiction of the Supreme Court, have unlimited jurisdiction to interpret as well as to determine authoritatively the law, codified law or uncodified law as well as to declare the law and to apply the relevant law to the facts of the case. The High Courts are Court of unlimited jurisdiction and repository of all judicial power under the Constitution but subject to any other exception specifically provided by the Constitution. Being Courts of records the High Courts have jurisdiction to determine their own powers as well. Being expositor of law and the intent and will of the Parliament the Legislature and the framers of the Constitution under the provisions of the Constitution of India as well, the framers of the Constitution have assigned a new role to the Constitutional Courts i.e. Courts constituted under the Constitution, to ensure the rule of law.

78. Their Lordships of Hon'ble the Supreme Court in the case of Delhi Judicial Services Association v. State of Gujarat reported in (1991) 4 S.C.C. page 406 at 452 have observed as under :--

"Advent of freedom and promulgation of the Constitution have made drastic changes in the Administration of Justice instituting new judicial approach. The Constitution has assigned a new role to the Constitutional Courts to ensure rule of law in the country. These changes have brought new perceptions. In interpreting the Constitution we have regard to the social, economic and political changes, need of continuity and independence of judiciary.

The Court cannot be helpless spectator bound of precedents of colonial days which have lost relevance time has come to have fresh look at the old precedents and to lay down the law with the changed perceptions keeping in view the provisions of the Constitution."

79. Keeping in view what their Lordships of Hon'ble the Supreme Court have laid down as above and the oath which is administered to a Judge of High Court in letter and spirit it appears to me that laws statutory and codified or uncodified have got to be considered and determined and have got to be laid down, keeping in view the changed perceptions and the provisions of the Constitution. The oath that a Judge is required to take reads as under: --

"I having been appointed a Judge of the High Court at... .....do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established (that I will hold the sovereignty and integrity of India) that, I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws."

80. The sum and substance of the oath indicates that the first allegiance which a Judge or any other Constitutional authority owes, he owes allegiance and true faith to the Constitution of India and with the sovereignty and integrity of the country. It is the oath of the Judge to duly and faithfully with his best of ability, knowledge and judgment to perform his duties without fear or favour, affection or ill-will just like a 'Dheer Buddhi or Isthiti Pragya' and the oath is to uphold the Constitution and the laws running in confirmity with the provisions of the Constitution as well as the letter and spirit of the Constitution and not otherwise. The very blood and soul of our Constitutional scheme are to achieve the objectives of our Constitution as contained in the Preamble which is part of our Constitution as declared by this Court in Keshva Nand Bharti's case reported in (1973) 4 SCC 225. Therefore, the Judges of the Courts who have been entrusted with the task of fostering and advancing social policy and philosopy in terms of the Constitutional mandates cannot afford as well as are not expected to sit in ivory towers keeping olympion silence unnoticed and uncaring of the storms or upheavals that affect the people, the society, men or women of this country.

81. Thus having considered the question of as to the scope and jurisdiction of this Court, and keeping these basic principles in view I proceed to examine the question involved in the case. The basic question involved in the case is whether Rahmatullah had divorced his wife Smt. Khatun Nissa in accordance with the principles of law applicable to them and whether the findings recorded by the opposite parties are in any manner vitiated by error of law apparent on the face of record or of jurisdiction or that the plea is merely a fake pretence to play fraud with the socio economic legislation i.e., the Ceiling Law. So now the question is what the Muslim Law of Divorce and to what extent it is applicable in India ? There is no statutory enactment made by the Parliament as mentioned above regarding divorce except the Dissolution of Marriage Act, 1939, dealing with the Dissolution of Marriage by a woman under Muslim Law and not with any other aspect of the Muslim Marriage. Under Dissolution of Muslim Marriage Act a woman is entitled to obtain a decree for dissolution of her marriage on the grounds mentioned and narrated in Section 2 of the Act. Here with reference to the case the question relates to law of Divorce as it is otherwise than under the Act

of 1939. As mentioned above the Act of 1937, i.e., Act No. 26 of 1937 provides that notwithstanding any custom or usage to the contrary the questions amongst others regarding marriage and Dissolution of marriage include Talaq, the Ila, Zihar, Lian, Khula and Mubarrat as well as maintenance and dower shall be decided and the Rule of decision in case where parties are Muslim shall be Muslim Personal Law (Shariat). It is well settled principle of law of interpretation of the provisions of an Act that it has got to be interpreted as far as possible in consonance with the letter and spirit of the Constitution to save the vires of the same. Keeping this principle in view I am of the opinion that since after the Constitution the position of law is that in matters referred to in Sub-section (2) including the marriage and dissolution of marriage Talaq, Ha, Zihar, Khula, Mubarrat, maintenance and dower notwithstanding any custom or usage to the contrary, when a question relating to those subject matters arise for decision the Muslim Personal Law (Shariat), subject to the provisions of the Constitution and to the extent of consistency with the Constitution, shall be applicable, and in case of any conflict with the Constitution of India the provisions of Constitution of India or its basic and fundamental features or structure, the provisions of personal law shall have to give the way and shall not be operative in the same way as law made by Parliament prevailing earlier and operative on the date of promulgation and enforcement of the Constitution has been declared not to be operative. A perusal of Article 372 of the Constitution reveals that all laws in force in the territory of India on the date of the commencement of the Constitution have been declared to continue in force subject to other provisions of the Constitution. Article 372(1) reads as under :

"372. Continuance of force of existing law and their adaptation;--(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein unless altered or repealed or amended by a competent legislature or other competent authority."

82. By reason of the expression used in Clause (i) I.e., "subject to other provisions of the Constitution" if there is any irreconceivable inconsistency or conflict between pre-Constitutional law and the provisions of the Constitution the latter i.e. the provisions of the Constitution shall prevail. Keeping this in view it appears that as far as possible the provision of pre-existing law has to be read and understood as regards the operation thereof that the statutory law or customary law or uncodified law made operative under certain statutory provision of law is operative to the extent and has been made operative and to be continuing in operation to the extent it is not inconsistent with the Constitution, and, as such Shariat Law by virtue of Section 2 of Muslim Personal Law (Shariat Application) Act of 1937 read with Article 372 of the Constitution of India it is to the extent Shariat Law is not inconsistent with the provisions of Constitution of India and its basic structure, the Shariat Law will be the rule governing the decision of dispute amongst Muslims relating to matters referred to in Section 2 thereof including Marriage & Divorce etc.

83. In the Mulla's Principles of Mohammedan Law the subject of law of Divorce has been dealt with in Chapter 16. Vide Section 307 it has been provided that the contract of marriage under Mohammedan Law may be dissolved either by the husband at his will without intervention of a Court or by the mutual consent of husband and wife without intervention of Court or by judicial

decree passed in a suit by wife. Mulla writes, "When the divorce proceeds from her husband it is called Talaq when it is affected by mutual consent it is called Khula or Mubarat according to the terms of the contract between the parties.

84. In paragraph 308 of his book learned author Mulla observes, "Any Mohammedan of sound mind who has attained puberty may divorce his wife when he desires without assigning any cause." Here we are concerned with the matter of Talaq i.e., divorce of the wife by her husband. A Talaq, according to learned author Mulla, vide para 310 may be affected orally (by spoken words or by written document called Talaq). A Talaq may be affected, according to learned author, vide paragraph 311 in the following forms;

(a) Talaq Ahsan,

(b) Talaq Hasan,

(c) Talaq-ul-Biddat or

(d) Talaq-i-Bidai.

85. Mulla defines Talaq Ahsan as under;

Talaq Ahsan This consists of a single pronouncement of divorce made during Tuhr (period between menstruation) followed by abstinence from sexual intercourse for the period of Iddat.

Talaq Hasan Mulla defines that "This consists of three pronouncements made during successive Tuhrs, no intercourse, no intercourse taking place during any of three Tuhrs. It is observed further in that book, the first pronouncement should be made during a Tuhr and the second during the next Tuhr and the third during the succeeding Tuhr.

Third mode prevalent is known as Talaq-ul-Biddat or Talaq-i-Badai. According to learned Author Mulla "This consists of--

(i) Three pronouncements made during a single Tuhr I divorce thee thrice or in three separate sentence e.g." I divorce thee, I divorce thee, I divorce thee" or

(ii) A single pronouncement made during a Tuhr indicating and intention irrevocably to dissolve the marriage i.e., I divorce thee irrevocably. In Paragraph 312 Mulla writes as under :

When Talak becomes irrevocable

(i) A Talaq in the Ahsan mode (Section 311(1) becomes irrevocable and complete on the expiration of the period of Iddat (Section 257).

(ii) Talaq in the Hasan mode (Section 311(2) becomes irrevocable and complete on the third pronouncement irrespective of the Iddat.

(iii) A Talaq in the Badai mode Section 311(3) becomes irrevocable immediately it is pronounced, irrespective of the Iddat (f). As the Talaq becomes irrevocable at once, it is called Talak-i-bain, that is irrevocable Talak.

Until a Talak becomes irrevocable the husband has the option to revoke it which may be done either expressly, or impliedly as by resuming sexual intercourse.

86. At page 330 of his Principles of Mohammedan Law edited by Hon'ble Justice Hidayatullah it is provided as under;

Talaq-us-Sunnat and Talak-ul-Biddat The Hanifs recognised two kinds of Talaq, namely, (i) Talaq-us-Sunnat, that is, Talak according to the rules laid down in the Sunnat (traditions) of the Prophet; and (ii) Talaq-ul-Biddat, that is, new of irregular Talak. Talaq-ul-Biddat was introduced by the Omeyyade Monarchs in the second century of the Mohammedan era. Talaq-us-Sunnat is of two kinds, namely, (1) Ahsan, that is most proper; and (2) Hasan that is proper. The Talaq-ul-Biddat, or heretical divorce is good in law, though bad in theology, and it is the most common and prevalent mode of divorce in this country (b) including Oudh (c) in the case of Talaq Ahsan and Talak Hasan, the husband has an opportunity of reconsidering his decision, for the Talaq in both these cases does not become absolute until a certain period has elapsed (Section 312) and the husband has the option to revoke it before then. But the Talak-ul-Biddat becomes irrevocable immediately it is pronounced.

87. Sri Mulla crystalises further under para 313 the effect that "in the absence of the words "showing a different intention" a divorce in writing operates as irrevocable divorce (Talaq-i-bain) and takes effect immediately on its execution."

88. In addition to above forms of divorce and the divorce under the judicial decree of the Court on the suit of the wife under Act No. 8 of 1939 on the ground mentioned therein only there are certain other forms of divorce known as Ila, Zihr, Khula and Mubarat.

89. "Divorce by Ila, Mulla observes, is a species of constructive divorce which is effected by the abstinence from sexual intercourse for a period of not less than four months pursuant to a vow. According to Shafi law the fulfilment of such a vow does not per se operate as divorce instead it gives the right to the wife to demand a judicial divorce."

90. "Zihr, according to Mulla, is a form of inchoate divorce. If husband compares his wife to his mother or other female within the prohibited degrees the wife has a right to refuse herself to him until he has performed penance. In default of expiration to penance the wife has a right to apply for judicial divorce." Zihr has got statutory recognition under Section 2 of Shariat Act subject to the provisions of the Constitution.

91. Khula and Mubarat are forms of divorce or dissolution of marriage by agreement between the husband and the wife. In either of these forms of Khula or Mubarat the dissolution of marriage is not the result of an arbitrary act of husband instead the marriage is dissolved by agreement entered into by husband and wife for the purpose. Mulla in his Principles of Mohammedan Law observes "A divorce by Khula is a divorce with the consent and at the instance of wife, in which she gives or agrees to give a consideration to husband for her release from the marriage ties. In such a case the terms of bargain are matters of arrangement between husband and wife and wife may as the consideration release her dyn-Mehr (dower and other rights) or make any other agreement for the benefit of husband." Relying on the decision of Monshee Buzul-ul-Rahim v. Lutee Futoon-Nissa (1861) 8 M.I.A. page 379 the learned Author observes "Failure on the part of the wife to pay the consideration for divorce does not invalidate divorce, though husband may sue the wife for it" A Khula divorce is effected by an offer from the wife to compensate the husband if he releases her from marital right and its acceptance by husband and once the offer is accepted it operates as single irrevocable divorce and its operation is not postponed until execution of Khula Nama. A Mubarat divorce, according to Mulla "like Khula is a dissolution of marriage by agreement." In such form of divorce the aversion to the continuance of marriage it mutual and both the sides desire separation. The transaction is called Mubarat. In such form of divorce of marriage the offer may proceed either from wife or husband. Mulla observes" Once offer is accepted the dissolution is complete as Talak-i-bain as in Khula. Wife in these both forms of divorce in Khula and Mubarat is bound to observe Iddat. The abstinence from marrying another husband during the period of Iddat is imposed to ascertain whether she is pregnant from the husband who has divorced or from whom she has been divorced, in order to avoid confusion or parentage. Mulla further observes in para 320" Unless it is otherwise provided by contract a divorce affected by Khula or Mubarat, operates as release by wife of her dower, does not affect the liability of the husband to maintain her during her Iddat or to maintain his children by her". Mulla has made a reference to Baillie and to Hedaya. The divorce by Khula or Mubarat being dissolution of marriage by agreement of the parties, the moment the concept of agreement appears that these two are the forms of agreement 'dissolution of marriage by agreement definitely they become subject to judicial review and to scrutiny by the Court on the basis of the tests set by or under law of contract, to say, if a legally valid agreement has been entered into by the persons of ages of majority and sound mind, free will and understanding and if the contract or agreement has been entered into without co-ercion, misrepresentation, fraud or the like. Zihr also indicates that if husband compares his wife to his mother or to any other female within prohibited degrees the wife gets a right to refuse herself to him, and, to refuse cohabitation, as well as to seek judicial divorce in default of expiration of penance. This form of divorce per se coupled with a reason i.e., marriage with mother is never conceived. Marriage with one related by milk of the mother is prohibited and not conceivable and so this form of dissolution of marriage or divorce, no doubt, gives a right to refuse company and cohabitation for justified reasons herself to her husband until the husband performs a penance for such a thought or notion of equating the wife to his mother or other female relative of prohibited degree. This form of divorce provides for an opportunity of re-thinking and retracing of the step by the divorcing husband to perform penance till the stage of finality of the passing of the decree of judicial divorce on an action being taken, in Court of law by the wife to claim right of divorce. Ila form also provides for a period of four months abstinence from sexual intercourse in pursuance to a void and does not per se affect a divorce instead provides for an opportunity and accrual of a right to the wife to demand judicial divorce, i.e.,

divorce under the decree of the Court. This form Prima facie also appears to prove ample opportunity till before the grant of decree for divorce to husband and wife to reconcile and retrace their steps to give up the vow and to lead a fresh and happy life.

92. Thus considered the dissolution of marriage in these form of Ila, Zihar, Khula and Mubarat per se shows that under these forms, the divorce by itself does not become effective and husband and wife have been provided ample opportunity of rethinking as well as for retracing the step taken towards divorce before the divorce becomes effective under Ila or Zihr till before the passing of decree for divorce. In the same way the Khula and Mubarat i.e. dissolution of marriage also provides for ample opportunity to husband and wife to consider and re-consider the disputes amongst them, to find out ways and means to obviate and remove the causes leading to aversion and desire of separation and to come to an agreement or Settlement to lead a fresh and happy life as husband and wife and in particular keeping in view the disastrous consequences of dissolution of marriage or divorce before the same takes place in irrevocable manner. It is well known that the moment the divorce becomes irrevocable there can be no tracing back of the steps either by husband or by the wife except undergoing of the wife to the harshness of what is known as Halala or the like as refered to above on one hand and other of the poor woman being placed to another agony of losing the right of maintenance by husband.

93. Conceive the effects of the divorce, Mulla deals with the effects of the divorce under paragraph 336 of his Book. Under paragraph 336 sub-paras (4 & 5) may be quoted here.

Sub-para (4) reads as under :--

"Cohabitation becomes unlawful:--

Sexual intercourse between the divorced couple is unlawful after the divorce has become irrevocable. The offspring of such an intercourse is illegitimate 111 (a) to Sub-section 5 and cannot be legitimated by acknowledgement (e) (Section 342). But the parties may remarry as stated in Sub-section (5) below :

(v) (i) Where the husband has repudiated his wife by three pronouncements (Section 311 (2) and Section 311 (3)(i) it is not lawful for him to marry her again until she has married another man, and the latter has divorced her or died after actual consummation of marriage by cohalitation or sexual intercourse. The presumption of marriage arising from an acknowledgement of legitimacy (Section 267) does not apply to a remarriage between divorced persons unless it is established that the bar to remarriage created by the divorce was removed by proving in intermediate marriage and a subsequent divorce after actual consummation (f) (ill) (a). Even if a remarriage between the divorced persons is proved the marriage is not valid unless it is established that the bar to remarriage was removed the mere fact that the parties have remarried does not raise any presumption as to the fulfilment of above conditions (g) (ill)(b). A marriage without fulfilment of the above condition is irregular, not void (Baillie 151).

(ii) In all other cases the divorced parties may remarry as if there had been no divorce either during the Iddat or after its completion."

94. In connection with the effects of an irrevocable divorce it would be just and proper and relevant to refer to the decision of their Lordships of Privy Council in the case of Rashid Ahmad v. Anlsa Khatun reported in AIR 1932 Privy Council page 25. In this decision their Lordships of the Privy Council after referring to R.K.Wilson's Digest of Anglo-Mohammedan Law in connection with divorce and Talaq observed as under :--

"There is nothing in the case to suggest that the parties are not Sunni Mohammedans governed by the ordinary Hanifi Law and in the opinion of their Lordships, the law of divorce applicable in such a case is correctly stated by Sir R.K. Wilson, in his Digest of Anglo-Mohamedan Law (5th Edition) at page 136, as follows;

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

In the present case the words of divorce addressed to the wife, though she was not present, were repeated three times by Ghiyas Uddin as follows :--

"I divorce Anisa Khatun for ever and render her Haram for me."

which clearly showed an intention to dissolve the marriage. There can be no doubt that the method adopted was the fourth above described and this is confirmed by the deed of divorce, which states that the three divorces, were given" in the abominable form" i.e. Bidaat. The learned Judges of the High Court have erred in treating the divorce as in the Ahsan form, instead of the Bidaat form.

The Talak was addressed to the wife by name, and the case is not affected by the decision of the High Court of Calcutta in Farzund Hossein v. Janu Bibee. (1) where the words of divorce were alone pronounced. In the bidaat form the divorce at once becomes irrevocable, irrespective of the Iddat (Baillie's Digest. Edn. 2 page 206). It is not necessary that the wife should be present when the talak is pronounced Ma Me v. Kallander Ammal, (2) at page 65 (of 54 1. A.) Ful Chnd v. Nawab Ali Chowdhry, (3) Asha Bibi v. Kadir Ibrahim Rowther, (4) at page 23 and though her right to alimony may continue until she is informed of the divorce, Their Lordships are of opinion that the pronouncement of the triple Talak by Ghiyas Uddin constituted an immediately effective divorce,

and, while they are satisfied that the High Court were not justified in such a conclusion on the evidence in the present case, they are of opinion that the validity and effectiveness of the divorce would not be affected by Ghiyas Uddin's mental intention that it should not be a genuine divorce, as such a view is contrary to all authority. A talak actually pronounced under compulsion or in jest is valid and effective; Baillie's Digest Edn. 2 page. 298 ; Ameer Ali's Mohammedan Law Edn. 3 Vol. 2 p. 518 : Hamilton's Hedaya, Vol. 1 p. 211.

The respondents sought to found on the admitted fact that for about fifteen years after the divorce Ghiyas Uddin treated Anis Fatima as his wife and his children as legitimate, and on certain admissions of their status said to have been made by appellant and respondent proforma 10, who are brothers of Ghiyas Uddin; but once the divorce is held proved such facts could not undo its effect or confer such a status on the respondents.

While admitting that upon divorce by the triple talak Ghiyas Uddin could not lawfully remarry Anis Fatima until she had married another and the latter had divorced her or died, the respondents maintained that the acknowledgement of their legitimacy by Ghiyas Uddin. subsequent to the divorce raised the presumption that Anis Fatima had in the interval married another who had died or divorced her, and that it was for the appellants to displace that presumption. In support of this contention, they founded on certain dicta in the judgment of this Board in 'Habibur Rahman Chowdhury v. Altaf Ali Chowdhury, (5). Their Lordships find it difficult to regard this contention as a serious one, for these dicta directly negative it. The passage relied on, which related to indirect proof of a Mohammedan marriage by acknowledgement of a son as legitimate son, is as follows (page 120 of 48 LA.) :--

"It must not be impossible upon the face of it. i.e. it must not be made when the ages are such that it is impossible in the nature for acknowledgor to be the father of the acknowledgee, or when the mother spoken to in an acknowledgement, being the wife of another, or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgement may be repudiated by the acknowledgee. But if none of these objections occur, then the acknowledgement has more than evidential value. It raises a presumption of marriage a presumption which may be taken advantage of either by a wife claimant or a claimant. Being however a presumption of fact, and not juris et de jure, it is. like every other presumption of fact, capable of being set aside by contrary proof".

The legal bar to remarriage created by the divorce in the present case would equally prevent the raising of the presumption, If the respondents had proved the removal of that bar by proving the marriage of Anisa Fatima to another after the divorce and the death of the latter or his divorce of her prior to the birth of the children and their acknowledgement as legitimate, the respondents might then have had the benefit of the presumption but not otherwise."

95. From the above quoted extract from the decision of their Lordships of Privy Council the following principles of law do emerge:

(a) That the divorce or Talaq may be irrevocable (bain) or revocable i.e. rajai,

(b) That Talaq bain i.e. irrevocable Talaq operates as an immediate and complete dissolution of marriage bond bat differs as to one of its ulterior effects according to the form in which it is pronounced. It may be effected by words addressed to the wife clearly indicating intention to dissolve the marriage either as:--

(i) once followed by abstinence from sexual intercourse for the period called Iddat or,

(ii) by pronouncement of Talaq three times during the successive intervals of purity and no intercourse taking place during any of the three intervals;

(iii) pronouncement of Talaq three times at short intervals or even in immediate succession during one single Tuhr or sitting or time or.

(iv) Once by showing clear intention to divorce in irrevocable form with immediate effect.

Their Lordships of Privy Council has observed that these forms have been correctly stated by Wilson and it has correctly been stated therein that "first named above method is called Ahsan (best), the second Hasan (good) and third and fourth are said to be Bidaat (sinful) but are nevertheless regarded by Sunni lawyer as legally valid.

In Bidaat form, according to the Privy Council, divorce at once used to become irrevocable irrespective of Iddat.

(v) Even a Talaq actually pronounced under compulsion or in jest is valid and effective.

(vi) When either admittedly or if the facts prove that divorce has taken place in irrevocable form even if it is in the form of Bidaat and even if it has been pronounced under compulsion or in jest as according to the Privy Council decision in case of Rashid Ahmad (supra) howsoever affectionate and lovable relation among the two i.e. husband and wife might have been in so whatsoever circumstance compulsion or jest or anger the divorce might have been pronounced thrice even no fault of the wife bat price pronounced in form 'C' or 'P' i.e. in Bidaat form the husband and the wife could not and cannot lawfully re-marry until the wife undergoes Halala i.e. until she is married to another person and the latter consumes the marriage and after consummation of marriage latter husband divorced her, whatsoever anguish or harshness may be prevailing and operating in the heart of the poor woman.

(vii) Even if and in case without performance of the Halala as mentioned above the husband and wife divorcing each other after peace and calmful thinking try to retrace their step and later start a new life of their own as husband and wife and as a result thereof the children are born or get produced, the clouds of ill-fate shadow their lives because according to the Privy Council legal bar created by divorce in irrevocable form of Talak-uJ-Bidaat negatives the legitimacy and status of those children unless the children prove that their mother had undergone Halala after divorce from her husband i.e. father of these children i.e. in other words the children will have to prove that after effective divorce of their mother by their father prior to their birth the mother was married to

another and that she was consummated by the latter and then after the divorce or death of the latter or divorce by the latter husband she re-married her former (first) husband i.e. the father of those children. Unless that is proved, the presumption under law of legitimacy will not be available to the children for no fault of their own.

96. How terrifying, terrible, how harsh to the poor woman and her children is the affect of a divorce i.e., Talaq. The pathos of such a woman Talaqed, in heat of temper or due to whims and anger and due to male authoritarianism by husband as expressed in the words of the Begum Anjum, a postess is as under :

Talaq da rahe ho garoor au kahar ka saath. mem shabab bhi lauta do mere mahr ka saath.

One has to realise the pain and pathos of the hearts of a living divorced women ordinarily devoted to husband in India and the children even if born to such a woman from her original husband by the placing of a sign of interrogation to the legitimacy in future unless custom like Halala is proved. If such a custom be conceived to have been prevalent in India in any community, leaving for a moment the Muslim community, would that custom be said and could that he called to have been retained and maintained under the provisions of Section 29 of the Hindu Marriage Act or any provision like that of Section 29 of Hindu Marriage Act and if that custom could have been made prevalent could that he said to be in consonance with the basic themes of Constitutional Law applicable in India? Whether the law or custom permitting unilaterial and exclusive right to divorce without rhyme or reason according to whims and caprice in arbitrary manner having the effect of placing, and casting havoc and disastrous effects to the life of a woman and the children born in the circumstances stated above by simple pronouncement of divorce in the form such as that of Talaq Bidaat either once declaring divorce irrevocably or thrice at one sitting arbitrarily by the husband or the man, be said and be deemed to be in consonance with the Supreme law of the land i.e., Constitution of India, the preamble of which, being basic structure of the Constitution and declaratory of the good or ensuring to all its citizens justice, social, political and economic equality of status and opportunity and the object of promoting among them the fraternity assuring the dignity of individual and the unity and integrity of individual and the unity and integrity of nation. Can such a law be said be taken to be in consonance with the duties enshrined in Part IV-A of the Constitution under Article 51A as fundamental duties of every citizen which vide clause (a) provides that it shall be duty of every citizen of India to renounce practices derogatory of the dignity of woman and which further imposes a duty on every citizen of India to develop vide Clause (h) of Article 51A the scientific temper humanism and spirit of inquiry and reform. Does it not run contrary to the basic policies of the Constitution and the Directive Principles of State Policy which have got an aim of achieving the goal enshrinsd in the Preamble and in particular related to the concept of justice, concept of equality of status and of opportunity as well as the dignity of individual.

97. Conferring of right to be exercised in an arbitrary manner to divorce even without providing an opportunity to the person going to be affected adversely and particularly the poor and weaker section of citizen, /"., a woman and particularly helpless woman does not result and does it not perpetuate something that is anti to the doctrine of equality before law and equal protection of law ? Does it not run counter and anti to the prohibition enshrined and provided by Article 15 of the

Constitution against discrimination on the ground of sex or in the name of religion or religious customs? These are the questions that crop up for determining whether this law relating to divorce under Muslim Law or any customary Hindu Law is prevalent? Can it be said that either Section 29 of Hindu Marriage Act or Section 2 of the Shariyat Application Act i.e., Act No. 26 of 1937 yet allow such a law to operate in this country in view of the Provision of Articles 13, 15, 21 and Article 372 of the Constitution of India ?

98. It had been contended that Shariat Law of marriage and divorce is protected under Article 25 of the Constitution of India. On behalf of the petitioner's Counsel it has been stated and argued that Article 25 of the Constitution of India confers an absolute right and complete protection to every citizen as regards his freedom of conscience and free profession, practice and propagation of religion. It has been contended that as such any custom or law or the provision of Shariat Law among Muslims relating to the marriage and divorce or under any other Law may be said to be completely protected under the iron shield or curtain of Article 25 of the Constitution of India. It has been contended by petitioner's Counsel in both the petitions, namely, Sri Mohammad Hanif Advocate as well as Sri Q.M. Haq Advocate and they submitted that in this view of the matter the Shariat Law as declared regarding divorce by the Privy Council in the above mentioned case including the one relating to divorce or Talaq in the form known as Talak-ul-Bidaat or Talak-i-Bidai stands protected and is to be taken to be operative under Article 372 of the Constitution of India read with Section 2 of the Shariat Act.

99. As this contention has been advanced in the context of Section 3(7) of the Act it is necessary to examine it in that context of determining the law of divorce and the expression "wife" used in the Section particularly in the context of my earlier finding that the expression "wife" does not include a divorced woman as has been held by this Court in a decision referred to me during the course of hearing by the learned Counsels namely, State of U.P. through Collector Basti v. III Addl. District Judge, reported in 1985 R.D. page 17. Hon. B.N. Sapru, J. in that case had laid down the law as under;

"Once there was a divorce between husband and wife she ceased to be the wife of Gokul Prasad and consequently Panni Devi, the divorced wife could not be treated as the member of the family of Gokul Prasad. Section 3(7) of the Act does not mean that the land of a divorced wife is to be clubbed with the land in tenure of her ex-husband."

100. In this view of the matter the question has got to be considered and I proceed with Article 25 of the Constitution which reads as under;

"25. Freedom of conscience and free profession, practice and propagation of religion--(i) Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law;

(a) regulating or restricting any economic financial, political or other secular activity which may be associated with religious practice;

(b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and Sections of Hindus.

Explanation I--The wearing and carrying of kripans shall be deemed to be included in the profession of the Sikh religion.

Explanation II--In Sub-clause (b) of Clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Budhist religion, and the reference to Hindu religious institutions shall be construed accordingly."

101. Article 25 referred to above no doubt confers fundamental right of faith and religion. It confers a fundamental right on the citizens of India of freedom of conscience and the right to freely profess and propagate religion. In the case of Tilkayat Sri Govind Lal Ji v. State of Rajastnan reported in (1964) 1 SCR page 561 at page 619 Hon'ble Mr. Justice Gajendragatkar while delivering the Five Judges Constitution Bench decision of the Supreme Court observed as under;

"Articles 25 and 26 constitute Fundamental Rights to freedom of religion guaranteed to the citizens of this country. Article 25(1); protects the citizen's fundamental right to freedom of conscience, and his right freely to profess, practice and propagate religion. The protection given to this right is, however, not absolute. It is subject to public order, morality and health as Article 22(1) itself denotes.

It is also subject to the laws existing or future which are specified in Article 25(2)".

102. The use of expression "subject to public order, morality, health and other provisions of this part" in Article 25(1) per se shows that freedom of conscience and free profession, practice and propagation of religion is not absolute and it is always subject to and controlled by the provisions relating to public order or morality and health and it is further subject to other provisions of part III of the Constitution. A reading of this Article further shows that expression "religion" here relates to "matters of faith with individuals and communities" and as "observed by Mukherjea, J. in the case of Commissioner Hindu Religious Endowments Madras 1964 SCR 1005." It is not necessarily theistic. It undoubtedly has its basis in the system of beliefs or doctrines which are regarded by those who profess that reliaion as conducive to their spritual welt being, but it is not correct to say that religion is nothing else but doctrine or beliefs. A religion may not only lay down code of ethical rules for its followers to accept, it might prescribed rituals and observances, ceremonies and modes of worship which are regarded as integral part of religion and these forms and observances might extend even to the matters of food and dress."

103. In Black's Law Dictionary expression "religion" has been defined as "man's relation to divinity, to reverence, worship, obedience and submission to mandates and precepts of super natural and superior beings" in its broadest sense includes all forms of belief in the existence of the superior

beings exercising power over human beings by volition, imposing rules of conduct with future rewards and punishments. Bonds uniting man to God and a virtue whose purpose is to render God worship due to him as a source of all beings and principle of all Government of things.

104. The expression "religious freedom" Black's Law Dictionary defines as "within Constitution embraces not only right to worship according to dictates of one's conscience but also the right to do and forbear to do any act for conscience sake, the doing and forbearing of which is not inimical to the peace, good order and morals of society."

105 The expression "religion" used in Article 25(1) is primarily concerned with the individual's relation with God, His mode of worship. It in and has its basis in the system of belief and doctrine as are regarded to be conducive to the individual's spiritual well being and his relation to God and here it includes the code of ethical rules, conduct rituals, their observations the ceremonies and the modes of worship as integral part of religion So the right to profess, practice and propagate religion in the above sense of the term 'religion' has been conferred to all persons but subject to public order, morality and health as well as subject to other provisions of Part III of the Constitution and as ruled in case of Steinlans v. State of U.P., (1977 (1) SCC 677 i.e., 1977 SC 908) it does not grant any right to convert one person from his religion to that of another.

106. A perusal of Clause (2) of Article 25 further shows that as retards economical, financial, political or other secular activities (which even if are or may be associated with the religious practice) in respect thereof nothing in Clause (1) of Article 25 is to effect the operation of any existing law nor shall anything in Clause (1) of Article 25 shall prevent the State from making any law regulating or restricting any activity economic, financial, political or otherwise secular activities, even if such an activity may be associated with the religious practice.

107. In the case of Tilkyat Govind Lal Ji Mahraj (supra) their Lordships of Supreme Court have been pleased to lay down. "In this connec-it cannot be ignored that what is protected under Article 25(1) and 26(b) respectively are the religious prectices and the right to manage the affairs in the matter of religion. If the practice, in question, is primarily secular or the affair which is controlled by the Statute is essentially and absolutely secular temporal in character, it cannot be urged that Article 25(1) or 26(b) has been contravened. The protection is given to the practice of religion and to denomination's right to manage its own affairs in the matters of religion.....if the practice is a religious practice or affairs of matters of religion then, of course, the rights guaranteed under Articles 25(1) and 26(b) cannot be contravened. "At page 623 their Lordships further observed". If secular matter is claimed to be a matter of religion or if an obviously secular temporal practice is alleged to be religious practice the Court would not be justified in rejecting the claim because the protection guaranteed by Articles 25(1) and 26(b) cannot be extended to secular practice and affairs in regard to denominational matters which are not matters of religion". Thereafter their Lordships further observed and put a note of caution and desired that "this aspect of the matter must be borne in mind in dealing with true scope and effect of Article 25(1) and Article 26(b)".

108. Keeping above observation of their Lordships of Hon'ble the Supreme Court the following principles of law can be derived and crystalised as emerging under Article 25 of the Constitution :

(a) That the protection and the right guaranteed under Article 25(1) is regarding freedom of conscience and free profession and practice and propagation of religion, the said right guarantees protection to matters of faith and religion and the practice relating to religion and to the management of the affairs relating to religion in the sense as explained above and that does not confer or grant any right to convert a citizen from his religion to another.

(b) That this right of freedom of religion guaranteed under Arts.

25 and 26 is not absolute and unbridled.

(c) It is subject to public order, morality, health and other provisions of part III.

(d) The secular activities, economic, financial, political or other i.e., otherwise secular may be relating to social life and social welfare, the power of the State to make the law in their regard is not at all affected by anything in Clause (1) of Article 25.

109. In this context the question that crops up is whether matters relating to marriage, divorce or succession either under personal law or otherwise can be said to be relating to religion or religious practice or be regarded as purely secular or temporal matters.

110. A perusal of the scheme of the Constitution in particular the provisions of the Constitution laying down the scheme of legislation and legislative powers of Parliament and State Legislature vide Anchieds 245, 246, 248 and 254 read alongwith three lists, i.e., Union List (list 1) State List (List 2) Concurrent List (List 3) and in particular entry 5 of concurrent list clearly show that the framers of the Constitution did not consider the matters relating to marriage and divorce to be matters of religion instead these matters were considered to be ordinarily secular matters. Entry 5 of the concurrent list reads as under :--

"Marriage and divorce; infants and minors, adoption, Wills, intestacy and succession, joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their Personal Law".

111. As per provisions of Article 246 of the Constitution of India Parliament has exclusive power to enact the laws in respect of any matter enumerated in the Union List and the State Legislature has exclusive power to make laws for State or any part thereof in respect of matters enumerated in List II of VIIth Schedule while with regard to the subject matters of the Concurrent List the Parliament and subject to Clause (1) of Article 246 the State Legislatures have been conferred power to enact laws and to legislate. In regard to any matter enumerated in the list III of Schedule VII i.e., Concurrent List and subject to provisions of Article 254 which makes the provision for meeting out the situation in case of inconsistency between the laws made by the Parliament and by the State Legislature both on the subject matter of Concurrent List both in respect of which Parliament and State Legislature can legislate. Anyway, this scheme per ae shows that the framers of the Constitution excluded matters of marriage and divorce, adoption, Will intestacy joint family and partition, divorce and infants from the scope of expression "religion" and the expression "matters or

practice of religion" instead treated these matters to be secular i.e., temporal in character and nature, though in the matter of marriage some specific rituals may be involved, when the Constituent Assembly and the framers of the Constitution considered and declared the matters of marriage and divorce to be secular or temporal matters or matters of temporal or secular character and in regard thereto the laws can be legislated by the Parliament as well as by the State Legislature as the matters of marriage and divorce are included in the Concurrent List, it is not open to hold to the contrary. This leads me to hold that marriage whether Hindu Marriage or Muslim Marriage or divorce whether under Hindu Law or Muslim Law and the said subjects being governed by the Shariat Law Application Act. 1937 and the Hindu Marriage Act, 1956 are matters of secular or temporal or social character though certain religious practices or rituals might have been attached thereto. The Parliament or State Legislature in regaid to these subjects cannot enact the law contrary to the basic principles of the Constitution enshrined in Parts III, IV and IV-A of the Constitution nor can such law be operative which may be in conflict with the provisions of the Constitution. The law adapted under any Statutory Act for application in this country under any Central Act or State Act and deemed to be the law operating in the country or the State shall be subject to the basic conditions and restrictions that no law is to be deemed or to be considered to be operative or be deemed to have been continued in operation by virtue of Article 372 which runs counter to or and in conflict with the provisions of the Constitution particularly contained in Chapters parts III, IV or IV-A of the Constitution of India including Article 51A.

112. When the Constitution of India ordains vide Article 14 that "State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India and that the State shall not discriminate against any citizen only on the ground of religion, race, caste, sex or place of birth or any of them can the law codified or uncodified adopted and made applicable either under Act No. 26 of 1937 or under any custom if prevalent be deemed to have been adopted and allowed to have a free play under Section 29 of Hindu Marriage Act which confers an unbridled right to the male, that is the husband to divorce his wife without any rhyme or reason at sweet will and whim as and when he so desires or wishes to divorce and be considered to be valid and operative when Article 13(1) of the Constitution declares that all law in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void ? The answer to the question is bound to be in negative.

113. In this view of the matter the laws relating to marriage and divorce cannot be said or be held to be integral part of Hindu or Muslim religion. Similar view has been taken in the case of Ram Prasad v. State of U.P., AIR 1957 Allahabad 411 and Badruddin v. Alisha reported in 1957 ALJ page 300. In this view of the matter the laws relating to marriage and divorce cannot be considered and be taken to be covered or protected by or under the umbrella of freedom of conscience of free profession/practice or propagation of religion i.e., Article 25 will not prevent the State Legislature from enacting any law or modifying the State law in regard to the subject matter of marriage and divorce regulating or restricting the secular activities or for providing something for the social welfare and reform, even otherwise as well any existing law relating to marriage, divorce for a moment may be taken to be covered by the freedom of religion if the same makes the provision derogatory to public order, morality or health or in conflict with the other provisions of Chapter III,

the provisions of existing law in view of Article 13 as well as Article 372(1) of the Constitution cannot be deemed to be continuing in operation since the enforcement of the Constitution of India. The provisions of divorce under customary Hindu Law or Muslim Law which confer and to the extent the same confers the absolute, arbitrary right to divorce to the husband even without any rhyme or reason according to the whims of the husband as and when he so likes by reciting Talaq or by pronouncing Talaq once or thrice and specially without giving any opportunity to the female sex to make effort for reconciliation or the like simply on the ground that husband being the male superior and have the tendency of creating discrimination on the ground of sex as well as such a law runs counter to the basic tenets of Article 14 of the Constitution of India because divorce is the productive of the disastrous results so far as the person belonging to weaker sex i.e., female is concerned particularly the divorcees divorced in the form of such Talaq. It also runs counter to the doctrine and principles enshrined in Article 23. Such a custom or law where husband gets an opportunity to divorce his wife without rhyme and reason orally, without any restriction on him and without any justified sufficient cause for divorce and without the same being made judicially scrutinised or scrutinizable or without being subjected to any judicial scrutiny or judicial review leading to the poor woman after the expiry of three months period and her children after the expiry of the two years period to a stage of seeking shelter hither and thither from one relative to another because of the disaster brought on the lady by the pronouncement of Talaq the application of the law under Section 2 of the Shariat Act leads to perpetuate something which is in conflict with the mandate of the Constitution to every citizen in the form of Fundamental Duties i.e., enshrined in Article 51A contained in part IV-A. Article 51 ordains that it shall be the duty of every citizen of India to renounce practice derogatory of the dignity of the woman vide Clause (e) thereof. Compelling a woman divorced by the husband by reciting talaq under customary law or under the Shariat law as applicable in India regarding divorce and maintenance as declared by their Lordships of the Privy Council in the case of Rashid Ahmad v. Ania Khatun (supra) by placing the woman, for the acts of her husband of pronouncing Talaq arbitrarily whimsically or pronouncing the same under jest or compulsion to a situation to undergo torture and harassment of Halala even against her wish and desire and if children of her divorcing husband borne subsequent to the divorce claim the property of their father, as legitimate sons they are put to the arduous situation, first to prove that prior to their birth there had been a Halala of their mother i.e., their mother had undergone the relationship to a marriage with another person and got herself consummated by the latter and then the latter divorced her and then she remarried her first husband i.e., the former and from this marriage with the former husband they were born. One can conceive how horrifying would be situation before wife or the mother i.e., the woman to have gone under Halala even if she had been in love and affection with her former husband and how far horrifying it would be for the children to allege all those things against or in respect of their molher simply for whimsical, irrational or sudden pronouncement of Talaq by the husband either in the heat of anger or even in jest without any reason and without fault of the woman or of those children? I put a question to myself whether such a situation is or is not one that can be said to be derogatory of dignity of woman and such a situation to be in conflict with the concept of dignity of individual forming the part of the Preamble of the Constitution which is the basic structure of the Constitution? Is it not conflicting with the mandate of the Constitution enshrined in Article 51E which ordains that it is the duty of every citizen to renounce the practice which are derogatory of the dignity of the woman ? Is it not perpetuating something that runs counter to the concept of scientific temper, humanism and the spirit of enquiry and reform. In my

oninion it results in something that runs counter to the Fundamental Duties imposed on every citizen under Article 51-E and F, when for the acts of the husband sudden and irrational such as divorcing a wife without rhyme or reason by pronouncing the Talaq either once or thrice on the spur of moment in one sitting or otherwise bringing all sorts of disaster and calamity to her including, the one rendering her without any substantial source of maintenance and depriving her of right of maintenance and making, the miserable life of woman till she does not remarry some one as well the life of her minor children born from divorcing i.e., forum husband miserable on their completing the age of two years.

114. In the case of Mohammad Ahmed Khan v. Shah Bano Begum reported in 1985 (2) S.C.C. 556 in AIR 1985 S.C. 945 the Lordships of the Hon'ble Supreme Court posed the following question:

"Does the Muslim Personal Law impose no obligation upon the husband to provide for the maintenance of his divorced wife? Undoubtedly the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad, or indifferent, Indeed for no reasons at all. But is the only price of that privilege the dole of pittance during the period of Idd-at ? And is the law so ruthless in its inequality that no matter how much the husband pays for the maintenance of his divorced wife during the period of Iddat, the mere fact that he has paid something, no matter how little absolves him for ever from the duty of paying adequately, so as to enable her to keep her body and soul together ? Then again is there any provision in Muslim Personal Law under which a sum is payable to the wife on divorce ?" Having quoted statements of law from Mulla's Muslim Law and Dr. Tayab Ji's Muslim Law as well as other treatises to the effect" that on the expiration of the period of Iddat, after Talaq the wife's right to maintenance ceases whether based on Muslim Law or on an order under Criminal Procedure Code or that the Muslim Law does not recognise an obligation on the part of a man to maintain his wife whom he had divorced, Hon'ble the Supreme Court was pleased to take the view that such statements of law, in Text Books are inadequate to establish the proposition that Muslim husband is not under an obligation to provide maintenance for his divorced wife who is unable to maintain herself and to hold and lay down the law as under :

"The true position is that if the divorced wife is able to maintain herself, the husband's liability to provide maintenance further ceases with expiration of the period of Iddat. If she is unable to maintain herself she is entitled to have recourse of Section 125 of the Code. The outcome of the discussion is that there is no conflict between the provision of Section 125 and those of the Muslim Personal Law on the question of Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself".

115. After the above decision of the Supreme Court in Shah Bano's famous case conic Act No. 25 of 1986 with an attractive title 'Muslim Women (Protection of Rights on Divorce) Act, 1986 to provide as per title protection to the rights of divorced Muslim women but in effect undoing the little or something which had been given by Supreme Court in Shah Bano's case to the divorced woman by applying Section 125 of the Code.

116. A study of the statutory scheme of Muslim Women (Protection of Rights on Divorce Act) in. the words of Hon. Mr. Justice Krishna Iyer reveals a legislative terror and a dishonour to Muslim womenhood. The sum and substance of substantive rights entitled and declared by the Section of the Act of 1986 is a hard truth i.e. to women who has been the queen of the heart of husband once but since has been talaqued gets the parliamentary Karuna of three months maintenance for herself and two years maintenance for her children born of her wedlock with her husband exercising the male authoritarianism and divorcing her even without rhyme or reason or even in order to get rid or self exoneration of orders of maintenance of wife passed by Courts, through divorce.

117. Section 4 of the Act involves litigative double dealing. Under Section 4 of the Act the guilt of husband for breaking conjugal unity--the divorcees unable to maintain themselves and remaining unmarried is to be visited on wife's relation as the husband who is morally liable to divorcee is completely absolved from this liability or viculum and instead the desperate poor women is statutorily directed to litigate against such of her relatives as would be entitled to inherit her property on her death as per Muslim Law to pay reasonable and fair maintenance to her, and it provides that potential heirs shall pay maintenance to her in proportion in which they would inherit her property. The poor woman unable to maintain her or having no means of sustenance is required to do litigative exercise, prove the assets of her relative etc and if the divorced woman has as well got no property of her then ? How can the relative be said or held to be entitled to succeed to her property and last the Act provides that if no such relative is available the poor lady should move with begging or litigative bowel before and against Waqf Board in Court and she should first prove that Board does not suffer from want of funds. Litigation after litigation placed before the divorced woman and her children for no fault of her or her children she is for the guilt or male authoritarianism as well as absolute and unbridled right of husband to divorce, placed to a position of a beggar, destitute or one compelled to lead the life of destitute or starvation of women leads to destitution and from destitution to starvation prostitution and the like and the children after attaining the age two years may be compelled to join waif and strays to become vagrants and juvenile delinquents.

118. These are evils and evil consequences of an unbridled power or authority of husband to make irrevocable divorce and consequent miseries of divorced women and their children and these realities lead one to think that the unbrided power to divorce by recital of Talaq under Shariyat Law that such unbridled power of divorce by Talaq including Talaq-i-Biddat appears to be contrary to provision of Articles 14, 15, 21 and 51A(E) & (P) of Constitution of India and so does not operate nor does Shariyat Law in this regard continue to operate under Section 2 of Act No. 26 of 1937 read with Article 372 of the Constitution.

119. "Faith without wisdom, without tolerance and respect for others' ways of life is a dangerous thing." Observes the Philosopher President of India Dr. S. Radhakrishnan in his work Indian Religions at page 16. He further observes "Crusaders who marched their armies eastward could not conceive it to be possible that the God of Islam is the same God on whom they themselves relied". Quoting the Historian Steven Runciwan, Dr. Krishnan observes "High ideals were vesmirched by cruelty and greed enterprise and endurance by a blind and narrow self righteousness and the holy was more than a long act of intolerance in the name of God which is a sin against the Holy Ghost."

120. In the Qur'an there are so many things of strictly local and temporary interest which are not at all relevant to religion qua religion, Conservatives of all creeds forget that the dry bones of a religion are nothing, spirit that quicken the bones is all Dr. S. Radhakrisbnan observes "Sir Ahman Husain distinguishes Islam from dogmatic Mohammedanism of some of our Maulvies. Sir Syed Ahmad Hussain observes as under:--

"I make a difference between Islam and Mohammedanism. The latter is not pure Islam. It has forgotten the spirit of Islam and remembers only the letter of Islam. This requires the investigation and search into the position of Talaq-i-Biddat or Talak-i-Bidai under Holy Quran."

When this question was posed at the time of hearing it was submitted that Islam, Qur'an and Shariyat Law are foreign to this land i.e., to India. This was submitted by Shri Abdul Mannan as well as by Shri S.S. Bhatnagar learned Advocate General as well and it was latter submitted and explained that it is foreign in the sense that it is in the foreign language i.e. Arabic so search of law may be difficult and in general should follow the law as Mid down in some decision or in the decision of Privy Council referred to above. When a section of citizens of the country claims to be the followers of Islam and claims that marriage is a contract but it belongs to the religion of that section and the Personal Law and that the religious law is to be applied, definitely, it requires the pondering over the matter otherwise there can be no ground not to accept this contention as of some substance.

121. Chapter 43 Surat-uz-Zukuruf Aayat Nos. 1 to 3 contained in Section 1 of this Chapter of the Holy Qur'an in Roman of their English translation by Abdullah Yusuf Ali are given below:--

(i) Haa-Miim,

(ii) Wal-Kitaabil-Mibiin

(iii) 'Inna j-' alnaahu- Qur-aa-nan' Arabiyyal-la- (allakum to quiluun).

English Translation :

(i) Ha-Mim (ii) By the Book that Makes things clear.

(iii) We have made it A Quran in Arabic, that ye may be able to understand (and learn wisdom).

In Hindi Quaran Sharif Sherwani Edition published by Lucknow Kitabghar Mausam Bag, Sitapur Road, Lucknow bearing the foreward of Maulana Sayed Abul Hasan Ali Hashni Al Nadvi (Zanab Ali Mian Saheb) these Aayat have been translated as under :

"Haa-Miim(1) Es vazah (spast) kitab ki Kasam (3) Hamne es Kuran ko Arbi jaban men rakha hat taki (apri madri jaban men saralta se tum samajh lo).

122. In Chapter 26 Section 11 Aayats Nos. 192 to 199 reveal that the Holy Qur'an has been sent in plain Arabic Language and why :--

(i) 192. Wa Innahuu la-Tanziilu Rabbil-Aalamiin,

(ii) 193. Nazala bihir-Ruuhul Amiin-

(iii) 194. Alas qualbika litakuuna minal-manziriin,

(iv) 195. Bilisaanin' Arabiyyimmubiin,

(v) 196. Wa innahuu lafil Zuuril-awmaliin,

(vi) 197. 'Awalam Yakullahum 'Aayatan' any-ya lamahuu 'nlamaaa-u-Baniii-' Israaa- illl ?

(vii) 198. Wa la nazzalnaahu alaa ba' zil-a-jamiin.

(viii) 199. Faqara-ahuu-alayhimmaa kaanuu bihii muminiin.

These Aayats have been translated by Abdullah Yusuf Ali as under :

(i) 192. Verily this is a revelation from the Lord of the worlds :

(ii) 193. With it came down. The Spirit of Faith and Truth,

(iii) 194. To thy heart and mind That thou mayest admonish,

(iv) 195. In the perspicuous Arabic tongue,

(v) 196. Without doubt it is (announced) In the mystic Books of former people,

(vi) 197. Is it not a Sign to them that the learned of the Children of Israel knew it (as true)

(vii) 198. Had we revealed it To any of the non-Arabs,

(viii) 199. And had he recited it To them, they would not have believed in it.

In Hindu version of Quran, referred to above these Aayats have been translated as under:

"Aur yih Kuran Jahan ke parvardlgar ka utara hua hat (192) Is ko amanatdar firisttah (ztbraeel A) lekar aya hai (193) (Ae pegambar yih utree hat) tere dil par taki (logon ko azab se) daraye (194) Saf Arbi zaban main (195) Aur iski khabar agle pegamberon kl kitabon men hat (196) Kya logon ke liye yah daleel nahi hat ki Isreal ke beton main vidwan log Is (honhar) se jankar hai (197) Aur Agar ham Kuran ko kisi Gair zaban vale par utrate (198) Aur vah use inko padhkar sunata To (bhee) ye na

samjhte Va us par iman na late (199)

123. (a) In Chapter 14 Surat Ibraahim there are Aayats which further explain why the Allaha Tala has sent Qur'an in Arabic and that it has been sent in Arabic for Arabs who were recipients thereof, but for other nations. He the lord Almighty has sent his messages through His Messengers and Prophets and Apostles to different nations in the language of those nations so that they may easily understand the message of God. This Ayat reads as under :--

(iv) Wa maaa 'arsinss mirrasuulin 'illas bi-lisaani qaw mihii liyu-bayyina lahum, Fayuzillul-l aa hu manu-yashsss-'u wa yshdii many-yasshasa': wa Huwai- 'Azizizl-Hakiim.

[We sent an apostle Except (to teach) in the language Of his (own) people, in order To make (things) clear to them Now Allah leaves straying Those whom He pleases And guides whom He pleases; And He is Exalted in Power, Full of Wisdom.]

124. Under note 1831 of Holy Qur'an by Maulvi Mohammad AH referred to above it is written "Because prophecy plainly showed that the Arabs were to be the recipients of the revelation (see Isa 42 : 11 : Let the wilderness and the cities thereof lift up their voice the village that Kedar doth inhabit" In the old Testament Kedar the son of ismael, stands for the Arab nation. Hence early prophecy required that the final revelation should be granted to an Arab.

125. Referring to chapter 16 Aayat 36/37 and chapter 35 Aayat 25 Dr. Radhakrishnan observed in his Book 'Religion and Culture' at pace 46 :--

"Prophet Mohammad recognized the fact that each religious teacher has faith in his own mission and his vision and experience alone would help the needs of his people and gives the English translation of the verses as under :--

"There is not a people but a warner has gone among them.

And every nation had a messenger, And every nation had a guide, And certainly we raised in every nation A Messenger saying serve Allah and shun the Devil, To every nation we appointed acts of devotion which they observe for every one on you did we appoint a law and a way".

126. All that have been mentioned above reveals the reason why the Lord Almight revealed the Holy Qur'an in Arabic and the statement in this regard quoted above no doubt gives the strength to the submission made by Mr. Abdul Mannan as well as Sri S.S. Bhatnagar that it is in foreign language, language than the one ordinarily Known to the people of India and is in the language of receipients i.e., Arabic so there is some substance beyond doubt in this contention of Shri A. Mannan and Shri S.S. Bhatnagar that is foreign to us but thereby Courts are not absolved of their duty in this regard in view Section 2 of Act No. 26 of 37,

127. Now let us examine the question in the light to Holy Quran to the extent possible. With reference to divorce reference has been made to Sura-e-Baqara. In English Sura-e-Baqara has been

described as the cow. Reference has been made to Aayat Nos. 227, 228, 229, 230, 231, 232 and 236, I may mention here that there is another Chapter 65 also which bears the title Sura-At-Talaq. Aayat Nos. 1 to 7 therefrom are relevant. The above mentioned Aayats in Roman with the English Translation from Holy Quran by Abdullah Yusuf Ali are quoted herewith :--

227. Wa in azamuttalaaqua fa innallaaha Samiiun Aliim (but if their intention is firm for divorce Allah heareth And knoweth all things) 228, Wal Mutallaquaatu, yatarabbasna bi-anfusi hinna salassata quruuu'. Wa laa yahillu lahunna 'any-yaktumna mas khalaq-allaahu fiii'ar haamibinna 'in kunna yu minna billashi wal Yawmil Aakhir wa bu- 'uulatubunna' ahaqqu bi-raddihinna fil zaa lika in 'arssdiiuu' islaahaa. Wa lahunna misjullazii alaphinna bil-ma-ruuf : wa lirrijaali' alayhinna darajah, Wallaahu 'Azizun Haklim (Section 29).

(Divorced women shall wait concerning themelves for three monthly periods. Nor is it lawful for them.

To Hide what Allah Hath created in their wombs, If they have faith, In Allah and the Last Day, And their husbands Have the better right, To take them back In that period, if They wish for reconciliation And women shall have rights Similar to the rights Against them, according To what is equitable;

But men have a-degree (Of advantage) over them, And Allah is Exalted to Power wise (Section 29) (229) At -talaaqu marrataan : fa- 'imsaakum-bima-ruufin' aw tasriihum-bi-ihssan. Wa laa yahillu lakum 'an-ta' khuzuu mitntnaaa 'aatay-tumuuhunna shay-' an 'illaaa 'any-yakhas-faaa 'allaa yuqiitnas Huduudallaah Fa-in khiftum 'allaa yuqimaa Huduudallaahi falaa junaabe 'alayhimaa flimaf-tadat bih Tilka Huduudullaahi fala ta'- taduuhaa Wa many-yata-adda Huduudallaahi fa- 'ulaaa' ika Humuz-zaali-muun.

[The divorce is only Permissible twice : after that, The parties should either hold Together on equitable terms Or separate with kindness.

It is not lawful for you, (Men) to take back Any of your gifts (from your wives) Except when both parties Fear that they would be Unable to keep the limits Ordained by Allah If ye (Judges) do indeed Fear that they would be Unable to keep the limits Ordained by Allah There is no blame on either Of them if she give Something from her freedom These are the limits Ordained by Allah So do not transgress them, If any do transgress The limits ordained by Allah, Such persons wrong (Themselves as well as others)

230. Fa-in-tallaqahaa falss tahillu lahuumim-ba-duhattaa tankiha zawjan gayrah : fa-in tallaqahas falss junaaha alay himagga any yataraja aaa in zannaaa any yuqiimaa Huduu dallaah. Wa tilka Huduudullashi yubayyi-nuhsa liqawminy. ya-lamuun.

[So if a husband, Divorces his wife (irrevocably) He cannot alter that, Remarry her until After she has married Another husband and He has divorced her In that case there is No blame on either of them If they reunite, provided They feel that they Can Keep the limits Ordained by Allah Such are

the limits Ordained by Allah Which He makes plain To those who understand]

231. Wa 'izas tallaqtumun-nissass-'s fabalagna 'ajalahunna fa-amsikuuhunna bi ma ruufin 'aw sarrihuu-nunna bi ma ruuf. Wa laa tumsikuuhunna ziraaral-litataduu. Wa mady-yaf-alzaalika fsqad zalama nafsah. Wa laa tattaljoziii 'Aayaa-tillaahi huzuwaa wazkuruu ni matallaahi alaykuro wa maaa 'anzala 'alaykum minal Kitaabi wal-Hikmatiya izukum bih. Wat taqullaaha wa lamuuu annal Lssha bikulii shay-in-Aliim (Part three-fourth) (Section 30).

[When you divorce Women, and they fulfil The term of their (Iddat), Either take them back On equitable terms Or set them free On equitable terms ;

But do not take them back To injure them or to take Undue advantage;

He anyone does that, He wrongs his own soul, Do not treat Allah's Signs As a jest But solemaly rehearse Alllah's favour on you, And the fact that he Sent down to you The Book And Wisdom For your instruction And fear Allah And know that Allah Is well acquainted With all things.

Section 30]

232. Wa 'izaa tallaqtumun nisaaa-' a fabalagnd ajalhunna false ta zuluuhunna 'any yan kihna' szwaajahunna 'izaa taraazaw baynahum-bil ma' ruuf. Zaalika vuu-azu bihii man kaana minkum yu minu billaahi wal Yawmil Aakhir Zaalikum 'szkaa lakum wa' athar, Wa llashu ya-lamu wa antum laa ta-lamuun.

[When ye divorce Women, and they fulfil The term of their (Iddat) Do not prevent them From marrying Their (former) husbands; If they mutually agree On equitable terms.

This instruction If for all amongst you, Who believe in Allah And the Last Day That is (the course) Making for most virtue And purity amongst you.

And Allah knows And ye know not.]

236. Lass junaaha 'alaykum in tallaqtumun nissas- 'a mma lam tamassnu hunna 'aw taf-rizuu lahunna farizah. Wa matti-uu-hunns 'alalmuusi-' i qadaruhuu wa 'alalmuqtiri qadaruh Mataa-'am-bil-ma' ruufi : Haqqan 'alal Muhsiniin.

[If There is no blame on you If Ye divorce women, Before consummation Or the fixation of their dower;

But bestow on them (A suitable gift) The wealthy According to his means, And the poor According to his means ;--

A gift of a reasonable amount Is due from those Who wish to do the right things, and

128. I may mention here that there is another Chapter, that is, Chapter 65 also which bears the title 'Surat-ut-Talaq'. Aayat Nos. 1 to 7 therein are also relevant which are quoted hereunder in Roman as well as with their English translation, rendered by Abdullah Yusuf Ali:

(i)Yaaa- 'ayyuhan-Nabfyyu 'isaa tallaq-tumun-nisaaa-' a fa-

talliquuhunna li- 'iddatihinna wa 'ahsul-' iddah; wattaqul-

laaha Rabbakum : laa tukhri juuhunna mim-buyuutihinna wa laa yakhrujna 'illaaa. 'any-ya 'tinna bi-faahishatim-mubay-

yinah. Wa tilkha buduudul-faah : Wa many-yata-' adda buduudallaahi faqad zalama nafsah : laa tadrii la-' allallaaha yuhdisu ba "-da zaalika' amraa.

[O Prophet 1, When ye Do divorce women, Divorce them at their Prescribed periods, And count (accurately) Their prescribed periods : And fear Allah your Lord : And turn them not out, Of their houses, nor shall They (themselves) leave, Except in case they are Guilty of some open lewdness. Those are limits Set by Allah : and any Who transgresses the limit Of Allah, does verily Wrong his (own) soul: Thou knowest not if Perchance Allah will Bring about thereafter Some new situation.]

(ii) Fa- 'izaa balagna' ajalshunria fa- 'amsi-kuuhunna bi-ma' ruu-fin 'aw faariquu-hunna bi-ma' ruufinw wa 'ash hiduu zaway-'adlim-minkum wa aqiimush shahaadata lillaah. Zaalikum yuu- azu bihii man kaana yu'- minu billaahi wal-Yawmil Aakhir. Wa amy-yattaqil-laaha yaj-al-lahuu makhrajaa.

[Thus when they fulfil Their term appointed, Either take them back On equitable terms Or part with them On equitable terms:

And take for witness Two persons from among you, Endued with justice, And establish the evidence (As) before Allah.

Such is the admonition given To him who believes In Allah and the Last Day :

And for those who fear Allah, He (ever) prepares A way out]

(iii) Wa yarzuq min haysu laa yahtasib. Wa many-yata-wakkal 'alalihi fa-Huwa hasbuh.' Innallaaha baaligu 'amrih : qad ja-alallaahu likulli shay-in-qadraa [And He provides for him From (sources) he never Could imagine, And if Anyone puts his trust In Allah, sufficient is (Allah) For him. For Allah will Surely accomplish His purpose : Verily for all things Has Allah Appointed A due proportion]

(iv) Wallaaa-ii ya- 'isna minal mabiizi minrnisaaa-' ikum 'inir-tabtum fa- 'iddatuhunna salaa-satu 'ash-burinw-wallaaa-' ii lam yahizn : wa 'ulaatul-' ah-maali 'ajaluhunna' 'any-yazana hamlahunn: wa many-yat-taquil-laaha yaj-' al-lahuu min smrihii yusraa.

[Such of your women As have passed the age Of monthly courses, for them The prescribed period, if ye Have any doubt, is Three months, and for those Who have no courses (It is the same):

For those who carry (Life within their wombs), Their period is until They deliver their burdens :

And for those who Fear Allah, He will Make their path easy]

(v) Zaalika 'Amrullaahi' anza lahuuu 'ilay-kum: wa many yattaqillaaha yukaffir' anbu sayyi- 'aatihii wa yu- zim lahuuu ajraa [That is the Command Of Allah, which He Has sent down to you : And if anyone fears Allah, He will remove his ills From him and will enlarge His reward] (Vi) Askmuuhunna min havsu sakan tum-minw-wujdikum wa laa tuzaaarruu-hunna litu zay yiquu 'alay-hinn, Wa 'in-kunna ulati-hamlm-fa-anfiquu'alay-hinna hattaa yaza' na hamla-huun. Fa- in-' arza-nalakum fa 'aatuu-hunna' ujuu-rahunn : wa -tamiruu bayna kum-bi ma ruuf. Wa 'in-ta- 'aasartum fasaturzi-ulahuuu' ukhraa.

[Let the women live (In iddat) in the same Style as ye live According to your means : Annoy them not, so as To restrict them. And if they carry (life In their wombs) then Spend (your substance) on them Until they deliver Their burden ; and if They suckle your (offspring) Give them their recompense And take mutual counsel Together, according to What is just and reasonable. And if ye find yourselves In difficulties, let another Woman suckle (the child) On the [fathers behalf]

(vii) Liyunfiq zuu-sa- 'atim -min-sa-' atih, wa man-qudira 'alayhi rizquhuu fal-yenfiq mimmaa' aataahullah. Laa yukalliful laahu nafaan 'illaa maa' aataahas. Sayaz- 'alullaahau ba' da usrify-yusraa (Section 2) [Let the man of means Spend according to His means : and the man Whose resources are restricted, Let him spend according To what Allah has given him. Allah puts no burden On any person beyond What he has given him After a difficulty, Allah Will soon grant relief.] Maulvi Muhammad AH ia his work 'Holy Quran' containing the Arabic Text with English translation and commentary gives English translation of Aayats 227, 228, 229, 230, 231 and 236 of Sura-e-Baqar Chapter as well as Aayat Nos. 1 to 7 of Sura-At-Talaq (Chapter 65) and the same as regards Aayats 227 to 232 of Sura-e-Baqar is being reproduced herewith :

227. And if they have resolved on a divorce then Allah is surely Hearing and knowing.

228. And the divorced women should keep themselves in waiting for three courses, and it is not lawful for them that they should conceal what Allah has created in their wombs, if they believe in Allah and the last day, and their husbands have a better right to take them back in the meanwhile if they wish for reconciliation, and they have rights similar to those against them in a just manner, and men are a degree above them; and Allah is Mighty, wise.

229. Divorce may be (pronounced) thrice, then keep (them) in good fellowship or let (them) go with kindness, and it is not lawful for you to take any part of what you have given unless both fear that they cannot keep within the limits of Allah, then if your fear that they cannot keep within the limits of Allah. There is no blame on them for what she gives to become free thereby. There are the limits of Allah so do not exceed them, and whoever exceeds the limits of Allah these it is that unjust.

230. So if he divorces her she shall not be lawful to him afterwards until she marrys another husband, then if he divorces her there is no blame no blame on them both if they return to each other by marriage if they think that they can keep within the limits of Allah which he makes clear for a people who know.

231. And when you divorce women and they reach their prescribed time then either retain them in good fellowship or set them free with liberty and do not retain them for injury, so that you exceed the limits and whoever does this he indeed is unjust to his own soul and do not take Allah's communications for a mocllery, and remember the favour of Allah upon you and that which he has revealed to you of the book and wisdom, admonish to you thereby be careful of your duty to Allah and know that Allah is the knower of all things.

232. And when you have divorced women and they have ended their term (of waiting then do not prevent them from marrying their husbands when they agree among themselves in a lawful manner, with this is admonished he among you who believes in Allah and the last day, this is more profitable and purer or you and Allah knows while you do not know.

English Translation of Aayats 1 to 7 of Sura-At-Talaq (Chapter 65) is being reproduced herewith :--

(1) O Prophet; when you divorce women, divorce them for their prescribed time and calculate the number of the days prescribed and be careful of (your duty to) Allah, your Lord. Do not drive them out of their houses, nor should they themselves go forth, unless they commit an open indecency; and these are the limits of Allah, and whoever goes beyond the limits of Allah, he indeed does injustice to his own soul. You do not know that Allah may after that bring about reunion.

(2) So when they have reached their prescribed time, then retain them with kindness or separate them with kindness, and call to witness two men of justice from among you, and give upright testimony for Allah. With that is admonished be who believes in Allah and their latter day: and whoever is careful of (his duty to) Allah. He will make for him an outlet.

(3) And give him sustenance from whence he thinks not; and whoever trusts in Allah. He is sufficient for him; surely Allah attains. His purpose; Allah indeed has appointed a measure for every thing.

(4) And (as for) those of your women who have despaired of menstruation, if you have a doubt, their prescribed time shall be three months, and of those too who have not had their courses; and (as for) the pregnant women, their prescribed time is that they lay down their burden; and whoever is careful of (his duty to) Allah, He will make easy for him his affair.

(5) That is the command of Allah which He has revealed to you, and whoever is careful of (his duty to) Allah, He will remove from him his evil and give him a big reward.

(6) Lodge them where you lodge according to your means, and do not injure them in order that you may straighten them; and if they are pregnant, spend on them until they lay down their burden;

then if they suckle for you, give them their recompense and enjoin one another among you to do good; and if you disagree, another (woman) shall suckle for him.

(vii) Let him who has abundance spend out of is abundance, and whoever has his means of subsistence straitened to him, let him spend out of that which Allah has given him; Allah does not lay on any soul a burden except to the extent to which He has granted it; Allah brings about ease after difficulty."

A reading of Aayat No. 228 which emphasises upon the divorced women to keep themselves in waiting for three courses i.e. the iddat period and then further mentioned therein to the effect that their husbands have a better right to take them back, in the meanwhile if they wish for reconciliation leads one to think and to take it to be the direction that the period of three courses i.e. period of iddat is conceived and thought and has been provided for the purpose of bringing about reconciliation. When I opined I find support from Aayat No. 1 of Chapter 65 Sura-ut-talaq wherein it is provided that when you divorce women divorce them for their prescribed time, calculate the number of days prescribed.....do not drive them out of their house nor should they themselves go-forth. You do not know Allah may after that bring about re-union. The Aayat which provides and says you do not know that Allah may after that bring about re-union this further explains why the Holy Quran vide Aayat No. 228 of Sura-e-Baqar i.e., Chapter 2 of Part II and vide Aayat No. 1 of Chapter 65 of Holy Quran lays great emphasis on the period of three courses or waiting for the period of iddat. The purpose is that Allah if so desires and wishes it may bring about re-union and for that purpose the time is allowed so that if there is any love for the union of the two before the ties of marriage are completely broken in irrevocable manner let there be a gap of time to allow that love and its pangs to assert themselves during this temporary period to bring about re-conciliation and difference being sorted out with the hope that differences may sink into insignificance. This is a very important condition that has been attached to the matters of divorce and this really indicate the intent behind this message that divorce is to be adopted when all efforts of re-conciliation failed and the recourse to divorce is to be taken in very stringent cases. When I so observe and hold I find support from the observation made under note 295 at page of the Holy Quran by Maulvi Muhammad Ali. It reads as the period of waiting is really a period of temporary separation during which conjugal relations may be re-established. This period of temporary separation serves as a check upon divorce and it is significant point, mentioned by Holy Quran in connection with law of divorce. If there is any love in the union let its pangs assert this during the period of temporary separation bringing about re-conciliation and to enable the differences to sink into insignificance. This is the best safeguard against the misuse of divorce. In this way only such unions shall be ended by divorce as really deserve to be ended being devoid of faintest spark of love.....thus, while Islamic Law of divorce makes every possible provision for love to assert itself which requires to remedy dissolution of marriage tie to be adopted only when it is proved that mutual love is lost. In the Holy Quran every direction in connection with subject of divorce is followed by injunction "be careful to your duty to Allah in Chapter 65 leads one to think that Holy Quran requires utmost carefulness in the matters of divorce. In the Holy Quran containing English translation by Molvi Muhammad Ali it has been observed in the portion of commentary at page 104 as under:

"It may also be added here that though divorce is allowed by Islam if sufficient cause is existing yet the right is to be exercised under exceptional circumstances. Quran itself approves of the Holy Prophet insisting Zaid not divorcing his wife, notwithstanding a dissension Of a sufficiently long standing (33 : 37) and the Holy Prophet's immemorial words of "all the things which have been permitted to men, divorce is the most hated by Allah will always act as a strong check of any loose interpretation of words of Holy Quran."

Taking these words that all the things which have been permitted to men divorce is most hated by Allah. From the above noted utterances of Holy Prophet, it appears to be that when Islam and the law under Islam divorce is the most hated thing by Allah, it is a mode to be adopted only in very exceptional circumstance and in cases where there is sufficient cause or a strong case for divorce i.e., there exist causes and circumstances that the two i.e., husband and wife cannot live with peace and happiness and amity, that it stands established almost that no reconciliation is possible and in life of two as husband and wife has become devoid of even the faintest spark of love of sympathy for each other and that both fear that they cannot keep within the limits of Allah i.e., they cannot perform marital obligations towards each other and maintain good fellowship.

The condition of waiting for three months and the waiting for a purpose so as to allow the time for the will of Allah to run if he desires and wills that re-union may be brought by re-conciliation and by love of the feelings of true love and their pangs to assert to enable the two i.e., husband and wife to come to terms and to lead a life of mutual affection and happiness. It leads me to think and come to a conclusion that making of irrevocable divorce during one Tuhar or during one sitting either by reciting thrice during that one sitting or by pronouncing it in a Tuhar once in an irrevocable manner without allowing the period of waiting for re-conciliation or without allowing the will of Allah to bring about the re-union its operation by removing differences or cause of differences and helping the two in sinking their differences runs counter to the mandate of Holy Quran. Molvi Muhammad Ali in 'Holy Quran' further observed in note 303 at page 107 of his work "it should also be noted that irrevocable divorce cannot be pronounced atonce. Special check on divorce have already been mentioned and it may be added here that the third or irrevocable divorce would be very rare if rules relating to divorce as given in Holy Quran are observed." The direction in Aayat No. 232 to the effect" do not take Allah's communication for a mockery leads one to think that divorce which is permissible subject to the various contentions and restrictions prescribed vide Chapter 2 of Part II and Chapter 65 has been provided to be adopted sn a remedy only in very rare and exceptional cases and is not to be usedas a mere play or mockery. The Holy Prophet always valued the life and love and so placed injunction on exercise of power of divorce and ordianed that none should take the message of Allah as a mockery where it relates to the injunction and mode and manners of divorce or other. Thus considered, in my opinion, a bare reading of these Aayats of the Holy Quran lead one to hold that pronouncement of irrevocable talaq either by pronouncing three talaq at one sitting or during one Tuhar or in any other manner atonce and doing the same in breach of the essential conditions of period of waiting which has been provided under the Holy Quran to be observed prior to talaq to be irrevocable, and to frustrate the purpose of that condition of waiting for iddat i.e., reconciliation or chances of re-conciliation, is nothing but an act against the basic tenets of Islam and is not in accordance with Sunnat. The emphasis in Aayat No. 1 of Chapter 65 on the prescribed time and calculation and the use of expression" you do not know may after that bring about re-union

as a religious injunction provides and makes that condition essential to be observed prior to talaq being allowed to become irrevocable. Any breach of any condition may render such an act of talaq illegal and bad atleast not in accordance with the tennets of Holy Quran and Islam. As has been observed by Mulla Talaq-i-Bidai is a law developed during the Second Century of Mohammedan Era during the rigime of Ommayyads. Here it will be just and proper to quote certain passage from Syed Amir Ali's Mohammedan Law III Edn. of 1908 Amir Ali at page 511 observed:

"The reforms of Mohammad mark a new Chapter in the history of eastern legislation. He restrained the power of divorce possessed by husband, he gave to the woman the right of obtaining separation on reasonable grounds and principles of his life. He went so far as practically to forbid its exercise by men without intervention of arbiters or a Judge. He pronounced talaq to be the most detestable before God of all permitted things. For it prevented conjugal hapiness and to interfere with proper bringing up of children. It is protection, therefore, in Quran that it gave certain contents to old customs has to be read in the light of law giver's own words."

Amir AH further observed :

"A large and influential body of jurists realised Talaq emanating from husband is really prohibited except for necessity such as adultery to wife. Another section consistihg chiefly of Matazalas considering Talaq as not permissible without sanction of Hakim-us-Sarah."

At page 512 Hanafis, Malakis, Shafies and the bulk of Shias held Talaq to be permitted that they relate to exercise of power without any cause to be morally and religiously abominable."

Dealing with Talaq-ul-Biddat, the learned author Amir Ali observed:

"Talaq-ul-Biddat is the heretical or irregular mode of divorce which was introduced during the second century of Mohammedan era. It was then that the Ommayyade monarch finding the checks imposed by prophet on the facility of repudiation galling, looked about for some escape from the strictness of law and found the pliability of jurists lead atleast to effect their purpose."

This passage indicates and shows that Talaq-ul-Biddat has been a movation of Ommayyade monarchs and of their period to find out loopholes to get rid of the checks imposed by prophet on the facility of repudiating galling. Thus, such a mode by Itself does appear not to be having sanction of Holy Quran whatever otherwise its nature may be. Amir Ali at page 515 further observed as under :

"As a matter of fact capricious and irregular exercise of power of divorce which was being left to the husband was strongly disapproved by the Prophet. It is reported that when once news was brought to him that one of his disciples had divorced his wife pronouncing three talaqs at one and the same time, the Prophet stood up in anger and declared that the man was making play thing of the words of God, the Allah, and made him take back his. wife."

Amir Ali has referred in this respect Radd-ul-muhtar, Vol. II page 684. These passages from Amir Ali's Mohammedan Law III Edn. lead me to think to opine that the Holy Prophet disapproved the pronouncing of three talaq at one and same time or during one Tuhar. Holy Prophet disapproved giving of irrevocable talaq atonce without allowing the period of waiting and opportunity to reconcile.

It will also be fruitful to quote the following paragraphs as well:

"The Shias and the Malikis do not recognise the validity of talaq-ul-Bidaat while Hanafis and Shafies agree in holding that a divorce is effective if pronounced in Bidaat form though in its commission man incurs sin."

It further leads one to think that talaq-ul-Bidaat or talaq against the injunctions of Quran is a sin. It is some act which is tantamount to think against the injunction of Allah and so immoral and irreligious. If it is irreligious than Talaq Bidaat definitely does not come eviction the frame work of the expression religion or "religious freedom" and such a mode of talaq as claimed or relied on by petitioner being based on some practice or custom which appears to have developed in breach of the basic tennets of Islam. Right to religion under Article 25 of the Constitution does not extend to the deeds, practice, customs, acts or actions including acquisition or creation of property by irreligious or by immoral means or means or modes running in conflict with the basic tennets and ordains of the Holy Book of that religion simply on the pretence of name of that religion, so Talaq-Bidaat is not a religious right. It appears to be against the basic tennets of Islam or Holy Quran. Further as I have already mentioned this mode of Talaq being against the doctrine and principles enshrined in various provisions of the Constitution referred to above including the preamble of the Constitution which lays emphasis on and grants assurance to on the dignity of individual and under Article 51A, this mode of divorce and the period cannot be deemed to apply in India under Section 2 of the Shariyat Application Act i.e., Act No. 26 of 1937, read with Article 372 of the Constitution of India. Considering on both the counts it appears to me that Talaq-ul-Bidaat i.e., making of irrevocable talaq atonce at one sitting in any form even if might have been part of Shariyat Law or present law of Muslims in Arab having developed during Ommayyade rigime but the same is not operative under Section 2 of Shariyat Application Act or Article 372 of the Constitution of India nor can be deemed to be continuing in operation and, therefore, the earlier rulings relied on by the Counsel for the petitioner are of no assistance.

That being the position of law even if the evidence led on behalf of the petitioner be taken to have established or proved that Rahmat Ullah petitioner of Writ Petition No. 45 of 93 pronounced divorce thrice on 15-6-69 and thereafter a deed in the nature of memoranda of irrevocable talaq having been prepared thereby no divorce in the eye of law has been established in my humble opinion, the said evidence has rightly been held by opposite parties 2 and 3 not to establish the divorce in the eye of law between Rahmat Ullah and Smt. Khatoon Nisa. Therefore, when Smt. Khatoon-Nisa had not been validly divorced she had rightly been held to be continuing the wife of Rahmat Ullah and her property was rightly clubbed with that of Rahmat Ullah petitioner of W.P. No. 45 of 93 in determining the ceiling and surplus area. Before concluding the judgment I may make it clear that as regards the question of the validity and vires of the provisions of Sections 3(7)

and 3(17) of U.P. Imposition of Ceiling on Land Holdings Act is concerned it is not open to be raised in view of firstly because of the provisions of Article 31B of the Constitution of India which provides that none of the Acts and Regulations specified in Schedule IX any provision thereof shall be deemed to be void or to have become void on the ground that such Act or Regulation of provision is inconsistent with or takes away or abridges any of the rights conferred by any provision of this part. It is not open to the petitioner to challenge the vires, in my opinion, none of the provisions challenged is hit by any of the articles contained in Part III, and further according to Article 318, of the Constitution, if some provision is inconsistent with provisions of Part III the same shall not be deemed to be inconsistent. The Ceiling Act has been mentioned in Schedule IX of the Constitution entries 58. 120 and 180, Secondly, it is also saved by the provisions of Article 31C as well as this enactment has been made with the object to secure the principles laid down in Part IV of the Constitution. It may be mentioned here that their Lordships of the Supreme Court has upheld the validity of this Act in the case of Latafat AH v. State Of U.P. reported in (AIR 1973 SC 2070). Thus having considered the whole matter my conclusions are as under :

(1) That the High Courts in our country are established under the Constitution of India. High Courts being superior Courts of record and constituted by and under the Constitution, as such, the High Courts do not have limited jurisdiction. The High Courts have got unlimited jurisdiction and are repository of all judicial powers under the Constitution. No matter is beyond their jurisdiction as a superior Court of record unless it is expressly shown to have been excluded under the provisions of the Constitution. In absence of any express provision in the Constitution the jurisdiction of the High Courts as a Court of Record is over every matter and if there is any doubt the High Court has got power to determine its jurisdiction. No, doubt, such determination is always subject to the appellate jurisdiction of the Supreme Court under the provisions of Articles 133 and 136 of the Constitution, and, as such, as mentioned in the earlier part of this judgment this Court has jurisdiction to determine the questions involved and arising in this case while exercising power under Article 226 of the Constitution.

(2) That provisions of Section 3(7) and 3(17) of the U.P. Imposition of Ceiling on Land Holdings Act are legal and valid and are intravires and their validity is not open to challenge in view of Article 31B and 31C of the Constitution of India read with Schedule IX and provisions of Part IV.

(3) That expression wife used in Section 3(7) of the Act means and includes in itself a woman married to a tenure-holder whose husband is alive and who has not been divorced by her husband and a woman who has been divorced in accordance with law is not included within the expression of wife in the matter of definition of family i.e., a divorced wife or a divorcee is not included and is not taken to be member of the family of her former husband, the tenure-holder for the purpose of ceiling and vice versa.

(4) That the expression "judicially separated wife" and the husband connote the idea of separation amongst husband and wife whose marriage has not been dissolved by divorce etc. but who live separately from each other under the decree of judicial separation granted under the law applicable to the party.

(5) That under Section 2 of the Shariyat Application Act the provisions of Shariyat Act will apply to the subjects mentioned therein and shall be deemed to have been continuing to be in operation only to the extent the provisions of Shariyat Law do not come in conflict or at variance with the provisions of the Constitution or any provision of the Constitution including the preamble as well as provisions of Articles 14, 15, 21, 23 or those contained in the Directive Principles i.e., Part IV and also those which are covered under head fundamental duties as any provision of law running counter to the provisions of fundamental duties if it comes in conflict to the provisions of Constitution or any of the above mentioned provisions of the Constitution, the codified law or uncodified law of custoamry law made applicable either under Muslim Personal Law Shariyat Application Act or under Section 29 of the Hindu Marriage Act will not prevail nor be operative so in nutshell any customary law either of Hindus or Shariyat Law or Muslim Law running counter to the provisions of the Constitution is not to prevail and is not to be operative.

(6) That any customary or codified law if it perpetuates against the dignity of woman and runs counter to the fundamental duty imposed on every citizen to denounce or to renounce. Practices derogatory of the dignity of woman or some other duties enjoined and imposed on a citizen under that article then in that case the law being in conflict with the provision of the Constitution, the said law cannot be deemed to be operative as in case of conflict between the constitutional provisions and other provision i.e., statutory or otherwise, the constitutional provision is to prevail.

(7) That Talaq-ul-Bidaat or Talaq-i-Bidai i.e., giving an irrevocable talaq atonce or during one Tuhar or at one sitting has been regarded by all under Islam-Sunnat to be sinful and to be against the mandate of Holy Quran.

(8) That the mode of Talaq as referred to in Rasheed Ahmad's case (AIR 1932 PC 25) and Talaq-i-Bidai in particular, conferring unbridled power to the husband empowering him to divorce by Talaq the wife without rhyme or reason and to this extent that husband can pronounce Talaq thrice in one sitting or during one Tuhar in irrevocable form cannot be deemed to be operative or be considered to be continued under Section 2 of Shariyat Application Act (Act No. 26 of 1937) read with Article 372 of the Constitution of India as the same has the effect of perpetuating discrimination on the ground of sex that is Male authoritarianism without rhyme or reason as well as, such system appears to be encouraging and allowing the doing of something and some Act that prima facie appears to be dereogatory of dignity of individual as well as derogatory of dignity of women i.e., doing of something in breach of the mandate of Constitution contained in the preamble and in Article 51A(a); (e), (f) and (h) which impose fundamental duty on every citizen of India to renounce the practices derogatory of the dignity of women apart from imposing the duty to abide by the Constitution and its ideals, and to develop scientific temper and humanism etc. (9) That even if it be taken for a moment that the evidence relied on by the petitioner proved the recitation of three talaqs, the pronouncement of three talaq at one sitting on 15-6-69 as claimed by the petitioners, neither the period of Iddat being allowed before its becoming irrevocable nor there being proof that there had been no Rusu or sexual intercourse between the two between the period of three Tuhars instead talaq in irrevocable form has been pronounced at that very day i.e., 15-6-69 and that mode of talaq not being constitutionaly operative in India under Article 372 of the Constitution of India read with Section 2 of the Shariyat Application Act, as held above, the petitioners have failed to

make out a case for interference and in my opinion the order of the Prescribed Authority and that of the appellate authority do not suffer any error of law apparent nor from that jurisdication, so do not call for any interference.

But before I part with the judgment I may observe that the need of the time is that the codified law on the subject matter of Muslim Marriage, Divorce and other allied matters should be enacted keeping pace with the aspiration, of the Constitution and its provisions including those contained in parts III, IV and IV-A thereof in the form of enactments such as Special Marriage Act, Indian Divorce Act or Dissolution of Muslim Marriage Act, 1939, Hindu Marriage Act 1956 or the like, so as to avoid the harping in darkness on account of uncodified law. Here I may join with Hon'ble Krishna Iyer, J, when he observes at 79 of his book 'The Muslim Women Protection of Rights on Divorce Act as under :--

"Reform of the law of marriage and divorce for Muslims as for others must be guided by right principles. In any matter of family law reform there are, I think, three clear competing issuss, all of which have to be weighed. First and foremost there is the strong interest of society generally that everything be done to encourage and maintain the stability and permanence of family unit not only for the sake of husband and wife, but even more urgently for the sake of children. Secondly there is public interest in allowing marriage which have hopelessly broken down to be decently and rationally dissolved. Thirdly there is public interest that in any matrimonial dispute justice should be seen to be done so that clearly guilty party should not be permitted to profit from a situation which he and he alone has been instrumental in creating."

It is also to be kept in view that according to Holy Prophet of all the things which have been permitted to men, divorce is the most hated by Allah, while bringing law reforms.

Having thus considered, in my opinion, both the writ petitions i.e., W.P. Nos. 45 of 93 and 57 of 93 have got no merit and they do not call for any interference, and, as such, are dismissed. The judgment in W.P. No. 45 of 93 shall govern the disposal of Writ Petition No. 57 of 93 as well and a copy of this judgment shall be placed on the record W.P. No, 57 of 93 as well.

After the delivery of the judgment in two Writ Petitions Shri O.M. Haq, Counsel for the petitioner in Writ Petition No. 45 of 1993 as well as Sri Mohammad Hanif. Counsel for the petitioner in Writ Petition No. 57 of 1993 jointly prayed that this Court may be pleaded to exercise its power under Article 133 read with Article 134A and accordingly they requested that this Court may be pleased to grant a certificate that they case involves substantial question of law and is fit one for appeal. The conclusions that I have given in the operative part of the judgment and detailed discussion in the judgment per se will reveal that the case involves substantial question of law of general importance as well relating to interpretation of Article 372 of the Constitution and Section 2 of Muslim Personal Shariyat Law Application Act as well as Section 29 of Hindu Marriage Act in the context of other provisions of the Constitution as contained in the Preamble and the three chapters, i.e., Chapters of Fundamental Right and Directive Principles of State Policy as well as Fundamental Duties specially under Article 51A(a)(e) and (f) and the scope of application of Shariyat Law or operation of Shariyat Law with special reference to Talaq-e-Biddat. Sri Haq also submitted that it may also be indicated

that the case involves the question of interpretation of Sections 3(7) and 3(17) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960. Though my findings primarily appear to be in favour of the petitioner but as the petitioners have prayed that this may also be indicated that the interpretation of the provision is involved, I have no objection to it. As such certificate is being granted on the ground that there involves substantial questions of law as well as that of the interpretation of the Constitution of general importance as well.

Certificate having been granted by me it appears to be just and proper to grant interim relief to the effect that till the petitioners obtain interim order from their Lordships of Hon'ble the Supreme Court, their possession over the land in dispute shall not be taken from the respective petitioners provided the appeal is filed within the period of limitation, prescribed for filing appeal and in any case during this period of limitation for the filing of appeal the petitioners shall not be dispossessed from the land in dispute.