Bombay High Court
Banu Wife Of Kutubuddin Sulemanji ... vs Kutubuddin Sulemanji Vimanwala on 5 October, 1994
Equivalent citations: 1995 (2) BomCR 110
Author: R Vaidyanatha
Bench: R Vaidyanatha
JUDGMENT R.G. Vaidyanatha, J.

1. This is a suit filed by the plaintiff for a declaration and for certain other reliefs. The defendant has contested the suit by filing Written Statement. Issues have been framed. The evidence was recorded on commission. The plaintiff examined herself and closed her case. The defendant has examined himself and one witness and closed his case. I have heard lengthy arguments addressed on behalf of the plaintiffs and defendant.

2. The plaintiffs case is as follows :

The 1st plaintiff is the wife of the defendant. The 2nd plaintiff is the son of the 1st plaintiff and the defendant. The parties belong to Dawoodi Bohara Sect of Muslim Shiya Community. The marriage between the 1st plaintiff and the defendant was performed on 19th January, 1980 at Godhra. The second plaintiff was born on 13th November, 1981. Though in the beginning the matrimonial relationship of the 1st plaintiff with the defendant was cordial, it is alleged that subsequently strained feeling started between the parties. It is alleged that on 6-11-1982 the defendant quarrelled with the plaintiff and assaulted her and drove her out of the house. Since then both the plaintiffs are residing with the parents the 1st plaintiff and away from the defendant. It is also stated that the defendant took another wife by name Rashida and this marriage was performed on or about 12th May, 1983.

There is also some allegation and also a prayer regarding the alleged divorce given by defendant before a Kazi at Bombay. It is not necessary to refer to those allegations since that relief no longer survives for consideration since the defendant has given another divorce subsequently and the defendant is not now pressing the earlier divorce before the Kazi.

The defendant has also filed Misc. Petition No. 377 of 1983 in this Court for custody of the second plaintiff, but that petition came to be dismissed by this Court as per the order dated 17-2-1994.

The 1st plaintiff called upon the defendant to pay maintenance by issuing their Lawyer's notice. The defendant sent a reply stating that he has divorced the 1st plaintiff before Amil Saheb at Indore. No relief was asked regarding the second divorce in the beginning on the ground that no particulars were furnished by the defendant regarding this second divorce.

It is asserted that the 1st plaintiff continued to be the lawfully wedded wife of the defendant. By amending the plaint, now plaintiff states that the alleged second divorce pleaded by the defendant said to have been given before the Amil Sahib is null and void and contrary to the law applicable to Dawoodi Bohora Sect. Hence it is asserted that the marriage between the parties still subsists.

defendant is bound to maintain the plaintiffs according to his status and financial position. The defendant's monthly income is about Rs. 12,000/-. He is doing a business, being a partner in number of firms. The 1st plaintiff is entitled to a separate residence and separate maintenance at the hands of the defendant. It is stated that Rs. 5,000/- per month be paid for the maintenance of both the plaintiffs.

It is also alleged that when the 1st plaintiff was driven out of house, her immoveable properties including jewellery are lying with the defendant which he is bound to return to the 1st plaintiff. The list of articles are mentioned in Exh. E attached to the plaint, that the plaintiff No. 1 has no separate source of income and she is dependant on the charity of her brother.

The first plaintiff has also asked for relief by amending the plaint by pleading that if the Court comes to the conclusion that the second divorce is valid then the plaintiff is entitled to 'Muta'. It means gift on divorce. Having regard to the status of the defendant, the plaintiff states that she is entitled to a sum of Rs. 10,00,000/- as 'Muta' from the defendant. There is also another amendment to the plaint praying for past maintenance from 6-11-1982.

On these allegations plaintiffs have filed this suit praying for a declaration that the two divorces said to have been given by the defendant before the Kazi at Bombay and before the Amil Sahib at Indore are void and have no legal effect and for a declaration that the marriage between the parties is still subsisting, that the defendant be directed to pay maintenance at the rate of Rs. 5,000/- per month from 6-11-1982, that the defendant be directed to return all the immoveables including jewellery. The defendant be directed to provide separate maintenance and separate residence to the plaintiffs.

It is also alleged that the defendant had a Savings Bank Account bearing No. 6544 in the Union Bank of India having a credit balance of Rs. 14,200/-. The defendant has withdrawn the entire amount except leaving a balance of Rs. 102.24p.

There is also an alternative prayer that in case the Court comes to the conclusion that the divorce between the parties is valid then the defendant may be directed to pay a sum of Rs. 10,00,000/- to the 1st plaintiff by way of gift on divorce. There is another prayer that the defendant be ordered to pay a sum of Rs. 12,197.76 p. with interest.

3. The defence is as follows :

Relationship is admitted. It is denied that the defendant quarrelled and assaulted the 1st plaintiff and drove her out of the house on 6-11-1982. It is stated that right from the inception of the marriage, the 1st plaintiff had a hostile attitude towards the defendant. She insisted to have a separate house for which the defendant did not agree, that the 1st plaintiff used to go to her mother's house frequently and was not looking after the household as expected of a wife. The 1st plaintiff was frequently quarrelling with the defendant, that on 6-7-1982 the 1st plaintiff on her own left the matrimonial home with her child with her mother, that defendant made attempts for reconciliation through the Amil Sahib of Godhra but the 1st plaintiff did not respond. Subsequently she attended a meeting before the Amil Saheb of Godhra and the reconciliation efforts failed. The defendant also

made attempt for reconciliation through the Head Amil of Bombay but in vain. The defendant had deposit all the jewellery etc. with the Head Amil at Bombay and the plaintiff has received the same from the Head Amil's office. The defendant took the second wife with the permission of the Head Amil. The defendant has also stated the circumstances under which he gave the first divorce before the Kazi at Bombay. Since the plaintiff has challenged the validity of the first divorce before the Kazi in her reply in Miscellaneous Petition No. 377 of 1983 by way of abundant caution the defendant approached the Head Amil of Bombay for divorce. Then he was told that he should be away from Bombay for three months and then he may approach Amil for giving divorce. Accordingly, the defendant left Bombay some time in April/May 1984. Then on 15-7-1984 he gave divorce to the 1st plaintiff in the presence of Amil of Indore as per the practice of Dawoodi Bohara sect. This divorce has been duly communicated to the first plaintiff. The first plaintiff took away all her ornaments and other articles from the office of the Head Amil of Bombay on 16-2-1985. She has given written acknowledgement to that effect. It is denied that the marriage between the parties is still subsisting, that the divorce given by the defendant before the Amil of Indore is perfectly legal and valid, that the maintenance claimed is excessive. The defendant is not bound to maintain the first plaintiff. The defendant's income is Rs. 2,500/- per month. As far as Bank account is concerned, it is stated that the amount in that account had been kept by the defendant and the amount did not belong to the 1st plaintiff. Hence there is no question of the defendant being asked to repay any amount withdrawn from the Bank account to the first plaintiff. The first plaintiff is not entitled to any maintenance and particularly being a divorcee.

After the amendment of the plaint, the defendant has filed an additional written statement. It is stated that both the prayers regarding declaration of validity of second divorce and the relief regarding 'Muta' are barred by limitation. It is stated that the second divorce before the Amil of Indore is perfactly valid and legal. The first plaintiff is not entitled to any such gift on divorce. The amount claimed is otherwise exorbitant, that the alleged claim for such a gift on divorce is not sustainable in law, that the first plaintiff is not entitled to any maintenance with effect from 6-11-1982 and that the plaintiff have not paid Court Fees on the amount claimed. It is also stated that this Court has no jurisdiction to grant the relief regarding the alleged gift on divorce.

It is therefore, prayed that the suit may be dismissed with costs.

4. The following issues have been settled in this suit :

Issues

1. Whether or not there is a valid divorce?

2. Whether the plaintiff and her son are entitled to maintenance? If so, what amount?

3. Whether the plaintiff is entitled to recovery of articles and jewellery as claimed by her?

4. Whether the talaq given by the defendant before the Amil Saheb of Indore is null, void or illegal being contrary to and against the Dawoodi Bohra Law as alleged by the plaintiff in paragraph 7-A of

the amended plaint?

5. Whether the relief claimed by the plaintiff vide prayer (a-1) is barred by the Law of Limitation as alleged in paragraph 2 of the written statement to the amended plaint?

6. Whether the plaintiff is entitled to a "Gift on Divorce" i.e. 'Muta' from the defendant as alleged in paragraph 14-A of the amended plaint?

7. If the answer to Issue No. 6 is in the affirmative, whether the plaintiff is entitled to the sum of Rs. 10,00,000/- or any other sum as Gift on Divorce as alleged in paragraph 14-A of the amended plaint?

8. Whether the claim of the plaintiff for Rs. 10,00,000/- 'Gift on Divorce' is barred by the Law of Limitation as alleged in paragraphs 1 and 3 of the written statement?

9. Whether the plaintiff is entitled to maintenance from 6th November, 1982 as alleged in paragraph 14-A of the amended plaint?

10. Whether the defendant gave to the plaintiff at the time of the marriage ornaments as per list Ex. '1' to the written statement?

11. Whether it was agreed between the plaintiff and the defendant that the plaintiff would retain the ornaments mentioned in Ex. '1' in full and final settlement of claim in divorce as alleged in paragraph 7 of the written statement?

12. Whether this Hon'ble Court has no jurisdiction to grant relief to the plaintiff in terms of prayer (f-1) of the plaint?

13. What relief if any, is the plaintiff entitled to?

Issues 1 & 4

5. These are two issues concerning the question of divorce. Parties belong to Dawoodi Bohra Sect which is a sub-sect among Muslims. It is well known that among the Muslims there are two broad sects viz., Sunnis and Shias. Sunnis are governed by Hanafi Law with which we are not concerned in this case. Among Shias there are sub-sects which are called as Athna-Asharias, the Ismailyas and the Zaidyas. Then among Ismailyas there are sub-sects which are called as Khojas and Bohras. Now, the parties belong to Bohra Community which is popularly known as Dawoodi Bohra who are largely settled in Western part of India including Bombay. Therefore, the Dawoodi Bohras are generally governed by Ismailyas, Taiyabi and also Fatimid Law.

Mr. A.A.A. Fyzee, a learned scholar in Muslim Law has done a commendable research in Fatimid Law and has written a "Compendium of Fatimid Law", which gives us a clear picture of law applicable to Dawoodi Bohras. In fact, the learned Counsel appearing for both the parties have laid

very much stress on this book of Fyzee and they are relying on some passages which I will refer to at a later stage. Both the counsel have also invited my attention to certain passages in other well known books of Muslim Law which also I will consider at an appropriate place. Before going to the question whether the marriage between the plaintiff and defendant is still subsisting or whether there has been a valid divorce between the two as alleged by the defendant, let me refer to law of bearing on the point.

6. In Fyzee's Compendium of Fatimid Law (hereinafter referred to as "Fyzee's Compendium'), the dissolution of marriage finds place in Chapter II. It clearly says on page 43 paragraph 198 that the husband is permitted to give talaq to his wife with or without any cause. It is true that talaq is disapproved but it is not forbidden. We may not like the institution of a divorce and we may detest it but legally divorce is provided or permitted in many of the Mohammedan Laws.

It is almost a settled position as far as Shias is concerned, there are only two valid forms of divorce namely, Ahsan (the most approved) and Hasan (approved).

In the Ahsan form, there is only one single pronouncement when the wife is in purity (that means, not during menstruation) followed by abstinence from sexual intercourse during the whole period of idda. It is stated that this form is the most approved form by the Holy Prophet.

The other form is Hasan where the husband has to make 3 pronouncement during three consecutive periods of purity of the wife. (Vide Outlines of Muhammadan Law by Asaf A.S. Fyzee, 4th Edn. pages 152 and 153). This is almost accepted by all the scholars namely that these are the two approved forms applicable amongst Shias including Dawoodi Bohras with whom we are concerned.

The fact that a Muslim husband can unilaterally give divorce to his wife without any reason but following certain procedure, has been judicially recognised by the Privy Council, many High Courts in India and also by the Supreme Court. Suffice it to refer to Zohara Khatoon v. Mohd. Ibrahim, where the Supreme Court has pointed out how a husband can divorce his wife by making oral pronouncement of talaq.

7. I will also make useful reference to a book Muslim Law and the Constitution by Justice A.M. Bhattacharjee, (1985 Edn.) who was formerly the Judge of the High Court of Sikkim and now the Chief Justice of the Bombay High Court, who has discussed the Constitutional validity of the power of a husband to divorce his wife unilaterally. Of Course in the present case, we are not concerned with that question; the learned Author has referred to mode of talaq at pages 145 and 146. The learned Author has clearly pointed out that under the Muslim Law, the husband has an unfettered and unilateral right to divorce his wife by orally pronouncing talaq.

8. Ms. Snehal Paranjape who argued the case of the wife did not dispute the right of the husband to divorce his wife. She contended that the alleged divorce given by the husband in this case suffers from legal defect and therefore, is invalid and void in the eye of law. She therefore, argued that notwithstanding the alleged divorce said to have been given by the husband, the marriage between the parties is subsisting. On the other hand Shri Muchala, the learned Counsel appearing for the

husband contended that the talaqnama given by the husband is perfactly according to law and does not suffer from any defect and that the marriage between the parties has been validly dissolved according to Muslim Law.

The learned Counsel for the wife stressed certain points to show that the divorce is not valid which are as follows :

i) absence of the wife and no notice to her to be present at the time of the alleged talaq,

ii) no attempt for reconciliation before talaq;

iii) Amil of Indore had no jurisdiction to record talaqnama;

iv) no evidence that plaintiff was in purity at the time of talaq;

v) single pronouncement of talaq is bad in law; and

vi) defects in the talaqnama.

9. I will consider the above points one by one.

As far as Point No. i) is concerned, I do not find any basis in law about the notice to the wife or presence of wife for the purpose of husband's pronouncing talaq. On the other hand I have already pointed out that all the Authors of Muslim Law clearly recognise the unfettered and unilateral power of the husband to give talaq to the wife. If it is a question of unilateral right then it is not necessary to issue notice to the wife to be present at the time or necessity of her presence at the time of divorce. The learned Counsel for the wife was not able to point out from any of the texts on Muslim Law that notice should be given to the wife or the wife should be present at the time of pronouncement of talaq by the husband. On the other hand there is some indication in some of the texts that wife's presence is not necessary. The fact that the Muslim Law has recognised unilateral right of the husband to give talaq itself shows that wife's consent or wife's presence is not necessary. What is necessary is presence of two witnesses at the time of pronouncement of talaq.

In Mulla's Principles of Mahomedan Law, Nineteenth Edition in paragraph 310 it is observed as follows :

"The talaq pronouncement in the absence of the wife takes effect though not communicated to her, but for purposes of divorce it is not necessary that it should come to her knowledge. It is further stated that for the purpose of limitation under Article 104 of the Limitation Act, 1908, the limitation begins to run from the date the wife gets the knowledge of the divorce".

Then there is a reference to a Mysore case stating that the divorce comes into effect immediately when it is done in the presence of the wife or from the date of knowledge when talaq is given in the absence of the wife.

In Outlines of Muhammadan Law, Fourth Edition by Asaf A.A. Fyzee, we have a statement at page 150 (para 23) which is as follows :

"The divorce operates from the time of the pronouncement of talaq. The presence of the wife is not necessary nor need notice be given to her."

In Muhsin Tayyibji's Muslim Law, Fourth Edition, at paragraph 157 (page 170) there is mention of revocation of divorce. Then, an illustration is given to say that if a husband pronounces a talaq against his wife while she was absent and subsequently enters her house then it amounts to revocation of talaq. In other words, the fact that the husband can divorce his wife in her absence is recognised.

In the Compendium of Fatimid law by Asaf A.A. Fyzee, at paragraph 212 at page 47 it is stated that a divorce pronounced by the husband takes immediate effect of which one of the categories is a woman whose husband has been absent for a long time. Then it is stated that the woman whose husband has been away for a long time has to observe 'idda' from the date the woman comes to know of the divorce by her husband. That means the husband can give a valid divorce during the absence of the wife but wife's duty to observe 'idda' comes into effect from the date she gets the knowledge of the divorce.

In my view, the argument for the learned Counsel for the wife about notice to wife or absence of wife at the time of talaq has no merit and it has no effect on the validity of divorce.

10. Miss Paranjape contended with vehemence supported by authority that prior reconciliation before talaq is a condition precedent and if it is not complied with, the talaq is void. On the other hand Shri Muchala contended that for a valid talaq there is no such condition precedent.

It is argued by both the learned Counsel that in the general procedure for talaq the only requirement is the presence of two adult Muslim males at the time of pronouncement of talaq by the husband. From the books on Muslim law, I have not been able to find out anywhere about such a condition precedent mentioned prior to effecting divorce. For instance, in Outlines of Muhammadan Law, Forth Edition by Fyzee, the provisions regarding talaq are mentioned in Chapter IV. But there is no provision showing a condition that reconciliation should be a condition precedent before giving talaq. My attention is also drawn to two books on Muslim Law namely, Mulla's 'Principles of Mahomedan Law' and Dr. Tahir Mahmood's 'The Muslim Law of India', 2nd Edition, but I do not find there being any such condition precedent to effect talaq.

But Ms. Paranjape invited my attention to the Compendium of Fatimid Law by Asaf A.A. Fyzee where in paragraph 218 on page 51. There is a section regarding mediation. It says that the Koran recommended mediation where there is a dispute between husband and wife. Then it is provided in paragraph 219 that if the reconciliation efforts fail then the marriage may be dissolved. It is clearly provided that the mediator can dissolve the marriage provided they are empowered by both the spouses. In my view this section pertaining to mediation is only an enabling provision. It is nowhere stated in the section that in every case of divorce, mediation must precede pronouncement of talaq.

On the other hand, in the Compendium of Fatimid Law, the rules regarding talaq are mentioned in paragraphs from 198 to 216. In some of the paragraphs, there is mention that a divorce is void on certain circumstances. But in none of the provisions from paragraph 198 to 216 there is mention that if a talaq is given without there being earlier mediation, it will be void or invalid. Hence, from the basis of a number of books on Muslim Law which I have referred to above. I can say that there is no such a condition precedent for mediation for making talaq a valid one.

11. No doubt, the learned Counsel for the wife invited my attention to two decisions of Gauhati High Court where this principle has been upheld. In (1981)1 Gauhati Law Reports 358 Sri Jiauddin Ahmed v. Mrs. Anwara Begum, it is observed that though the husband has right to give talaq to his wife, he can exercise that right only under exceptional circumstances. It cannot be at the caprice and whim of the husband. It is further pointed out that an attempt for reconciliation is an essential condition precedent to talaq. The Court has referred to some passages from Quran and then it is observed that an attempt at reconciliation is an essential condition precedent to talaq.

Same view is taken by the Division Bench of the Gauhati High Court in a decision reported in (1981)1, Gauhati Law Reports 375.

I have not come across any other decision either any of the High Court or the Supreme Court taking the view that the reconciliation is a condition precedent for talaq. I have already referred to one judgment of the Supreme Court earlier. All the decisions so far rendered have taken a consistent view that the husband has unilateral and unfettered right to divorce his wife any time and without giving any reason and that is the view expressed by all the authors on Muslim Law which I have mentioned above. Reconciliation is, no doubt, necessary when there is a dispute between the husband and wife. The Court should encourage reconciliation. The Court may discourage divorce. But we are not at that point. We are not for a moment considering whether reconciliation should be there or not. The question is whether earlier reconciliation is a mandatory condition precedent for a valid talaq. With great respect to the learned Judges who have rendered the above two decisions, I am unable to subscribe to the view that an attempt for reconciliation is a condition precedent for a talaq and the talaq will become void if there is no such earlier reconciliation.

12. Even if we assume on the basis of the decisions of the Gauhati High Court that an attempt of reconciliation is a condition precedent, there is evidence on record to show that there was such an attempt and it failed.

The witnesses were examined on commission. The plaintiff has been examined as P.W. 1.

The defendant has asserted in his evidence that there was an attempt for reconciliation and it failed.

The plaintiff was examined as P.W. 1, unequivocally admitted in her examination-in-chief at page 13 as follows :

"The said Doctor and my relatives tried to settle our matrimonial disputes but they failed as my husband wanted to give divorce to me."

Again in examination-in-chief itself at page 31, the plaintiff denied the allegation put by her Counsel which is as follows :

"It is not true that I refused to attend the meeting called by Jamat Committee at Godhra. In fact, I attended the meeting."

Here she has clearly admitted that there was a meeting of Jamat Committee at Godhra which she had attended. Again she has stated:

"It is not true that inspite of messages from the Head Amil Saheb of Bombay, I did not attend the meeting before him. Whenever I was given message I attended the meeting before him."

At page 54 she has admitted as follows :

"When I was in Godhra, I received a message from Amil Saheb of Godhra to meet me. I was called by the Amil Saheb because defendant wanted to give me divorce.

It is not true that I was called by the Amil Saheb in order to bring about reconciliation between myself and the defendant."

In the same way she admits that her brother came to Godhra when there was meeting. Then she denied a suggestion that during that meeting she quarreled with her brother regarding suggestion of reconciliation made by Amil Saheb.

She admits on page 55 that she received a letter from Head Amil of Badri Mahal when she met him when she was told that her husband wanted to give her divorce.

On the other hand the defendant examined as D.W. 1 has stated at page 85 that in November 1982 he requested the Amil Saheb at Godhra to bring about a reconciliation between himself and the plaintiff, that the Amil Saheb told him that he will talk to the plaintiff. Then it is further stated that the meeting did take place between himself, plaintiff, her brother and other family members in the presence of the Amil Saheb but the talk of reconciliation failed. It is also in evidence that the plaintiff had appeared before the Head Amil at Bombay and gave a list of moveables belonging to her. This also shows that reconciliation must have failed and therefore, she wanted all her things back. It is also admitted in evidence that defendant deposited the moveables with the Head Amil who returned it to the plaintiff which means reconciliating efforts did not bare fruit. Ultimately, talaq came to be given long after on or about 15-7-1984.

We may also notice that the plaintiff left the house of the defendant on 6-11-1982 and was living with her parents. Her case is that she was driven out of the house after assault and in the circumstances there could not be any chance for reconciliation. Therefore, the defendant's evidence that reconciliation failed is more probable and acceptable. Hence in this case, there was in fact, an attempt for reconciliation but in vain.

For the above reasons, my finding is that the talaq is not invalid on the mere ground that there was no attempt for reconciliation prior to talaq. Even otherwise, on facts, I hold that in this case that there was an earlier attempt of reconciliation. It is spoken to by the defendant and admitted by the plaintiff but the talks failed and hence on any ground the talaq is not invalid on this point.

13. The marriage between the parties took place at Godhra on 19-1-1980. After marriage, parties resided at Bombay. It was therefore, argued by the learned Counsel for the wife that the talaq proceedings before the Amil of Indore was without jurisdiction. The learned Counsel for the plaintiff was not able to point out from any texts on Muslim Law that the talaq should be given before a particular Kazi or Amil. In fact, the presence of Kazi or Amil itself may not be necessary because the requirement for a valid talaq is that the husband should pronounce talaq in the presence of two witnesses. This could be done anywhere and there is no provision that this should be done either in the place of marriage or in the place where the parties last resided or in any other particular place. Therefore, the argument that the talaq should have been given either at Bombay or at Indore and that the Amil of Indore had no jurisdiction cannot be accepted. The Amil or the Kazi does not do any judicial work. They only record a talaq given by the husband. Their presence is not necessary for a valid talaq. Therefore, the question of jurisdiction of a particular Amil or a particular Kazi does not arise at all. In my view, the argument has no merit and is rejected.

14. It is argued on behalf of the plaintiff that in view of the admission of the defendant that he was not aware about the plaintiff being not in her period of menstruation on the date of the talaq, the talaq, is not valid. The plaintiff has stated in her evidence on 15-7-1984 that she was in her menstruation. How could she remember after a long lapse of time whether she had periods or not on a particular day. It is true that the texts on Muslim Law do mention that the divorce should be given when wife is in a state of 'tuhr' which means that she should not be during her period of menstruation at the time of talaq. In the Compendium of Fatimid Law at page 45 in paragraph 206 it is stated that talaq is void if it is pronounced when the wife is in period of menstruation. Even other texts on Muslim Law mention this condition.

Now in the present case the assertion of plaintiff that on a particular day when talaq was given, she was in her menstruation cannot be accepted because she has stated it for the first time in her evidence when her statement was recorded in 1988 about 5 years after the date of talaq. No such plea is taken in the plaint. This was a question of fact, which should have been pleaded and proved. Merely saying that the talaq is void is not sufficient. Question of fact namely, that the talaq was void on the ground that the wife was not in her menses on the date of talaq should have been pleaded in the plaint which is not done. It is in evidence that the wife left the house of the husband on 6-11-1982. It is admitted by the plaintiff that eversince 6-11-1982 till she gave evidence in 1988, there was no cohabitation between her and her husband. They have not lived together after 6-11-1982 till today. talaq was given on 15-7-1984 which means there is a gap of about one year and eight months after the plaintiff left the house and the date of talaq, when admittedly both parties were residing separately and at different places.

15. In the very nature of things, the fact that wife is in her menstruation or not is within the special and personal knowledge of the wife herself. Nobody else can know whether the wife is in her menses

unless she herself announces. When admittedly the husband is staying separately and away from wife for about one year and eight months, how can we expect the defendant to know that on 15-7-1984, the wife was in menstruation or not. It is impossible for the defendant to know that fact. It may be that in usual course in the talaqnama against the relevant column it is mentioned that the plaintiff was in purity. By any stretch of imagination we cannot expect a husband to know whether the wife was in menstruation or not particularly when she is staying away from him. Now, in such a situation, can we insist this condition say that the talaq is void on the ground that the husband has not proved that the wife was in her periods on the date of talaq. It is an impossible condition for the husband since the wife and wife alone can know whether she is in her menstruation period or not. That is why the Text on Muslim Law have provided exception to this rule. Even in the Compendium of Fatimid Law on which the learned Counsel for the wife heavily depended, there is a provision in paragraph 212 that a divorce can be given which takes effect immediately under five circumstances of which one is a woman whose husband has been absent for a long time. Since there is a provision enabling the husband to give talaq whose wife is living separately for a long time, the inference is that we cannot insist this condition of the purity, on the date of talaq. In fact the same Author Asaf A.A. Fyzee, who has prepared a Compendium of Fatimid Law, is also the Author of Outlines of Muhammadan Law. The learned Author has stated at page 152 (Fourth Edition) which reads as follows :

"Where the parties have been away from each other for a long time or where the wife is old and beyond the age of menstruation, the condition of tuhr is unnecessary."

Earlier it is mentioned that divorce must be given when the wife is in a period of tuhr which means period of purity. The exception is as mentioned above when the parties are living separately for a long time or whether the wife is very old.

In Faiz Badruddin Tyabji's Muslim Law in paragraph 142 at page 157, the necessary rule regarding pronouncement of talaq is mentioned and one of the conditions is that the wife must be free from her menstrual courses. In the Note below the provision the learned Author has stated as follows:---

"Under Shiite law, where the husband is absent from the wife, the pronouncement may be made at any time (irrespective of her being free from menstruation), ..."

Therefore, we find that when the parties are living away for a long period, this condition does not apply.

16. The next point of the attack by the learned Counsel for the plaintiff is that the alleged talaq given by the husband purported to be a single pronouncement and therefore, it is invalid in law. She argued that there should be three successive pronouncement with interval of one month between two pronouncements to make a valid divorce.

The evidence of the husband-D.W. 1 is that on 15-7-1984 he appeared before the Amil Saheb at Indore to pronounce talaq and then signed the talaqnama prepared by the Amil which is marked as Exhibit 'B'. He has stated that in the presence of the two witnesses he announced that he has given

talaq to his wife out of his free will and without pressure from anybody. Then he signed the talaqnama which is Exhibit 'B'.

Then the original talaqnama book is not produced from the office of Amil Saheb of Indore through D.W. 2-Mr. Zoeb Pathanwala. The witness has given evidence on oath but only produced the talaqnama book which is marked as Exhibit 22. He also produced two letters taken from the Head Amil of Bombay to Amil Saheb of Indore.

Then the oral talaq is also proved by D.W. 3 Amiruddin Kalimuddin Gulam Hussainwala. He was one of the two witnesses who was present at the time of oral talaq. He has also stated that in the presence of Amil Saheb himself and another witness, the defendant pronounced that he has given talaq to his wife out of free will and without duress from anybody. Himself and one Saifuddinbhai were two witnesses. Then the necessary talaqnama was signed by the other witness and Amil Saheb. He also identified Exh. 22 as the original talaqnama book. He also identified the original form in that book which is signed by him at Exhibit 24. He also identified another form of talaqnama which is at Exhibit 19. He has denied a suggestion that Exhibit 24 is a fabricated document. In my view the evidence of this witness has not been shaken in cross-examination though some formal questions are put, the fact that the husband pronounced talaq in the presence of the two witnesses has not been challenged or shaken in cross-examination.

Therefore, as far as the factum of divorce is concerned, we have the assertion of the defendant coupled with the evidence of D.W. 2 and the contents of talaqnama which clearly show that on the particular day when the defendant orally pronounced talaq and also signed the talaqnama before two witnesses and Amil Saheb of Indore. It is admittedly a case of single pronouncement of talaq on one day. Now the question is whether this is a valid talaq in the eye of law.

17. Now let us refer to the Compendium of Fatimid Law which has been relied on by both the Counsel. No doubt, paragraph 204 says that pronouncement of three talaqs at one sitting is an unlawful act and is void and of no effect as an irrevocable divorce. But in the next sub-paragraph, it is clearly mentioned that any number of pronouncements at one sitting is treated as one pronouncement of talaq. What the Author meant is three pronouncements of talaq at one sitting is void as an irrevocable divorce. For the moment, we are not concerned with the question whether the divorce effected on 15-7-1984 was a revocable divorce or irrevocable one. Then paragraph 205 mentions that the husband has to give three pronouncements with a gap of one month between the two pronouncement. After the third pronouncement, the divorce becomes complete and the husband cannot remarry the same woman, unless she marries another husband and is lawfully divorced by him. In paragraph 207 it is stated that when a man divorces a woman, he can take her back which means after the first pronouncement of talaq, the husband can take her back. Then, the learned Author mentions clearly in the said paragraph that thus, only the first and validly pronounced declaration, is lawful and effective.

18. As already stated that the said Author Mr. Fyzee who has prepared the Compendium, is also the Author of the Outlines of Muhammadan Law, where we get a clear picture about the mode of talaq. We have already seen that among Shiite which include Dawoodi Bhoras with whom we are

concerned, there are only two modes of divorce namely, "Ahsan" and "Hasan".

In fact, the most approved form is Ahsan form, we find in Fyzee's 'Outlines of Muhammadan Law', Fourth Edition at page 152. It says that in the most approved form (Ahsan), the procedure consists of one single pronouncement in a period of tuhr. It is also mentioned that this was the one form which was most approved by the Holy Prophet. But it is stated that this form of talaq is revocable at any time during the period of 'idda'. That means this is an approved form because the husband can always change his mind during the period of three months (idda) and take back the wife.

In the Hasan Form it is mentioned at page 153, the procedure consists of three successive pronouncements during three consecutive periods of tuhr. Therefore, we find the learned Author has made a distinction between single pronouncement of talaq and the talaq consisting of three successive pronouncements. According to the learned author single pronouncement was the most former by no less a person than the Holy Prophet.

In Faiz Badruddin Tyabji's 'Muslim Law', Fourth Edition, paragraph 143 on page 158 it is stated that pronouncement of talaq in the Ahasan mode is revocable. That means in the case of single pronouncement the marriage is revocable if during the period of idda, the husband cohabits with the wife. The Author has mentioned in paragraph 144 on page 159 the other form which is called Hasan and in which, there should be three successive pronouncements made during consecutive tuhrs (periods of purity) when after the third pronouncement, the divorce becomes irrevocable.

The learned Authority has mentioned the Ahsan mode in paragraph 142 shows that it is a case of a single pronouncement.

Then we can make useful reference to Mulla's 'Principles of Mahomedan Law'. Nineteenth Edition, where he has mentioned the two modes of talaqs in paragraph 311 which reads as follows:

"(1) Talak Ahsan.----This consists of a single pronouncement of divorce made during a tuhr (period between menstruations) followed by abstinence from sexual intercourse for a period iddat.

(2) Talak Hasan.---This consists of three pronouncements made during successive tuhrs, no intercourse taking place during any of the three tuhrs."

Therefore, it is seen that the law recommends both single pronouncement talaq and three successsive pronouncements of talaqs. As we have seen above that Ahsan (single pronouncement) is the most approved form than the other. Hence, the argument that the talaq in this case is bad due to single pronouncement has to be rejected.

19. The next point that was urged is that there are some discrepancies in 2/3 talaqnamas produced in this case. One of the copy of talaq is produced by the plaintiff. One copy of talaq is produced by the defendant. Then we have a original talaqnama in the book produced by the office of the Amil of Indore. The learned Counsel for the wife stated that the talaqnamas are different since there are discrepancies and variations from one talaqnama to another. In my view, the argument has no

merit. The discrepancy has arisen in the English Translations of these talaqnamas. But in the original talaqnama in Urdu, there is no difference at all and they are verbatim one and the same. Since the learned Counsel for the plaintiff had some doubt on this point, I secured one of the Official Translator, from the office of the Chief Translator, High Court and he perused all the original Urdu talaqnama and other copies before the Court and in the presence of both the Lawyers and stated that there is no discrepancies or variations between different talaqnamas before the Court. The variation is only in English Translation. Hence, the argument that there are defects or variations in the talaqnamas has to be rejected as the variations have been found in English Translations and not in the original talaqnama.

20. I may also mention that the learned Counsel of the plaintiff argued about the admissibility of the two letters written by Head Amil of Bombay to Amil Saheb of Indore on the ground that they were not duly approved. Some decisions were also cited at the Bar about the admissibility of the documents when it is not duly proved etc. In my view, it is not necessary to go into this question since I have not referred to those documents which according to the learned Counsel for the plaintiff had not been proved. I have also relied upon the evidence of D.W. 1 and D.W. 3 and also the talaknamas. There is no necessity for the examination of the Amil Saheb to prove the talaqnama. It is the husband who is the author of the talaqnama though it is signed by the Amil Saheb and the two witnesses. The talaqnama has been proved by the husband. Not only we have the evidence of the husband but also one of the witnesses. The original talaqnama book is produced from the Office of the Amil. It is also in evidence and now admitted by the plaintiff that she received the Lawyer's Notice sent by the defendant along with the copy of talaqnama. It means the wife is put in the knowledge of the talaq given by the husband.

21. In my view the defendant has successfully proved the factum and validity of talaq. The number of contentions put forth by the learned Counsel for the plaintiff have no merit as pointed out above. After considering the material on record and law bearing on the point I find that the defendant has successfully proved that he has validly divorced his wife and has duly proved the talaq.

I may mention here that originally the plaintiff had challenged the talaq given by the defendant before a Kazi of Bombay on 21-7-1983. Admittedly, this talaq before the Kazi of Bombay was not a valid one since the parties belong to Dawoodi Bohra community. Therefore, the defendant subsequently gave another talaq before the Amil Saheb of Indore on 15-7-1984. That is why the defendant has not pressed before the Court, the earlier talaq of 21-7-1983 and has not led any evidence on that point. But however, I have considered the evidence regarding talaq dated 15-7-1984 and found that it is a valid one. Issues Nos. 1 and 4 are answered accordingly.

22. The parties were married on 19-1-1980. A child was born on 13th November, 1981 named Ali Asgar, who is joined as second plaintiff who is a minor. Admittedly, the child and the mother are residing together separately since 6-11-1982.

As far as the son is concerned, the learned Counsel for the defendant fairly submitted that the defendant is duty bound to maintain the son and is prepared to pay the reasonable amount that the Court may fix. As far as the wife is concerned, the learned Counsel for the defendant submitted that

she is not entitled to separate maintenance according to Mohammedan Law. Now after amending the plaintiff, the plaintiffs are asking separate maintenance from 6-11-1982. The first plaintiff-wife is claiming maintenance upto the date of talaq namely, 15-7-1984. Then after talaq, she is entitled for maintenance only for three months Iddat period as per the new law namely, the Muslim Women (Protection of Rights on Divorce) Act, 1986 and even then the claim for maintenance of those three months will have to be recovered by filing an application before the Magistrate. Hence this Court is not concerned with granting of any maintenance after the date of talaq.

According to the learned Counsel for the plaintiffs, the wife is entitled to separate maintenance from 6-11-1982 till the date of talaq since she was driven out of the house by the husband after assaulting her. But on the other hand, the learned Counsel for the defendant-husband contended that wife is not entitled to separate maintenance at all when she had left the house on her own and further she is not entitled to claim any arrears of maintenance according to the provisions of the Muslim Law. As far as quantum is concerned, both the parties have given exaggerated versions. The plaintiffs have inflated the income of the defendant on the one hand but on the other hand, the income given by the defendant is very meagre.

23. Now first I will consider the question whether the wife is entitled to separate maintenance at all. It is true that according to the Muslim Law, a wife is entitled to reside with the husband and not entitled to separate maintenance. In Mulla's 'Principles of Mahomedan Law', (Nineteenth Edition) in paragraph 277 it is clearly stated that a husband is bound to maintain his wife, but the clarification is that so long as she is faithful to him and obeys his reasonable orders. Then it is stated that the husband is not bound to maintain his wife who refuses hereself to him, unless the refusal is justified and she leaves the husband's house on account of his cruelty.

We may see that under the Dissolution of Muslim Marriage Act, 1939, a wife has a right to approach the Court for dissolution of marriage and one of the grounds is that the husband has neglected or has failed to provide for her maintenance for a period of two years. Thus, it is the liability of the husband to maintain his wife and if he does not provide her maintenance for a period of two years, the wife has ground to ask for dissolution of the marriage.

Reference may be made to a decision reported in Amir Mohd. v. Mt. Boshra, A.I.R. 1956 Rajasthan 103 where it has been clearly held that a wife has a right to live separately from the husband due to ill-treatment. In such a case, the husband is bound to provide maintenance and failing which it will be a ground for divorce under the Dissolution of Muslim Marriages Act, 1939.

In a case reported in Mr. Kurshid Begum v. Abdul Rashid, A.I.R. 1927 Nagpur 139, the husband had filed a suit for restitution of conjugal rights and it was rejected on the ground that wife was entitled to live separately when she proves cruelty and neglect by the husband. It is further stated that the wife is entitled to maintenance though she was living separately.

The learned Counsel for the defendant invited my attention to a case reported in Mt. Khatijan v. Abdulla, A.I.R. (30) 1943 Sind 65 where it is held that the husband is bound to provide maintenance when the wife is faithful and obedient to the husband. In that case the wife was living with her

mother and did not agree to go and reside with her husband. She did not make any allegation much less proof of cruelty or ill-treatment at the hands of the husband. Further there was an earlier decree obtained by the husband for restitution of the conjugal rights against the wife. In my view, that decision has no bearing on the facts of the present where the wife is living separately on the allegation of ill-treatment at the hands of the husband.

Similarly, in another decision cited by the learned Counsel for the defendant reported in Fazal Mahmud v. Mt. Umatur Rahim, A.I.R. 1949 Peshawar 7 wherein it was found that the wife was at fault in deserting her husband and hence she was not entitled to maintenance. It may be noted that it was a case of divorce and not a case for maintenance.

As already stated Muslim Law recognises the duty of the husband to provide maintenance to his wife. As far as the question whether the wife was faithful to the husband or obedient to the husband, to claim maintenance, it must be stated that when the wife is forced to leave the house of the husband because of the cruelty or ill-treatment, then it cannot be said that she is not entitled to claim separate maintenance. If it is proved that the wife cannot live with the husband or that she was driven out of the house by the husband, by causing ill-treatment, then she is entitled to claim separate maintenance since the husband is duty bound to provide maintenance to the wife.

24. Now the question is whether, on facts in this case, cruelty and ill-treatment are established by the wife or it is a case of the wife voluntarily leaving the husband and then residing with her parents. As far as this point is concerned, we have the assertion of the wife on the one hand and the assertion of the husband on the other and there is no corroborating evidence. The Court has to consider their evidence and decide as to which version is more probable and true.

25. The wife who was examined as P.W. 1 on commission has stated that her relations with the husband were not cordial. She has stated that her husband used to quarrel with her and used to assault her. Then ultimately, as to the circumstances on which she left the house, she has stated in her deposition at page 12 which reads as follows :

"On 6th November, 1982, my husband's relatives namely Ghuribai invited me, my son Ali Asgar, my mother and my sister for dinner. I returned to my matrimonial home at 9 p.m. However, unexpected rain was there. Hence, I came to my house in rickshaw. Therefore, myself and my son were not affected by rain. However, my husband became angry and in the presence of my mother and sister told me that I had not taken proper care of my son Ali Asgar. Then, my husband and his brother Fakribhai brutally assaulted me. I was slapped severely. My head was banged with wall as a result of which, I suffered intense headache for two days. At that time, my husband's two other brothers who were there at that time also came down and all of them jointly threw me out of the house along with my son. Thereupon, I along with my mother and sister and my son went to my mother's house."

In cross-examination, she has denied some suggestions.

As against this, the defendant examined as D.W. 1 has denied the allegations of cruelty or ill-treatment. As to under what circumstances, the wife left his house, he has stated on page 81

which reads as follows :

"On 6th November, 1982, there was unseasonal rain in Bombay and when I returned to my home at 7 p.m. after my work, I found the house was locked. I found that the plaintiff along with her mother and sister and my son Ali Asgar had gone out. They returned to the house at around 9.30 p.m. When they came back at about 9.30 p.m. they were fully drenched with rain water due to unseasonal rain. I scolded the plaintiff and told her that I did not like their going out in such bad weather with one year old child. Quarrel thereupon took place between myself and the plaintiff. Quarrel took a bad turn as the plaintiff and her mother started shouting. I thereupon called my elder brother and told him that the plaintiff and her mother is picking up unnecessary quarrels when I told something for the welfare of my minor child. My brother intervened in the matter and tried to explain to the plaintiff and her mother but they again started shouting. The plaintiff's mother shouted and said that she would come and stay in my house and nobody could throw her out. Thereafter, the plaintiff along with her mother and sister and my son left the house in anger and excitement and while going told me that she would see me in Court."

In cross-examination, he has denied some suggestions.

26. Now the question is as to whose evidence is acceptable. In the very nature of things, the evidence of both P.W. 1 and D.W. 1 is interested since they are parties to the suit. Since it is a dispute between a husband and wife, we cannot expect any independent corroboration from independent witnesses about the husband assaulting or beating a wife. It may be that the plaintiff could have examined her mother and defendant could have examined his brother or sister-in-law on this point. Even if they had been examined, they could not have helped us in any way since the mother would be interested in plaitniff and brother would be interested in defendant. One interested evidence cannot be corroborated by another interested evidence. We cannot expect independent evidence on a matter like this. We have to be guided by the conduct of the parties and the circumstances of the case and broad probabilities of the case and find out as to whose version is probable.

Parties are Muslims. They are Indians. In the Indian background, irrespective of the community, a wife always lives with the husband. After marriage, she is more attached to the husband than her parents. She suffers indignity at the hands of the husband and does not want to come openly lest it may become public unless it is inevitable. No woman by nature wants to accuse her husband for nothing at all. We must bear in mind that the first plaintiff was working and she left the job after the marriage with the husband. She was not a working woman after marriage and even now. Her parents are not rich. What is the advantage that she gets by falsely accusing the husband and deserting him and living with her parents. She has a young child whom she has to bring up. Why does she want to live alone with that child after deserting husband unless she had some compelling reason. No woman dare to take such a stand of going away with the child by deserting the husband unless she has some good reason. Even after the defendant alleged that he had given divorce, the wife has filed this suit praying for a decree that the talaq is invalid and she continues to be his wife and that the marriage subsists. If really, the wife who was given talaq by her husband wanted the same, she would have accepted the talaq given by her husband. There was no necessity for her to file this suit and ask for a decree that the marriage still subsists. That shows the nature of a woman who

tries her best to keep the marriage intact even though the husband may be bad or husband ill-treats her etc.

27. As against this, let us look to the conduct of the defendant. It is seen that within six months after the wife left the house, the defendant married another woman by name Rashida on 12-5-1983. Therefore, he is a defendant who takes a second wife within few months after the first plaintiff left the house. I may also place it on record that the first plaintiff is not the first wife, but she was the second wife of the husband. The defendant and the earlier wife were married in the year 1974. The first wife expired in the year 1978 and then the defendant married the first plaintiff herein as a second wife. Then after she left the house, in a few months he married the third wife named Rashida on 12-5-1983 and is living with her.

Within two months after this third marriage with Rashida, the defendant divorced the first plaintiff before Kazi of Bombay on 21-7-1983. It is conceded that it was not a valid divorce and therefore, the defendant had to give one more talaq before the Amil of Indore which I have held to be a valid divorce.

After this third marriage, the defendant filed Misc. Petition No. 377 of 1988 in this Court for custody of the minor son who is the 2nd plaintiff in the present suit. This Court after hearing both the parties rejected the petition filed by the husband for the custody of the child. It is interesting to note that though this order came to be passed by this Court on 17-2-1984 and now 10 years have elapsed, the defendant has not made any other attempt to get back the custody of the child. This shows the love he had for the wife and the son.

Having regard to the conduct of both the parties and the human nature and the circumstances of the case, I am inclined to believe and accept the wife's version as more probable and truthful than the version of the husband about the circumstances under which she was forced to go out of the house. I am satisfied that this is a case of the wife being driven out of the house by the husband by assaulting her. Then, how can we expect the wife to be obedient and faithful to the husband and live with him in view of the conduct of the husband. It is much more so particularly when the defendant has married another wife and he has given one invalid talaq before the Kazi of Bombay. In these circumstances, I hold that the wife was perfectly justified in living separately and therefore, she is entitled to claim separate maintenance from the husband. It is common ground that the parties are living separately ever since the incident of 6-11-1982 till the date of talaq at Indore namely on 15-7-1984. Of course, even after the said talaq and till today they are living separately.

28. Now, the question is whether the wife is entitled to arrears of past maintenance from the husband according to Muslim Law. In common law, a person is entitled to claim maintenance arrears, which can be claimed for a period of 3 years prior to the date of suit. Now the question is whether according to the Muslim Law the wife is entitled to arrears of maintenance?

29. The learned Counsel for the defendant contended that the Muslim wife is not entitled to arrears of maintenance and relied upon a decision reported in Mohammad Ali v. Fareedunnisa . No doubt, in that case, it is mentioned that a wife is not entitled to arrears of maintenance. But it is not clear

from the reported decision as to which sect of the Muslim Law, the parties belong. A perusal of the judgment shows that as far as the divorce was concerned, though it was held to be not proved, it is held that if the husband alleges divorce by issuing a notice or by filing a written statement and even though the divorce is not proved, it must be held to have been given from the date on which the written statement is filed. Such a statement of law cannot and does not apply to Muslims who belong to Shia sub-sect. Such a statement applies only to Muslims, who are Sunnis. Similarly, I will presently point out that in one of the Laws which applies to Sunnis, arrears of maintenance cannot be claimed. Hence, it is likely that the above decision applies to Sunnis and therefore, it cannot be applied to the present case where the parties are Dawoodi Bohra among Shias.

30. Now, coming to the texts on Muslim law, we may make useful reference to 'Outlines of Muhammadan Law', Forth Edition, by Asaf A.A. Fyzee on page 213 where it is observed as follows:

".....But the wife is not entitled to past maintenance, except under Shiite and Shafii law....."

Similarly, Tayyibji's 'Muslim Law' in para 310 (page 271), it is stated as follows :----

"310 (1) under Shiite and Shafi'i law the wife is entitled to maintenance notwithstanding that she has allowed it to get into arrears without having had the amount fixed by the Court, or by agreement with the husband.

(2) Under Hanafi law arrears of maintenance are not recoverable unless fixed by the Court or by agreement between the husband and wife; nor even after they have been so fixed, in case of divorce or death of either party; provided that arrears may be recovered if the Court has decreed maintenance, but not fixed its amount."

Therefore, it is clear that in none of these Laws, the grant of arrears of past maintenance namely, under Shiite and Shafai'i Law, is barred. Parties to this case belong to Dawoodi Bohra community which is a sect among Shias. Hence, there is no bar or legal impediment to grant arrears of maintenance to the plaintiffs in this case.

31. Now, the next question for consideration is the quantum of maintenance.

The second plaintiff, who is the son aged about 13 years now, is studying. By virtue of an interim order, the son is being paid Rs. 1,000/- per month since 1988. There is no default so far as the payment of interim maintenance to the son is concerned. Having regard to the young age of the son, a sum of Rs. 1,000/- p.m. as ordered by the interim order should be made absolute. In fact, the plaintiff has taken out a Notice of Motion bearing No. 1532 of 1994 for enhancement of the interim maintenance and it is pending consideration since on evidence I am fixing the quantum of maintenance, the Notice of Motion does not survive for consideration. Since son has been paid interim maintenance till now, there should now be a decree in his favour for payment of maintenance of Rs. 1,000/- per month from the date of judgment till he attains majority. However, if there is any change in the circumstances like the son requiring more money for studies or for any other reasonable cause, he is entitled to move the Court for modification of this order and to ask for

enhancement of maintenance.

32. As far as the wife is concerned, as per the interim order dated 22-6-1988, a lumpsum amount of Rs. 18,000/- has been granted. It is admitted that the husband has paid this amount to the wife. This amount will have to be adjusted or accounted when arrears of maintenance are fixed by the Court.

It is admitted that the quantum of maintenance has to be fixed having regard to the requirement of the wife as well as the financial position of the husband and his liability to look after other dependant members.

As far as the wife is concerned, her claim in the plaint for maintenance is Rs. 5,000/- per month for herself and her minor son. The relevant allegation in the plaint is that defendant is a business man and a partner in many firms and his monthly income is about Rs. 10,000/-. During the course of evidence, the wife (P.W. 1) says that her husband's income is Rs. 15,000/- per month. Then she says that defendant is doing a business as a partner along with his brother and others. She says that defendant owns a Fiat Car but this is denied by the defendant. Then she says that she requires at least Rs. 5,000/- per month for the maintenance of herself and her son. As far as the income of the husband she has admitted that she has no personal knowledge as such about the business transaction or business affairs of the husband. In her cross-examination at page 72 she says that she has stated that the income of the husband is Rs. 10,000/- per month on the basis of the statement made by her husband to her. She further says that now in cross-examination she has stated that her husband's income is Rs. 15,000/- per month. It is also based on what her husband had told her. She has denied a suggestion that she has given a false version about his income.

33. As against this, the defendant (D.W. 1) says in his evidence that he is getting an income of Rs. 3,000/- per month from all the firms in which he is a partner. He admits that at the time of marriage, he was partner in both the firms Raksha Timber Traders and Timber Wood Syndicate. He was a Income tax assessee from 1969 to 1989.

34. It is, therefore, seen that we have two versions before the Court. According to the plaint, the husband's income is Rs. 10,000/- per month and plaintiff in her evidence says that defendant's income is Rs. 15,000/-. On the other hand, the defendant would have us believe that his income is only Rs. 3,000/- per month.

Number of Income tax returns are summoned from the Income-tax office and they are exhibited in this case and are marked as Exh. 16 (Collectively). But from the perusal of these Income- tax Returns, it is not possible to fix up the income of the defendant. Both the counsel gave their own interpretation about the defendant's income from these Income tax Returns. Even if we give margin to exaggeration on either side, having regard to the fact that the defendant is a businessman, being a partner in number of firms, we may fix his approximate monthly income at about Rs. 6,000/- to Rs. 8,000/- per month.

It is in evidence that defendant has another wife and has children from her. He has to maintain them. He has to pay Rs. 1,000/- per month to the 2nd plaintiff. Hence, in these circumstances, I feel, we may reasonably fix the amount of maintenance to be paid to the first plaintiff at Rs. 2,000/- per month from 6-11-1982 to 15-7-1984 less Rs. 18,000/- which is already paid to her during the pendency of the case. Issue No. 2 is answered accordingly.

35. The wife has come to Court stating that number of her articles and jewellary are remaining with the defendant but interestingly, no list of moveables or jewellary is given either in the plaint or in its annexures. For the first time during evidence, the plaintiff has given a list of moveables including jewellery. The defence is that all moveables including jewellery belonging to plaintiff have been returned to her and she has taken them from the office of the Head Amil at Bombay.

P.W. 1 has given the details of the jewellery and moveables in pages 25, 26 and 27 of her deposition. As already stated, these details are not given in the plaint. Then a question was put to her in her cross-examination at page 56 whether she has given any statement on oath that the defendant has deposited the moveables with the Head Amil. She stated that she does not remember. Then she was confronted with two of her affidavits filed in the custody case filed by the husband against her in Miscellaneous Petition No. 377 of 1983. Then she admitted that she has filed two affidavits in that case. Then she was confronted with portions of the affidavit which she admitted. Those two affidavits are Exhs. 6 and 7 in this suit.

Exh. 6 is her affidavit where she has stated that now she has come to know that all her wearing apparels and ornaments have been handed over by the husband in the office of the Head Amil at Bombay. Similarly, in another affidavit filed by her in the said petition which is Exh. 7, she has stated the same thing that all her wearing apparels and ornaments have been handed over by the husband in the office of the Head Amil at Bombay. Therefore, she cannot ask the defendant to return the moveables when the defendant has already deposited them with the Head Amil of Bombay. She should have made the Head Amil a party to the suit or she should have taken legal action for recovery of those moveables. Obviously, she has not taken any such action since she must have received those moveables from the office of the Head Amil which is very clear. She has, in her cross-examination at page 57, stated that she had signed the receipt Exh. 8. A perusal of Exh. 8 shows that it contains a list of all of her moveables which she has admittedly signed.

Then she admits that she has signed the Receipt Exh. 8 dated 16-2-1985, which has been summoned to the Court from the office of the Head Amil. A perusal of Exh. 8 shows list of 7 items of jewellery and below it is written as follows :

"I have received the above articles Sd/-

Banu K. Vimanwala.

16-2-1985."

I have already shown the plaintiff has already admitted this document and her signature. She had offered no explanation to explain this. In view of this document, it can be safely held that she had received all the jewellery from the office of the Head Amil. Similarly, her receipt Exh. 7 which she had admitted shows that she had received all the moveables. As already stated she has admitted that she had come to know that defendant had deposited all the moveables in the office of the Head Amil. Hence, in these circumstances, I am constrained to hold that plaintiff had received all the moveables including jewellery and therefore, her claim on this point has to be rejected. Point No. 3 is answered in the negative.

36. These two issues pertain to the question of limitation. The question arises this way. In the original plaint there was no prayer regarding second divorce of 1982 and no prayer regarding the claim for gift on divorce. These two prayers were introduced in the plaint by an amendment of plaint in 1993. Subsequently, the defendants filed Additional written statement and raised the question of limitation. The defence is that these two claims are barred by limitation as on the date of amendment of plaint in 1993. There is no dispute that if these two claims had been made in the original plaint, as on the date of suit, they would be within time. Now the short point for consideration is whether we have to consider question of limitation as on the date of original plaint filed in 1986 or as on the date of the amended plaint in 1993.

There is no specific article in the Limitation Act to cover a suit of this type; hence we have to fall back on the residuary article, namely, Article 113 of the Limitation Act. The period of limitation is three years from the date of cause of action. The cause of action for these two prayers is the date of divorce namely, 15-7-1984. Originally plaint was filed in 1986 well within three years from the date of cause of action. Therefore, if these two amendments relate back to the date of suit, then there is no dispute that the amended prayers are well within time. But the learned Counsel for the defendant, Mr. Muchala, argued that the amendment does not relate back to the date of suit but they should be given effect to when the amendment was allowed in 1993 and therefore, the claim being made long after the period of three years from the date of cause of action to the date of amendment, the amended prayers are barred by limitation.

The learned Counsel for the plaintiffs, Ms. Snehal Parajape, on the other hand argued that the amendment relates back to the date of suit and therefore, there is no question of limitation at all. The other argument is that for a matrimonial dispute like this, the Limitation Act itself does not apply in view of the exemption provided under section 29(3) of the Limitation Act. Another submission made by her was that the amendment does not introduce any new case but is only a new approach to the facts already mentioned in the original plaint and therefore, the date of original plaint alone should be taken into consideration for the purpose of limitation.

37. The amendment application was allowed by this Court as per the order dated 26-2-1993. A perusal of that order shows that one of the strong objection taken by the defendant was that the proposed amendment is highly belated and it is barred by limitation.

The Court noticed that the proposed amendment does not make out a new case or does not introduce a new cause of action. Therefore, the Court granted the amendment.

The defendant challenged the said order of amendment in an appeal before the Division Bench of this Court in Appeal No. 675 of 1993. Before the Appellate Bench, the defendant-appellant contended that the proposed amendments are barred by limitation and should not have been allowed by the learned Single Judge. The Appellate Bench held that the amendment does not change the nature of the suit and even if there is delay, the Court has powers to grant amendment. Hence the appeal was dismissed. But the learned Counsel of the defendant submits that the Appellate Bench has kept intact the defendant's plea that the claim is barred by limitation and placed reliance on paragraph 5 of the Appellate Bench Order.

The observations of the Division Bench in paragraph 5 are as follows :

"5. As regard the second contention. We only wish to say that the appellant may take up a contention as regards limitation in the written statement if it is available in law. The appellant may also ask for an issue, if it is required to be framed in law."

(underlining is mine)."

Therefore, it is seen that the Appellate Bench has not conceded the defendant's request that the amendment should be granted subject to the question of limitation or that the amendment should be made effective from the date, the application for amendment was filed. What the Division Bench has observed is that if such a plea is open to the defendant, he may take up. Therefore, the question is whether such a plea of limitation can be raised at this stage after the amendment was granted by the Court. If the answer is in the affirmative, then certainly, the amendment should be held to be effective from the date of actual amendment but if the answer is in the negative then the amendment automatically relates back to the date of suit.

38. The argument of Ms. Paranjape that the amendment relates back to the date of the suit is well-founded and is based on number of authorities relied on by her.

In A.I.R. 1921 Privy Council 50, Charan das and others v. Amir Khan and others, it has been held that the Court can grant belated amendments.

In A.K. Gupta & Sons v. Damodar Valley Corporation, it was held that the amendment has to be allowed if the amendment makes out a new approach and not a new cause of action or an altogether different view. In the present case, the suit is essentially for a declaration that the marriage is still subsisting and for a declaration that the talaq before a Kazi of Bombay is not valid. In the plaint also there is a reference that the second divorce before the Amil of Indore but no specific relief was asked for by stating that necessary particulars are not available. Therefore, both the parties know that what is the main case between them namely, whether the marriage is still subsisting or whether it has been dissolved according to law. Hence it cannot be said that by virtue of amendment a new cause of action or new case is made out. Even otherwise that question cannot be raised at a later stage when the amendment has been granted and the order has been confirmed by the Appellate Court.

In Shanti Kumar v. H. Ins. Co., New York, it has been pointed out that in exceptional case even amendment barred by limitation may be allowed.

39. In M/s. Ganesh Trading Company v. Moji Ram, it has been pointed out that if there is no change in the cause of action or no change in the character of suit then amendment should be granted. I have already pointed how the proposed amendment does not make out a new case and does not change the nature or character of the suit.

, Suraj Prakash v. Raj Rani, it is observed that amendment which does not change the cause of action should be allowed and delay in filing the amendment application can be compensated by awarding costs.

Dena Bank v. Gautam Ratilal Shah, a belated amendment has been allowed.

40. Now the question is as to what is the effect of the amendment. The normal rule is that amendment always relates back to the date of suit.

In , All India Reporters Ltd. v. Ramchandra, it was a case where amendment has been allowed though the amended claim was barred by limitation. It is observed that the amendment relates back to the date of suit. It is further pointed out that once amendment is allowed, the question of limitation of the proposed amendment cannot be reserved, that means even if there is an observation that the amendment is granted subject to the limitation still the amendment relates back to the date of suit and it is not subject to any reservation as such. If, however, the amendment is barred by limitation even on the date of filing of the original plaint, the matter will be different.

Then we have also a decision of a Division Bench of this Court in 1986 Bom.L.R. 409 R.N. Shetty v. Syndicate Bank. It has been observed that time barred amendment had been granted subject to limitation. But it was observed that even though such a conditional order had been passed, the amendment relates back to the date of suit. What the Court has to find out is whether the amended plaint was barred by limitation not on the date of actual amendment but on the date the original plaint was filed.

In view of the above authorities, we may conclude that the Court has power and jurisdiction to grant even a time barred amendment though the Court be slow to grant such an amendment. Normally, the Court should not grant time barred amendment. But in exceptional circumstances, the Court has such a power to grant time barred amendment. When such amendment is granted, it cannot be made subject to limitation. Automatically, the amendment relates back to the date of suit. Even if the defendant takes a plea of limitation after the amendment is carried out, the question to be considered is whether the claim is barred by limitation as on the filing of the original plaint and not when the amendment is carried out. In the present case though the amendment was carried out in 1993 it relates back to the date of suit namely, 1986, but the cause of action arose in 1984. Under Article 113 of the Limitation Act, the suit should be filed within three years and therefore, it has to be held that the suit is well within time.

41. The other alternative submission of Ms. Paranjape was that there is no question of limitation at all to a matrimonial suit in view in section 29(3) of the Limitation Act, 1963.

Section 29(3) of the Limitation Act, 1963 reads as follows :

"29(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law."

The learned Counsel for the defendant Mr. Muchala argued that this sub-section applies only to those matrimonial disputes which are filed under Special Acts like, Hindu Marriage Act, Indian Divorce Act, Parsi Marriage Act. In my view, on the bare reading of the above provision, it is not possible to accept the argument urged on behalf of the defendant. The above provision shows that the Limitation Act does not apply to any matrimonial dispute under law for the time being in force and does not refer to only statute law or special enactment. On a bare reading of section it applies to all matrimonial suits for the time being in force either under special enactment or under any personal law. In this view, I am fortified by two judgments of the Allahabad High Court namely :

Ahmadi Bibi v. Mohd. Mabood and Sayed Ahmad Khan v. Imrat Jahan Begum .

42. The learned Counsel for the defendant invited my attention to some of the earlier decisions where Limitation Act had been applied. But all those cases were either under the Limitation Act, 1908 or the earlier Limitation Act, 1877.

As far as the Limitation Act, 1877 is concerned, there was specific provision in that Act pertaining to matrimonial reliefs like restitution of conjugal rights and when specific provisions are made in that Act and when no corresponding provision is in that Act like section 29(3) of the Limitation Act, 1963, we cannot be guided by the old decisions tendered under the Limitation Act, 1877. Similarly, the Limitation Act, 1908 section 29(3) had similar provision but limited to only cases under the Indian Divorce Act. Section 29(3) of the Indian Limitation Act, 1908 reads as follows:

"Nothing in this Act shall apply to the suit under the Indian Divorce Act."

Therefore, the only exception made in the 1908 Act was only regarding cases filed under the Indian Divorce Act. It did not apply to any other matrimonial disputes. Therefore, all matrimonial disputes under other laws must be covered by the provisions of the Indian Limitation Act, 1908 except those cases filed under the Indian Divorce Act when 1963 Act was brought on the statute book, the legislature made a departure and enlarged that scope of section 29(3) by stating that the Limitation Act does not apply to all cases pertaining to marriage and divorce under any law for the time being in force which is wide enough to cover statute law or personal law. Hence the decisions rendered under 1908 Act or 1877 Act are not relevant since we are concerned with 1963 Act. My view is that in view of this specific provision under section 23(3) of the Limitation Act, the provisions of Limitation Act, 1963 are not applicable to any suit pertaining to marriage or divorce under any law for the time being in force in India.

For the above reasons, my findings on Issues 5 and 8 are in the negative.

43. These three issues can be taken up for consideration since they pertain to different aspects of the gift on divorce.

It was argued on behalf of the defendant that this Court has no jurisdiction to grant that relief since any relief to be granted in connection with the divorce should be obtained by approaching a Magistrate as provided under the 1986 Act.

We are aware that lot of controversy was generated after the decision of the Supreme Court in Mohd. Ahmed Khan v. Shah Bano, case . In order to get over the effect of that Judgment, the Parliament passed the Muslim Women (Protection of Rights on Divorce) Act, 1986. In order to see the intention of the leigislature one of the principles is to find out the object for which the law was enacted and the statement of objects and reasons which preceded the introduction of the Bill in the Parliament. The statements of objects and reasons given by the Government by introducing the Bill gives such an idea about the intention with which it prompted the Government to pass the bill and the reasons for which the Parliament passed the Bill. In that statement of objects and reasons it is stated that decision of the Supreme Court in Shah Bano's case has generated controversy about the obligation of a Muslim husband to pay a maintenance to a divorced wife. Hence it has become necessary for introducing the Bill in order to clarify the right of a Muslim divorced woman regarding maintenance after divorce.

Then we come to section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 which reads as follows :

"3(1) Notwithstanding anying containing in any other law for the time being in force, a divorced woman shall be entitled to -

(a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband."

The other sub-clauses of sub-section are not relevant for out present purpose. In my view, what section 3(1)(a) provides is only a reasonable maintenance to be paid to a divorced wife by a husband for the period of iddat. The learned Counsel for the defendant submitted that this 1986 Act is a complete Code and invited the attention of the Court to Noor Jammal s/o Habib Momin v. Haseena w/o Noor Jamal. It is true that it is a complete Code so far as the matters provided in that Act are concerned, the payment of Mehar, payment of maintenance and other matters which are specifically mentioned in the Act. It can not certainly apply to any other matter which is not mentioned or referred to in the Act. The Legislature did not codify the entire law of divorce or the rights of woman on divorce under this Act. The scope of the Act is very limited and it was brought into force with the minimum object of removing the controversy that had been generated by the decision of the Supreme Court in Shah Bano's case where it had been ruled that notwithstanding the personal law, a divorced woman is entitled to maintenance under section 125 of the Code of Criminal Procedure. Hence it cannot be said that all rights of a woman on divorce are codified under the Act, for

example, a woman on divorce may be entitled to the custody of the children. A dispute may arise after divorce between the husband and the former wife about the custody of the children either party can certainly approach the Court of law for the custody of the minor child. It is for the Court to decide as to which person is entitled to the custody of the child in the larger interest of the child. That is not a matter which is provided under the Act of 1986 though it may arise as a dispute between the husband and wife after divorce.

Similarly, the question of Mata (some times also spelt as Muta) or gift on divorce is concerned, it is neither allowed nor rejected nor even referred to in the 1986 Act. Strictly speaking the grant of gift on divorce by a Court of Law is not in practice at all and further this is a particular provision applicable to Dawoodi Bohra sect which is a very small section of the Muslim community. Hence, it was not the intention of the Legislature to make any reservation either to provide for it or by saying that the wife is not entitled to it regarding the gift on divorce. Hence by any stretch of imagination it cannot be said that the gift on divorce is included in 1986 either expressly or by necessary implication. The Act is silent on that point. That was not the intention or object of the Act. The Act was not codifying the entire rights of a divorced woman under the Act. The limited object of the Act is only to provide for payment of Mehar, providing maintenance during the iddat period and return of some moveables to the wife; hence I am not impressed by the argument for the learned Counsel for the defendant that the plaintiff should approach a Magistrate by filing an application for payment of gift on divorce under section 3 of 1986 Act. In my view, if the Law provides for such a right then it can be enforced in a Civil Court. Hence Issue No. 12 is answered in the negative.

44 Now, most important discussion that was mooted before me was whether really a Muslim woman was entitled to such a gift on divorce or not and of course, if the question is answered in the affirmative, then as to what is reasonable amount that can be fixed under this caption. At first, it may be stated that in actual practice, in Muslim Law, this payment of gift on divorce is not being followed. I am dealing with this particular right mentioned in some of the texts on Muslim Law pertaining to Dawoodi Bohra Community which I have already stated, is a very small section of Muslim community in India.

As already stated, the well known scholar Sri Fyzee has done a lot of research on Fatimid Law and has prepared a Compendium of Fatimid Law, which is based on the original Muslim Law based on Quran and traditions of the Holy Prophet and other texts. He has relied on the principal text on the subject namely (Da'a'im al-Islam) and has also referred to number of other texts which are mentioned in his Introduction in the Compendium. On page xxxiii, the learned Author has mentioned that the importance of his Compendium is to throw light on questions directly related to social life in western India. Then he observes as follows :

"As such, it is of the greatest importance for the study of social behaviour among the Bohoras as it was affected by this system of Islamic law."

The learned Author has also referred to the book 'Hawashi' in the same page and mentions that the author adhered to the Daudi sect, the books more highly esteemed among the Daudis.

45. In the Compendium of Fatimid Law in Chapter II section VIII, page 67 the learned Author has explained the relevant provision relating to Muta (Gift on Divorce).

Paragraph 286 reads as follows :

"286. (i) The Koran clearly lays down that a man should make a gift (muta) to his divorced wife, according to his means and recognized custom. The obligation exists whether the marriage is consummated or not (DM, 1100-01; Mukh, 362; Yan, 208)

(ii) the giving of a present after divorce is a well-established sunna (Mukh, 362).

(iii) Imam Jafar al-Sadiq held it to be obligatory (farida, wajiba) and always decreed its payment (DM, 1101-03, Mukh, 362).

(iv) The muta should be a generous donation (Mukh, 362)

287. (i) The gift is obligatory even to a slave-girl."

The learned Counsel for the defendant contended that in the very nature of things a gift is a voluntary act and it cannot be enforced by law. Though the English translation is gift on divorce, we find from the above proposition that Koran has laid down that a man "should make a gift" to his divorced wife. Though the word "gift" is used, it is clarified by the word "should make" which means that it is some thing obligatory or compulsory though it is styled as a gift. The very next sentence in paragraph 286 shows that this "obligation" exists whether the marriage is consummated or not. The word used is "obligation" which means some thing to be obeyed or complied with. Further, section 286 (ii) says that this practice of giving of a present after divorce is a well-established "sunna". Then section 286(iii) also uses the word that it is "obligatory" and further Imam Jafar decrees payment which also means that it is not some thing voluntary but some thing which can be enforced. We have seen above that section 287(i) says that gift is obligatory even to a slave-girl. Though the word "gift" is used, it is followed by the word "should be made" which means it involves a sense of obligation and not something that is voluntary. What is more, we come to paragraph 290 which reads as follows :

"290. Every divorced woman is entitled to a muta; but not a woman divorced by khul, khiyar, or mubara'a (D.M, loc. cit., Yan, 208) (underlining is mine)."

Here again we find that the word used is "is entitled" which means that it is a legal right.

46. Now we will refer to Fyzee's 'Outlines of Muhammadan Law', Fourth Edition, which is one of the leading text books on Muslim Law. At paragraph 29 (page 187), the learned Author has stated as follows :

"29.(iv) Gift (muta) to divorced wife on divorce-Fatimid Law. The Fatimid law lays down very specifically that on divorce, and apart altogether from the payment of mahr, the husband shall make

a gift (called muta, and to be distinguished from the term used for temporary marriage in Ithna Ashari law) to the divorced wife. This payment is to compensate her for loss of consortium, and is based on the text of the Koran, ii, 286. Unfortunately however this rule is not known in India and it is submitted that it should be enforced on the parties governed by this school of law, Fatimid Law 286-91."

Both the learned Counsel have relied on this paragraph. The learned Counsel for the plaintiffs contended that Fatimid Law recognizes this gift on divorce. The learned Counsel for the defendant also relied on this passage to say that this Rule is not being practised in India as mentioned by the author himself. It is true that the Author has stated above that this Rule is not known is India. But he has further stated that it should be enforced on the parties governed by this school of law.

47. Then we may make a useful reference to Muhsin Tayyibji's 'Muslim Law', Fourth Edition at page 174 where he has mentioned as follows :

"The Da'a'imu'l-Islam makes it incumbent on the husband to give a mit'at, or present to the wife on talaq : the value of the present to correspond to the means of the husband, - a duty derived from the Quran..... (Underlining is mine)."

Therefore, we find that the Author has used the word "incumbent" on the part of the husband to give such a gift which means it is something obligatory and not voluntary or optional. Further, the Author has used the word "a duty derived from the Quran". The learned Counsel for the plaintiff also invited my attention to a book by name "Personal Law in Islamic Countries" by Tahir Mahmood, 1987 Edition where there is a reference to Muslim Law in all the Islamic countries and some of the countries have adopted and followed the principle of 'Muta', gift on divorce to divorced wife.

48. Then we may also refer to "Reform of Muslim Personal Law in India" by A.A.A. Fyzee. Among other things, the learned Author has stated that one of his proposition at page 27 is that the husband should be made to pay compensation to the divorced wife at the time of talaq. Then the learned Author gives the reason for this suggestion made by him in the following words :

"This follows from an important point mentioned by the Fatimid and Maliki authorities. In those systems of law, this compensation is payable in addition to mahr, dower. Such a payment is clearly envisaged in the verse of the Koran which says :

Provide for them (the divorced women), the rich according to his means, and the straitened according to his means, a fair provision. This is a bounden duty for those who do good (2,236). Now this clear provision of the Koran is interpreted in various ways by the jurists of Islam, and the force of the words "fair provision" (mata un bi 'l-ma'ruf) overlooked in most of the schools. It is only in the Fatimid and Maliki schools that such a payment is made compulsory. However it is to be noted that this clear rule of law is universally disregarded even by the Bohoras in India, who are under a clear obligation to follow it. (Underlining is mine.) Though it is a recommendation by Fyzee in his text "The Reform of Muslim Personal Law in India", he bases his recommendation on the texts on

Muslim Law and Holy Koran. The abovementioned words show that as far as Fatimid Law is concerned, it is a compulsory obligation and not something voluntary or optional as contended by the learned Counsel for the defendant.

49. The learned Counsel for the defendant invited my attention to Salmond's Jurisprudence (1966 Edition) where at pages 216, 217 and 233 contain comments on duties, rights and kind of legal rights. He therefore argued that there is lot of difference between a legal duty and a moral duty. He also submitted that there is a difference between perfect right and imperfect right corresponding to a perfect duty which is recognized by law and can be enforced in law. He further argued on the basis of the said book that an imperfect right is one which cannot be enforced in a Court of law.

In my view, the above argument has no force since the law pertaining to this compensation to a wife on talaq which can be called either as a gift or present cannot be said to be an imperfect right which cannot be enforced in a Court of Law. I have already referred to various Text mentioned above where the duty of the husband is shown as "obligation", "should be paid", etc., which means that it is a legal duty which can certainly be enforced in a Court of Law. Merely because the right has not been claimed in any case before a Court of Law in India, it does not mean that the right does not exist or right cannot be enforced in a Court of Law. This particular community is a very small community mostly concentrated in western India. They have a high sense of religious discipline and further they have a religious head. It is also not disputed that this religious Head of Dawoodi Bohras commands great influence among the members of the Community and has even powers to ex-communicate any member. When it is such a small Community and controlled by a religious Head it is quite likely that number of cases have not come to Court and therefore, it is possible that till now no Dawoodi Bohra woman had claimed this compensation or gift on divorce from her former husband. Hence it cannot be said that the right is an imperfect right on this ground alone.

50. The learned Counsel for the defendant also reminded the Court that the Court should not lay down a new principle of law or lay down its own interpretation and referred to some Authorities. It is true that as far as Muslim Law is concerned, the Court should not put its own interpretation on Muslim Law vide Ibrahim Fathima v. Mohamed Saleem, and I.L.R. 1925 Cal. 10 Aga Md. Jaffer Bindanim v. Koolsom & Co. In this case, I am not putting any of my own interpretation on the original text of Koran or on any other text. I am just applying the law as declared by well-known scholars Fyzee and Tayyabji who have based their interpretation of law on the basis of original text including the Holy Koran. The duty of the Court is to apply the Law. In this connection, we may also make reference to the talaq form prescribed for the use of members of Dawoodi Bohra Community. The entire talaq book has been got produced from the office of the Head Amil and it contains instructions to the husband who wants to give talaq to his wife. One of the columns in instructions (English translation of Exhibit 22) is that in the case of talaq-ul-Sunna, then the divorcer may be exhorted to pay mataa. The learned Counsel for the defendant submitted that the word used is "exhorted" which means that the husband should be encouraged or persuaded to give this gift. I do not know as to what is the original Urdu words used in the Form and therefore, I cannot say whether the word exhorted is a correct translation for the said word. Even otherwise, I have already pointed out that though the word used is "gift", it is meant to be an obligatory act on the part of the husband. I have already shown that in some books, it is mentioned as "compensation" or "gift". The intention

can be gathered from the interpretation mentioned above. This is not left to the will or pleasure of the husband but it is something which is obligatory on his part to give some compensation or present or gift to the wife with whom he has parted company by giving talaq. After giving my serious and anxious consideration to the question I have reached the conclusion that this compensation or gift or present on divorce is well recognised in Fatimid Law and the Dawoodi Bohras is a community governed by the Fatimid Law. This right is a legal right which has been recognised by the Koran and other ancient texts, and therefore, it can be enforced in a Court of Law. For these reason my finding on this point is in the affirmative.

51. Now remains the question as to how much compensation should be granted. The plaintiff has claimed a sum of Rs. 10,00,000/- as gift on divorce which on the face of it a highly exaggerated claim. Even the texts which I have referred to above show that the amount should be such that a husband can pay having regard to his financial status. The defendant is said to be a partner in some Firms. Though the income-tax Returns have been summoned, they do not give us a clear picture about the financial position of the husband. The net income found on all these income-tax Returns is very small.

Having regard to the financial status of the husband, I feel that a sum of Rs. 25,000/- may be fixed as reasonable sum to be paid by the defendant to the first plaintiff as compensation for talaq or as gift on talaq. Issue No. 7 is answered accordingly.

52. No evidence has been adduced on these two issues. No arguments were addressed on these two issues. Hence both these issues are answered in the negative.

53. In view of my findings on several issues, it has to be held that the marriage between the parties is no longer subsisting and that there is a valid divorce which has come into effect on and from 15-7-1984. As far as the arrears of maintenance are concerned, the plaintiff is entitled to the sum less Rs. 18,000/- which she has already received. As far as the gift on divorce, I have granted to the extent of Rs. 25,000/- only having regard to the financial status of the defendant. I find that there is a prayer in the plaint regarding refund of the amounts withdrawn from the joint account in the Bank. No clear evidence has been led on this point, there is nothing to show that the amount had been deposited by the first plaintiff. Hence in my view, the first plaintiff has not made out a case that the amounts in the Bank belong to her and that it was she who had deposited that amount in the Bank. Hence she is not entitled to any such amount.

54. In the result, the suit is decreed partly as follows :

a) the marriage between the parties is no longer subsisting and the divorce given by the defendant is valid divorce and the marriage stands dissolved with effect from 15-7-1984;

b) the first plaintiff-wife is entitled to arrears of maintenance at the rate of Rs. 2,000/- per month from 6-11-1982 to 15-7-1984 less Rs. 18,000/- already paid;

c) the second plaintiff-son is entitled to get a maintenance at the rate of Rs. 1,000/- per month from today till he attains majority. Liberty is reserved to the second plaintiff to move the Court for enhancement of the rate of maintenance fixed in case of change in circumstances;

d) the first plaintiff-wife's prayer for recovery of moveables including jewellery is rejected;

e) the first plaintiff-wife's prayer for recovery of the amount which has been kept in the joint account in the Union Bank of India by the defendant is rejected;

f) the first plaintiff is entitled to recover Rs. 25,000/- as gift-compensation on divorce from the defendant;

g) the plaintiff-wife is also entitled to get proportionate Court costs from the defendant;

the defendant is granted three months' time to pay the amount as decreed by the Court to the plaintiff in this suit;

as far as Notice of Motion No. 1532 of 1994 is concerned, it does not survive for consideration since I have determined the maintenance in the final judgment itself and the Notice of Motion is disposed of accordingly.

Notice of Motion disposed of accordingly.