IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

TUESDAY, THE 5TH DAY OF JULY 2022 / 14TH ASHADHA, 1944

RFA NO. 40 OF 2012

AGAINST THE JUDGMENT AND DECREE PASSED IN OS 192/2005 OF III ADDITIONAL SUB COURT, KOZHIKODE

APPELLANTS/DEFENDANTS 4 TO 12 AND 15 TO 18:

1 C.ABDUL AZIZ
S/O. C.ABU, AGED 51 YEARS,
SUHARA MANZIL, KAITAVALAPPU,
OPP.NEW EVAREST LODGE,
PANNIYANKARA AMSOM, DESOM,
P.O.KALLAI, KOZHIKODE -3.

2 C.ABDUL LATHEEF
S/O.C.ABU, AGED 43 YEARS,
SUHARA MANZIL, KAITHAVALAPPU,
OPP.NEW EVEREST LODGE,
PANNIYANKARA AMSOM, DESOM,
P.O. KALLAI, KOZHIKODE -3

3 C.MUMTHAZ
D/O.C.ABDU, AGED 42 YEARS,
SUHARA MANZIL,
KAITAVALAPPU, OPP.NEW EVEREST LODGE,
PANNIYANKARA AMSOM, DESOM,
P.O. KALLAI, KOZHIKODE -3

4 C.THAHIRA
D/O.C.ABDU, AGED 38 YEARS,
SUHARA MANZIL, KAITHAVALAPPU,
OPP.NEW EVEREST LODGE,
PANNIYANKARA AMSOM, DESOM,
P.O. KALLAI, KOZHIKODE – 3

5 **T.K.FATHIMA, W/O. C.BEERAN KOYA,**
AGED 61 YEARS
NEELO BHAVAN, THIRUVANNOOR ROAD,
PANNIYANKARA AMSOM, DESOM, KOZHIKODE,
NOW RESIDING AT VINODINI NIVAS,
ELATHUR AMSOM,DESOM, VENGALI,
ELATHUR P.O., KOZHIKODE
(SHOWN IN THE IMPUGNED JUDGMENT AND DECREE
AS FATHIMA @ KUNHEEVI WRONGLY)

6 **C.BABU**
S/O.C.BEERAN KOYA,
AGED 41 YEARS, NEELO HAVAN,
THIRUVANNOOR ROAD,
PANNIYANKARA AMSOM, DESOM,
KOZHIKODE NOW RESIDING AT VINODINI NIVAS,
ELATHUR AMSOM, DESOM, VENGALI,
ELATHUR P.O. KOZHIKODE
(SHOWN IN THE IMPUGNED JUDGMENT AND DECREE
AS C.BAKKAR BABU WRONGLY)

7 **C.SAIRA**
D/O.C.BEERAN KOYA,
AGED 37 YEARS, NEELO BHAVAN,
THIRUVANNOOR ROAD,
PANNIYANKARA AMSOM, DESOM,
KOZHIKODE, NOW RESIDING AT VINODINI NIVAS,
ELATHUR AMSOM, DESOM, VENGALI,
ELATHUR P.O. KOZHIKODE
(SHOWN IN THE IMPUGNED JUDGMENT AND DECREE
AS SHAHAR BANU WRONGLY)

8 **C.NILOFER @ C.NEELOFFER**
D/O. C.BEERAN KOYA, AGED 34 YEARS,
NEELO BHAVAN, THIRUVANNOOR ROAD,
PANNIYANKARA AMSOM, DESOM,
KOZHIKODE, NOW RESIDING AT VINODINI NIVAS,
ELATHUR AMSOM, DESOM, VENGALI,
ELATHUR P.O. KOZHIKODE

9 **C.NAJITH MUHAMMED**
S/O. C.BEERAN KOYA, AGED 30 YEARS,
NEELO BHAVAN, THIRUVANNOOR ROAD PANNIYANKARA AMSOM,
DESOM KOZHIKODE,
NOW RESIDING AT VINODINI NIVAS,
ELATHUR AMSOM, DESOM, VENGAI,
ELATHUR P.O., KOZHIKODE

(WRONGLY SHOWN AS C.NAJEED IN THE IMPUGNED DECREE AND JUDGMENT)

10 HAZEENA, W/O. ABDUL MAJEED
AGED 41 YEARS, SUHARA MANZIL,
KAITAVALAPPU, OPP.NEW EVEREST LODGE,
PANNIYANKARA AMSOM, DESOM,
P.O. KALLAI, KOZHIKODE - 3

11 SHAMSUDDEEN C
S/O. ABDUL MAJEED, AGED 25 YEARS,
SUHARA MANZIL, KAITAVALAPPU,
OPP.NEW EVEREST LODGE,
PANNIANKARA AMSOM, DESOM P.O. KALLAI,
KOZHIKODE - 3

12 SHAMRIN @ SHEMRIN
D/O. ABDUL MAJEED, AGED 21 YEARS,
SUHARA MANZIL, KAITAVALAPPU,
OPP.NEW EVEREST LODGE,
PANNIYANKARA AMSOM, DESOM,
P.O. KALLAI, KOZHIKODE - 3

13 ASHA SHAFEENA
D/O. ABDUL MAJEED AND W/O.FIROS ELEYEDATH,
AGED 23 YEARS,
SUHARA MANZIL,
KAITAVALAPPU,
OPP.NEW EVEREST LODGE,
PANNIYANKARA AMSOM, DESOM,
P.O.KALLAI, KOZHIKODE -3,
NOW PERMENENTLY RESIDING WITH
HER HUSBAND AT ELAYODATH HOUSE, PALAPPETTA
P.O.PANIPPARA, MALAPPURAM-676541.

(SHOWN AS SHAFEENA IN THE JUDGMENT AND DECREE WRONGLY)

BY ADVS.SRI.K.M.FIROZ
SRI.N.M.MADHU
SMT.C.S.RAJANI

<u>RESPONDENTS/PLAINTIFFS AND DEFENDANTS 13, 14 AND 2:</u>

1 CHEMBUKANDY SAFFIYA
D/O.C.VEERAN, CHEMBUKANDY HOUSE,
KAITHAVALAPPU OPP.NEW EVEREST LODGE,
PANNIYANKARA AMSOM, DESOM,
P.O. KALLAI, KOZHIKODE 673003

2 CHEMBUKANDY SHAMSUDDIN @ ABDUL SALEEM

S/O. C.VEERAN, CHEMBUKANDY HOUSE,
KAITHAVALAPPU OPP.NEW EVEREST LODGE,
PANNIYANKARA AMSOM, DESOM
P.O. KALLAI, KOZHIKODE 673003

3 C.MOIDEEN KOYA(DIED)
AGED 49 YEARS
S/O. C.VEERAN, JAMSHEENA MANZIL,
VELLATHUMPADAM, CHERUVANNUR AMSOM, DESOM,
P.O. NALLALAM, KOZHIKODE-673003.

4 SUHARABI
D/O. C.VEERAN,
EDAKKORA POTTAMMAL VEEDU,
CHELAVOOR AMSOM, DESOM,
KOTTAMPARAMBU P.O.
KOZHIKODE 673003

5 IMBICHI PATHUMMABI
D/O. C.ABU, KAMBI STORE HOUSE,
CHAKKIRIKADE PARAMBA NADUVATTAM AMSOM, DESOM,
ARAKINAR P.O.
KOZHIKODE-673003.

ADDL.R6 KHADEEJA,
W/O.LATE C.MOIDEEN KOYA,
JAMSHEENA MANZIL,
VELLATHUMPADAM,
CHERVANNUR AMSOM, DESOM,
P.O.NALLALAM,
KOZHIKODE- 673 027

ADDL.R7 JAMSHEENA,
D/O.LATE C.MOIDEEN KOYA,
JAMSHEENA MANZIL,
VELLATHUMPADAM,
CHERVANNUR AMSOM, DESOM,
P.O.NALLALAM,
KOZHIKODE- 673 027

LEGAL HEIRS OF THE DEACEASED R3 IMPLEADED AS ADDITIONAL R6 AND R7 VIDE ORDER DATED 11/3/2019 IN IA 561/2016

BY ADVS.SRI.K.S. VINAYAK PRATAP FOR R3 AND R4
SRI.R.BINDU (SASTHAMANGALAM) FOR R6 AND R7
SRI.PRASANTH M.P FOR R6 AND R7
SRI.SRINATH GIRISH FOR R2
P.JERIL BABU
MS.V.NAMITHA FOR R1 AND R2
PRASUDHA.S
K.B.SIVARAMA KRISHNAN FOR R5

SRI. K.I.MAYANKUTTY MATHER, AMICUS CURIAE

THIS REGULAR FIRST APPEAL HAVING COME UP FOR FINAL HEARING ON 05.07.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R."

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

R.F.A.No.40 of 2012

Dated this the 5th day of July, 2022

J U D G M E N T

C.S.Sudha, J.

Does the Qur'an or Hadith specifically prohibit or bar a mother from being guardian of her minor child's person and property? Article 13 of the Constitution says laws cannot be inconsistent with or in derogation of the fundamental rights. If that be so, will not prohibiting a Muslim mother from being guardian of her minor child's person and property, be violative of Articles 14 and 15 of the Constitution, asks/queries Sri. Firoz K.M, the learned counsel for the appellants. If it is violative, can the court interfere to set right the injustice, if any, caused? According to the learned counsel, the answer to the first question is an emphatic no and to the remaining part, in the affirmative. Let us examine whether the arguments advanced are tenable or sustainable in the light of the settled position that a Muslim mother cannot be the guardian of her minor child's person or

property except movable property. We propose to consider the issues involved herein strictly going by the precedents laid down by the Hon'ble Supreme Court being the law of the land under Article 141 of the Constitution of India.

2. Extensive arguments have been advanced by either side by referring to various verses in the Qur'an, Hadith, several decisions of the Privy Council, Apex court, this court and other High Courts, in support of their respective arguments. We heard Sri.K.M.Firoz, the learned counsel for the first appellant; Sri.N.M.Madhu, the learned counsel for appellants 2 to 9; Ms.Namitha V, the learned counsel for first and second respondents and Sri.R.Bindu Sasthamangalam, the learned counsel for sixth and seventh respondents. In the light of the important questions of law raised, Advocate Sri.K.I. Mayankutty Mather was appointed as the *Amicus curiae* to assist us in the matter. The learned Amicus has also made extensive submissions on the point, more or less supporting the arguments advanced on behalf of the appellants. Before we go into the facts of this case and the impugned judgment, we will first refer to the various arguments advanced relating to the aforesaid aspects.

3. On behalf of the appellants, reference has been made to the following verses-

(i) Hadith 134 narrated by Ibn Umar, a companion of Prophet Mohamed and recorded by Sahih Al-Bukhari - *"Chapter 90: The woman is a guardian in her husband's house. The Prophet Said, "All of you are guardians and are responsible for your wards. The ruler is a guardian and the man is a guardian of his family; the lady is a guardian and is responsible for her husband's house and his offspring; and so all of you are guardians and are responsible for your wards." (*Emphasis supplied)

(ii) Hadith No. 105 narrated by Abu Huraira, a companion of Prophet Mohamed and recorded by Sahih Al- Bukhari- *"I heard Allah's Apostle saying, "Amongst all those women who ride camels (i.e., Arabs), the ladies of Quraish are the best. They are merciful and kind to their off-spring and the best* ***guardians*** *of their husbands' properties.' Abu Huraira added," Mary the daughter of Imran never rode a camel."*

(iii) Hadith 283 in Riyad as-Salihin reads: *Ibn Umar (May Allah be pleased with them) reported: The Prophet (PBUH) Said, "All of you are* ***guardians*** *and are responsible for your subjects. The ruler is a* ***guardian*** *of his subjects, the man is a* ***guardian*** *of his family, the woman is a* ***guardian*** *and is responsible for her husband's house and his offspring; and so all of you are* ***guardians*** *and are responsible for your subjects." [Al-Bukhari and Muslim*]

3.1. Referring to the aforesaid Hadiths, it was argued on behalf of the appellants that, a woman has in fact been recognized as guardian of her husband's house as well as his wards. These Hadiths were never considered in any of the judgments which have held that the mother cannot be the guardian of her minor child. Reference was also made to the Hedaya or Guide, a commentary on the Mussulman laws by Charles Hamilton, the relevant portion of which reads:

> *"If a person bestow any thing in gift or alms upon an orphan under the protection of a particular person, it is lawful for that person to take possession of such gift or alms on his behalf.-It is here proper to remark, that acts in regard to infant orphans are of three descriptions- I. Acts of guardianship, such as contracting an infant in marriage, or selling or buying goods for him; a power which belongs solely to the Walee, or natural guardian, whom the LAW has constituted the infant's substitute in those points.- II. Acts arising from the wants of an infant; such as buying or selling for him on occasions of need; or hiring a nurse for him, or the like; which power belongs to the maintainer of the infant, whether he be the brother, uncle, or (in the case of a foundling,) the Mooltakit, or taker-up, or the mother, provided she be maintainer of the infant; and as these are empowered with respect to such acts, the Walee, or natural guardian, is also empowered with respect to them in a still superior degree;- nor is it requisite, with respect to the guardian, that the infant be in his immediate protection.- III. Acts which are purely advantageous to the infant, such as accepting presents or gifts, and keeping them for him; a power*

> *which may be exercised either by a Mooltakit, a brother, or an uncle, and also by the infant himself, provided he be possessed of discretion, the intention being only to open a door to the infant's receiving benefactions of an advantageous nature.-The infant, therefore, is empowered in regard to those acts, (provided he be discreet,) or any person under whose protection he may happen to be."*

3.2. It was pointed out that the source of law on the basis of which the aforesaid conclusion has been arrived at by Charles Hamilton, has not been made clear. This commentary by Charles Hamilton, which according to the appellant is wrong, is the basic text adopted and considered by the Privy Council in **Imambandi v. Haji Mutsaddi: AIR 1918 Privy Council 11,** which dictum has been followed in the subsequent decisions of the Hon'ble Supreme Court and by various High Courts including this court. This conclusion has been arrived at without taking into account the aforesaid verses in the Hadith. Further, there is absolutely nothing in the Qur'an prohibiting a mother from being the guardian. An interpretation which finds no place in the Qur'an or Hadith cannot be adopted in interpreting Muslim law. Reference has been made to the decisions in **State of U.P. v. Synthetics and Chemicals Ltd., 1991 KHC 1164** and **Delhi Airtech Services Pvt. Ltd. (M/s) vs. State of U.P., 2011 KHC 4721** wherein the principle relating to judgments passed *sub-*

silentio have been discussed and explained. According to the appellants, the decisions of the Hon'ble Supreme Court, namely, **Mohd. Amin v. Vakil Ahmad: AIR 1952 SC 358; Syed Shah Gulam Ghouse Mohiuddin v. Syed Shah Ahmad Mohiuddin Kamisul Qadri: AIR 1971 SC 2184** and **Meethiyan Sidhiqu vs. Muhammed Kunju Pareeth Kutty, AIR 1996 SC 1003**, have been passed *sub-silentio,* as the aforesaid arguments were never advanced or raised by the parties in the said cases and so the Apex Court never had the occasion to consider the same. Therefore, the aforesaid decisions cannot be a precedent of a position which has never been considered or adjudicated, argue the appellants.

4. Per contra, Ms.Namitha, the learned counsel for the respondents submitted that, neither the Qur'an nor the Hadith say that a mother can be the guardian. According to her, one cannot read into the Qur'an or Hadith something which is not there. Specific reference has been made to certain verses in the Qur'an and Hadith to substantiate the argument that a woman has never been given the status of a guardian. The relevant verses in the Qur'an and Hadith which would indicate this, according to the respondents, are -

> *"240. And those of you who die and leave behind wives should bequeath for their wives a year's maintenance and residence without turning them out, but if they (wives) leave, there is no*

sin on you for that which they do of themselves, provided it is honourable (e.g. lawful marriage). And Allah is All-Mighty, All-Wise." (Surah 2. Al-Baqarah)

4.1. The mother was never intended to be a guardian because both the Qur'an and the Hadith allow widows to remarry after the 'iddah' period if they choose to, and require that the man bequeath for the widow a year's maintenance and residence without turning them out. To substantiate this argument, reference was made to the decision in **Sita Ram v. Amir Begam (1886) ILR 8 All 324.** On the issue of mother as a guardian of minor's property, it has been held that even in the case of minority of her children, she cannot exercise any power of disposition with reference to their property, because she cannot act as their guardian in respect of such matters. The facility of divorce on the one hand, and of remarriage of widows on the other, account for this doctrine of the Muhammedan law. Pointing to this decision, it is submitted that, it is therefore clear as to why a mother has not been made a guardian of the minor's property.

4.2. Surah An-Nisa (The Women) IV-

"2. And give unto orphans their property and do not exchange (your) bad things for (their) good ones; and devour not their substance (by adding it) to your substance. Surely, this is a great

sin."

"6. And try orphans (as regards their intelligence) until they reach the age of marriage; if then you find sound judgment in them, release their property to them, but consume it not wastefully and hastily fearing that they should grow up, and whoever (amongst guardians) is rich, he should take no wages, but if he is poor, let him have for himself what is just and reasonable (according to his labour). And when you release their property to them, take witness in their presence; and Allah is All-Sufficient in taking account."

" 9. And let those (executors and guardians) have the same fear in their minds as they would have for their own, if they had left weak offspring behind. So let them fear Allah and speak right words."

"*10. Verily, those who unjustly eat up the property of orphans, they eat up only fire into their bellies, and they will be burnt in the blazing Fire!"*

"*152. And come not near to the orphan's property, except to improve it until he (or she) attains the age of full strength; and give full measure and full weight with justice. We burden not any person, but that which he can bear. And whenever you give your word (i.e.) judge between men or give evidence), say the truth even if a near relative is concerned and fulfil the Covenant of Allah. This He commands you, that you may remember."*

From the translation of the meanings of **Sahih Al-Bukhari**: translated by Dr.Muhammad Muhsin Khan. (Volumes 2, 3, 4, 6 and 7) :-

"893. Narrated Ibn 'Umar*: I heard Allah's Messenger saying, "All of you are guardians and responsible for your*

> *wards and the things under your care. The Imam (i.e., ruler) is the guardian of his subjects and is responsible for them, and a man is the guardian of his family and is responsible for them. A woman is the guardian of her husband's house and is responsible for it. A servant is the guardian of his master's belongings and is responsible for them."*
> *Ibn Umar added, "I thought that he also said, 'A man is the guardian of his father's property and is responsible for it. All of you are guardians and responsible for your wards and the things under your care.'"*

This Hadith, according to the respondents, show that a woman has been given a very limited role. This only provides for a woman as guardian, a custodian or caretaker, of her husband's properties/household and responsible for the upbringing of her children and nothing more.

> *"(25) CHAPTER. The servant gets a reward for giving charity when ordered by the owner of the property, as long as the servant has no intention of spoiling it (his master's property).*
> *1437. Narrated Aishah: Allah's Messenger said, "When a woman gives in charity from her husband's meals with no intention of spoiling it (the property of her husband), she will get a reward for it and her husband too will get a reward for what he earned, and the trustee (store keeper) will have the reward likewise."*
> *1440. The Prophet further said, "If a lady gives meals (in charity) from her husband's house without spoiling her, husband's property, she will get a reward and her husband will also get a reward likewise. The husband will get a reward*

because of his earnings and the woman because of her spending.

1862. Narrated Ibn Abbas: The Prophet said, "A woman should not travel except with a Dhu-Mahram (her husband or a man with whom that woman cannot marry at all according to the Islamic Jurisprudence), and no man may visit a woman except in the presence of a Dhu-Mahram".

*"*2212. Narrated Urwa: *I heard Aishah saying, "The Holy Verse: '... Whoever amongst guardians is rich, he should take no wages but if he is poor, let him have for himself what is just and reasonable (according to his labour)' (V.4:6), was revealed concerning the guardian of the orphans who looks after them and manages favourably their financial affairs; if the guardian is poor, he could have from it what is just and reasonable (according to his labour)."*

"2658. "Narrated Abu Sa'id Al-Khudri : The Prophet said, "Isn't the witnessof a woman equal to half of that of a man? The women said, "Yes". He said, "This is because of the deficiency of a woman's mind."

These verses were pointed out to show that at that point of time, women were never considered equal to men, in fact they were treated or considered inferior to men and so the question of conferring guardianship on them was never even contemplated.

"(21) CHAPTER. *The statement of Allah:*

"*And give unto orphans their property, and do not exchange (your) bad things for (their) good ones; and devour not their substance (by adding it) to your substance. Surely, this is a*

great sin.

(22) CHAPTER. The statement of Allah:

"And try orphans (as regards their intelligence) until they reach the age of marriage; if then you find sound judgment in them, release their property to them, but consume it not wastefully and hastily fearing that they should grow up, and whoever (amongst the guardians) is rich, he should take no wages, but if he is poor, let him have for himself what is just and reasonable (according to his labour). And when you release their property to them, take witnesses in their presence; and Allah is All-Sufficient in taking account."

2765. Narrated Aishah: The following verse:

"...And whoever (amongst the guardian) is rich, he should take no wages, but if he is poor, let him have for himself what is just and reasonable..." (V.4:6) was revealed in connection with the guardian of an orphan, and it means that if he is poor he can have for himself (from the orphan's wealth) what is just and reasonable (according to his labour) from the orphan's share of the inheritance."

(24) CHAPTER. Allah's Statement:

"...And they ask you concerning orphans. Say: ' The best thing is to work honestly in their property, and if you mix your affairs with theirs, then they are your brothers. And Allah knows him who means mischief (e.g, to swallow their property) from him who means good (e.g, to save their property). And if Allah had wished, He could have put you into difficulties. Truly, Allah is All-Mighty, All-Wise.'"

(25) CHAPTER.

"The employment of an orphan on a journey and at home

provided it is beneficial for him. And (it is obligatory) for the mother and the step mother of an orphan to look after him (even if they were not his guardians).”

4531. Narrated Mujahid (regarding the verse):

“…. And those of you who die and leave behind wives (i.e., widows) should bequeath for their wives a year's maintenance and residence without turning them out, but if they (wives) leave, there is no sin on you for that which they do with themselves, provided it is honourable (e.g lawful marriage)...” (V.2:240).

4575. Narrated Aishah regarding the Statement of Allah:

“This Verse was revealed regarding the orphan's property. If the guardian is poor, he can take from the property of the orphan what is just and reasonable, according to his work and the time he spends on managing it.”

(12) CHAPTER. What type of women should one seek in marriage? And what type of women is better? And what type of women one is recommended to select so as to beget good offspring, without there being any compulsion to do so.

5082. Narrated Abu Hurairah: The Prophet said, “The best women are the riders of the camels and the righteous among the women of Quraish. They are very kind to their children in their childhood and very careful in guarding of the property of their husbands”.

This verse according to the respondents make it clear that women were only given the responsibility or the task of guarding their husband’s

property.

(37) CHAPTER: *"Whoever said, A marriage is not valid except through the Wali (i.e., her father or her brother or her relative etc.)"*

(80) CHAPTER. To be polite and kind to the women.

"*5184. Narrated Abu Hurairah: Allah's messenger said, "The women is like rib; if you try to strengthen her, you will break her. So if you want to get benefit from her, do so while she still has some crookedness."*

(91) CHAPTER: The woman is a guardian in her husband's house.

"5200. Narrated Ibn Umar: The Prophet said, "All of you are guardians and are responsible for your wards. The ruler is a guardian and the man is guardian of his family; the lady is a guardian and is responsible for her husband's house and his off-spring; and so all of you are guardians and are responsible for your wards."

(92) CHAPTER. *The Statement of Allah: "Men are protectors and maintainers of women." (V.4:34)*

(94) CHAPTER. The (kind of) beating of women which is disapproved of.

And the Statement of Allah: Beat them (lightly your wives, if it is useful) [ie., without causing them severe pain.] (V.4:34)"

(50) CHAPTER. "*And those of you who die, and leave behind wives... (up to) ... and Allah is Well-Acquainted with what you do. (V.:234)"*

(10) CHAPTER. A woman should take care of the wealth of her husband and also of what he gives her

for expenditures.

> *"5365. Narrated Abu Hurairah: Allah's messenger said, "The best women who ride the camels, are the women of Quraish." (Another narrator said) The Prophet said, "The righteous among the women of Quraish are those who are kind to their young ones and look after their husband's property."*

4.3. Reference was made to the decision in **Ballabhadas Mathurdas Lakhani vs. Municipal Committee, Malkapur, 1970 KHC 495** wherein it has been held that the High Court cannot ignore a decision of the Supreme Court because they thought that the "relevant provisions had not been brought to the notice of the Supreme Court". The decision in **Pandurang Kalu Patil vs. State of Maharashtra, 2002 KHC 556** has been cited to point out that Privy Council decisions are binding on High Courts, so long as the Supreme Court has not overruled it. Reference was also made to the decision in **Suganthi vs. Jagadeeshan, 2002 KHC 122** wherein it has been held that, even if the Supreme Court has laid down a particular legal position without considering any point(s) involved, the High Court is still bound by it and has no power to overrule it. Therefore, relying on these decisions, it is submitted that this Court is bound by the earlier decisions of the Hon'ble Supreme Court holding that Islamic law does not permit a Muslim mother to act as the guardian of her minor child and so it is not for

this Court to say that the aforesaid arguments raised in the instant appeal had not been considered in the earlier decisions and therefore the said decisions are not a precedent on the point and so are not binding on the Courts.

5. Following are the arguments of the *Amicus Curiae*. The prominence of Qur'an has been recognized by the Hon'ble Supreme Court in **Shayara Bano v. Union of India, AIR 2017 SC 4609 : 2017 KHC 6574**, in which case it has been held that, an understanding of the verses of the Qur'an is imperative when a contention is taken that a particular practice is not in conformity with the unambiguous edicts of the Qur'an and therefore cannot be considered as valid constituent of Muslim personal law. A verse in the Qur'an that is quite often quoted to argue that the mother cannot be the natural guardian contained in Chapter 4 verse 34 of the Qur'an reads:

> *"Men are the **protectors and maintainers of women** because Allah has made one of them excel over the other **and** because they spend out of their possessions (to support them)".*

This verse called the "DNA of patriarchy", is one among the most hotly debated verses in Muslim scripture. Many scholars claim that this verse evidences the fact that Almighty Creator has set out man's superiority and

authority over women. This verse has to be understood, interpreted and applied in its correct perspective. As far as interpretation of Qur'anic verse is concerned, each verse will have to be understood in the light of the Qur'an itself. When a verse is interpreted in a particular way, it should be in conformity with other affirmative evidence provided by the other sources of the Qur'an. If this evidence is absent or if the interpretation clearly contradicts other Qur'anic verses, then the understanding of the verse is incorrect, as it is not possible for the Qur'an to contradict itself.

5.1. The article '**and**' in the aforesaid verse envisages a specific condition for bestowing the mantle of "protectors and maintainers of women**"** on men provided "they spend out of their possessions". Here 'men' refers to 'husband'. Therefore, if a husband protects and maintains his wife, he is entitled to be her protector and maintainer. On the contrary, if he ignores these obligations, then he is not entitled to act so and the woman is not obliged to be under his protection. Due to the fact that women are born with the ability to give birth to children, and are naturally better equipped to care for the needs of a new-born, Islam has assigned them a central role in the upbringing of children, which however does not mean that men do not have any role in the matter. It only means that the father has a supportive role while the mother has the primary role and

responsibility in taking care of young children. Islam assigns the role of supporting the family financially on the husband/father, who has to bear the responsibility of ensuring that the family is well taken care of. But, when the husband dies or he abandons his wife, this command is not applicable. This verse is therefore confined to a husband's duty to his wife and does not have anything to do or say about the custody of the minor children or deal with their immovable property.

5.2. According to the learned *Amicus*, whether the aforesaid verse indicates that a Muslim mother cannot be the natural guardian of her minor children can be judged only after a proper evaluation of the equality, rights and position/status given to women in the Qur'an, right from her birth till death and salvation. Equality to women has been provided in the following verses-

(a) **Equality in creation.**

Qur'an says that man and woman are created from a single soul. Chapter 4 verse 1 says- *"O mankind keep your duty to your lord. Who created you from a single soul. And from it created its mate. And from both has spread a multitude of men and women"*. Qur'an always uses the word "mate" to indicate equality.

(b) **No discrimination at the time of birth.**

Even during the present times, when female infanticide is prevalent,

Chapter 2 verse 233 of the Qur'an says-*"No mother shall be treated unfairly on account of her child".* Chapter 17 Verse 31 reads: *"Kill not your children for fear of want: We shall provide sustenance for them as well as for you: the killing of them is a great sin."* Chapter 81 Verses 8 and 9 the Qur'an warns parents, who kill their female children of the severe punishment that awaits them in their life after death- *"And when the girl child that was buried alive is asked for what crime she was killed"*

(c) **Equal rights.**

Chapter 2 verse 228 reads -*"And women shall have rights similar to the rights against them"*

(d) **Right to work and earn.**

Chapter 4 verse 32 says-*"Man has got share in what he earns and women has got share in what she earns".*

The Qur'an as well as the Prophet has granted women the freedom to work, to earn, to acquire wealth and keep the wealth they have earned at their disposal and has also given them the liberty to spend it. The position being so, how can an interpretation be given that the mother has been prevented from dealing with the immovable property of a minor under her protection?

(e) **Right to inherit**

Verse 7 of Chapter 4 reads-*"Man has got a share in the wealth left by parents as*

well as close relatives. Similarly, a woman has a right to a share in the wealth left by parents as well as close relatives." Islam allows a daughter to inherit from her parents, a sister to inherit from the wealth belonging to her brothers and sisters, and a wife has the right to inherit the wealth left by her husband. So, if she has the right to inherit and manage her wealth, then on what basis can she be prevented from dealing with the property of her minor child?

5.3. There is a reason why daughters are only entitled to half the right of a son in the matter of inheritance. As per Islamic law, the obligation to maintain the family members and close relatives is always on the male members. When a daughter gets half share, it becomes her property exclusively. At the time of marriage, she is entitled to get dower from her husband whereas, the son has to give dower to his wife. Even after marriage, an obligation is cast on the brother to maintain his sister if she is in financial difficulty. In the event of her becoming a widow, her brother is liable to look after her and her minor children if they are unable to financially support themselves.

(f) **Freedom to accept or reject a marriage proposal:**

Verse 19, Chapter 4 reads-*"O you believers it is not permissible for you to inherit women".* Islam gives women absolute freedom to accept or reject a

marriage proposal. According to the Prophet, no woman should be compelled to marry a person against her wishes. So, no father can compel his daughter to marry a person against her wishes. When a lady approached the Prophet with a complaint that her father was compelling her to marry a person against her wishes, the Prophet said: "*The decision is up to you. You can either accept or reject the proposal."* Though, the Nikah ceremony is conducted by the father or guardian, a religious and mandatory duty is cast on them to ascertain her consent for the marriage.

(g) **Right to get dower at the time of marriage.**

Chapter 4 Verse 4 says- "*And give the women (on marriage) their dower as a free gift*". The Qur'an insists that the bridegroom should give gifts and wealth to the bride at the time of marriage. However, it does not set any limit to such Maher. The Qur'an says that a bride has got the absolute freedom to even insist upon even a mountain of gold as *Maher* or dower. This verse also indicates that women enjoyed freedom in financial matters.

(h) **Wife should be treated fairly.**

Men and women as per Islamic faith are two sides of the same coin. Both have rights and duties and they have to discharge them in their respective spheres. Chapter 4 Verse 19 of the Qur'an deals with the behaviour of a husband towards his wife - *"And live with them in kindness. For if you dislike them*

- perhaps you dislike a thing and Allah makes therein much good". The Prophet's advice to a companion was: *'Aa'ishah said: "Hind bint 'Utbah, the wife of Abu Sufyaan, approached the Messenger of Allah and said, 'O Messenger of Allah, Abu Sufyaan is a stingy man who does not spend enough on me and my children, except for what I take from his wealth without his knowledge. Is there any sin on me for doing that?' The Messenger of Allah said, 'Take from his wealth on a reasonable basis, only what is sufficient for you and your children." (Narrated by Al-Bukhaari, 5049; Muslim, 1714)*

(i) **Right to Divorce**

Chapter 2, Verse 229 says- *"If Judges indeed fear that they would be unable to keep the limits ordained by Allah there is no blame on either of them if she give something for her freedom."* This Verse says that if a wife for some genuine reason feels that she cannot live with her husband, she can seek divorce after paying back the Maher she has received from him. Verse 128 of Chapter 4 says- "*If a wife fears cruelty or desertion on her husband's part there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though men's souls are swayed by greed. But if you do good and practice self-restraint Allah is well-acquainted with all that ye do."*

(j) **Right of a Divorced Wife for maintenance.**

Verse 241 Chapter 2 says-*"For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous".* Verse 236. Chapter 2

says-*" There is no blame if you divorce women before the marriage is consummated or the dowry is settled. But give them a suitable compensation - the rich according to his means and the poor according to his. A reasonable compensation is an obligation on the good-doers".* Qur'an also fixes no limit for the maintenance to be given.

(k) **Rights of a mother**

Verse 15, Chapter 46 says-*"We have enjoined on man Kindness to his parents: in pain did his mother bear him and in pain did she give him birth."* Chapter 31 Verse 14 says-*"We* ***enjoined upon man to be dutiful to his parents.*** *His mother bore him in weakness upon weakness, and his weaning lasted two years (We, therefore, enjoined upon him) "Give thanks to Me and to your parents. To Me is your ultimate return."* The Almighty reminds of the troubles and hardships a mother has to face while bringing up a child. But the Scripture does not anywhere mention about the hardships that a father has to endure. Once a person asked the Prophet*: "who is the one who most deserves my love and respect" The Prophet replied: "your mother". The person inquired: "Who comes next?" The Prophet replied: "your mother". The person asked again: "Who comes next?" The Prophet replied "your mother". Then the person asked for the fourth time "Who comes next? Now, the Prophet said: "your father".* On another occasion, the Prophet said- *"Paradise lies at the feet of your mother".*

(l) **Equality in religious duties, moralities and criteria for**

salvation.

Chapter 33: Verse 35 reads-

> *"For the men who acquiesce to the will of God, and the women who acquiesce,*
> *the men who believe and the women who believe,*
> *the men who are devout and the women who are devout,*
> *the men who are truthful and the women who are truthful,*
> *the men who are constant and the women who are constant,*
> *the men who are humble and the women who are humble,*
> *the men who give charity and the women who give charity,*
> *the men who fast and the women who fast,*
> *the men who are chaste and the women who are chaste,*
> *and the men and women who remember God a lot,*
> *God has arranged forgiveness for them, and a magnificent reward"*

Chapter 16 Verse 97- *"To whoever, male or female, does good deeds and has faith, we shall give a good life and reward them according to the best of their actions (16:97)*

5.4. Referring to the aforesaid verses, it was submitted that when the Qur'an treats a man and a woman equally, the same scripture cannot deprive her of being a natural guardian of her minor child and to deal with his properties. Chapter 4 verse 34 has therefore to be understood only as dealing with the obligation of a husband to financially support and protect his wife.

5.5. Reference was also made to the verses in the Hadith and Sunna of the Prophet to indicate the attitude of the Prophet to a female

child- *"If God had permitted me to show partiality among children, I would have favored my daughters," said the Prophet".* Once, the Prophet saw a person kiss his little son who was sitting on his lap. When the man's little daughter came running to him, he neither kissed her nor allowed her to sit on his lap. With visible displeasure the Prophet asked him: "Why don't you treat your children equally?" The Prophet said: *"If anyone has a female child, and does not bury her alive, or slight her, or prefer his male children to her, Allah will bring him into Paradise"* (Ahmad, authenticated by Al-Hakim, graded Hasan by Ahmad Shakir)

5.6. Jabir ibn Abdullah reported that the Prophet said: *"Whoever has three daughters and he accommodates them, show mercy toward them, and supports them, Paradise is definitely guaranteed for him. Thus, someone asked the Prophet, what if they are two daughters only. He replied. "[He gets that reward.] even if they are [only] two".* Aishah reported *"A woman came to me with her two daughters. She asked me (for charity) but she found nothing with me except one date-fruit, so I gave it to her She [accepted it and then] divided it between her two daughters and ate nothing out of it. Then, she got up and went out. When the Messenger of Allah came in, and I narrated to him the story, he said, "He who is tested with these girl children and he is benevolent towards them, they will become protection for him against hell fire".*

5.7. Uqbah ibn Aamir narrated, I heard the Messenger of Allah say*: "Whoever has three daughters and is patient towards them, and feeds them, gives them to drink and clothes them from his wealth, they will be a shield for him from the Fire on the Day of Resurrection." (Authenticated by Al-Albani). "It is the duty of every Muslim man as well as every Muslim woman to acquire knowledge."*

5.8. The learned *Amicus* has also referred to the Hadiths relied on by the appellants to support the view that a mother can be the natural guardian and competent to deal with the minor's property. According to the learned *Amicus*, even though Imams have given importance to the father for appointment as guardian, they have stated that the father or a judge can entrust the guardianship to a mother. They have also stated that after the father and the paternal grandfather, mother can be considered to be appointed as guardian. All these indicate that there is no prohibition in the mother taking the role of the guardian and dealing with the movable as well as the immovable property of a minor. It was also pointed out that the opinion of the Imams can have no prominence over the Qur'an or the sayings of the Prophet.

5.9. Reference was also made to certain other verses in the Qur'an and Hadiths which are often referred to, in favour of as well as against the position as to whether a woman can be a ruler. One argument

is that women should always be under the command of men. The verses cited by those who oppose the rule of women as head of the state include -

(a) though women have similar rights as men, yet men are a degree above them

(Al-Qur'an 2:228).

(b) evidence of two women is equal to that of one man (Al-Qur'an 2:282).

(c) men are protectors and maintainers of women (Al-Qur'an 4:34).

(d) when the Prophet heard that Persians had made the daughter of Kisra ruler, he said: "*Never shall a people prosper who make a woman their ruler*".

(e) Prophet is also attributed to have said- "*Women lack in intelligence and their knowledge of religion*".

As men are superior to women; as a woman is half of a man and as men are the protectors of women, the argument is that she cannot rule over him.

5.10. Those who contend that a woman can rule a country, advance the following arguments-

(a) There is no verse in the Qur'an permitting or prohibiting a woman from ruling or heading the country. The Qur'an is silent on this point. The

silence of the Qur'an on this crucial issue would only mean that it has been left to the Muslim community to decide according to the circumstances. To substantiate this, reference has been made to the examples of women Prime Ministers and Presidents in many Muslim majority countries, like Pakistan, Turkey, Senegalese etc.

(b) Women have rights similar to that of men (Al-Qur'an 2:228). Therefore, if men have the right to become head of the State or Government, why not women?

(c) The story of a woman ruler: Bilqis, the Queen of Sheba, has been referred in Chapter 27 (Sura 27) of the Qur'an. From the narration given in the Qur'an, it can be noticed that- (i) she was not an autocrat, on the other hand, she had the very good quality of consulting others on all important affairs of the state; (ii) she was quite a wise woman and her sound opinions were not ignored. It is pertinent to note that, the Qur'an has not only not spoken of her rule with disapproval or condemnation but has made a special mention about her rule in it.

(d) As per verse 9:71 in the Qur'an, both men and women are friends protecting each other, they are to enjoin the right and forbid the wrong, which is primarily the duty of the State and one needs to have a position to discharge it effectively. The Qur'an directs women to discharge the duty of

enjoining good and forbidding wrong, which can be discharged effectively only by persons in authority. The verse paves the way for women to become the repository of State authority, including being the Head of the State.

(e) The functions of an Islamic state have been outlined in the Holy Qur'an in verse 41 of chapter 22. These functions include collection of Zakat, enjoining good and forbidding wrong etc. The responsibility of discharging these functions has been laid on the shoulders of both men and women.

(f) Regarding two women witnesses. There are at least 5 Verses in the Qur'an, which speak about witnesses, without specifying whether it should be male or female. In Chapter 2 Verse 282, there is an indication to the effect that two women witnesses are equal to one male witness, that is, in Surah Baqarah. This verse only means that if one forgets, the other can remind. Chapter 24 Verse.6 says - “If any of you put a charge against your spouse, and if they have no evidence, their solitary evidence is sufficient.” This means that if a husband and wife want to trade charges against one another and if there are no witnesses, their solitary evidence would be sufficient. This verse would clearly indicate that one female witness is equal to one male witness. There are several instances where jurists agree

that even in cases of sighting of the moon, one woman witness is sufficient. Verse 282 in Chapter 2 states that if there is no male witness, then two women witnesses can be taken. This verse is in respect of financial contracts. It needs to be noticed that the Qur'an does not prohibit women from being a witness to financial dealings. Here, two women witnesses are specified only because, generally, very few women are well versed in financial matters. All said and done, this verse would also support the view that women can deal in financial matters.

(g) Verse-Al-Qur'an 2:228- "*Though the women have similar rights as men, yet men have a degree above them*". The scholars refer to the portion, "*men have a degree above them*", to indicate that in a family there should be only one person who should take the leadership, if not, the chances are for chaos. The learned *Amicus* compared this situation to running a country where there can only be one leader and not several leaders leading to absolute chaos.

(h) The authenticity of the narration (riwayah) relating to the daughter of Kisra has been doubted as its reporter was found guilty of false evidence. Likewise, the saying attributed to the Prophet- "Women lack in intelligence and their knowledge of religion" has also been doubted by many.

5.11. Role of women in public life in the early period of Islamic history- Muslim women enjoyed the freedom of movement and participated in many spheres of social life. They co-operated with men both in military and civil life. Freedom enabled women to develop their latent faculties. The social institutions and environment enabled them to make full use of their potentialities. So, women excelled in the field of war, literature, oratory, public administration, music, theology (Kalam), jurisprudence (Fiqh), Hadith Studies (I'lmul Hadith), mysticism (Tasawwuf), poetry. etc. As the early Muslim society gave women their fundamental rights to education and self-development, many women have left their mark on the pages of history. Ayesha, the wife of Prophet Muhammad was a lady of profound erudition. Many Sahaba (companions of the Prophet) and Tabeeyeen (direct followers of the Sahaba) used to approach Ayesha for learning Islamic law, theology and Hadith. Zainab, the daughter of the third Khalif Ali, was a great scholar of theology. Fatima Binte Abbas and Sikha Sayeeda, two Islamic scholars used to go to the mosque regularly to deliver lectures on Islamic theology. History has also recorded the names of many female warriors who fought in the battle fields. Even Ayesha, the wife of the Prophet took active part in many battles. Umme Atyqah was another brave lady who participated in wars.

Wairyh, the sister of Muawia(the founder and first caliph of the Ummayyad Caliphate), led a contingent of women in the battle of Yarmuk.

5.12. The learned *Amicus* also cited a few instances to show that women were consulted and that their opinions had prevailed. Prophet Muhammad had consulted Umme Salma on the occasion of the Treaty of Hudaybiyyah (an event that took place during the time of the Prophet Muhammad. It was a treaty between Muhammad, representing the State of Medina, and the Qurayshi tribe of Mecca in January 628) and had followed her advice. Prophet Muhammad had also followed the advice of Khadija (his first wife) in the very beginning of the revelation when he was frustrated. Ayisha had corrected Abu Huraira (one of the companions of Prophet Muhammad) in respect of the traditions on the basis of their contradicting the Qur'an. The Prophet has specifically directed Muslims not to prevent women from entering Masjids and praying. During earlier times, while travelling long distances, Scholars used to insist that a male member accompany a female as it would be dangerous for her to travel alone. In modern times, when one travels in a public transport, there is no meaning in insisting that a female member be accompanied by a male member. All over the world, vast majority of Muslim women enjoy the freedom to use their money in the manner they wish, for which she does

not require the permission of a third person. Working Muslim women have the freedom to buy immovable properties. The Prophet's wife Khadhija was a leading and successful business woman. That being the position, how can a Muslim mother be prevented from being appointed as the natural guardian, with freedom to deal with the immovable property of her minor children under her custody, is the question posed by the learned *amicus* also. Reference is also made to Section 17 of the Guardians and Wards Act, 1890, (the GW Act), applicable to Muslims too, which refer to the law to which the minor is subject to. This provision will have to be considered in the light of the Qur'an, Hadiths and Sunnah of the Prophet.

5.13. Referring to Chapter 4 Verse 6 of the Qur'an, it is submitted that, the Qur'an in fact permits a woman to be a natural guardian and dispose of their immovable property in cases of dire necessity. The said verse reads - "*And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgment, release their property to them. And do not consume it excessively and quickly, [anticipating] that they will grow up. And whoever, [when acting as guardian], is self-sufficient should refrain [from taking a fee]; and whoever is poor-let him take according to what is acceptable. Then when you release their property to them, bring witnesses upon them. And sufficient is Allah as Accountant.*" This verse relates to the duties of guardians in respect of minor's property under their custody. It says that the guardian

should protect the wealth of the minor and if he is rich, he should not take any fee for protecting the minor's wealth. On the contrary, if he is poor, he can take what is necessary as a fee. This indicates that for the protection of the minor, the guardian can sell the property of the minor, whether movable or immovable. Here also, there is nothing to indicate that the guardian should be male. Muslim Scholars have nowhere stated, this verse to be confined to male guardians. Therefore, the guardian can be male or female. In every religious scripture, especially in Qur'an, when gender is not specified, the pronoun used will be 'he'.

5.14. Further, referring to the Prophet's advice to a companion, which reads - "*Aa'ishah said: Hind bint 'Utbah, the wife of Abu Sufyaan, approached the Messenger of Allaah and said, 'O Messenger of Allaah, Abu Sufyaan is a stingy man who does not spend enough on me and my children, except for what I take from his wealth without his knowledge. Is there any sin on me for doing that?' The Messenger of Allaah said, 'Take from his wealth on a reasonable basis, only what is sufficient for you and your children' (Narrated by al Bukhaari, 5049; Muslim, 1714)",* it is submitted that scholars indicate that this verse also permits a Muslim woman to be appointed as natural guardian.

5.15. The Apex Court has repeatedly held in various judgments that the Qur'an is the fundamental source to understand Islamic law. Hadiths comes thereafter. This is the law declared by the Apex Court

under Article 141 and hence the law of the land. Therefore, according to the learned *Amicus*, it is well within the powers of this court to distinguish the earlier judgments of the Privy Council, Apex Court and various High Courts on the point, as in none of the said cases, the arguments that have been presently advanced has been considered. The said judgments are inconsistent with Islamic law, as the courts never took into account any of the fundamental sources of Islamic law which has nowhere prevented a Muslim mother from being considered as the natural guardian of her minor offsprings and to deal with their immovable properties. In Islam, there is Halal, i.e., what is permissible, and Haram, that which is prohibited. No scholar can permit what is haram or prohibit what is halal. As considering a Muslim mother as guardian or her right to deal with the immovable property of her minor offsprings is neither Haram nor prohibited by either the Qur'an or by the Prophet, no one can restrict the same. This is all the more so, when Islam does not have priest-hood and do not recognize anyone to be infallible, submits the learned *Amicus*.

6. We will first examine the submission made on behalf of the appellants that none of the primary sources of Muslim law prohibit or bars a mother from being the guardian of her minor children. For resolving the said issue, we need to look into the four primary sources of Muslim

law which are- (i) Qur'an;(ii) Hadith, that is precepts, actions and sayings of the Prophet Mahomed not written down during his lifetime, but preserved by tradition and handed down by authorized persons; (iii) Ijmaa, that is, a concurrence of opinion of the companions of Prophet Mahomed and his disciples; and (iv) Qiyas, the analogical deductions derived from a comparison of the first three sources when they did not apply to the particular case. The fact that above are the four sources of Muslim law, has been recognized by the Hon'ble Supreme Court in **Shayara Bano** *(Supra)* wherein it has been held that the Holy Qur'an is the "first source of law" and pre-eminence is to be given to the Qur'an, which means, sources other than the Holy Qur'an are only to supplement what is given in it and to supply what is not provided for. In other words, there cannot be any Hadith, Ijma or Qiyas against what is expressly stated in the Qur'an. Islam cannot be anti-Qur'an [Para 208 of the judgment in **Shayara Bano** (*Supra*) reported in **2017 KHC 6574**].

7. Admittedly, Qur'an does not specifically say in so many words that a mother is incompetent or that a mother cannot be the guardian. The conclusion that a mother cannot be or is not the guardian as per Muslim law seems to have been made on the basis of the inferences drawn from the verses in the Qur'an and Hadith. To the argument of the

learned counsel for the appellants that the celebrated author Charles Hamilton in his commentaries, without correctly comprehending the verses in the Qur'an or the Hadith or without any reference to the primary sources of Muslim law has incorrectly concluded that a mother cannot be a guardian, we are reminded of Justice V.R Krishna Iyer's words in **Yousuf Rowthan v. Sowramma, 1970 KLT 477**, wherein this court was called upon to consider the scope, nature and ambit of S.2(ii) of the Dissolution of Muslim Marriage Act 1939 and whether a suit for dissolution of marriage by a woman was maintainable. The relevant portion reads-

> *"7. There has been considerable argument at the bar and precedents have been piled up by each side as to the meaning to be given to the expression 'failed to provide for her maintenance' and about the grounds recognised as valid for dissolution under Muslim law. Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglican judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book.* ***Marginal distortions are inevitable when the Judicial Committee in Downing Street has to interpret Manu and Muhammad of India and Arabia. The soul of a culture law is largely the formalised and enforceable expression of a community's cultural norms cannot be fully understood by alien minds.*** *The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. The statement that the wife can buy a divorce only with the consent of or as delegated by the husband is also not wholly correct. Indeed,*

> *a deeper study of the subject discloses a surprisingly rational, realistic and modern law of divorce and this is a relevant enquiry to apply S.2 (ix) and to construe correctly S.2 (ii) of the Act."*
> (Emphasis supplied*)*

However as pointed out on behalf of the respondents, the Apex court in **Kapore Chand vs. Kadar Unnisa Begum, 1953 KHC 379** and **Mohd. Hanif Quareshi vs. State of Bihar, 1958 KHC 477** has considered and relied on Hamilton's Hedaya as a leading text book on Hanafi law.

8. Now coming to the question - What is the law that is applicable to Muslims in the matter of guardianship? Going by the Statement of objects and reasons given to the Muslim Personal Law (Shariat) Application Act, 1937 (the Shariat Act), the same was enacted to put an end to the unholy, oppressive and discriminatory customs and usages in the Muslim community. In **Shayara Bano** (*Supra*)**,** the Hon'ble Supreme Court has held that after the Shariat Act, in respect of matters enumerated in Section 2 regarding marriage, dissolution of marriage, including talaq, the law that is applicable to Muslims shall only be their personal law, namely, the Shariat and that the Act simply makes Shariat applicable as the rule of decision in respect of the matters enumerated in Section 2.

Section 2 of the Shariat Act reads:

> "*2.* ***Application of Personal Law to Muslims****.-Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower****, guardianship****, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)* ". (Emphasis supplied)

9. Guardianship is also referred to in the aforesaid section and so the law that is applicable in the case of guardianship can only be the Shariat. But, who are the persons who can be guardians, has not been stated or codified in the Act. As Shariat has been declared to be the Muslim personal law by the Act, we need to understand what Shariat is. As referred to by the Hon'ble Supreme Court in **Shayara Bano** (*Supra*), this has been explained by the renowned author, Asaf A.A.Fyzee in his book Outlines of Muhammadan Law, 5th edition, 2008 at page-10 as - "*....What is morally beautiful that must be done; and what is morally ugly must not be done. That is law or Shariat and nothing else can be law. But what is absolutely and indubitably beautiful, and what is absolutely and*

indubitably ugly? These are the important legal questions; and who can answer them? Certainly not man, say the Muslim legists. We have the Qur'an which is the very word of God. Supplementary to it we have Hadith which are the Traditions of the Prophet - the records of his actions and his sayings- from which we must derive help and inspiration in arriving at legal decisions. If there is nothing either in the Qur'an or in the Hadith to answer the particular question which is before us, we have to follow the dictates of secular reason in accordance with certain definite principles. These principles constitute the basis of sacred law or Shariat as the Muslim doctors understand it. And it is these fundamental juristic notions which we must try to study and analyse before we approach the study of the Islamic civil law as a whole, or even that small part of it which in India is known as Muslim law."

10. Therefore, as held by the Hon'ble Supreme Court, the Qur'an is the “first source of law” and so pre-eminence has to be given to the Qur'an, which means, sources other than the Qur'an are only to supplement what is given in it and to supply what is not provided for. In other words, there cannot be any Hadith, Ijma or Qiyas against what is expressly stated in the Qur'an. Islam cannot be anti-Qur'an. We also refer to the decision in **Masroor Ahmed vs. State (NCT of Delhi), ILR**

2007(2) Delhi 1329 wherein Justice Badar Durrez Ahmad said - "*In essence, the Shariat is a compendium of rules guiding the life of a Muslim from birth to death in all aspects of law, ethics and etiquette. These rules have been crystallized through the process of ijtihad employing the sophisticated jurisprudential techniques. The primary source is the Quran. Yet, in matters not directly covered by the divine book, rules were developed looking to the hadis and upon driving a consensus. The differences arose between the schools because of reliance on different hadis, differences in consensus and differences on qiyas and aql as the case may be."*

11. The fact that Qur'an, Hadith, Ijma and Qiyas are the four primary sources of Muslim Law, is not disputed by the respondents also. It is also admitted by both sides that there is no verse either in the Qur'an or in the Hadith which specifically bars the mother from being a guardian. It is also true as argued by the respondents that, one cannot read into the Qur'an or Hadith what is not specifically stated therein. But then, one cannot also say that the Qur'an or Hadith has barred women from being a guardian, as the same are silent on this aspect. The verses referred to by either side only give an indication as to the course to be followed. It is quite interesting to note that relating to certain particular verses, like the

one, as to whether women should always be under the control of men or that men are the protectors of women, different interpretations have been given by either side. Interpretations seem to be subjective, all depending on individual perspectives and one's outlook. The argument that the Qur'an and the Hadiths have considered women to be intellectually weaker than men; that a woman always needs to be controlled by a man; that women are inferior to men etc., do not seem right in the light of the various verses and its interpretation given by the learned *Amicus Curiae*.

12. Pointing to the view taken in **Shayara Bano** (minority view), it was argued on behalf of respondents 1 and 2 that, if there is any illegality or anomaly in the practice being followed in not recognizing the mother as guardian, the same needs to be rectified by the Legislature, by bringing necessary legislation in the matter and it is not for this court to interpret the Qur'an or the Hadiths and conclude either way. As noticed by us earlier, neither the Qur'an nor the Hadith specifically bar the mother from being the guardian. But neither is the same specifically stated to be permissible. So, it requires an interpretation of the various verses in the Qur'an or Hadith. Can this Court, undertake that exercise? We think not, especially in the light of the view taken by the Hon'ble Supreme Court (the minority view) in **Shayara Bano** *(Supra)*. In the said decision, the

Hon'ble Supreme Court was called upon to consider the validity of talaq-e-biddat or triple talaq, as it is commonly known. While considering the question whether or not talaq-e-biddat constitute a valid practice under Shariat, the Court was cautioned and told that it was neither the duty nor the role of the court to determine the true intricacies of faith or interpret the nuances of Muslim personal law-Shariat and that under the Muslim personal law, it is the religious head, the Imam, who would be called upon to decipher the teachings expressed in the Qur'an and the Hadith in case of a conflict. It was submitted that the Imam alone has the authority to resolve a religious conflict, amongst Muslims and that the Imam would do so, not on the basis of his own views, but relying on the verses of the Qur'an and Hadiths, and based on other jurisprudential tools available, and thereupon would render the correct interpretation. The Apex Court after examining the rival hadiths relied on by either side, accepted the argument advanced, and held that it would not be appropriate for the court and refrained from determining whether or not talaq-e-biddat constituted a valid practice under the Muslim personal law, Shariat.

13. Another argument advanced on behalf of the respondents disputing the argument of the appellants that an incorrect interpretation of the Qur'an and the Hadith has resulted in the present

anomalous situation of the mother being deprived of the status of a guardian, is by referring to the practice being followed in other Islamic countries, like for instance, Pakistan and the UAE. It was pointed out that the said countries till date have not recognised mother as the guardian, though they have undertaken significant reforms in areas like divorce and have regulated divorce law. This would also, according to the respondents, show that the courts in India have been on the right path or right in their interpretation of the personal law or Shariat. *Per contra*, it was argued on behalf of the appellants that with the passage of time, the courts must adopt/or interpret laws in a manner conducive to the current/existing social background and also after taking into account the ground realities. Many Islamic countries, say for instance, our neighbours, Pakistan and Bangladesh have had women at the helm of the affairs of the State, the latter continues to have one now also. When women can even head a State or country, hold high posts in various or diverse fields or spheres of life, engage themselves in various avocations or pursuits in life, it is just not right to hold on or hang on to the centuries old mistaken belief, which has absolutely no basis and unsupported by any of the primary sources of law, that a woman cannot be the guardian. It is high time the court steps in and corrects this anomaly, purely based on gender and as it defies any logic,

goes the argument. It was pointed out that the Shariat Act being a pre-Constitution legislation will have to satisfy the requirements of Article 13(1) of the Constitution, as per which all laws in force immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III, shall, to the extent of such inconsistency be void. Therefore, according to the appellants, the personal law which prevents a Muslim woman from being a guardian, defies logic and the same which is purely based on sex alone is clearly violative of Articles 14 and 15 and hence void.

14. Reference was also made to the decision in **Githa Hariharan v. Reserve Bank of India, 1999 KHC 444** and it was submitted that the Apex court moving with the times and in consonance with the provisions of the Constitution has interpreted Section 6(a) of the Hindu Minority and Guardianship Act, 1956 (the HMG Act) and Section 19(b) of the Guardians and Wards Act, 1890 (the GW Act) and recognized a Hindu mother as a natural guardian. Therefore, the argument advanced is that this court must also interpret the law in tune with the dictum in the aforesaid case, if not it would be a clear case of discrimination of Muslim mothers based on their gender alone, which would be violative of not only Article 14 but also Article 15 of the Constitution.

15. On the constitutionality of Section 6(a) of the HMG Act and Section 19(b) of the GW Act in **Githa Hariharan** *(Supra)*, it was contended that the said provisions are violative of the equality clause of the Constitution, in as much as the mother of the minor is relegated to an inferior position on the ground of sex alone since her right as a natural guardian of the minor, is recognized only '**after'** the father. Hence, the argument advanced was that both the sections required to be struck down as unconstitutional. Section 6(a) of the HMG Act reads -

> *"6. The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property) are-*
> *(a) in the case of a boy or an unmarried girl—the father, and* ***after*** *him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother"*

The Apex court held, the expression 'natural guardian' is defined in Section 4(c) of the HMG Act as - any of the guardians as mentioned in Section 6. The term `guardian' is defined in Section 4(b) of the HMG Act as "a person having the care of the person of a minor or his property or of both his person and property, and includes a natural guardian among others". Thus the definitions of 'guardian' and 'natural guardian' do not make any discrimination against mother and she being one of the

guardians mentioned in Section 6, would undoubtedly be a 'natural guardian' as defined in Section 4(c). The only provision to which exception was taken was S.6(a) which reads "the father, and after him, the mother". The Apex court held that the said phrase, on a cursory reading, does give an impression that the mother can be considered to be natural guardian of the minor only after the life time of the father. It is well settled that welfare of the minor in the widest sense is the paramount consideration and even during the life time of the father, if necessary, he can be replaced by the mother or any other suitable person by an order of court, if it would be in the interest of the welfare of the minor. Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a Court of law, the word 'after' in the Section would have no significance, as the Court would be primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor. The question, would assume importance only when the mother acts as guardian of the minor during the life time of the father, without the matter going to Court, and the validity of such an action is challenged on the ground that she is not the legal guardian of the minor in view of S.6(a).

15.1. To the question whether the word 'after' in the Section means only 'after the life time' of the father - the Hon’ble Supreme court held that if this question is answered in the affirmative, the section would have to be struck down as unconstitutional as it undoubtedly violates gender-equality, one of the basic principles of our Constitution. The Parliament by enacting the HMG Act, which came into force six years after the Constitution, never intended to transgress the constitutional limits or ignore the fundamental rights guaranteed by the Constitution, which essentially prohibits discrimination on grounds of sex. It has been further held that, if on one construction, a given statute would become unconstitutional, whereas on another construction, which may be open, the statute remains within the constitutional limits, the Court would prefer the latter on the ground that the Legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the constitutionality of the statutory provisions. The court was of the view that the S.6(a) is capable of such construction as would retain it within the Constitutional limits. The word 'after' need not necessarily mean 'after the life time'. In the context in which it appears in S.6(a), it means 'in the absence of, the word 'absence' therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly

indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity in all such like situations, the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian. So it was concluded that such an interpretation will be the natural outcome of a harmonious construction of S.4 and S.6 of HMG Act, without causing any violence to the language of S.6(a).

15.2. Similarly Section 19(b) of the GW Act was also construed in the same manner in which Section 6(a) of the HMG Act was interpreted. While both the parents are duty bound to take care of the person and property of their minor child and act in the best interest of his welfare, it has been held that in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor

because of his physical and / or mental incapacity, the mother, can act as natural guardian of the minor and all her actions would be valid even during the life time of the father, who would be deemed to be 'absent' for the purposes of S.6(a) of HMG Act and S.19(b) of GW Act.

16. According to the learned *Amicus,* this decision cannot be applied to the facts of the present case because, as per Section 6 read with Section 4(c) of the HMG Act, a Hindu mother has already been recognised as the natural guardian. The Apex Court in the decision did not add anything new, but only interpreted the word 'after' appearing in Section 6(a) of the Act and held that the same cannot be interpreted to mean the predominance of the father in the matter of appointment of guardianship. On the other hand, in the case on hand, there is no similar provision like Sections 4 or 6 of the HMG Act to be applied. Further, the court has also relied on one of its earlier judgment.

17. As rightly pointed out by the learned *Amicus,* there are specific provisions in the HMG Act which recognise a Hindu mother as the natural guardian. There is no such provision in this case. Further, it is no doubt true that all forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights. As held in **C.Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil:**

(1996) 8 SCC 525, personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Article 13 if they violate fundamental rights. Right to equality is a fundamental right. Parliament has therefore enacted Article 14 to remove pre-existing disabilities.

18. As opined by Justice Kurian Joseph in his judgment in **Shayara Bano** (*Supra*), when issues of such nature come to the forefront, the discourse often takes the form of pitting religion against other constitutional rights. In the matter of triple talaq, the court was of the opinion that a reconciliation between the same was possible, but the process of harmonizing different interests is within the powers of the Legislature, which power is to be exercised within the constitutional parameters without curbing the religious freedom guaranteed under the Constitution. However, according to the learned judge, it is also not for the Courts to direct for any legislation.

19. The Constitution through its Preamble, Fundamental Rights and Directive Principles created secular State based on the principle of equality and non - discrimination striking a balance between the rights of the individuals and the duty and commitment of the State to establish an

egalitarian social order. Here we are reminded of what Dr. K. M. Munshi contended on the floor of the Constituent Assembly which reads- "*we want to divorce religion from personal law, from what may be called social relations, or from the rights of parties as regards inheritance or succession. What have these things got to do with religion, I fail to understand. We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If, however, in the past, religious practices have been so construed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation. Religion must be restricted to spheres which legitimately appertain to religion, and the rest of life must be regulated, unified and modified in such a manner that we may evolve, as early as possible, a strong and consolidated nation*" (Vide: Constituent Assembly Debates, Vol. VII 356-8).

20. In **John Vallamattom v. Union of India: (2003)6 SCC 611,** it has been held that, it is no matter of doubt that succession and like matters of a secular character cannot be brought within the guarantee enshrined under Art.25 and Art.26 of the Constitution. Any legislation which brings succession and the like matters of secular character within

the ambit of Art.25 and Art.26 is a suspect legislation. In **Sarla Mudgal v. Union of India: (1995) 3 SCC 635** it has been held that succession and like matters of secular character cannot be brought within the guarantee enshrined under Art.25 and Art.26 of the Constitution. It has also been held that it is a matter of regret that Art.44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common Civil Code will help the cause of national integration by removing the contradictions based on ideologies.

21. As regards the role of the court, it is true as held in **State of Karnataka v. Appu Balu Ingale: AIR 1993 SC 1126,** judiciary acts as a bastion of the freedom and of the rights of the people. The Judges are participants in the living stream of national life, steering the law between the dangers of rigidity and formlessness in the seamless web of life. Judge must be a jurist endowed with the legislator's wisdom, historian's search for truth, prophet's vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future to decide objectively, disengaging himself/herself from every personal influence or predilections. The Judges should adapt purposive interpretation of the dynamic concepts under the Constitution and the act with its interpretive armory to articulate the felt necessities of the time.

Social legislation is not a document for fastidious dialects but means of ordering the life of the people. To construe law, one must enter into its spirit, its setting and history. Law should be capable to expand freedom of the people and the legal order can weigh with utmost equal care to provide the underpinning of the highly inequitable social order. Judicial review must be exercised with insight into social values to supplement the changing social needs. The existing social inequalities or imbalances are required to be removed readjusting the social order through rule of law.

22. If succession and like matters of secular character has nothing to do with religion, the same would be the position with the case of guardianship also. It is no doubt true that in this modern age, women have scaled heights and have slowly but steadily stormed several male bastions. As pointed out, many Islamic countries or Muslim dominated countries have women as their heads of State. Women have been part of expeditions to the space too. Pursuant to the decision of the Apex Court in **Lt.Col.Nitisha vs. Union of India, 2021 KHC 6192,** women officers are now considered for permanent commission in the armed forces. As pointed out on behalf the appellants and by the learned *Amicus*, which fact is admitted by the respondents also, there is nothing in the Qur'an or the Hadith prohibiting or barring women from being considered as guardians

of their minor offsprings. Just as one cannot read into the Qur'an or Hadith what is not stated therein, one cannot also say that something has been prohibited or barred, because the Qur'an or Hadith is silent on the same. This is especially so when an interpretation has been given that a father or judge can entrust a mother with guardianship; that after the father and paternal grandfather, there is no prohibition in the mother taking the role of guardianship. These interpretations have been stated to have been given by Imams. But it is also pointed out that opinion of Imams cannot override what is contained in the Qur'an and the sayings of the Prophet. This is all the more so, when it is stated that Islam does not have priest-hood and do not recognize anyone to be infallible.

23. **Be that as it may, this court is bound by the decisions of the Hon'ble Supreme Court**. Here we again refer to **Shayara Bano** *(Supra),* wherein the Apex court *inter alia* considered the question- whether the Shariat Act confer statutory status to the subjects governed by the Act. The two judges constituting the minority, were of the view that the object sought to be achieved by the Shariat Act is to negate the overriding effect on usages and customs over the Muslim personal law-Shariat. The Shariat Act, neither lays down nor declares the Muslim personal law, not even on the questions/subjects covered by the legislation.

What was sought to be done through the Shariat Act, was only to preserve Muslim personal law-Shariat, as it existed from time immemorial. The Shariat Act recognizes Muslim personal law as the rule of decision in the same manner as Article 25 recognizes the supremacy and enforceability of personal law of all religions. That being the position, it was held that the Shariat Act cannot be considered as a State enactment. Therefore, the argument advanced that the questions/subjects covered by the Shariat Act ceased to be personal law and got transformed into statutory law was rejected. Consequently, it was also held that the practices of the Muslim personal law–Shariat cannot be required to satisfy the provisions contained in Part-III – Fundamental Rights, of the Constitution applicable to State actions, in terms of Article 13 of the Constitution. (Paras 156 & 157 in **Shayara Bano** (*Supra*))

24. The third judge, namely, Justice Kurian Joseph, also agreed with this view and held that in respect of the enumerated subjects under Section 2 of the Shariat Act regarding the subjects mentioned therein, the law that is applicable to the Muslims shall be only their personal law, namely Shariat. Nothing more, nothing less and that it is not a legislation regulating any of the subjects mentioned in Section 2 of the Act. The Act simply makes Shariat applicable as the rule of decision in the

matters enumerated therein. Therefore, while talaq and other subjects referred to in Section 2 is governed by the Shariat, the specific grounds and procedure for talaq have not been codified in the Act. Consequently, Justice Kurian Joseph disagreed with the stand taken by the third and fourth judges, namely, Justice Rohinton Nariman and Justice U.U. Lalit that the Shariat Act is a legislation regulating triple talaq and hence the same can be tested on the anvil of Article 14. That being the position, as the Shariat Act has been held to be not a State legislation, it cannot be tested on the anvil of Articles 14 or Article 15 of the Constitution as argued on behalf of the appellants.

25. Moreover, there are several decisions of the Honourable Supreme Court which categorically hold that a muslim mother cannot be a guardian of her minor children. According to the appellants, all the said decisions have been passed *sub silentio* and in support of this argument, reference has been made to the decision in the **Synthetics and Chemicals Ltd.** *(Supra)* wherein it has been held that a decision passed sub silentio, in the technical sense that has come to be attached to that phrase, means, when the particular point of law involved in the decision is not perceived by the court or present to its mind. Reference was made to the decision in **Lancaster Motor Company (London) Ltd. vs. Bremith Ltd., 1941(2)**

All. ER 11 where the court did not feel bound by the earlier decisions as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. This decision was approved in **Municipal Corporation of Delhi vs. Gurnam Kaur, 1989(1) SCC 101.** The bench held that, 'precedents sub silentio and without argument are of no moment'. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Art.141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In **B.Shama Rao vs. Union Territory of Pondicherry, AIR 1967 SC 1480 : 1967(2) SCR 650** it has been observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth

of law.

26. Reference was also made to the decision in **Delhi Airtech Services Pvt. Ltd. (M/s)** *(Supra)* wherein it has been held that when a point does not fall for decision of a Court but incidentally arises for its consideration and is not necessary to be decided for the ultimate decision of the case, such a decision does not form a part of the ratio of the case but the same is treated as a decision passed sub silentio. A decision passes sub silentio, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio. Therefore, a point in respect of which no argument was advanced and no citation of authority was made, is not binding and would not be followed. The position has been further explained by saying that one of the chief reasons behind the doctrine of precedent is that once a

matter is fully argued and decided the same should not be reopened and mere casual expression carry no weight. It has also been held that not every passing expression of a Judge, however eminent, can be treated as "ex cathedra statement, having the weight of authority".

27. It is no doubt true, that the arguments as advanced by the learned counsel for the appellants in this case was never advanced before the Hon'ble Supreme Court in any of the decisions. However it is not for this Court to say so in the light of the decisions in **Ballabhadas Mathurdas Lakhani** *(Supra)* ; **Anil Kumar Neotia vs. Union of India, 1988 KHC 969** and **Suganthi** *(Supra)*. In **Ballabhadas Mathurdas Lakhani** (*Supra*) it has been held that the High Court cannot ignore a decision of the Apex court because they think that "the relevant provisions were not brought to the notice of the Court". In **Anil Kumar Neotia** (*Supra*) it has been held that in the light of Article 141 of the Constitution, the law laid down by the Hon'ble Supreme Court is the law of the land and the binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided. A plea that certain points had not been urged cannot be raised. In **Suganthi** (*Supra*) it has been held that it is impermissible for the High

Court to overrule the decision of the apex Court on the ground that Supreme Court laid down the legal position without considering any other point. It is not only a matter of discipline for the High Courts in India, it is the mandate of the Constitution as provided in Article 141 that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The High Court cannot question the correctness of the decisions of the Hon'ble Supreme Court even if the point sought before the High Court was not considered by the Supreme Court.

28. Now coming to the facts of the case- This is appeal is against the judgment and decree dated 29/09/2011 in O.S.No.192/2005 on the file of the Sub-ordinate Judge's Court, Kozhikode (Additional Sub Judge-III). The suit is one for partition. Defendants 4 to 12 and 15 to 18 are the appellants. The plaintiffs and defendants 2, 13 and 14 are the respondents. Parties in this appeal will be referred to as described in the suit.

29. The plaintiffs filed the suit for partition of plaint B schedule consisting of four items of property. The property initially belonged to two brothers, namely, Chempumkandy Veeran and Chempumkandy Abu. Plaintiffs and defendants 13 and 14 are the children of Veeran. The first defendant is the 2nd wife of Abu and defendants 2 to 7

are their children. The 8th defendant is the wife of Beeran, who is the son of Abu through his first wife. Defendants 9 to 12 are the children of Beeran through his first wife. Plaintiffs as legal heirs of Veeran, claim partition of the plaint schedule property and allotment of their respective shares.

30. Defendants 1 and 3 to 7 filed written statement denying the plaint allegations and contended that the property is not available for partition. Long back in the year 1969, plaint B schedule properties were partitioned as per Ext.B2 partition deed, in which deed, in addition to the plaintiffs, defendants 13 and 14, their mother Ayishabi and Abu were also parties. As per Ext.B2 partition deed, B schedule item No.1 was allotted to Abu; item Nos.2 and 4 jointly to the plaintiffs, defendants 13 and 14 and their mother, Ayishabi. Ever since the partition of the properties, Abu has been in possession and enjoyment of B schedule item No.1 and after his demise, his heirs, namely, defendants 1 and 3 to 7. Plaint B schedule item Nos. 2 and 4 have been in the possession and enjoyment of the plaintiffs and defendants 13 and 14 and their mother Ayishabi, from the date of execution of Ext.B2 partition deed. The 2nd defendant released her right in plaint B schedule item No.1 to defendants 1 and 3 to 7. Now the 2nd defendant has no right in the property. After the demise of Abu, his heirs

have partitioned B scheduled item No.1 in the year 1983 and the sharers have been in possession and enjoyment of the properties since then.

30.1. Plaint B schedule item No.3 is comprised of 4 cents. Out of this extent of 4 cents, 1 ½ cent was purchased by Abu in the year 1969, pursuant to which he was in possession and enjoyment of the property and after his demise, his heirs D1 to D7. After the 2nd defendant released her right over the property, D1 and D3 to D7 have been in possession and enjoyment of the same. The plaintiffs, D13 and D14 and their mother, Ayishabi after obtaining item Nos.2 and 4, have sold certain portions of the same and obtained sale consideration for the same. Plaintiffs and defendants 13 and 14 are bound by the partition deed of the year 1969. The plaintiffs are now estopped from seeking partition. If at all they had any right over item No.1, the same has been lost by adverse possession and limitation. No property is available for partition, hence the plaintiffs are not entitled for the reliefs prayed for.

31. Defendants 8 and 9 filed written statement contending that the plaintiffs and defendants 13 and 14 have executed a release deed on 11/08/1987 in respect of item No.4 in favour of Beeran Koya, the husband of defendant No. 8 and father of defendants 9 to 12. From the date of the release deed, till his death, Beeran Koya was in possession and

enjoyment of the property and after his death, the defendants have inherited the same. So neither the plaintiffs nor defendants 13 and 14 have any right over plaint schedule item No.4. Apart from that, if at all the plaintiffs and defendants 13 and 14 had any right over the property, the same has been lost by adverse possession and limitation. The release deed of the year 1987 was executed by the plaintiffs, defendants 13 and 14 and their mother after receiving sufficient consideration for the same.

32. Defendants 15 to 18 filed written statement adopting the contentions of defendants 1 and 3 to 7.

33. Defendants 13 and 14 filed written statement supporting the plaint claim.

34. Based on the aforesaid pleadings, necessary issues were raised by the court below. Evidence in this case consists of the oral testimony of PW1 and Exts.A1 to A18 on the part of the plaintiffs and the oral testimony of DW1 to DW3 and Exts.B1 to B12 on the side of the defendants. On a consideration of the oral and documentary evidence and after hearing the parties, the court below decreed the suit. Hence the present appeal.

35. The points that arise for consideration in this appeal are:

(i) Was Ayishabi, the mother of plaintiffs and defendants 13 and 14 competent to execute Ext.B2 partition deed for and on behalf of her minor children?

(ii) If no, are the plaintiffs and defendants 13 and 14 estopped from seeking partition of the plaint schedule property?

(iii) Are the plaintiffs and defendants 13 and 14 entitled to any share of the plaint schedule property? If so, their shares?

(iv) Is there any infirmity in the findings of the court below calling for an interference by this Court?

(v) Reliefs and costs.

36. **Points (i) to (iv)** - According to the contesting defendants, no property is available for partition as claimed by the plaintiffs, as the same had already been partitioned in the year 1969 by Ext.B2 partition deed in which late Abu, the predecessor-in-interest of the defendants, the plaintiffs, defendants 13 and 14 and their mother Ayishabi were parties. Admittedly, when Ext.B2 was executed the plaintiffs, defendants 13 and 14 were minors. Hence the partition deed executed by the mother on behalf of her minor children acting as their guardian is not

valid in the light of the aforesaid decisions of the Hon'ble Supreme Court holding so.

37. It was pointed out on behalf of the defendants that after the execution of Ext.B2, the plaintiffs, defendants 13 and 14 have ratified the act of their mother by executing Ext.B1 release deed dated 13/05/1989. Therefore, now they are estopped from contending that Ext.B2 partition deed is not binding on them. The court below found that Ext.B2 partition deed is a void document and hence Exts.B1 and B9 release deeds, if at all executed by the plaintiffs and defendants 13 and 14 are also void documents and hence nonest.

38. Ext.B2 admittedly is a partition deed of the year 1969, in which deed the plaintiffs, defendants 13 and 14 are seen represented by their mother, Ayishabi. According to the plaintiffs, they were unaware of Ext.B2 partition deed and it was only when they received the reply notice from the defendants, they came to know of the existence of such a deed. They have also alleged that their mother was ignorant of the nature of Ext.B2 document as she was made to believe that she was executing only a power of attorney. It was also argued that since the mother cannot be the guardian, she was incompetent to deal with the immovable properties of her minor children. Ext.B2 partition deed is a void document. There cannot

be any estoppel against law and also that a void document cannot be ratified by the minors on attainment of majority. In support of the arguments, reference has been made to the decisions in **Pathummabi v. Vittil Ummachabi, ILR (1993)26 Mad. 734; Mohd. Amin** *(Supra)* **; Syed Shah Ghulam Ghouse Mohiuddin** *(Supra)* **; Meethiyan Sidhiqu** *(Supra)* **; Saidu vs. Amina, 1970 KHC 87; Varghese Varghese vs. Iype Kuriakose, 1973 KHC 369** and **Madhegowda vs. Ankegowda, 2002 KHC 1088.** On the other hand, the defendants argued that the principle of estoppel is not alien to Muslim law and referred to the following decisions in support of the argument **C.Beepathuma vs. Velasari Shankaranarayana Kadambolithaya, 1965 KHC 481 ; Gulam Abbas vs. Haji Kyyam Ali, 1973 KHC 408 ; Dhurandhar Prasad Singh vs. Jai Prakash University, 2001 KHC 924 ; Hasan Khani Rawther vs. Muhammed Rawther, 2008(2) KHC 249 ; Hameed vs. Jameela, 2009 KHC 1204 ; Shehammal vs. Hasan Khani Rawther, 2011 KHC 4653 ; State of Punjab vs. Dhanjit Singh and Sandhu, 2014 KHC 4167 ;** and **Bhagwat Sharan vs. Purushottam, 2020 KHC 6317**.

39. Before this Court, appellants 5 to 9 have filed I.A.No.1/2021 under Order 47 Rule 27 read with Section 151 CPC seeking production of additional documents. The documents produced as

Annexures A1 to A3, according to them were not in their possession or within their knowledge and hence the reason why they were unable to produce them before the court below. They contend that these documents are highly necessary for a just decision of the case and so they may be accepted in evidence. Annexure A1 release deed dated 04/06/1980 produced is relating to item no.4 of plaint B schedule property by which one Abdul Fathah released his tenancy rights in favour of the plaintiffs and their mother. Annexure A2 dated 12/11/1981 is a sale agreement as per which the plaintiffs' and their predecessor-in-interest have agreed to sell their Karayima right in respect of item no.4 of the plaint schedule property in favour of late Beeran Koya, the predecessor-in-interest of defendants 9 to 12. These documents have been produced by the defendants to substantiate their contention that the case of the plaintiffs that they were unaware of Ext.B2 partition deed is absolutely false. Annexure A3 document of the year 1989 has been produced to counter the allegation of the plaintiffs that their mother Ayishabi was ignorant of the formalities relating to registration of a document. This document would show that apart from the disputed documents in the suit, Ayishabi had executed other registered documents also. As these documents are not disputed by the plaintiffs and defendants 13 and 14 and as these documents are required

for a just decision of the case, the application for receiving the same is allowed and they are marked as Exts.B13 to B15.

40. It was submitted on behalf of the respondent that the finding of the court below that since Exts.B2 and B5 are void documents and nonest, the plaintiffs and defendants 13 and 14 had no right to execute Exts.B1 and B9, is eminently right as Exts.B2 and B5 deeds being void, they are incapable of being ratified. In support of this argument, reference was made to the decisions in **Saidu** (*Supra*) and **Varghese Varghese** (*Supra*). In **Saidu** (*Supra*), a Division Bench of this Court held relying on the decision in **Imambandi** (*Supra*) that documents executed by a Muslim mother on behalf of her minor children are void and ineffective for want of authority of power on the part of the mother to alienate or encumber the minorsproperty. Therefore there can be no ratification of the sale of the immovable property of a Mohammedan minor by the so called de facto guardian, the mother. A de facto guardian is not recognized by Muslim law. She is like a rank outsider and any alienation by her is void. **Varghese Varghese** (*Supra*) was a case in which the plaintiff therein sought a declaration that the sale deeds caused to be executed by him during his minority are null and void and for recovery of possession of those properties with mesne profits. Defendants in the case contended that with

the sale consideration obtained, the plaintiff had purchased properties and therefore he is estopped from impeaching the validity of the sale deeds executed by him during his minority. The trial court accepted the contentions of the defendants and dismissed the suit. In appeal, a Division Bench of this Court held that the sale deeds being void are incapable of being ratified as there was nothing on record to show that the plaintiff had made any representation after attaining majority that the sale deeds executed by him during his minority are valid and also because there was no evidence to show that on the basis of any such representation the defendants had altered their positoin so as to constitute an estoppel to the plaintiff.

41. It is true that Ext.B2 partition deed executed by the mother for and on behalf of the plaintiffs and defendants 13 and 14 is void. But here is a case where after the execution of Ext.B2 partition deed in the year 1969, years thereafter, the plaintiffs and defendants 13 and 14 after attaining majority have executed Ext.B1 release deed wherein they have referred to Ext.B2 partition deed also. Therefore this is not a case like **Varghese Varghese** (*Supra*) where there was no evidence to show that after attainment of majority, the plaintiffs had represented the sale deeds to be valid. By execution of Ext.B1 release deed whereby specific reference

has been made to Ext.B2 partition deed, the plaintiffs and defendants 13 and 14 have clearly indicated that they have accepted or ratified Ext.B2 deed.

42. As submitted on behalf of the appellants the principle of estoppel and equity are not alien to Muslim law as can be evident from the decisions cited on their behalf. In **Beepathuma** *(Supra)* it has been held that after having obtained benefit from a transaction, a minor cannot later on deny it and that he is estopped from repudiating the same. In **Gulam Abbas** *(Supra)* it was held that after relinquishment of a future possible right of inheritance in the properties by a muslim-heir for a consideration, he cannot later on claim any share in the property as the principle of estoppel operates. In **Shehammal** *(Supra)* it was held that even in a void transaction like spes successionis, when the right is relinquished for a consideration, the heir cannot later on claim right in the property as the principle of estoppel applies. In **Dhanjit Singh Sandhu** *(Supra)* it has been held that the doctrine of election is based on the rule of estoppel and the principle that one cannot approbate and reprobate is inherent in it. In **Bhagwat Sharan** *(Supra)* it has been held that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one party knowingly accepts the benefits of a contract or

conveyance or an order, he is estopped from denying the validity or binding effect on him of such contract or conveyance or order. **Hameed** *(Supra)* was a case in which a Muslim heir-apparent received money from his father in-lieu of his share in the father's property and purchased property using that money. It was held that the said act of receipt of money by an heir-apparent in lieu of his share in the property of his father during his lifetime, would estop the heir-apparent from claiming a share in the father's property on his dying intestate.

43. The principle of estoppel needs to be applied in the instant case also. The plaintiffs and defendants 13 and 14, accepting Ext.B2 partition deed is seen to have executed the subsequent documents. After having executed the said release deeds they cannot now take a *volte face* and plead ignorance of the same. It is rather late in the day to contend that they are not bound by it. That being the position, the finding of the court below that the plaintiffs are not bound by Ext.B2 deed and that the plaint schedule property is available for partition, is liable to be reversed.

44. Before we conclude, we place on record the assistance rendered to us by the learned *Amicus Curiae* by way of his meticulous arguments and exhaustive notes submitted, which has immensely helped us in adjudicating the issues before us.

45. **Point (v)** - In the result, the appeal is allowed. The judgment and decree of the court below are set aside and the suit is dismissed.

All interlocutory applications, if any pending, shall stand disposed of.

Sd/-

P.B.SURESH KUMAR
JUDGE

Sd/-

C.S.SUDHA
JUDGE

ami/Jms

R.F.A.No.40 of 2012

APPENDIX

APPELLANTS' EXHIBITS

EXT.B13 : CERTIFIED COPY OF THE RELEASE DEED NO.2263/1980 DATED 04/06/1980 OF SRO, CHALAPPURAM.

EXT.B14 : ORIGINAL OF THE SALE AGREEMENT DATED 12/11/1981

EXT.B15 : CERTIFIED COPY OF THE DOCUMENT DT.10/4/1989 NO.701/1989 SRO, CHALAPPURAM.