IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION.

PRESENT:

Mr. Justice Surendra Kumar Sinha

Madam Justice Nazmun Ara Sultana

Mr. Justice Syed Mahmud Hossain

Mr. Justice Muhammad Imman Ali

Mr. Justice Muhammad Mamtaz Uddin Ahmed

Mr. Justice Md. Shamsul Huda

CIVIL APPEAL NO.139 OF 2003.
(From the judgment and order dated 16.6.1999 passed by the High Court Division in Civil Revision No.1984 of 1996.)

Mst. Momtaz Begum: Appellant.

=Versus=

Anowar Hossain: Respondent.

For the Appellant: Dr. Rabia Bhuiyan, Senior Advocate, instructed by Mr. Md. Nawab Ali, Advocate-on-Record.

For the Respondent: Mr. Abdul Wadud Bhuiyan, Senior Advocate, instructed by Mr. A.K.M. Shahidul Huq, Advocate-on-Record.

Date of hearing: 21st June, 2011, 19th, 26th and 31st July, 2011.

J U D G M E N T

S.K. Sinha, J: This appeal raises questions of some importance in the field of Mohammedan Law but they are not abstract questions which can be divorced from the facts giving rise to them and in order to resolve them the facts in some detail are necessary.

Appellant instituted a suit against the respondent for dower and maintenance in the Family Court. She claimed that though their marriage was solemnized according to Mohammedan Law, the Kabinnama was not registered. They lived as husband and wife together for a considerable time and the marriage was duly consummated. With the passage of time the respondent became more greedy and started demanding dowry from her and at one stage the respondent drove her away from his house. Respondent contested the suit denying the marriage and claimed that the appellant's brother was an employee under him. He misappropriated a sum of taka thirty five thousand from his shop and to divert the said incident, the appellant instituted the suit by making wild allegations. Besides the evidence of the appellant, the Family Court on assessment of the evidence of Shadrul Islam (P.W.2), Madu Mia (P.W.3), Swapan (P.W.4) and Babul Mia (P.W.5) came to the definite finding that the respondent married the appellant and that they lived as husband and wife, and

decreed the suit. The Court of appeal below affirmed the judgment. A single Bench of the High Court Division in exercise of revisional jurisdiction reversed the judgments of the courts below and dismissed the suit.

It has been observed by the Family Court that the appellant examined independent witnesses who stated in unequivocal terms that there was marriage between the appellant and the respondent, that they lived together as husband and wife and that the respondent examined nearest relations who are not reliable witnesses. The Family Court inferred adverse presumption against the respondent on the reasonings that though the respondent denied the marriage, he being the eldest among seven siblings, the marriage of his two younger brothers is not unnatural but considering the surrounding facts coupled with the nature of the witnesses examined by him led to the inference that there was legal marriage between the appellant and the respondent. The Court of appeal below also evaluated

the evidence on record afresh and arrived at the conclusion that the respondent failed to prove by adducing reliable evidence that he did not lead conjugal life with the appellant, that despite that there was no kabinnama, they lived as husband and wife which had been satisfactorily proved by the appellant by examining independent witnesses and that the Family Court was perfectly justified in decreeing the suit.

The High Court Division held that in the absence of a registered kabinnama a special onus is cast upon the appellant to prove the fact about marriage, that there is no material to show that the marriage between the parties was solemnized after fulfilment of requirements laid down in paragraph 252 of the Mohammedan Law, that the appellant having failed to prove the marriage by examining competent witnesses her claim of marriage falls to the ground and that mere living together did not bring her within the bounds of marriage.

Leave was granted to consider on three points, as to (1) whether non-registration of the marriage under Mohammedan Law makes the marriage illegal or irregular or non-existent, (2) whether continuous co-habitation by the appellant and the respondent over a period of three years as husband and wife coupled with their conduct infer a presumption as to the legal marriage, and (3) whether the High Court Division is justified in interfering with the concurrent findings of fact arrived at by the Courts below on proper assessment of the evidence on record as to the solemnization of a legal marriage between the appellant and the respondent in exercise of revisional jurisdiction.

Dr. Rabia Bhuiyan, learned counsel contended that the view of the High Court Division in drawing adverse presumption against the appellant merely on the ground of absence of kabinnama is based on misconception of law. According to the learned counsel, in view of the concurrent findings that the appellant and the respondent had lived together as husband and wife over

a period of three years which suggested the presumption of legal marriage, the High Court Division erred in law in interfering with the said concurrent findings of fact.

The courts below on a thorough sifting of the evidence on record came to a definite conclusion that the marriage was consummated. The High Court Division did not at all repel the findings arrived at by the courts below on the point of consummation of marriage. The High Court Division did not dislodge the findings of the courts below that the appellant and the respondent lived jointly for a considerable time as husband and wife but dismissed the suit mainly on the ground of the absence of registered kabinnama, and on the face of denial by the respondent, the appellant was required to prove solemnisation of marriage after observance of the requirements of paragraph 252 of the Mohammedan Law, the basic essentials of marriage, which she failed to prove by adducing reliable evidence. The High Court Division, however, believed

the appellant's claim that they lived together as husband and wife but castigated such living as unethical observing "Now-a-days the obnoxious alien culture of living together has made its in-road into our society and this slowly is spreading its tentacles undermining our social value and the institution of marriage". It seems to me that the learned Single Judge of the High Court Division has failed to address the point in dispute between the parties in the light of the evidence and the principles of law applicable in the facts of the given case.

Let us consider the concept of marriage under Mohammedan Law. Marriage under the Mohammedan Law is a civil contract requiring no ceremony or special formality. In Harvard Law Review, XXVII, 387 an article appears on 'Requisites and Proof of Common Law Marriages' explaining the concept of the common law marriage. F.B. Tyabji in his Mohammedan Law at page 101 said, the principles stated in the article may be

helpful in the decision of similar questions arising under Mohammedan Law. The article reads thus:

> “From early times, it has not always been clear what acts were necessary to the validity of a marriage. According to early civil law the consent of the parties was sufficient; but it seems doubtful, whether under the early English common law a marriage without a minister was valid. In this country, however, many States have adopted the view that a marriage may be valid even without a ceremony before third parties. The rule is usually stated to be that an agreement to be married henceforth, followed by cohabitation, constitutes the so-called common law marriage. But both on principle and authority, it would seem that the agreement alone is sufficient to consummate a common law marriage, and that the subsequent cohabitation is important only as evidence of the agreement.”

> “Moreover, it is clear on the authorities, in the States where formal solemnization is not necessary, that although there is no proof of an actual written or oral contract, the agreement necessary to the formation of a common-law marriage may be inferred solely from the conduct of the parties.”

The article then proceeds to refer to four situations which are said to be rather common: “(1) The only evidence of the agreement may be that the parties have lived together as husband and wife: from this a common law marriage is often inferred, even without proof of an express agreement: an implied agreement being sufficient. The parties may have purported to contract a marriage and lived together, but the agreement at the time it is entered into may be void because of some disability unknown to both parties. If, subsequently, the disability is removed, a new contract is in strictness.”

There is no dispute that the Mohammedan marriage among muslims is not sacrament but purely civil contract. Marriage brings about a relation based on and arising from, a permanent contract for intercourse and procreation of children between man and woman who are referred to as ‘parties to the marriage and, who after being married, become husband and wife. Though generally solemnized with recitations from Koran, yet no positive service peculiar to the occasion is prescribed by law; writing not required; validity and operation of whole depends upon declaration or proposal and acceptance or consent of contracting parties before competent witnesses; (Bail.1.4). In Asha B.V. Kadir B., (1909) 33 Mad 22, it is stated, “marriage is contract between parties to live as husband and wife for term of their lives.”

In Muhammadan Law by Faiz Badruddin Tyabji, Third Edition, marriage is defined in paragraph 17, and after considering different authorities the essentials of marriage are summed up as under:

“Marriage arises in Muhammadan Law from a contract-(a) Providing for intercourse and the procreation of children; (b) commencing from the time of contract; (c) made for effectuating a marriage between a man and woman whose intermarriage is not prohibited by law; (d) entered into in accordance with the rules and forms laid down in s.17A to S.23, inclusive, and (e) by a person who has authority to contract in marriage the person purported to be married.” Quoting Fatawa Alamgiri in Abdul Kaidr V. Salina, (1886) 8 All.149(155) it is stated, “also for the solace of life; one of the prime and original necessities of man. Therefore lawful in extreme old age after hope of offspring has ceased and even in the last or death illness.”

The Mohammedan Law does not insist upon any particular form in which the contractual performance should be effected or that “the union should be evidenced by any writing, nor is the presence of witnesses essential for its validity”. In this

connection Syed Ameer Ali in his Mohammedan Law, 6th Edition, following Fatawai Alamgiri, Vol.11 page 209 and Radd-ul-Muhtar, Vol.II page 429 opined, though among the Sunnis the presence of witnesses is considered necessary to the validity of a marriage their absence only renders it invalid which is 'cured by consummation'. A marriage contract, it is stated, as a civil institution, rests on the same footing as other contracts. The parties retain their personal rights against each other as well as against strangers; and, according to the majority of the schools, have power to dissolve the marriage-tie, should circumstances render this desirable.

To use the words of Baillie, marriage, like other contracts, "is constituted by *ejab wa kabul* or declaration and acceptance, but it confers no rights on either party over the property of the other. The legal capacity of the wife is not sunk in that of the husband; she retains the same powers of using and disposing of her property, of her entering into all

contracts rendering it, of suing and being sued without his consent, as if she were unmarried. On the principle of contract of marriage, the author stated, in the language of the law, as in the common parlance, the formal conclusion of the contract is called ‘akd’ conveying the same meaning as the term ‘obligation’ in the Roman Law. In fact, *akd* is the completion of the contract which commences with the proposal or demand in marriage and ends with the consent.” Radd-ul-Muhtar, Vol.II, says “*akd* signified both proposal and assent, and that the word means the contract of marriage as well as co-habitation”.

On the capacity of the parties to marry each other, Syed Ameer Ali says, “the validity of a marriage under the Mohommedan Law depends primarily on the capacity of the parties to marry each other. “The performance of the marriage according to the form prescribed in the place where the marriage is celebrated, or which would impress on the woman by the customary law of the Musalmans the status of a wife is

a matter of secondary consideration". Dicey on Domicile stated, it is recognized principle of law that the capacity of each of the parties to a marriage is to be judged of by their respective *Lex domicilii*. If they are each, whether belonging to the same country or to the different countries, capable, according to their *Lex domicilii*, of marriage with the other, they have the capacity required by the rule under consideration.

Fatawai Alamgir, Vol.I, page 377 says "Among the conditions which are requisite for the validity of a contract of marriage, are understanding, puberty and freedom in the contracting parties, with this difference that whilst the first requisite is essentially necessary for the validity of the marriage, as a marriage can not be contract by a *majnun (non compos mentis)*, or a boy without understanding; the other two conditions are required only to give operation to the contract, as the marriage contracted by a (minor) boy (possessed) of

understanding is dependent of its operation on the consent of the guardian.”

The essentials of a marriage mentioned in paragraph 252 by M. Hidayatullah on Mulla’s principles of Mahomedan Law are based on the arguments made in Moung Kyi V. Ma Shwe Baw (1929) 7 Rang 777, 121 I.C. 718, Gagu Bibi V. Mesal Shaikh (1936) 63 cal 415 and 164 I.C. 957. In the absence of witnesses to the marriage, Mulla says in paragraph 254 “A marriage contracted without witnesses as required by sec.252 is irregular, but not void”. This rule has been upheld in Shahzada Begum V. Abdul Hamid (1950) Lah 773. As regards irregular marriage, Mulla following Baillie, 155 said in paragraph 264(3):

“An irregular marriage is one which is not unlawful in itself, but unlawful ‘for something else’ as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstances, such as the absence of witnesses.”

It has been explained, the reason why certain marriages though irregular but not void that a marriage which is contracted without witnesses, the irregularity arises from an accidental circumstance. The effects of an irregular marriage may be terminated by either party, either before or after consummation, by words showing an intention to separate, as where either party says to the other about the intention of relinquishment. Even in respect of irregular marriage, if consummation has taken place, Mulla says, ‘the wife is entitled to dower, proper or specified, whichever is less (Paragraph 267(2)). The High Court Division, in the premises, on a superficial consideration of the principles of a legal marriage, termed the living of the appellant and the respondent together as husband and wife “adulterous relations”.

Mr. Wadud Bhuiyan, learned counsel submitted that the plaint is totally silent as to the date, place and presence of witnesses of the marriage and the appellant having failed to prove the essentials of a

marriage under Mohammedan Law, the High Court Division is perfectly justified in dismissing the suit. In support of his contention the learned counsel has referred to the cases of Khorshed Alam @ Shah Alam V. Amir Sultan Ali Hyder and another, 38 DLR (AD) 133, Debendra Mohan Rai V. Sona Kunwar, (1904) 36 Allahbad 295, Abdool Razack V. Aga Mahomed Jaffer Bindaneem, 21 Indian Appeal 56 and some other decisions.

Under Hanafi and the Maliki Law, a presumption of marriage is inferred if the marriage is consummated from the retirement of the husband and the wife into the nuptial chamber, under circumstances which lead to the natural inference of matrimonial intercourse.

Syed Ameer Ali stated that Muhammadan Law does not insist upon any particular form in which the contractual performance should be effected or that the union should be evidenced by any writing, nor is the presence of witnesses essential for its legality. For, though among the Sunnis the presence of witnesses is considered necessary to the validity of a marriage,

their absence only renders it invalid which is cured by consummation. Therefore, according to the author, even if the person seeking a declaration of legal marriage failed to prove it in the absence of the witnesses, if he or she proves the consummation of marriage, it may be treated as valid marriage. “A marriage may be proved directly or presumptively; directly, by means of the oral testimony of the witnesses present at the marriage, or by documentary evidence in the shape of a deed of marriage; presumptively, by statement of parties or by evidence of conduct and reputation. As in many cases invalid marriages are rendered valid by consummations, and as the dower does not become due in its entirety until the marriage has been actually or constructively consummated, the question of consummation forms often an important element in the status of marriage”.

Section 50 of the Evidence Act declares that "when the Court has to form an opinion as to the relationship of one person to another, the opinion

expressed by conduct as to the existence of such relationship of any person, who as a member of family or otherwise, has special means of knowledge on the subject is a relevant fact". Illustration (a) to section 50 says; “the question is, whether A and B were married. The fact that they were usually received and treated as husband and wife, is relevant”. This section says when the question arises as to the presumption of marriage, the opinion that makes relevant is opinion expressed by conduct as to the existence of such relationship and not merely as to that relationship. It is for the Court to weigh such evidence and to come to its own opinion as to the relationship in question. When the Court has to form an opinion as to the relationship of one person to another, the opinion expressed by conduct, as to the existence of such relationship, of any person who, as a member of family or otherwise, has special means of knowledge on the subject, is a relevant fact.

To narrow the ground by limiting it to "opinion expressed by conduct" so far an opinion expressed by conduct, i.e. by evidence of specific facts of the conduct mentioned in the illustration to section 50 of the Evidence Act. When a woman lives for a number of years in close association with a man and their children, who are acknowledged by the man as born to him; relations and persons of the village treated them as such, there is a presumption of legitimacy, if the witnesses prove the conduct of the man and the woman by their friends and neighbours from which the Court can draw this conclusion. It is not for the witness to draw the conclusion himself and to express a mere opinion about the very matter which the Court has to decide. Taylor in his Law of Evidence says, ‘general reputation’ is admissible to establish the fact of the parties being married.’ "When a person" says Fatawai Alamgiri, "has seen a man and woman living in the same house, and behaving familiarly towards each other as husband and wife, it is lawful to him to testify that

the woman is the man's wife". Reference in this connection is the case of Khajah Hidayatoollah V. Raijan Khanum, (1844) 3 MIA 299 and Wise V. Sanduloonissia Chowodanee, (1867) 11 MIA 177.

Faiz B. Tyabji in his Muhammadan Law, in Chapter ‘Proof and Presumption of Marriage’ in paragraph 81 stated:

> “when the question arises whether a marriage has been contracted in due form, the burden of proving that the alleged wife consented to it, is upon the person who affirms it; provided that unless the parties were prohibited from intermarrying it is in the following cases presumed that they were validly married, and the burden of proving that their cohabitation was illegal, shifts to the person who alleges it to be illegal; viz. where (1) it is proved that the parties cohabited together continuously and for a long period, as husband and wife, and were treated as such by their

friends; or (2) either party has acknowledged that he or she was married to the other (and the other party has been confirmed, or acquiesced in, the acknowledgment."

There are exceptions to the presumption of cohabitation. It is said, co-habitation means something more than mere residence in the same house. Residing as a menial servant in the house of a Muslim and bearing a child to him does not raise presumption of marriage, or where the relation admittedly began as concubinage, lapse of time, and propriety of conduct and the enjoyment of confidence, with powers of management reposed in the woman, were not held sufficient to raise presumption of subsequent marriage.

Mulla on the Principle of Mahomadan Law, 'presumption of marriage' has been stated in paragraph 268 as under:

> “Presumption of marriage-Marriage will be presumed, in the absence of direct proof, from-
>
> (a) prolonged and continual cohabitation as husband and wife (e); or
>
> (b) the fact of the acknowledgment by the man of the paternity of the child born to the woman, provided that the conditions of a valid acknowledgment mentioned in section 344 below are fulfilled (f); or,
>
> (c) the fact of the acknowledgment by the man of the woman as his wife (g).”

The presumption does not apply if the conduct of the parties was inconsistent with the relation of husband and wife nor does it apply if the woman was admittedly a prostitute before she was brought to the man’s house. The mere fact, however, that the woman did not live behind the purda, as the admitted wives

of the man did, is not sufficient to rebut the presumption.

In Abdool Razack V. Aga Mahomed Jaffer Bindaneen, 21 Indian Appeal 56, Lord Macnaghten argued on the point of presumption of marriage that if the conduct of the parties were shown to be compatible with the existence of the relation of husband and wife, the conduct is a very good test, and a safer guide than the recollection or imagination of interested or biased witnesses. Their lordships accepted the argument that every presumption ought to be made in favour of marriage "when there had been a lengthened cohabitation, especially in a case where the alleged marriage took place so long ago that it must be difficult if not impossible to obtain a trustworthy account of what really occurred".

The appeal was, however, dismissed on other grounds as to the acknowledgment of the legitimacy of the child. It was argued that the word acknowledgment in its legal sense under Mohammedan Law of

acknowledgement of antecedent right established by the acknowledgment on the acknowledger, that is, in the sense of a recognition, not simply of sonship, but of legitimacy of a son. Their lordships were of the opinion that the term acknowledgment is used, say, a child born out of wedlock is illegitimate; if acknowledged, he acquires the status of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment expressed or implied, directly proved or presumed. The facts are that Abdul Hadee left a will bequeathing everything to his brother Hadjee Hosain, in which he mentioned that he had offspring in Burma. According to one witness, the offspring is Abdool Razack and expressed a wish that his brother should give him something. Their lordships are of the opinion that every word in the will is said about it to be perfectly true, the evidence falls very far short of such an acknowledgment as would confer the status of legitimacy upon an illegitimate child.

In Ghaganfor V. Kaniz Fatima, their Lordships of the judicial committee said:

> “The learned Judges fully recognized that prolonged cohabitation might given rise to a presumption of marriage, but that presumption is not necessarily a strong one, and their lordships agree that it does not apply in the present case, for the mother before she was brought to the father’s house was, according to the case on both sides, a prostitute.”

There is no evidence that the appellant was a prostitute or woman of a bad character. Therefore, the conduct proved by the witnesses suggested a presumption in favour of a legal marriage.

In Ma Khatoon V. Ma Mya and others, 165 IC 232, a Division Bench of the Rangoon High Court argued that according to Mohammedan Law, where there had been continual cohabitation between a man and a woman, which is not a mere casual concubinage, but a more permanent connection and a child has been born, and

where there is no insurmountable obstacle to such a marriage, then the presumption is in favour of such a marriage having taken place. It is further argued that where cohabitation between a man and a woman was continuous from the time when they first met, either through an elopement or in consequence of an ordinary marriage before a moulvi, and that that cohabitation was with repute, it must be held that a valid marriage existed between them. These views have been taken with the approval of the views taken in Khajah Hidayut Oolah V. Rai Jan Khanum, 3 MIA 295.

In Bashir and others V. Ilam Din and others, PLD 1988 SC 8, Nasim Hasan Shah,J. argued “Muslim Law presumes in favour of marriage in the absence of direct evidence on the point provided, however, evidence exists to show that a man and a woman have lived together as man and wife for a long time”. The above views were taken from a passage of Tyabjee, Muhammadan Law, as under:

> “Legitimacy of a child may be presumed where there had been continuous cohabitation of the alleged parents, acknowledgement of the child by the father, treatment by the father of the mother and child, and repute and notoriety amongst members of the family, the community, or respectable members of the locality.”

In Hamida Begum V. Murad Begum, PLD 1975 SC 624, the Supreme Court of Pakistan endorsed the views taken by the judicial committee in Syed Habibur Rehman Chowdhury V. Syed Altaf Ali Chowdhury, AIR 1922 PC 159, and made the following observations:

> “Legitimacy is a status which results from certain facts, whereas legitimation is a proceeding which creates a status which did not exist before. This proceeding becomes necessary where either the existence of a valid marriage can not be expressly proved or where the child is born within six months of

the marriage as stated above. In such cases, acknowledgment of legitimacy in favour of the child may be either expressed or by necessary implication from the course of treatment by the man of the mother and the child, or from the evidence of repute and notoriety amongst the members of the family, community and respectable members of the locality. Such an acknowledgment raises a presumption of a valid marriage and legitimate birth."

In Khorshid Alam Vs. Amir Ali, 38 DLR (AD) 133, the point in dispute was as to the legitimacy of Khorshid Ali is the son of Amir Ali Mia. Leave was granted to consider whether the principle of acknowledgement of sonship under the Muslim Law has been correctly considered by the High Court Division. In the said case, the question of marriage between Monwara Begum and Amir Ali Mia came under consideration. Khorshid Alam, the defendant, pleaded about the legal marriage. This Division though noticed

that the defendant failed to prove marriage but taking consideration of the doctrine of acknowledgment of sonship held that there was legal marriage between Monwara Begum and Amir Ali Mia and that once acknowledgment of parentage is established, the marriage will be held proved. In that case this Division considered a decision of the Privy Council in 56 I.A.201 wherein it was argued that ‘until the claimant establishes his acknowledgment the onus is on him to prove marriage. Once he establishes an acknowledgment the onus is on those who deny a marriage to negative it in fact.’ The plaintiff denied the existence of the marriage and this Division shifted the onus upon the plaintiff to prove that there was no marriage. This Division concluded its opinion with the observation that “the person who deny it (marriage) will have to be established. In other words, it was for the plaintiff to prove that there was no marriage with Monwara Begum as alleged”. I fail to understand why Mr. Bhuiyan has referred this

decision which rather supports the case of the appellant.

In Masit-un-Nissa V. Pathani, XXVI All 295, referred by Mr. Bhuiyan, the suit was brought to recover joint possession of a share in the property of a deceased Muslim, Wazir Muhammad Khan, who was alleged by the plaintiff Pathani to have been her husband, the father of her children, and for mesne profits. The defendants who are wife and her son resisted the claim. The trial Court decreed the suit. The Allahabad High Court reversed the judgment of the trial Court following a dictum of the Privy Council that in the co-habitation there must be a treatment tantamount to acknowledgment of the fact of marriage and the legitimacy of the children and that there is no evidence in the case upon which it can be inferred that the fact of Pathani’s marriage or her children’s legitimacy. Therefore, this case is quite distinguishable.

The recognized custom of all sects are that a marriage is solemnized by a person conversant with the requirements of the law who is designated for the occasion, the Kazi. Two other persons, formally appointed for the purpose, act on behalf of the contracting parties, and the terms are usually embodied in a deed of marriage called ‘Kabin-nama’. Under the Sunni law what is required more is that a declaration should precede the acceptance, in order to demonstrate conclusively the intention of the parties. A marriage contracted without witnesses in invalid. But a marriage contracted at a place where compliance with it is impracticable, the marriage would not be void on that ground. Where it is possible to obtain testimony, and the ceremony of marriage has gone through without the presence of witnesses to attest its performance, it may be declared to be invalid. The condition of testimony, therefore, is not so essential that it can not be dispensed with. Once the marriage is consummated and the parties have cohabited, the

contractual defect is removed; and the marriage is declared to be legitimate.

A marriage may also be proved presumptively by general conduct of the parties over which I have discussed above. The sources of presumptions of fact are, (i) the common course of natural events, (ii) the common course of human conduct, and (iii) the common course of public and private business. When a presumption operates in favour of a party, the burden of proof is on the opponent and when a burden of proof is on a party, there is a presumption operating in favour of the opponent. A presumption of fact is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved. The difference between Hanafi and Shia School is that in Hanafi law in regard to valid retirement has the same effect as consummation in respect of (1) the confirmation of Mahr; (2) the establishment of descent, or paternity; (3) the necessity for the wife observing iddat; (4) the wife’s right to maintenance and residence during

iddat; and (5) the prohibition by conjunction against the husband marrying the wife’s sister or other four women with her. In respect of above five matters, the rights of the parties would be same as though consummation has taken place.

From the above discussions, I conclude that there are unanimous views of the jurists and authorities that even in the absence of formal proof of a valid marriage, a marriage can be presumed by evidence of conduct and reputation, and the question of consummation forms often an important element in the status of valid marriage. A presumption of consummation is raised from the retirement of the husband and wife, i.e. there should be no third person at the place and that the place should not be a public one, like a public bath, public road, a mosque etc. Where there has been prolonged and continuous cohabitation as husband and wife, in the absence of direct proof a presumption arises that there was a valid marriage. The law permits no specific ceremony

for the contractual performance of a marriage: and no religions rites are necessary for contracting a valid marriage. There are even opinions that a marriage may be constituted without any ceremonial and even in the absence of direct proof, indirect proof might suffice. The High Court Division, in the premises, erred in holding that mere living together as husband and wife did not bring it within the bound of marriage. Apart from acknowledgment by either party, if there is continual cohabitation between a man and woman as husband and wife, there is presumptive marriage and legitimacy provided that the parties were not prohibited from intermarrying.

As regards the submission that the plaint is silent regarding the date, the place and the presence of witnesses of the marriage, it is too late in the day to examine and reopen the findings of fact arrived at by the Courts below on a fresh assessment of the pleadings and the evidence by this Division. As the ultimate Court in the land, this Division, as a rule, should give due weight and consideration to the

opinions of the courts below, in particular, to the opinion of the trial Court which had the advantage of observing the veracity of the witnesses and watching their demeanour. We find that the High Court Division has totally overlooked the presumption of a muslim marriage and relying upon paragraph 252 of Mulla's Mohammedan Law disbelieved the appellant's claim of marriage. If the High Court Division had considered paragraphs 254 and 268 of Mulla's Mohammedan Law, its decision would have been otherwise. The High Court Division based its decision on piecemeal consideration of Mulla's Mohammedan Law and arrived at a decision which is not supported by any of the authors of Mohammedan Law. It has tried to apply a doctrine of Muslim Marriage against the established schools of Mohammedan Law. Therefore, the decision of the High Court Division is based on a misconception of the basic principles of Mohammedan Law and thus the interference of the judgments of the Courts below is an error of law apparent on the face of the record. The evidence on record sufficiently proved that there

was existence of legal marriage between the appellant and respondent.

The High Court Division, in the premises, exceeded its power in interfering with the concurrent findings of fact in the absence of any misreading or non-consideration of the evidence on record. Accordingly, we find merit in contention of Dr. Rabia Bhuiyan.

The appeal is, therefore, allowed with costs of Tk.10,000/-.

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The 31st July, 2011
Mohammad Sajjad Khan

APPROVED FOR REPORTING