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here we are



**ASSIGN
BUSTER**

The Hindus and the Muslims have, all along, claimed that their laws are of divine origin.

However, in Hindu law it has been an established proposition that a valid custom overrides the sacred law. Custom has never been an important aspect of Muslim law, although, at one time, the Privy Council held the view that a valid custom overrode Muslim law. During the long period of Hindu rule, Hindu law was all pervasive. All aspects of the life of an individual were regulated by it. When the Muslims ruled the country, almost all areas of Hindu law, except the Hindu personal law, were superseded. The same happened when the Britishers came to rule this country. Every religious community was allowed to retain its personal law in personal matters.

That continues to be the position in modern India. In India, whenever personal matters come before a court of law, the first question that arises is: Which law applies to the parties to litigation? If the parties are Hindus, Hindu law will apply; and so on. Since here we are concerned with the question of application of Muslim law, we would answer that question under Muslim law. In modern India, Muslim law means that portion of Islamic law which governs the Indian Muslims in their personal matters. Since Muslim law applies to the Muslims alone, we have to define who is a Muslim. In modern Hindu law, the term "Hindu" has not been defined strictly in terms of religion, whereas the term "Muslim" in Muslim law has always been defined in terms of religion, even though the orthodoxy or heterodoxy of belief is no concern of the court. For the purpose of the application of Muslim law, the Muslims fall under the following two categories: (a) Muslims by origin; and (b) Muslims by conversion.

Muslims by conversion may be further subdivided into the following categories: (i) Muslims who profess Islam, and (ii) Muslims who undergo formal conversion.

Muslim by Origin:

No person can be a Muslim who does not subscribe to the basic tenet of the Islam. A person, who subscribes the basic tenets of Islam, is a Muslim. The basic tenets of Islam are the following two: (a) The principle of the unity of God, i. e., God is one, and (b) Muhammad is the Prophet of God. According to Islamic theology, other essential beliefs of a Muslim are : the holy book, the Koran, is the only revealed book of Allah, Hazrat Muhammad was the last rasul (prophet), and there is a day of judgment (Keyamat) followed by life after death (Akhirat).

A person, who subscribes to the basic tenets of Islam, will be a Muslim by origin if it is not established that he is a convert to Islam. If a person is born of Muslim parents, he will be a Muslim; and it is not necessary to establish that he observes any Islamic rites or ceremonies, such as performance of five prayers, observance of the Ramazan fast. It is not at all necessary to establish that he is an orthodox believer in Islam. Such a person will continue to be a Muslim till he renounces Islam.

Mere observance of some of rituals of Hinduism, or for that matter, of any other religion, will not by itself make that person a non-Muslim. Conversely, a person will not become a Muslim just because he calls himself a Muslim, or is considered by others a Muslim. In Muslim law, a child born to Muslim parents is presumed to be a Muslim. The Shariat lays down that if one of the parents

is a Muslim, even then the child will be a Muslim. The ordinary rule in India is that the child takes to the religion of his father, unless the contrary is proved. This rule is now subject to the rule of modern Hindu law, viz., if one of the parents is a Hindu and the child is brought up as a Hindu, then the child will be a Hindu.

To this category of Muslims, Muslim personal law applies in its totality and no rule of Muslim law can be modified by custom.

Muslims by Conversion:

A non-Muslim may become a Muslim by professing Islam, i. e., by acknowledging that there is only one God and Muhammad is his prophet, or by undergoing the ceremonies of conversion to Islam. A convert of Islam is ordinarily governed by Muslim law. Till 1937, it was possible for a convert to be continued to be governed by his personal law, including customary law.

After the coming into force of the Shariat Act, 1937, the generality of that statement stands modified, though, it is submitted the application of custom to the Muslims has not been totally abrogated.

Profession of Islam:

“ Profession with or without conversion is necessary and sufficient to remove the disability of having another religion”. Thus, observed Lord Macnaughten in *Abdul Razak v. Aga Mahommed*. In this case, a wealthy Muslim, Abdul by name, had died, apparently, without any heir. But, one Abdul Razak made a claim to his estate on the plea that he was the son of the pre-deceased brother of Abdul. The brother of Abdul had married a Burmese woman, Mah

Thai, a Buddhist by religion, but it was not established that she had been converted to Islam either before, or after, the marriage. It was established that she was to recite the Muslim prayers.

The court came to the conclusion that, since the marriage of Abdul's brother with the Buddhist woman was void under Muslim law, Abdul Razak, though a Muslim could not succeed to Abdul's estate, being an illegitimate child. The converse situation arose in *Mst. Resham Bibi v. Khuda Baksha*, where a Muslim wife, with a view to ending an unhappy marriage, renounced Islam, and prayed to the court that Muslim law of apostasy should be applied to her, and her marriage should be deemed to have been automatically dissolved from the date of her apostasy.

Curiously enough, the District Judge Ordered a plate of pork to be brought in the court room, and the wife was asked to eat it. On her refusal to do so, the court concluded that her apostasy was insincere. Accepting the appeal, the appellate court observed: " One may relinquish a faith which is an easy thing to do, but one may not acquire liking for those things which one has been taught to detest throughout one's life". The court accepted the wife's statement that she no longer believed in Allah, in Muhammed as her Prophet and in the Koran, and thus ceased to profess Islam. The court then said: " a person's religious belief is not a tangible thing which can be seen or touched. It is the mental condition of one's believing in certain articles of faith that constitutes one's religion and if one ceases to believe in them, which again is a mere mental condition, one automatically ceases to profess that religion". In this case, *Din Mohammad J.*

remarked that the motive of the declarer was also immaterial; a person might renounce his faith for love or avarice; one might do so to get rid of his present commitments or truly to seek salvation elsewhere, but that would not affect the factum of change of faith. And, in matters like these, it was the factum alone that matters and not the latent spring of action which resulted there from. Whether mere profession of Islam is sufficient to make a non-Muslim a Muslim is not entirely free from doubt. It is true, as Lord Macnaughten had stated, no court of law can test or gauge the sincerity of religious belief. In all cases where, according to Muslim law, unbelief, or difference of creed, is a bar to marriage with a true believer, it is enough if the alien in religion embraces Islam.

It is submitted that a non-Muslim will become a Muslim by professing Islam, provided that it is not colourable or mala fide or made with a view to perpetrating fraud upon law.

Conversion to Islam:

It appears to be a well established proposition of law that a non-Muslim, on undergoing the ceremonies of conversion prescribed under Islam, becomes a Muslim. In Islam, the ceremonies of conversion are very simple. A person seeking conversion to Islam may go to a Muslim mosque.

On the Imam asking him, " Are you voluntarily embracing Islam", if he answers affirmatively, he is given the Kalma to recite. On the completion of the recitation of the Kalma, the conversion ceremony is over, and the non-Muslim becomes a Muslim. The Imam then confers a Muslim name on the convert. In most of the mosques, a register is kept in which the name of the

person embracing Islam is entered and the convert puts his signature thereto.

Conversion of a Muslim from one sect to another does not amount to apostasy, and a person changing from- one sect to another continues to be a Muslim. The genuineness of belief in the new faith is immaterial, and even when a convert does not practise the new faith, he will continue to be a Muslim. But it is necessary that the conversion should be bona fide, honest, and should not be colourable, pretended or dishonest. In the leading case, *Skinner v. Orde*, a Christian woman was cohabiting with a married Christian man. With a view to legalizing their living together as husband and wife, both of them underwent a ceremony of conversion to Islam. After conversion, they married. Later on, when the question of validity of this marriage arose, the Privy Council held that the marriage was null and void on the ground that conversion was not bona fide.

Moreover, it was a fraud upon the law, since the parties underwent the ceremony of conversion with a view to eluding their personal law. The question of colourable, fraudulent and dishonest conversion has come up before the Indian High Courts in a number of cases, where a non-Muslim has embraced Islam, either to claim divorce on the ground of apostasy, or to enter into a polygamous marriage. Thus, in the matter of *Ram Kumari*, a Hindu married woman adopted Islam, and assuming that this meant automatic dissolution of her marriage, took a second husband. She was prosecuted and convicted for bigamy.

In *Rakeyabibi v. Anil Kumar*, this aspect of the matter has been very cogently and brilliantly discussed by Chakravarti, J. In this case, a married Hindu woman, with a view to getting rid of her impotent husband, embraced Islam, and sought to a declaration that on her conversion to Islam, her Hindu marriage stood dissolved. Observing that the question whether conversion was bona fide or merely a device for terminating the marriage, was very important, the learned judge said: " it may be that a court of law cannot test or gauge the sincerity of religious belief, or that, where there is no question of genuineness of a person's belief in a certain religion, a court cannot measure its depth or determine whether it is an intelligent conversion or an ignorant superficial fancy. But a court can and does find the true intention of men lying behind their acts and can certainly find out from the circumstances of a case whether a pretended conversion was really a means to some further end. Indeed, it seems to us to be elementary that if a conversion is not inspired by religious feelings and undergone for its own sake, but is resorted to merely with the object of creating a ground for some claim of right, a court of law cannot recognize it as a good basis for such claim, but must hold that no lawful foundation of the claim has been proved. When conversion gives a legal right through a mock conversion and set up as basis of that right is to commit fraud upon the law. We are clearly of opinion that where a party puts forward his conversion to a new faith as creating a right in his favour to the prejudice of another, it is proper and necessary for a court of law to inquire and find out whether the conversion was a bona fide one".

The court found that conversion as not bona fide, since the mind of the convert, the unhappiness caused by her husband's impotence and conversion to Islam as a means to escape from that unhappiness were interconnected.