Bombay High Court
Shaikh Babbu S/O. Sk. Khutbuddin vs Sayeda Masarat Begum & Another on 23 July, 1999
Equivalent citations: 2000 (5) BomCR 118, 1999 CriLJ 4822
Author: B Marlapalle
Bench: B Marlapalle
ORDER B.H. Marlapalle, J.

1. Petitioner - the revision applicant was married to respondent No. 1 Sayeda Masarat Begum as per Muslim religion on 2nd July 1994. Out of the said wedlock, the respondent No. 2 son was born on 1st July 1995. The applicant husband gave divorce to respondent No. 1 on 24-10-1996 in the presence of two witnesses and the Head Kazi at Aurangabad. It is contended by the applicant husband that the wife refused to take the document of divorce entered in the register. The wife filed an application under section 125 of the Code of Criminal Procedure in the Family Court on 27-9-1996 and claimed maintenance for herself and for her son (Petition No. E-319/96). The husband opposed the said claim both on merits as well as on the point of jurisdiction. After hearing both the parties, the learned Judge of the Family Court on relying on a judgment of this Court (D.B.) in the case of Allabuksh Karim Shaikh v. Noorjahan Allabuksh Shaikh, 1994(11) Mah.L.J. 1376 allowed the claim of the wife and son by the impugned judgment and order dated 28-12-1996.

2. Shri Gulam Mustafa, learned Counsel appearing for the applicant, has raised, during the course of his arguments, the following preliminary points:

i) The law laid down by this Court in the case of Allabuksh (supra) is not a good law and is a judgment per incurium as the earlier judgments of two different Division Benches in the case of Faridabano Shahabuddin Kadri and another v. Shahabuddin Muzzaroddin Kadri and another, and in the case of Noor Jamaal Habib Momin v. Haseena w/o. Noor Jamaal, 1993(1) Mh.L.J. 749 were not referred to and considered.

ii) This Court in the case of Allabuksh (supra) gave findings on an issue which was not a subject matter of challenge and findings on such issue cannot operate as a precedent in view of the judgment of the Supreme Court in the case of High Court of Judicature at Bombay through its Registrear v. Shirishkumar Rangrao Patil and another, .

iii) In the case of Karim Abdul Rehman Shaikh v. Shehnaz Karim Shaikh, 1997(3) Bom.L.R. 467, a learned Single Judge (Bhairavia, J.) has already held that the judgment in the case of Allabuksh is not a good law and has referred the issue to a larger Bench and, therefore, this Court should not proceed to decide the instant matter and instead refer to the learned the Chief Justice for constitution of a Full Bench.

iv) On the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, (for short referred to as the M.W. Act), the law laid down by the Supreme Court in the case of Mohd. Ahmed Khan v. Shah Bano Begum and others, does not hold field regarding the rights of divorced Muslim woman to seek maintenance against her husband under Chapter IX of the Criminal Procedure Code.

v) After the enactment of the M.W. Act, a divorced Muslim woman is precluded from filing an application for maintenance under Chapter IX of the Code of Criminal Procedure against her husband in view of the provisions of section 3 and 4 of the said Act.

3. The M.W. Act is enacted to protect the rights of Muslim women who have been divorced by or have obtained divorce from their husbands and to provide for matter's connected therewith or incidental thereto. There is no dispute that so far as the rights of the children are concerned, for claiming maintenance against the father, they are governed by the provisions of section 125 of Cr.P.C. and the provisions of the M.W. Act in any manner do not come in their way from claiming such a right. This position in law has been well recognized by the Supreme Court in the case of Noor Saba Khatoon v. Mohd. Quasim, . Section 3 of the M.W. Act inter alia provides that the husband is liable to pay a reasonable and fair maintenance amount to the divorced wife within the Iddat period as well as where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by the husband for a period of two years from the respective dates of birth of such children; an amount equal to the sum of Maher or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends. The remedy for these benefits is provided in sub-section (2) of section 3, namely; to file an application before a Magistrate of the concerned area. Sub-section (3) lays down the procedure to be followed by the Magistrate whereas subsection (4) provides for the means for the enforcement of the order passed by the Magistrate including the punishment to the husband.

Section 4 of the M.W. Act is titled as "Order for payment of maintenance" and states that where a Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the Iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper. Where such a divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her. If any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order. Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them does not have enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid, the Magistrate may, by order, direct the State Wakf Board established under section 9 of the Wakf Act, 1954 (section 36 of the Wakf Act of 1995) or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1). In short, the steps for such an application before the Magistrate would be (1) the proceedings shall in the first instance be initiated against the children of the divorced

woman; (2) if the children are unable to pay maintenance then the second proceedings shall be initiated against the parents of the divorced woman; (3) if the parents or any one of them is unable to pay the respective share of maintenance then fresh proceedings be started against the relatives; (4) in case the relatives are unable to meet the claim of maintenance, fresh proceedings be initiated against "other relatives"; and (5) finally, when no relative exists as mentioned in sub-section (1) or such relatives or any one of them unable to pay maintenance then another set of proceedings be initiated against the State Wakf Board; all backed by the orders of the Magistrate.

4. After the enactment of the Family Courts Act, 1984, which was brought into force in the State of Maharashtra on 1-12-1986, the State of Maharashtra has established Family Courts at selected places like Mumbai, Thane, Nagpur, Pune and Aurangabad. Section 7 of the said Act deals with the jurisdiction of the Family Court and a suit or proceeding for maintenance can be entertained and decided by the Family Court. Sub-section (2) of section 7 of the Family Courts Act states that a Family Court shall also have jurisdiction exercisable by a Magistrate of First Class under Chapter IX (relating to order of maintenance of wife, children and parents) of the Criminal Procedure Code, 1973 and such other jurisdiction as may be conferred on it by any other enactment. Section 8 of the said Act excludes jurisdiction of Civil and Criminal Courts and sub-section (b) more particularly states that no Magistrate shall in relation to such area have or exercise any jurisdiction or power under Chapter IX of the Criminal Procedure Code, 1973 and such applications under Chapter IX if pending before the Magistrate's Court shall stand transferred on establishment of a Family Court for the concerned area. Section 19 provides for appeals and revisions and section 20 of the said Act states that the provisions therein shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of this law other than this Act.

RE: POINT No. 1:

5. Let us consider the first point raised by the learned Counsel as set out in paragraph 2 above as to whether the law laid down by this Court in the case of Allabuksh (supra) is per incurium. In the case of Farida Banu (supra), the issue before this Court was in a narrow compass inasmuch as whether the M.W. Act was prospective or retrospective in operation and this Court concluded that the applicability of the Act is not retrospective but prospective. In the case of Noor Jamaal Habib Momin (supra), this Court was considering an appeal under section 19 of the Family Courts Act against an order for payment of reasonable and fair provision and maintenance to the wife and minor daughter under section 3(2) of the M.W. Act which was passed by the Family Court. This Court in paragraphs 4 and 5 analysed the scheme of section 7 of the Family Courts Act as well as sections 3, 4 and 6 of the M.W. Act and concluded in para 6 thus:

"Proceedings under the M.W. Act, therefore, do not fall either under section 7(1) or section 7(2)(a) of the F.C. Act. Sub-section (2)(b) of section 7 provides for conferral of other jurisdiction by any other enactment upon the Family Court. Despite existence of such provision, the M.W. Act (which is a latter enactment by the very legislative body which made the F.C. Act) has not conferred jurisdiction to adjudicate rights under the said Act upon the Family Court. The jurisdiction is conferred on the First Class Magistrate. There is, therefore, no scope whatsoever to infer any legislative intention to

confer upon the Family Court jurisdiction to entertain any try applications under the M.W. Act."

This Court in no uncertain words held in the case of Noor Jamaal (supra) that the proceedings instituted or to be instituted under sections 3 and 4 of the M.W. Act cannot lie before the Family Court and they must necessarily be filed before the Magistrate only.

6. In the case of Allabuksh (supra), an application was filed by a divorced Muslim wife and a minor daughter against her husband and father respectively, under section 125 of the Criminal Procedure Code. The claim of the wife was dismissed but the claim of the daughter was allowed and the order of grant of maintenance to the daughter as passed by the Family Court on transfer of the proceedings from the Metropolitan Magistrate under section 8(c) of the Family Courts Act came to be challenged by way of an appeal under section 19 of the said Act. The main ground urged by the father was that as a result of the operation of the M.W. Act, a minor child was entitled to be maintained only for a period of two years from the date of its birth under the provisions of section 3(1)(b) of the M.W. Act and the said plea was negatived. This Court referred to the judgments of different High Courts and also the judgment of the Apex Court in the case of Shah Bano Begum and inter alia held as under:

(a) If an application for maintenance by a Muslim divorced woman is made before the Family Court, as it is now to be made because of section 7(2) of the Family Courts Act, wherever the Family Court is constituted, same shall continue to be governed by the provisions of Cr. P.C. and not by the provisions of Muslim Women Act.

(b) All that the M.W. Act of 1986 provides is that, if after the commencement of that Act, application for maintenance is made by a divorced Muslim woman before a Magistrate, same shall be disposed in accordance with the provisions of that Act.

(c) Where a Family Court has been established, the power and jurisdiction of the Family Court under section 7(2) of the Family Courts Act, 1994 to entertain an application for maintenance even by divorced Muslim wife under Chapter IX of the Cr. P.C. has not been taken away either expressly or even by implication by M.W. Act and once such application is made, to the Family Court under section 7(2) of the Family Courts Act and not to a Magistrate, the same has got to be disposed of by the Family Court in accordance with the provisions of Chapter IX of the Cr. P.C. and the M.W. Act would have no manner of application.

(d) The M.W. Act does not even remotely refer to a proceeding under Chapter IX of the Cr. P.C. in or before a Family Court, the conclusion is irresistible that such a proceeding under Chapter IX of the Code is still available to a Muslim divorced woman even before the Family Court while a remedy under the M.W. Act is an additional remedy.

7. In short, the Division Bench of this Court in Allabuksh's case (supra) has held that (a) a divorced Muslim woman has a right to invoke the provisions of section 125 of the Criminal Procedure Code and (b) the Family Court has the power to entertain such a claim where-ever the Family Court is established and in the other areas such an application will be maintainable before the Magistrate. It

is, therefore, clear that there is absolutely no conflict between the two Judgments of this Court in the case of "Noor Jamal' (supra) and "Faridabano" (supra) on one hand and the judgment in the case of Allabuksh (supra) on the other hand. It is for this reason that the subsequent judgment of this Court in the case of Allabuksh cannot be held to be per incurium.

8. The next point raised is regarding the binding nature of the judgment of this Court in the case of Allabuksh (supra). It is contended that in paragraphs 7 to 10 of the said Judgment, the learned Judges deliberated on the issues, which were not a subject matter for consideration and so long as such observations are made on irrelevant issues, these observations cannot act as a law binding on this Court. In support of this contention the learned Counsel has relied upon a judgment of the Supreme Court in the case of High Court of Judicature of Bombay v. Shirish Patel, and in the case of State of Tripura v. Tripura Bar Association and others, . It is further contended that the Advocate who appeared in the case of Allabuksh before the Division Bench had no reason to argue on irrelevant issues which were not referred to the Court for consideration or which were not a subject matter of the claim made before the Court. While relying upon the judgment of the Supreme Court in the case of Uptron India Ltd. v. Shammibha, the learned Counsel submitted that the concession given by the Counsel for the parry does not constitute a just ground for a binding precedent. He has more particularly relied upon the following observations of the Apex Court in paragraph 23 of the said judgment:

".. ... Even otherwise a wrong concession on a question of law, made by a Counsel, is not binding on his client. Such a concession cannot constitute a just ground for a binding precedent".

A perusal of the opening words of paragraph 7 of this Court's judgment in Allabuksh case would indicate that the Division Bench proceeded to deliberate on the other issues only because an impression had gained ground that after the commencement of Muslim Women (Protection of Rights on Divorce) Act, 1986, an application for maintenance by a divorced Muslim woman shall and cannot but be covered by that Act only. The Division Bench, therefore, thought it necessary to declare for the guidance of the parties concerned and the public at large that the impression was absolutely erroneous. It is not that the Division Bench suo motu deliberated on those issues or the issues which were not germane to the case at hand. The intention was to clarify the correct legal position.

In the case of Rattachand Hirachand v. Askar Nawaz Jung (Dead by Lrs) and others, , the Supreme Court stated :

"...The Legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to file the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicity delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of legislation or perversion of the goals and values of the society. So long as the courts keep themselves tethered to the ethoes of the society and do not travel off its course, so long as they attempt to furnish the felt necessities of the time and do not

refurbish them, their role in this respect has to be welcomed. ... ..."

The argument - that the findings in the case of Allabuksh cannot operate as a precedent binding on this Court - must, therefore, fail.

RE: POINT NO. 3 :

9. The learned Counsel has referred to two different orders passed by the learned Single Judge of this Court in two separate matters. The first order was passed in "Criminal Application No. 66 of 1989" (1992 Mh.L.J. 11) on 2nd August, 1991 and the second order was passed in the case of Karim Abdul Rehman Shaikh v. Shehnaz Karim Shaikh, 1997(3) Bom.L.R 463 (Bhairaviya, J.). So far as the earlier order is concerned regarding referring issues for the consideration of the larger Bench, by the judgment of the Division Bench in the case of Allabuksh almost all these issues have been impliedly replied to and hence the said order need not be considered as in operation presently.

In Karim Abdul Rehaman Sheikh's case (supra) the learned Single Judge framed an issue as to whether a Family Court is empowered to entertain an application under section 125 of the Criminal Procedure Code filed by a divorced Muslim woman against her former husband for post-iddat period maintenance and after referring to the judgment in the case of Allabuksh he expressed doubts in accepting the same. The learned Judge, therefore, held that the matter was required to be referred to a Full Bench for decision and he accordingly passed the following order:

"In this view of the matter, this matter be referred to the Full Bench to decide the following issue:

Can a Family Court hear an application filed by a divorced Muslim woman under section 125 of the Criminal Procedure Code, claiming post Iddat period maintenance against her former husband?".

In the case of Sunderjas Kanyalal Bhathija and others v. The Collector, Thane, Maharashtra and others, the Supreme Court was dealing with an issue akin to the circumstances under consideration in the instant case and it ruled :

"One must remember that pursuit of the law, however, glamorous it is, has its own limitation on the Bench. In a multi judge Court, the judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a Single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of the judicial process not to follow this procedure."

This principle has been reiterated by the Supreme Court in its subsequent judgments and it sets out a discipline to be meticulously followed by a co-ordinate Bench consisting of either a Single Judge or a larger Bench.

10. It is true that if a learned Single Judge of this Court does not agree with the earlier view taken by a Division Bench he has the authority to say so and by invoking powers under Rule 7 of Chapter-I of

the Bombay High Court Appellate Side Rules, 1960 pass an order giving his opinion and place the matter before the learned Chief Justice who shall make such an order thereon as he shall think fit. Rule 7 of the said Rules does not give powers to the learned Single judge to himself pass an order and refer the matter to a larger Bench or a Full Bench. The opinion expressed by learned Single Judge disagreeing with the view enunciated by the earlier Division Bench is required to be placed before the learned Chief Justice and it is upon his satisfaction that the learned Chief Justice is required to pass an order referring the issue to larger Bench or to a Full Bench. With due respect to the concerned learned Single Judge it must be noted that the order passed in the case of Karim Abdul Rehaman Sheikh suffers from judicial impropriety and , therefore, it cannot be deemed, in the eyes of law, that the matter is pending for consideration of the Full Bench as at present. A reference in this regard can usefully be made to a judgment of the Supreme Court in the case of Tribhovandas Purushottamdas Thakkar v. Ratilal Motilal Patel, . The order passed in Karim Abdul Rehman Sheikh's case, therefore, does not detain this Court from proceeding further for deciding the instant application on its own merits.

RE : POINT NO. 4:

11. In the case of Bai Tahira v. Ali Hussain Fissali Chothia and another, and in the case of Fuzlunbi v. K. Khader Vali and another, , the Supreme Court took a view that a divorced Muslim woman was entitled to apply for maintenance under section 125 of the Criminal Procedure Code. In a subsequent case a Bench of two Judges of the Supreme Court was not inclined to the view in the cases of "Bai Tahira" and "Fuzlunbi" as the Bench was of the view that those cases were not correctly decided and hence the appeal was referred to a Larger Bench by an order dated 3rd February, 1981. A Constitution Bench of the Supreme Court pronounced its views finally in the famous case of Mohd. Ahmed Khan v. Shah Bano Begum, which is popularly known as the "Shah Bano case". The Apex Court held that the law laid down in the case of "Bai Tahira" and "Fuzlunbi" was correctly decided and confirmed that a Muslim divorced woman is entitled to the benefits of section 125 of the Criminal Procedure Code and the said provision over-rides the Personal Law, if there is any conflict between the two. It is the contention of the learned Counsel for the applicant that after the enactment of the M.W. Act by the Parliament the law laid down by the Supreme Court in Shahbano case cannot be made applicable to the Muslim divorced woman for claiming maintenance under section 125 of the Criminal Procedure Code for the post Iddat period and in support of these contentions he has referred to the judgment of the Supreme Court in the case of Secretary, Tamilnadu Wakf Board and another v. Sayed Fatima Nachi, . The learned Counsel more particularly referred to the opening sentence of paragraph 5 of the said judgment and submitted that the Apex Court has recognized the position in law that the M.W. Act has been enacted to undo the effect of the Supreme Court judgment in the case of Shahbano. The said first sentence reads thus:

"The Parliament enacted the Act to undo the effect of a Constitution Bench decision of this Court in Mohd. Ahmed Khan v. Shah Bano Begum, , because the said decision was strongly opposed by a sizeable section of the Muslim community."

Even in a subsequent judgment in the case of Noor Saba Khatoon, the Supreme Court in paragraph 6 observed that M.W. Act was enacted as a sequel to the judgment in the case of Mohd. Ahmed Khan

v. Shah Bano,. Similarly, a Division Bench of this Court in the case of Faridabanu Shahbuddin Kadri (supra) in para 19, while dealing with the provisions pf sections 3 and 4 of the M.W. Act and section 125 and 127 of the Criminal Procedure Code, observed:

"This is the only permissible view because even though the new Act has superseded the provisions of section 125 and 127 of the Code of Criminal Procedure, it has still retained as far as the enforcement of orders is concerned, the provisions of section 125(3) of the Code of Criminal Procedure, which are bodily reproduced in section 3(4) of the new Act."

On the basis of these observations the learned Counsel argued that even the Division Bench of this Court has concluded that the M.W. Act has superseded the provisions of sections 125 and 127 of the Criminal Procedure Code.

12. In the case of S.S. Bold and others v. B.D. Sardana and others, the Apex Court has, inter alia, considered the issue regarding the manner in which the law laid down by it or the High Court could be undone or made ineffective or repealed. The Apex Court more particularly held that if a decision is rendered by it or by the High Court, that decision can be made ineffective either by enacting a law which specifically takes away the effect of the said decision or by filing a review before the same Court and so long as this is not done the law laid down cannot be undone or rendered ineffective. In para 155 (G) of its judgment, the Apex Court observed that the legislature has no power to overrule the decision of the Constitutional Court by mere declaration, without properly and constitutionally removing the base upon which the previous decision was founded, nor has it the power to direct that the decision of the Court does not bind the State or its instrumentalities and in paragraph 155 (H) more particularly observed as under:---

"H. In a democracy governed by rule of law, the legislature exercises its power under Articles 245 and 246 and other companion Articles read with the specified entries in the respective lists of the Seventh Schedule to the Constitution. Power to legislate law would include the power to amend the law, to enact a new law, and in an appropriate case, with retrospective effect. The legislature in enacting new law or amending the existing law or revalidating the law has power to alter the language in the statute by employing the appropriate phraseology and to put up its own interpretation inconsistent with that put up by the Court in an earlier judgment on the basis of the pre-existing law and to suitably make new law, amend the law or alter the law removing the base on which the previous decision was founded. If a legislature finds that the interpretation given by the Court to the existing law is inconsistent with the constitutional or public policy or the objects of the Act intended to be achieved, the legislature has power to enact new law, or amend the law consistent with Constitutional or public policy sought to be achieved by the statute. Such an enactment must generally be prospective and not retrospective in nature."

13. The above observations of the Apex Court rule that the law laid down by the Constitutional Court cannot be made ineffective or such a law cannot be said to be no more a good law unless the statute subsequently enacted by the legislature or the Parliament specifically uses a phraseology nullifying the effect of the earlier law laid down by such a Court. Mere observations by the Court to the effect that the Parliament enacted the Act to undo the effect of the Constitutional Bench decision will not

per se lead to a conclusion that the law laid down by the Supreme Court has been undone by the enactment of the M.W. Act. Unless the language of the M.W. Act, 1986 so specifically stated, it is not permissible to come to the conclusion that by the enactment of the said Act the law laid down by the Constitutional Bench of the Apex Court has been undone by the Parliament by framing the said Act. The Preamble of the M.W. Act, 1986 does not, in any manner, indicate that the said Act has been enacted to take away the effect of the law laid down by the Supreme Court in the case of Shah Bano. On the contrary, the Preamble states that it is an Act to protect the rights of Muslim divorced women and to provide for matters connected therewith or incidental thereto. The Act nowhere provides that the divorced Muslim women is not entitled to file an application under section 125 of the Criminal Procedure Code. The issue is accordingly answered in the negative.

14. In the case of Arad Ahmedia Abdulla and etc. v. Arab Bail Mohmuna Saiyadbhani & others, , a learned Single Judge of the Gujarat High Court (M.B. Shah, J., as then he was) held that by the enactment of the M.W. Act, 1986 the orders passed by the Magistrate under section 125 of the Criminal Procedure Code, ordering Muslim husband to pay maintenance to his divorced wife, would not be non-est and that there was no provision in the said Act which nullifies the orders passed by the Magistrate under the said section of Criminal Procedure Code. The High Court further observed that a vested right of claiming maintenance under section 125 of Cr. P. Code had not been taken away by the Parliament by incorporating any specific provisions in the M.W. Act and that there was no inconsistency between the provisions of the said Act and the provisions of section 125 to 128 of the Criminal Procedure Code. To conclude, the High Court held that the provisions of M.W. Act as made available to the divorced Muslim women are in addition to the claims available to them under section 125 of the Criminal Procedure Code.

A Full Bench of the Andhra Pradesh High Court in the case of Usman Khan Bahamani v. Fathimunnisa Begum and others, disagreed with this view of the Gujarat High Court in the case of Arad Ahmadia. It would be useful to refer to the following observations made by the Full Bench while dissenting with the view of the Gujarat High Court:---

"As stated above there are several inherent contradictions and inconsistencies in the above statements of law which do not stand to reason or scrutiny. It is clear that the liability of the husband for the payment of maintenance is limited that is only during and for the period of Iddat The liability cannot be extended by the provisions of section 125 of the Code unless the parties exercise their option under section 5 of the Act of 1986."

With due respect to the view of the learned Judges of the Andhra Pradesh High Court it is pertinent to note that the provisions of section 5 of the M.W. Act are applicable only to an application under sub-section (2) of section 3 of the said Act and the said provisions of exercising option by a divorced Muslim woman and her former husband are not available for the proceedings instituted under section 4 or under section 3(1) of the said Act. This vital aspect of the scheme of section 5 of the M.W. Act appears to have escaped the attention of the learned Judges of the Andhra Pradesh High Court. The view of the Gujarat High Court in the case of "Arab" (supra) has been impliedly accepted by a Division Bench of this Court in the case of Allabuksh and I am bound by the said enunciation, unless I record my dissenting view.

15. If the contentions of the learned Counsel on this issue are accepted, the following picture would emerge depicting the status of a Muslim divorced woman namely (a) till she is married and if not maintained or if she is neglected, she has a right to claim maintenance from her father under section 125 of the Criminal Procedure Code; (b) if she is married and is neglected or is not maintained, she has the right to claim maintenance from her husband under section 125 Cr.P.C., (c) if she becomes a mother and if she is not maintained and looked after, she can file a claim against her earning children under section 125 of the Criminal Procedure Code; (d) if she is a widow and is not being maintained by her children or if she is being neglected, she has the right to claim maintenance from such children under section 125 Cr.P.C., as well as from her parents; (e) if she is a sister unmarried she can claim maintenance under section 125 Cr.P.C. from her brothers and at last, (f) the moment she is a divorced woman, she forfeits such a right to claim maintenance under section 125 of the Criminal Procedure Code after her Iddat period and till she is remarried and that the only remedy to her for maintenance for herself is either under section 3(1) (a) and (b) or under section 4 of the M.W. Act.

16. The provisions of the Criminal Procedure Code, 1973 are applicable to all the citizens of this country irrespective of their castes, religion, or faith and status. In this regard, the Supreme Court has, in the case of "Shahbano" observed, while concluding in paragraph 29, in the following words:---

"It must follow from this discussion, unavoidably a little too long, that the judgments of this Court in Bai Tahira, and Fuzlunbi, are correct. Justice Krishna Iyer who spoke for the Court in both these cases, relied greatly on the ideological and schematic method of interpretation so as to advance the purpose of the law. These constructional techniques have their own importance and the interpretation of statutes mean to ameliorate the conditions of suffering sections of the society. We have attempted to show that taking the language of the statute as one finds it, there is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under section 125 and that, Maher is not a sum which under the Muslim Personal Law, is payable on divorce."

Admittedly, a Muslim divorced woman cannot cease to be a citizen of this country for some period of her life just because she is a divorced woman and, therefore, the contention that the provisions of sections 125 to 128 of the Criminal Procedure Code are not applicable to her when she is a divorced woman do not stand to any logic. The law laid down by the Apex Court in the case of Shah Bano has given a right to a divorced Muslim woman to claim maintenance under section 125 of Cr.P.C. against her former husband and there is nothing in the M.W. Act of 1986 which states that the provisions of section 125 of Cr.P.C. are not available to such a woman as soon as the said Act was brought into force. It cannot be inferred from the provisions of the M.W. Act that it was intended for the purpose of denying the benefit of claim under section 125 of Cr.P.C. to a divorced Muslim woman. The contentions raised by the petitioners that the remedy for the claim of maintenance against the former husband is not available to a divorced Muslim woman during her status as a divorced wife and otherwise the provisions of section 125 Cr.P.C. are applicable to her for rest of her life, lead to violation of her constitutional rights guaranteed under Articles 14, 15 and 21 of the Constitution of India-It cannot be accepted in law that the provisions of the general rule viz. the Criminal Procedure Code are not applicable to a female Muslim citizen of this country only for the period when she is a

divorced wife.

17. If the intention of the Parliament behind enacting the M.W. Act was to provide for the protection of the rights of Muslim women who have been divorced or who have obtained divorce, the said Act is certainly aimed at welfare of such women. While interpreting the provisions of such a welfare statutes, which are meant for the general well being of a large section of a society, a liberal meaning is required to be given to the words used in such enactments. We must also note that while interpreting the provisions of such a welfare and social legislation, purposive interpretation should be adopted so as to achieve the constitutional goals for the upliftment and welfare of the weaker sections of the society. The observations of the Supreme Court in the case of State of Karnataka v. Appa Balu Ingale 1995(4) (Suppl.) S.C.C. 469 may aptly be quoted thus:

"Public policy or law as determined by new conditions, would enable the courts to recast the changing conceptions of social values of yester-years yielding place to the changed conditions and environment to the common good. The courts are to search for light from among the social elements of every kind that are the living forces behind the factors they deal with."

18. Section 4 of the M.W. Act begins with a non-obstante clause "notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force.....". While interpreting such non-obstante clause, its meaning is required to be gathered depending upon each situation and the purpose of the statute. Keeping in mind the aims and objects in enacting the M.W. Act, 1986, as they appear in the Preamble, it will have to be held that the words "notwithstanding" means "irrespective of". In this regard, a reference may be usefully made to the judgment of the Supreme Court in the case of Parayankamdiyal Eravath Kamapravan Kalliani Amma v. K. Devi,. The Apex Court, after referring to its earlier decisions in paragraph 77 of the said judgment observed as under :---

"... Non-obstante clause is sometimes appended to a section in the beginning, with a view to give the enacting part of the section, in case of conflict, and over-ridding effect over the provision or Act meant in that clause. It is equivalent to say that inspite of the provision or Act mentioned in the non-obstante clause, the enactment following it will have its full operation or that the provisions enacted in the non-obstante clause will not be an impediment for the operation of the enactment."

In a more recent case viz. Bhagat Ram [dead] v. Teja Sing, , the Apex Court had an occasion to interpret the provisions of section 15(2) of the Hindu Succession Act, 1956. Section 15 of the said Act reads as under:

"15. General rules of succession in the case of female Hindus:---(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16:---

(a) firstly, upon the sons and daughters [including the children of any predeceased son or daughter] and the husband;

[b] secondly, upon the heirs of the husband;

[c] thirdly, upon the mother and father;

[d] fourthly, upon the heirs of the father; and [e] lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1),

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased [including the children of any predeceased son or daughter] not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband."

The Apex Court held that the two sub-sections of section 15 of the Hindu Succession Act, 1956, as quoted above, operate in different spheres and subsection (1) covers the properties of a female Hindu dying intestate while sub-section (2) started with the words "notwithstanding anything contained in sub-section (1)". The Court further observed that what fell within the sphere of sub-section (2), sub-section (1), would not apply. It is, therefore, clear that the meaning given to the word "notwithstanding anything contained" is "irrespective of in the above said judgment.

Shri Gulam Mustafa, learned Counsel for the applicant on the other hand urged that the word "notwithstanding" should be read as "over riding" and if so read, it would be clear that the provisions of the M.W. Act and more particularly provisions of section 3 and 4 of said Act override the effect of section 125 of Cr.P.C., so long as claimant - divorced wife remains to be unmarried. If such an interpretation is accepted, to say the least, it would lead to discrimination, violating the provisions of Article 14 of the Constitution of India and as observed earlier, while interpreting the provisions of a welfare and social legislation, the words therein must be given their natural meaning and more particularly the meaning which will lead to a harmonious construction as well as for the benefits of a large section of a society. Even otherwise, if the meaning suggested by the learned Counsel for the appellant is to be accepted, the opening word of section 4 would be "save as otherwise provided" and this would indicate a saving clause. Such a clause does not appear in the M.W. Act. In addition, if the interpretations as sought to be placed by the learned Counsel are accepted, it would lead to denying the rights guaranteed under Article 21 of the Constitution, to a divorced Muslim woman. Such an interpretation is, thus, far fetched and against our constitutional mandate.

19. The learned Counsel for the appellant also submitted that as per the Muslim Personal Law, marriage is a 'civil contract' and the said contract stands terminated as soon as the couple is separated by way of divorce given by following the procedure under the Personal Law and therefore, relationship between the parties ceases to exist and the former divorced wife becomes totally alien to her ex-husband. In such a situation, the husband has no liability towards the divorced wife after

'Iddat' period or on a child attaining the age of two years and this position has been well recognized by the Muslim Personal Law and therefore, if it is held that the provisions of sections 125 to 128 of Cr.P.C. are applicable to a divorced Muslim woman in addition to the provisions of M.W. Act, there would be a conflict between the Personal Law and the law laid down by the Supreme Court in Shahbanu's case (supra) and it is with the sole object of avoiding this conflict, M.W. Act has been enacted by the Parliament. The submissions are not only fallacious but are also against the constitutional spirit. Every citizen of this country irrespective of his/her religion, region, or status, is governed by the provisions of our Constitution and such an interpretation would defeat the basic ethoes of protection to a weaker section of the society while enacting a special statute meant for the social welfare of that section.

20. The M.W. Act does not provide for an appeal or revision against the orders passed by a Magistrate either under section 3 or 4 of the said Act and therefore, the only remedy that would be available to an aggrieved party may be to approach this Court by way of a writ petition. In the State of Maharashtra, there are six revenue divisions and till now, the Govt. has constituted a Wakf Board only at Aurangabad, which is one of the six revenue divisions. As at present, admittedly, the Wakf Boards are not constituted, for whatever reasons, in the remaining five revenue divisions. As noticed from the judgment of the Supreme Court in the case of the Secretary, Tamilnadu Wakf Board (supra), for seeking orders by the Magistrate under section 4 of the M.W. Act, a divorced Muslim woman has the option to implead the Wakf Board in the array of respondents even at the first instance. If regard be had to all these realities, it would be apt to say that the remedy of claiming maintenance under the M.W. Act is an illusion, at least for the time being.

21. I am in respectful agreement with the view enunciated by the Gujarat High Court in the case of Arab (supra) and by our High Court (Division Bench) in the case of Allabuksh (supra). It must be, therefore, held that the provisions of the M.W. Act are available to a divorced Muslim woman for claiming maintenance from her former husband, in addition to the provisions of Chapter IX of the Criminal Procedure Code and they are not in exclusion of each other.

22. Having dealt with all the points raised by the learned Counsel for the appellant, it is necessary to examine the claim of the applicant on merits in the facts and circumstances of this case.

In his written statement filed before the Family Court, the husband has contended that he has given divorce to the claimant wife through the Qazi on 24th October, 1996 and postal communication to this effect, which was addressed to the former wife, was refused to be accepted by her. It is also pointed out that for the declaration that the claimant is no more the wife of the applicant, he has filed a civil suit registered as Regular Civil Suit No. 1252 of 1996 which is presently pending before the Court of Civil Judge, Senior Division at Aurangabad. A Division Bench of this Court in the case of Jaitunbi Mubarak Shaikh v. Mubarak F Shaikh & others, Cri.W.P. No. 1299/1990 has reiterated the legal proposition that as soon as the husband takes a plea in writing before the Court in his written statement that he has given divorce to the claimant wife, such a statement will have to be accepted and on the basis of such a statement it is presumed in law that the husband has given a divorce to his wife.

Even if the claimant is a divorced wife she still has the right to claim maintenance under section 125 of the Criminal Procedure Code. The provisions of the M.W. Act in the instant case do not come in her way to claim maintenance from her former husband i.e. the present applicant. The learned Judge of the Family Court has examined the relevant factors of financial capacity and the refusal to maintain the claimant by the present applicant. On consideration of these factors, the learned Judge has fixed the quantum of maintenance at the rate of Rs. 200/- per month for the former wife and Rs. 100/- per month to the child. As stated earlier, there is no challenge to the maintenance granted for the child, in view of the law laid down by the Apex Court in the case of Noor Saba Khatoon (supra) and the amount of maintenance cannot be called unreasonable, especially when the learned Judge of the Family Court has accepted the monthly income of the applicant as Rs. 1,500/- at the relevant time. The challenge to the impugned order is, therefore, devoid of merits and the revision application is hereby dismissed. Interim order passed earlier stands vacated. Rule is discharged with no orders as to cost.

23. This Court had, by order dated 28th February, 1997, directed the applicant husband to deposit an amount of Rs. 1,600/- towards the arrears and by a further order dated 19th June, 1997 interim relief was granted, on condition that the applicant husband would continue to deposit the amount of maintenance as granted by the learned Judge of the Family Court and liberty was granted to the former wife to withdraw the amount of maintenance. Shri Sapkal, learned Counsel appearing for the claimant wife has raised a grievance that this order was not complied with though pursuant to an earlier order an amount of Rs. 1,600/- was deposited. The wife is hereby allowed to withdraw the amount of Rs. 1,600/- deposited earlier and the same be paid to her in cash and it is further directed that the applicant husband shall pay the arrears of maintenance amount as directed by the learned Judge of the Family Court within a period of three months from today and shall continue to pay the amount of maintenance till the wife is remarried.

24. Shri Gulam Mustafa, learned Counsel for the applicant made an oral application praying for stay of this judgment. The oral application is hereby rejected.

25. While parting with the case, it is necessary to record my appreciations for the able assistance rendered by Shri Gulam Mustafa as well as Shri Sapkal, learned Counsel representing the respective parties.

26. Revision application dismissed.