

Gujarat High Court

Farhan Haji Gafar Gudda vs Rijwanaben Usmanbhai Patel & on 8 March, 2013

FARHAN HAJI GAFAR GUDDA....Applicant(s)V/SRIJWANABEN USMANBHAI PATEL

R/SCR.A/1012/2012

JUDGMENT

IN

THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION NO.

1012 of 2012

FOR
APPROVAL AND SIGNATURE :

HONOURABLE
MR. JUSTICE K.M. THAKER

=====

Whether

Reporters of Local Papers may be allowed to see the judgment ?

2

To

be referred to the Reporter or not ?

3

Whether

their Lordships wish to see the fair copy of the judgment ?

4

Whether

this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5

Whether

it is to be circulated to the civil judge ?

=====

FARHAN HAJI GAFAR
GUDDA...Applicant(s)

Versus

RIJWANABEN USMANBHAI PATEL &
2....Respondent(s)

=====

Appearance:

MR
YUSUFKHAN PATHAN, ADVOCATE for the Applicant(s) No. 1

MR

TUSHAR L SHETH, ADVOCATE for the Respondent(s) No. 1 - 2

PUBLIC

PROSECUTOR for the Respondent(s) No. 3

=====

CORAM:

HONOURABLE

MR.JUSTICE K.M.THAKER

Date : 08/03/2013

ORAL JUDGMENT

1. In present petition the petitioner has prayed, inter alia, that:

13(B) YOUR LORDSHIPS may be pleased to issue an appropriate writ, order or direction regarding order pass in Criminal Misc. Application No.90 of 2010 by Honourable Court of Judicial Magistrate First Class, Upleta (District: Rajkot) on 19.9.2011 as stated in order at Annexure-A.

(C) The aforesaid order passed by Honourable Judicial Magistrate First Class of Upleta in Criminal Misc. Application No.90 of 2010 on dated 19.9.2011 be quashed and set aside.

2. The petitioner is aggrieved by order dated 19.09.2011 passed by Judicial Magistrate First Class under Section 125 of Code of Criminal Procedure (hereinafter referred to as the Code) whereby the learned Magistrate has directed the petitioner to pay Rs.1500/- per month to the respondent towards her maintenance and Rs.500/- towards maintenance of minor son.

2.1. The respondent No.1 is divorced wife of the petitioner. The divorce between the petitioner and respondent No.1 came to be finalised in November, 2009 and since then the respondent No.1 stays separate with the minor son (i.e. respondent No.2) born from the wedlock with the petitioner. The minor son stays with respondent No.1. The petitioner has also averred that his marriage with respondent No.1 was solemnized according to Muslim Law and their divorce is also in accordance with Muslim Law.

2.2. On the ground that she is not able to maintain herself and the minor son, the respondent No.1, in or around April, 2010 (i.e. about 4 months after the divorce) filed an application seeking maintenance for herself and her son under Section 125 of the Code. The learned Magistrate has allowed the said application under Section 125 of the Code and has awarded Rs.1,500/- for maintenance to respondent No.1 and Rs.500/- to respondent No.2. The petitioner divorced husband is aggrieved by the said order decision dated 19.09.2011. Hence, this petition.

3. The said order is challenged on a singular and solitary ground that in view of the provisions under the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereafter referred to as the Act) the provisions under Section 125 of the Code cannot be invoked and applied in case of a divorced Muslim woman and any order directing payment of maintenance to a Muslim woman who is divorced by her husband cannot be passed under Section 125 of the Code.

3.1. So far as the facts involved in and giving rise to present petition are concerned, the petitioner has stated, inter alia, that the petitioner married the respondent no.1 and from their wedlock they have a minor son i.e. respondent No.2 herein.

3.2. Sometime after the birth of respondent No.2, the petitioner and respondent No.1 parted ways and the petitioner has, as per the custom and practice of Muslim Religion, divorced respondent No.1.

3.3. It is claimed that the divorce between petitioner and respondent No.1 came to be finalised with effect from 22nd November 2009.

3.4. The petitioner has further claimed that after divorce between him and respondent no.1 was finalised, the respondent no.1 filed an application in the Court of learned Judicial Magistrate First Class, Upleta under Section 125 of the Code and prayed for maintenance. The said application came to be registered as Criminal Misc. Application No.90 of 2010.

3.5. It is further claimed by the petitioner that the said application No.90 of 2010 came to be finalised in September 2011 and by order dated 19.9.2011, learned Magistrate allowed the application by directing the petitioner to pay Rs.1500/- per month to respondent no.1 i.e. the divorced wife and Rs.500/- towards maintenance of minor son.

3.6. The petitioner is aggrieved by the said direction. Hence, present petition.

4. Mr.Y.R.Pathan, learned counsel appeared for the petitioner and submitted that if a divorced Muslim wife wants to claim maintenance then she cannot prefer application under Section 125 of the Code but such application can be preferred only under the provisions of the Act and any order granting maintenance to a divorced Muslim woman can be passed only in consonance with and only under the provisions of the Act and not under Section 125 of the Code. Learned counsel for petitioner submitted that despite the provisions under the Act, the learned Magistrate entertained the application which was filed under Section 125 of the Code and the learned Magistrate proceeded to decide and grant the said application. The said decision by the learned Magistrate is passed under misconception of law and under the provisions of law which is not applicable and attracted in case of petitioner and his divorced wife i.e. respondent No.1 and that therefore the decision is unsustainable. He also submitted that the impugned order is contrary to provisions under Sections 3 and 4 of the Act. As a part of the said contention learned counsel also submitted that after the Act came to be enacted and came in force, neither an application for maintenance can be filed by a divorced Muslim woman under Section 125 of the Code nor any order under the said provisions could have been passed against the petitioner. So as to support and justify his submission, learned counsel for petitioner relied on the decision in case between Danial Latifi and Another v. Union of India [AIR 2001 SC 3958].

5. I have heard learned counsel for petitioner and I have also considered the impugned order passed by learned Magistrate.

6. Since the impugned order has been passed in an application filed under Section 125 of the Code, it would be appropriate to keep in focus the provisions under Section 125 of the Code. The relevant part of the said provision (i.e. the part of the said Section which is relevant for present purpose) reads thus:

125. Order for maintenance of wives, children and parents.-(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

[Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.] Explanation.-For the purposes of this Chapter,-

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

[(2)

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.-If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

No Wife shall be entitled to receive an [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be] from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

6.1. In view of the explanation under sub-section (1) of Section 125 of the Code, the term or expression wife in Section 125 of the Code includes a divorced woman who has not remarried. According to the provision if a person having sufficient means neglects or refuses to maintain or provide for maintenance of his wife who is unable to maintain herself then he may be directed by a Magistrate to pay such amount to a divorced woman as provided for under the said section. The provision under the said Section is made with a view to providing summary remedy to persons (wife, legitimate or illegitimate minor child, father or mother) who are unable to maintain themselves. From plain reading of the provision it also becomes clear that the Section neither provides for, nor it even impliedly admits, that the applicability of the Act or the power of Magistrate to direct the husband to provide for maintenance is to be guided by, or the said power is to be exercised having regard to, the religion professed and followed by the spouse. As observed by Hon ble Apex Court the religion professed by a spouse has no place in the scheme of the provision under Section 125 to 127 under the Code. Thus, whether the spouses are Hindus or Muslims or Christians or Parsis is not relevant in considering and deciding application under Section 125 of the Code. Therefore, the religion followed by divorced Muslim wife who is neglected in matter of making provision or for payment of maintenance will not and cannot make any difference in her right to make an application under Section 125 of the Code. It is one thing to say that the provisions under Section 125 do not supplant the personal law of parties but it is altogether different thing to contend that the religion professed by the parties to the application would be relevant factor in determining applicability of the provision under Section 125 of the Code or in determining the issue about maintainability of application by divorced Muslim wife under Section 125 of the Code. So far as Section 125 of the Code is concerned, as observed by Hon ble Apex Court, the religion professed by the parties or the personal law by which they are governed cannot have any repercussion on the applicability of such law. The right and remedy conferred by the provision under Section 125 of the Code is available to the persons under Clauses (a) to (d) of sub-section (1) of Section 125, irrespective of the personal law of the applicant.

6.2. In this context, it is appropriate to take into account, at this stage, the observations by Hon ble Apex Court in the case between Mohd. Ahmed Khan v. Shah Bano & Ors. [AIR 1985 SC 945] wherein the issue about applicability of Section 125 of the Code to a divorced Muslim woman vis-a-vis personal law applicable to a Muslim husband and Muslim wife came up for consideration and Hon ble Apex Court observed, inter alia, that:

14. These statements in the text book are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is

unable to maintain herself. One must have regard to the entire conspectus of the Muslim Personal Law in order to determine the extent both, in quantum and induration, of the husband's liability to provide for the maintenance of an indigent wife who has been divorced by him. Under that law, the husband is bound to pay Mahr to the wife as a mark of respect to her. True, that he may settle any amount he likes by way of dower upon his wife, which cannot be less than 10 Dirhams, which is equivalent to three or four rupees (Mulla's Mahomedan Law, 18th Edition, para 286, page 308). But, one must have regard to the realities of life Mahr is a mark of respect to the wife. The sum settled by way of Mahr is generally expected to take care of the ordinary requirements of the wife, during the marriage and after. But these provisions of the Muslim Personal Law do not countenance cases in which the wife is unable to maintain herself after the divorce. We consider it not only incorrect but unjust, to extend the scope of the statements extracted above to cases in which a divorced wife is unable to maintain herself. We are of the opinion that the application of those statements of law must be restricted to that class of cases, in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. We are not concerned here with the broad and general question whether a husband is liable to maintain his wife, which includes a divorced wife, in all circumstances and at all events. That is not the subject matter of section 125. That section deals with cases in which, a person who is possessed of sufficient means neglects or refuses to maintain, amongst others, his wife who is unable to maintain herself. Since the Muslim Personal Law, which limits the husband's liability to provide for the maintenance of the divorced wife to the period of iddat, does not contemplate or countenance the situation envisaged by section 125, it would be wrong to hold that the Muslim husband, according to his personal law, is not under all obligation to provide maintenance, beyond the period of iddat, to his divorced wife who is unable to maintain herself. The argument of the appellant that, according to the Muslim Personal Law, his liability to provide for the maintenance of his divorced wife is limited to the period of iddat, despite the fact she is unable to maintain herself, has therefore to be rejected. The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to section 125 of the Code. The outcome of this discussion is that there is no conflict between the provisions of section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.

29. It must follow from this discussion, unavoidably a little too long, that the judgments of this Court in Bai Tahira (Krishna Iyer J., Tulzapurkar J. and Pathak J.) and Fazlunbi (Krishna Iyer, J.,) one of us, Chinnappa Reddy J. and A. P. Sen J.) are correct. Justice Krishna Iyer who spoke for the Court in both these cases, relied greatly on the teleological and schematic method of interpretation so as to advance the purpose of the law. These constructional techniques have their own importance in the interpretation of statutes meant 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, Mahr is not a sum which, under the Muslim Personal Law, is payable on divorce.

30. Though Bai Tahira was correctly decided, we would like, respectfully, to draw attention to an error which has crept in the judgment. There is a statement at page 80 (of S.C.R.): (at p.365 of AIR 1979 SC 362) of the Report, in the context of section 127 (3) (b), that payment of Mahr money, as a customary discharge, is within the cognizance of that provision. We have taken the view that Mahr, not being payable on divorce, does not fall within the meaning of that provision.

6.3. It is relevant to mention at this stage that having regard to the object and scope of the provision under Section 125 of the Code and the decision by Hon ble Apex Court in above mentioned decision in case of Mohd.

Ahmed Khan (supra) and to dilute the effect of the judgment the Act came to be enacted. The said aspect is addressed in present decision at appropriate place, however, at this stage, it is relevant to mention that even after the enactment and introduction of the Act a Muslim husband and divorced Muslim wife can file an affidavit and declare that they would prefer to be governed by provisions of Section 125 to 128 of the Code.

7. It is not in dispute that both the petitioner and respondent No.1 are Muslim and the marriage between the petitioner and the respondent no.1 was solemnized and is dissolved in accordance with Muslim Law.

7.1. It is also not in dispute that respondent no.2 is minor son born from the wedlock between the petitioner and respondent no.1 and since the divorce between the petitioner and respondent no.1, the respondent no.2, the minor son, stays with the respondent no.1.

7.2. In this background the respondent no.1, about 4 months after divorce, preferred application under Section 125 of the Code which, as mentioned above, came to be allowed by learned Magistrate vide order dated 19.9.2011.

8. In view of the facts of the case and in view of the issue raised in the case, it is also relevant to take into account the provisions contained under Sections 3, 4 and 5 of the Act. The said provisions read thus:

3. Mahr or other properties of Muslim woman to be given to her at the time of divorce.-(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to-

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

(b) 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 her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and

(d) all the properties given to her before or at the time of marriage or after the marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be.

(3) Where an application has been made under sub-section(2) by a divorced woman, the Magistrate may, if he is satisfied that-

(a) her husband having sufficient means, has failed or neglected to make or pay her within the iddat period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in clause(d) of sub-section (1) have not been delivered to her.

Make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such mahr or dower or the delivery of such properties referred to in clause (d) of sub-section(1) to the divorced woman;

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974) and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

4. Order for payment of maintenance.-(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where the 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 or 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, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order:

Provided that where such 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:

Provided further that 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.

(2) Where a divorced woman is unable to maintain herself and she has no relative as mentioned in sub-section(1) or such relatives or any one of them have not 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 by such other relatives under the second proviso to sub-section(1), the Magistrate may, by order direct the State Wakf Board established under section 9 of the Wakf Act, 1954 (29 of 1954), 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) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.

9. It emerges from the above quoted provisions that by virtue of Section 3(1), a divorced Muslim woman is entitled for reasonable and fair maintenance from her husband which is to be made and paid within the Iddat period and if the divorced husband has not paid her reasonable and fair provision and maintenance or mahr due to her or if he has not delivered the properties given to her before or at the time of marriage then a divorced Muslim woman can file an application before the Magistrate and the Magistrate can pass order under Section 3(3) directing the former husband to pay such reasonable and fair provision and maintenance to a divorced Muslim woman as the Magistrate may think fit and proper having regard to the needs of the divorced Muslim woman, the standard of life she enjoyed during her marriage and the means of her divorced husband. Besides the said provision, the Act, by virtue of Section 4, confers power on the Magistrate to issue order for payment of maintenance to a divorced Muslim woman against her relatives in the cases where the divorced Muslim woman has not remarried and she is not able to maintain herself after the Iddat period. Thus, while Section 3 of the Act deals with situation within the Iddat period, Section 4 makes provision after the Iddat period. Sub Section 2 of Section 4 also provides that in cases where a divorced Muslim woman is unable to maintain herself after the Iddat period and she has no relatives or the relatives do not have enough means to pay the maintenance then the Magistrate may direct the State Waqf Board established under Section 9 of the Waqf Act, 1954 to pay maintenance to such

divorced Muslim woman.

9.1. At this stage it is also relevant to take into account provisions under Section 7 of the Act. The said provision reads thus:

7. Transitional provisions.-

Every application by a divorced woman under section 125 or under section 127 of the Code of Criminal Procedure, 1973 (2 of 1974) pending before a Magistrate on the commencement of this Act, shall, notwithstanding anything contained in that Code and subject to the provisions of section 5 of this Act, be disposed of by such Magistrate in accordance with the provisions of this Act.

9.2.

According to the provisions under Section 7 of the Act all applications filed under Section 125 or Section 127 of Criminal Procedure Code, pending on the commencement of the Act should be disposed of by the Magistrate in accordance with the provisions of the Act.

9.3. However, Section 5 of the Act provides that a divorced Muslim woman and her divorced husband may jointly declare, by an affidavit, that they would prefer to be governed by provisions of Sections 125 to Section 128 of the Code. The said Section 5 of the Act reads thus:

5.Option to be governed by the provisions of section 125 to 128 of Act 2 of 1974.- If, on the date of the first hearing of the application under sub-section (2) of section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of section 125 to 128 of the Code of Criminal Procedure, 1973 (2 of 1974); and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly.

Explanation.-

For the purpose of this section, date of the first hearing of the application means the date fixed in the summons for the attendance of the respondent to the application.

10. As mentioned earlier it was after the decision in Mohd. Ahmed Khan v. Shah Bano (supra) that the Legislature enacted the Act. It is expressly mentioned in the Introduction of the Act that the Bill was introduced in the Parliament to dilute the judgment. The Introduction of the Act reads thus:

INTRODUCTION The Supreme Court in Moh. Ahmed Khan v. Shah Bano Begam has held that if the divorced woman is able to maintain herself, the husband's liability ceases with the expiration of the period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to section 125 of the Code of Criminal Procedure, 1973.

The above decision has led to some controversy as to obligation of the Muslim husband to pay maintenance to the divorced wife. To dilute the judgment given in the above case, the Muslim Women (Protection of Rights on Divorce) Bill was introduced in the Parliament.

10.1. Having thus explained the reasons for Introduction of the Act, the Legislature also explained the Object of the Act in the Statement of Objects and Reasons which reads thus:

STATEMENT OF OBJECTS AND REASONS The Supreme Court, in Mohd. Ahmed Khan v. Shah Bano Begum and Others, (AIR 1985 SC 945), has held that although the Muslim law limits the husband's liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by section 125 of the Code of Criminal Procedure. The Court held that it would be incorrect and unjust to extend the above principle of Muslim law to cases in which the divorced wife is unable to maintain herself. The Court, therefore, came to the conclusion that if the divorced wife is able to maintain herself the husband's liability ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat she is entitled to have recourse to section 125 of the Code of Criminal Procedure, 1973 (2 of 1974).

2. This decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the right which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. The Bill accordingly provides for the following other things, namely:-

(a) a Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period of iddat, by her former husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extended to a period of two years from the dates of birth of the children. She will also be entitled to mahr or dower and all the properties given to her by her relatives, friends, husband and the husband's relatives. If the above benefits are not given to her at the time of divorce, she is entitled to apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of mahr or dower or the delivery of the properties;

(b) where a Muslim divorced woman is unable to maintain herself after the period of iddat, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim law in the proportions in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where a divorced woman has no relatives or such relatives any one of them has no enough means to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives also do not have means to pay the shares of the defaulting relatives the Magistrate would order the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.

3. The Bill seeks to achieve the above objects.

10.2. After the enactment of the Act the Constitutional validity of the Act came to be challenged before Hon ble Apex Court in the case between Danial Latifi (supra). While holding that the Act does not violate constitutional provision and is constitutionally valid, Hon ble Apex Court observed, inter alia, that:

8. As held in Shah Banos case, the true position is that if the divorced wife is able to maintain herself, the husbands liability to provide maintenance for her ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Section 125 CrPC. Thus it was held that there is no conflict between the provisions of Section 125 CrPC and those of the Muslim Personal Law on the question of the Muslim husbands obligation to provide maintenance to his divorced wife, who is unable to maintain herself. This view is a reiteration of what is stated in two other decisions earlier rendered by this Court in Bai Tahira vs. Ali Hussain Fidaalli Chothia, (1979) 2 SCC 316, and Fuzlunbi vs. K.Khader Vali & Anr., (1980) 4 SCC

125.

19. The learned counsel for the parties have elaborately argued on a very wide canvass. Since we are only concerned in this Bench with the constitutional validity of the provisions of the Act, we will consider only such questions as are germane to this aspect. We will decide only the question of constitutional validity of the Act and relegate the matters when other issues arise to be dealt with by respective Benches of this Court either in appeal or special leave petitions or writ petitions.

26. A reading of the Act will indicate that it codifies and regulates the obligations due to a Muslim woman divorcee by putting them outside the scope of Section 125 CrPC as the divorced woman has been defined as Muslim woman who was married according to Muslim law and has been divorced by or has obtained divorce from her husband in accordance with the Muslim law. But the Act does not apply to a Muslim woman whose marriage is solemnized either under the Indian Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either under Indian Divorce Act, 1969 or the Indian Special Marriage Act, 1954. The Act does not apply to the deserted and separated Muslim wives. The maintenance under the Act is to be paid by the husband for the duration of the iddat period and this obligation does not extend beyond the period of iddat. Once the relationship with the husband has come to an end with the expiry of the iddat period, the responsibility devolves upon the relatives of the divorcee. The Act follows Muslim personal law in determining which relatives are responsible under which circumstances. If there are no relatives, or no relatives are able to support the divorcee, then the Court can order the State Wakf Boards to pay the maintenance.

29.Precisely, the point that arose for consideration in Shah Banos case was that the husband has not made a reasonable and fair provision for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was

available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are a reasonable and fair provision and maintenance to be made and paid as provided under Section 3(1)(a) of the Act and these expressions cover different things, firstly, by the use of two different verbs to be made and paid to her within the iddat period, it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4 of the Act, which empowers the magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to provision. Obviously, the right to have a fair and reasonable provision in her favour is a right enforceable only against the woman's former husband, and in addition to what he is obliged to pay as maintenance; thirdly, the words of the Holy Quran, as translated by Yusuf Ali of *mata* as maintenance though may be incorrect and that other translations employed the word provision, this Court in *Shah Banos* case dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether *mata* was rendered maintenance or provision, there could be no pretence that the husband in *Shah Banos* case had provided anything at all by way of *mata* to his divorced wife. The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to *mata* is only a single or one time transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word provision in Section 3(1)(a) of the Act incorporates *mata* as a right of the divorced Muslim woman distinct from and in addition to *mahr* and maintenance for the iddat period, also enables a reasonable and fair provision and a reasonable and fair provision as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in *Shah Banos* case, actually codifies the very rationale contained therein.

30. A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support is satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

31. Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

35. In *Arab Ahemadhia Abdulla and etc vs. Arab Bail Mohmuna Saiyadbhai & Ors. etc.*, AIR 1988 (Guj.) 141; *Ali vs. Sufaira*, (1988) 3 Crimes 147; *K. Kunhashed Hazi v. Amena*, 1995 CrL.J. 3371; *K.*

Zunaideen v. Aameena Begum, (1998] II DMC 468; Karim Abdul Shaik v. Shenaz Karim Shaik, 2000 Cr.L.J. 3560 and Jaitunbi Mubarak Shaikh v. Mubarak Fakruddin Shaikh & Anr., 1999 (3) Mh.L.J. 694, while interpreting the provision of Sections 3(1)(a) and 4 of the Act, it is held that a divorced Muslim woman is entitled to a fair and reasonable provision for her future being made by her former husband which must include maintenance for future extending beyond the iddat period. It was held that the liability of the former husband to make a reasonable and fair provision under Section 3(1)(a) of the Act is not restricted only for the period of iddat but that divorced Muslim woman is entitled to a reasonable and fair provision for her future being made by her former husband and also to maintenance being paid to her for the iddat period. A lot of emphasis was laid on the words made and paid and were construed to mean not only to make provision for the iddat period but also to make a reasonable and fair provision for her future. A Full Bench of the Punjab and Haryana High Court in Kaka v. Hassan Bano & Anr., II (1998) DMC 85 (FB), has taken the view that under Section 3(1)(a) of the Act a divorced Muslim woman can claim maintenance which is not restricted to iddat period. To the contrary it has been held that it is not open to the wife to claim fair and reasonable provision for the future in addition to what she had already received at the time of her divorce; that the liability of the husband is limited for the period of iddat and thereafter if she is unable to maintain herself, she has to approach her relative or Wakf Board, by majority decision in Umar Khan Bahamami v. Fathimnurisa, 1990 Cr.L.J. 1364; Abdul Rashid v. Sultana Begum, 1992 Cr.L.J. 76; Abdul Haq v. Yasima Talat; 1998 Cr.L.J. 3433; Md. Marahim v. Raiza Begum, 1993 (1) DMC

60. Thus preponderance of judicial opinion is in favour of what we have concluded in the interpretation of Section 3 of the Act. The decisions of the High Courts referred to herein that are contrary to our decision stand overruled.

36. While upholding the validity of the Act, we may sum up our conclusions:

Court holds that-

- 1) a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.
- 2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.
- 3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

10.3. Subsequently, in the decision in case between Iqbal Bano v. State of U.P. & Anr. [AIR 2007 SC 2215] Hon ble Apex Court observed that, the Act applies to a divorced woman and not to a woman who is not divorced. In the said decision, Hon ble Apex Court further observed that:

9. Proceedings under Section 125 Cr.P.C. are civil in nature. Even if the Court notices that there was a divorced woman in the case in question, it was open to him to treat it as a petition under the Act considering the beneficial nature of the legislation. Proceedings under Section 125 Cr.P.C. and claims made under the Act are tried by the same Court. In Vijay Kumar Prasad v. State of Bihar and Ors. (2004 (5) SCC

196), it was held that proceedings under Section 125 Cr.P.C. are civil in nature. It was noted as follows:

"14. The basic distinction between Section 488 of the old Code and Section 126 of the Code is that Section 126 has essentially enlarged the venue of proceedings for maintenance so as to move the place where the wife may be residing on the date of application. The change was thought necessary because of certain observations by the Law Commission, taking note of the fact that often deserted wives are compelled to live with their relatives far away from the place where the husband and wife last resided together. As noted by this Court in several cases, proceedings under Section 125 of the Code are of civil nature. Unlike clauses (b) and (c) of Section 126(1) an application by the father or the mother claiming maintenance has to be filed where the person from whom maintenance is claimed lives."

10.4. Thereafter, in the case between Shabana Bano v. Imran Khan [AIR 2010 SC 305] Hon ble Apex Court considered the issue, whether a Muslim divorced wife would be entitled to receive the amount of maintenance from her divorced husband under Section 125 of Criminal Procedure Code and, if yes, then through which forum? In the said case, the appellant before the Hon ble Apex Court had, at initial stage, filed a claim petition under Section 125 of the Code in the Court of learned Family Judge, Gwalior and claimed a sum of Rs.3,000/- per month from the respondent towards maintenance. In the said proceedings a preliminary objection was raised on the ground that the appellant had already been divorced in accordance with Muslim law. When the said case reached before Hon ble Apex Court in appeal by Special Leave, Hon ble Apex Court considered the abovementioned issue and after examining the provisions contained under Section 3 and 4 of the Act, Hon ble Apex Court observed, inter alia, that:

25. Judgment of this Court reported in (2007) 6 SCC 785; (2007 AIR SCW 3880) (Para 9) titled Iqbal Bano. v. State of U.P. & Anr. whereby the provisions contained in Section 125 of the Cr.P.C. have been aptly considered and the relevant portion of the order passed in Iqbal Bano s case reads as under:

10. Proceedings under Section 125, CrPC are civil in nature. Even if the Court noticed that there was a divorced woman in the case in question, it was open to it to treat it as a petition under the Act

considering the beneficial nature of the legislation. Proceedings under Section 125, Cr.P.C. and claims made under the Act are tried by the same court. In *Vijay Kumar Prasad v. State of Bihar* (2004) 5 SCC 196: (2004 AIR SCW 2276) it was held that proceedings under Section 125, Cr.P.C. are civil in nature. It was noted as follows (SCC p.200, Para 14).

14. The basic distinction between Section 488 of the old Code and Section 126 of the Code is that Section 126 has essentially enlarged the venue of proceedings for maintenance so as to move the place where the wife may be residing on the date of application. The change was thought necessary because of certain observations by the Law Commission, taking note of the fact that often deserted wives are compelled to live with their relatives far away from the place where the husband and wife last resided together. As noted by this Court in several cases, proceedings under Section 125 of the Code are of civil nature. Unlike clauses (b) and c of Section 126(1) an application by the father or the mother claiming maintenance has to be filed where the person from whom maintenance is claimed lives.

26. In the light of the findings already recorded in earlier paras, it is not necessary for us to go into the merits. The point stands well settled which we would like to reiterate.

27. The appellant's petition under Section 125 of the Cr.P.C. would be maintainable before the Family Court as long as appellant does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C. cannot be restricted for the iddat period only.

28. Learned Single Judge appeared to be little confused with regard to different provisions of Muslim Act, Family Act and Cr.P.C. and thus was wholly unjustified in rejecting the appellant's Revision.

29. Cumulative reading of the relevant portions of judgments of this Court in *Danial Latifi* (supra) and *Iqbal Bano* (supra) would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.

30. In the light of the aforesaid discussion, the impugned orders are hereby set aside and quashed. It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of period of iddat also, as long as she does not remarry.

11. Thus, in the case between *Mohd. Ahmed Khan v. Shah Bano* (supra), Hon ble Apex Court observed and clarified that if the divorced woman was able to maintain herself, the husband's liability to provide maintenance would cease with expiry of period of Iddat, however, if she was unable to maintain herself, she would be entitled to take recourse of Section 125 of the Code. So as to dilute the said situation by Hon ble Apex Court, the Act came to be enacted. This aspect is clarified in the statement of objects and reasons of the Act. When the validity of the provision under the Act was challenged, Hon ble Apex Court in case of *Danial Latifi* (supra), observed, inter alia, that

.....a divorced Muslim woman is entitled to a fair and reasonable provision for her future being made by her former husband which must include maintenance for future extending beyond the iddat period. It was held that the liability of the former husband to make a reasonable and fair provision under Section 3(1)(a) of the Act is not restricted only for the period of iddat but that divorced Muslim woman is entitled to a reasonable and fair provision for her future being made by her former husband and also to maintenance being paid to her for the iddat period.

11.1 In the said decision Hon ble Apex Court also observed that:

1) a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.

3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

12. It was in light of the above mentioned decision that Hon ble Apex Court considered the issue of applicability of Section 125 after enactment of the Act and the issue about the right of Muslim divorced woman to prefer application under Section 125 of the Code after enactment of the Act and to claim maintenance after Iddat period on the ground that she has not remarried and is not able to maintain herself/children staying with her. After considering the decisions in case of Mohd.

Ahmed Khan v. Shah Bano & Ors. (supra), Iqbal Bano v. State of U.P. (supra), Danial Latifi (supra) and also upon considering the provisions under Section 125 of the Code and the provision under the Act, Hon ble Apex Court observed and held in Shabana Bano v. Imran Khan (supra) thateven a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women. In the said decision Hon ble Apex Court further observed that, It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of period of iddat also, as long as she does not remarry

13. It follows from the foregoing discussion that the contention on which the petitioner has questioned the impugned order by learned Magistrate is no more res integra and Hon ble Apex

Court has settled the issue and clarified the legal position in the decision in case between Shabana Bano v. Imran Khan (supra). Hence, the petition as well as the challenge raised by the petitioner against the impugned order passed by learned Magistrate, must fail. The impugned order does not suffer from any infirmity. The order is in consonance with the observations made by and legal situation clarified by Hon ble Apex Court and therefore it does not warrant any interference in petition under Article 227 of Constitution of India. Therefore, the petition deserves to be rejected and is accordingly rejected. Notice is discharged.

14. The amount deposited by the petitioner in pursuance of the order dated 04.05.2012 may be paid to the respondent, if the petitioner has not made any payment to the respondent pursuant to and in compliance of the order passed by learned Magistrate and if the petitioner is in arrears. However, if the petitioner has made payments to the respondent in compliance of the order passed by learned Magistrate and if there are no arrears then the petitioner may move an application for appropriate order.

15. The aforesaid observation and clarification will be applicable only if the petitioner has deposited the specified amount in accordance with the order dated 04.05.2012.

With the aforesaid clarification the petition is disposed of.

(K.M.THAKER, J.) Jani