

Karnataka High Court

Abdul Khader vs Smt. Razia Begum on 31 July, 1990

Equivalent citations: 1991 CriLJ 247, ILR 1990 KAR 3109

Bench: K Navadgi

ORDER

1. This is a Revision Petition under section 397 of the Code of Criminal Procedure (the Code for short) and is directed against the order dated 19-3-1990 made by the learned 111 Additional Sessions Judge, Belgaum. in Criminal Revision Petition No. 242/88 on his file.

2. The matter is heard on admission.

3. The facts are these :

Sri Abdul Khader, the petitioner, married Smt. Razia Begum, the respondent, on 27-4-1977. In course of time there cropped up differences between the petitioner and the respondent. According to the petitioner, some days after the marriage, the respondent deserted him and went to reside with her parents. According further to him, his efforts to bring her back to his roof through the intervention of elders proved futile.

The respondent filed an application under section 125 of the Code, seeking a monthly maintenance allowance in a sum of Rs. 300/- from the petitioner, in Miscellaneous Case No. 50/82. The learned Chief Judicial Magistrate, who dealt with and disposed of the application, by the order dated 20-3-1985, allowed the application and awarded a monthly maintenance allowance at the rate of Rs. 150/- per month.

The petitioner, feeling aggrieved by the said order, preferred a Criminal Revision Petition in the Court of Session at Belgaum in Criminal Revision Petition No. 48/85. The learned I Additional Sessions Judge, who heard the Criminal Revision Petition, by the order dated 21-10-1986, disposed of the same confirming the order made by the learned Chief Judicial Magistrate awarding monthly maintenance allowance in favour of the respondent, but reducing the quantum of maintenance from Rs. 150/- to Rs. 100/-. The petitioner was directed to pay the monthly maintenance allowance from the date of the application filed by the respondent.

The petitioner approached the learned Chief Judicial Magistrate, Belgaum, with his application, numbered as Criminal Miscellaneous No. 49/87, on 11-3-1987, seeking the cancellation of the order dated 20-3-1985 made in Criminal Miscellaneous No. 50/82. He filed the application under section 127(3)(b) of the Code.

He stated in the application that in view of the conduct displayed by the respondent, he felt convinced that the respondent had no mind to live with him as his married wife and lead marital life and that, therefore, he gave 'Talaq' pronouncing the same thrice in the presence of two persons by name A. M. Kastkar and Ahmedsaheb. According to him, he gave 'Talaq' on 17-11-1986.

The petitioner further stated in his application that the fact of 'Talaq' having been given was communicated to the respondent by means of a notice dated 17-11-1986 sent through Registered Post and that the respondent refused to receive the notice on 25-11-1986. According to the petitioner, along with the notice he had sent a Draft for a sum of Rs. 825/- drawn on the Branch of Canara Bank, Belgaum, towards the 'Mahr' amount of Rs. 525/- and the maintenance amount of Rs. 300/- at the rate of Rs. 100/- per month during the 'Iddat' period. According to him, he mentioned in the notice that the respondent was free to collect the properties given to her at the time of her marriage.

After the notice and the Draft were returned with the endorsement by the Postal Authorities as refused, the petitioner published the contents of the notice in 'Tarun Bharat' a Daily Paper published from Belgaum in its Issue dated 28-11-1986. In the publication, he stated about the fact of he having given 'Talaq' to the respondent as per customary law prevailing in the Muslim community. The copy of the issue of the paper in which the notice came to be published was sent to the respondent. The respondent refused to receive the issue of the paper. The Postal Cover containing the issue was returned to the petitioner on 11-12-1986 with the endorsement of the Postal Authorities regarding the refusal.

The ground urged by the petitioner in support of his prayer made in the application filed under section 127(3)(b) of the Code was that in view of the divorce given by him, the respondent acquired the status 'of' a divorced woman and that from the date of the divorce, she lost the right to recover maintenance from him under the order made in her favour by the learned Chief Judicial Magistrate on 20-3-1985 as maintained and affirmed in Criminal Revision Petition No. 48/85 on 21-10-1986. The further assertion of the petitioner was that if at all the respondent needed and required any maintenance, she has to approach the Judicial Magistrate having jurisdiction under section 4 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (the Act for short) which came on the statute book with effect from 19th May, 1986. It was on the aforesaid grounds and assertions the petitioner sought the cancellation of the order of maintenance.

The learned III Additional Chief Judicial Magistrate, Belgaum, who disposed of the application filed by the petitioner, on consideration of the evidence adduced by the petitioner, concluded that the divorce pleaded by the petitioner had been established and that the respondent being a divorced woman, had to seek her remedy for maintenance elsewhere in view of the provisions contained in Section 4 of the Act. In that view of the matter, he allowed the application in terms of the prayer made therein.

The respondent, feeling dissatisfied with the order made by the learned III Additional Chief Judicial Magistrate, Belgaum, took the matter in Revision to the Court of Sessions at Belgaum, in Criminal Revision Petition No. 242/88.

The learned III Additional Sessions Judge, Belgaum, heard the Revision and by the order dated 19-3-1990, allowed the Revision Petition and set aside the order made by the learned Chief Judicial Magistrate. He dismissed the application filed by the petitioner with costs.

The learned III Additional Sessions Judge concurred with the finding of the learned Chief Judicial Magistrate that there was divorce and held that the respondent had been divorced by the petitioner on 25-11-1986. Reading the provisions of Section 4 of the Act and placing dependence on the decisions of the High Courts of Gujarat and Calcutta, ; and 1989 Criminal Law Journal, NOC 200 (Cal) he held that the Act was prospective in nature and effect; that the right acquired by the respondent by virtue of the order dated 20-3-1985 was long before the coming into force of the Act; that it was a vested right and that the Act could not take away the right acquired by the respondent crystallising into a vested right long before the Act was put on the statute book. In the view he took, as observed earlier, he allowed the Revision Petition and dismissed the application filed by the petitioner with costs after setting aside the order made by the learned Chief Judicial Magistrate on the application filed by the petitioner for cancellation of maintenance.

4. Asserting that the order made by the learned Chief Judicial Magistrate allowing the application is correct and contending that the order made by the learned III Additional Sessions Judge is wrong and erroneous, the petitioner has invoked the revisional jurisdiction of this Court challenging the legality and correctness of the order made by the learned III Additional Sessions Judge in the Revision Petition.

5. In view of the premises placed before the Court and the contentions urged and canvassed, the questions that arise for consideration and determination are these :

(1) Whether the Act is retrospective or prospective ?

(2) Whether the provisions of the Act defeat the vested rights, acquired by the respondent to recover maintenance from the petitioner under the Order dated 20-3-1985 ?

(3) Whether, even if it is held that the Act is prospective in nature, the provisions contained in Section 4 of the Act would be attracted to the case of the respondent in the matter of her right to claim maintenance ?

6. My answers to the above questions are as under :

(1) The Act is prospective.

(2) In the negative.

(3) In the negative.

7. To decide the question as to whether the Act is retrospective or prospective in operation, it would be necessary to consider not only the language used but also the object of the Act.

8. Before proceeding to determine the question we may refer to certain general principles governing the determination of the question. Every legislation is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. There is a presumption that

statutes are not intended to have retrospective operation.

9. With these general principles, I feel it would be advantageous to go to Objects and Reasons to reach the heart of the question. True, the Statement of Objects and Reasons cannot be used for interpreting the Act. But it can be used for knowing the historical background of the legislation the evil against which it was directed and mischief that was intended to be cured.

10. The objects and Reasons of enacting the Act are as under :

"The Supreme Court, in Mohd. Ahmed Khan v. Shah Bano Begum, , 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 Cr.P.C., 1973. 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 Criminal P.C.

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 rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests."

11. A reading of the Statement makes it clear that the Legislature took the opportunity arising out of the decision of the Supreme Court in Mohd. Ahmed Khan v. Shah Bano Begum, , to specify the rights a Muslim divorced woman would be entitled to at the time of divorce and to protect her interests.

12. The Title of the Act reads :

"The Muslim Women (Protection of Rights on Divorce) Act, 1986."

13. The title of a statute is an important part of it. It helps in ascertaining the general scope and thrown a light on the construction. The title indicates that the Act protects the rights of Muslim women on divorce.

14. The preamble of the Act, which is the key to the intention of the Legislature, reads as under :

"An Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto."

15. A reading of the preamble makes it apparent that the Act is enacted to protect the rights of Muslims women who have been divorced by or have obtained divorce from, their husbands. Needless to state that the preamble nowhere provides that the Act is enacted for taking away some rights which a Muslim woman was having either under the general law, that is Sections 125 to 128 of

the Code or under the personal law. The preamble also makes it clear that the Act is enacted for making other provisions for matters connected therewith or incidental thereto.

16. Section 2 is the definition section.

17. Section 3 of the Act provides :

"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 her 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 her 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."

18. Section 3(1) begins with non-obstante clause and provides that a divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the Iddat period by her former husband. Clause (b) of Section 3(1) provides for a reasonable and fair provision and maintenance to be made and paid by her former husband where a divorced woman herself maintains the children born to her before or after her divorce. The liability to provide a reasonable and fair provision and maintenance is for a period of 2 years from the respective dates of birth of the children. Clause (c) of Section 3(1) lays down that a divorced woman is entitled to an amount equal to the sum or Mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim Law. Clause (d) of Section 3(1) gives a right to a divorced woman to claim 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.

19. Section 3(2) of the Act gives a right to a divorced woman to file an application before a Magistrate when her former husband fails to make or pay a reasonable and fair provision and maintenance or the amount of Mahr or dower due and when he fails to deliver the properties referred to in Clause (d) of sub-section (1), on her divorce, for an order for payment of such provision and maintenance, Mahr or dower or the delivery of the properties, as the case may be.

20. Section 3(3) provides how the Magistrate is required to proceed with the application. The applicant has to satisfy the Magistrate that 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 her children if the claim is made for the children also. She has to satisfy the Magistrate if the claim is for payment of an amount equal to the sum of Mahr or dower that the said amount has not been paid. She has to satisfy the Magistrate if the claim is in respect of the properties referred to in Clause (d) of Sub-section (1) that the properties have not been delivered to her

21. If the Magistrate is satisfied, then he has to make an order within one month of the date of filing of the application, directing the former husband of the applicant to pay such reasonable and fair provision and maintenance to her 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 the 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).

22. The proviso to Clause (b) of Section 3(3) of the Act provides that if the Magistrate finds it impracticable to dispose of the application within the period of one month as stated in Clause (b), he may, for reasons to be recorded by him, dispose of the application after the said period of one month.

23. What emerges clearly from the careful analysis of the section is that it specifies the rights of a Muslim divorced woman, provides for enforcement of the rights, deals with the nature of proof she is required to establish not proof beyond reasonable doubt, but proof on the test of preponderance of probabilities and gives objective criteria for the determination of quantum of provision and maintenance. It provides for the manner for enforcement of the order, in case of its non-compliance.

Section 4 of the Act reads :

"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 as 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, 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 relatives 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.

24. This Section also begins with the non-obstante clause.

25. A reading of Section 4 of the Act excerpted herein above would show that whatever might have been provided under section 3 or in any other law for the time being in force, a divorced woman is entitled to file an application for grant of maintenance if she has not re-married after the expiry of the Iddat period and is not able to maintain herself after Iddat period. In other words, a divorced woman, even if she has received reasonable and fair provision and maintenance from her former husband if she has not re-married after the Iddat period and is not able to maintain herself after the Iddat period, she can file an application for grant of maintenance and the Magistrate has to pass an order in accordance with the provisions contained in Section 4.

26. A close and careful reading of Sections 3 and 4 of the Act would give us a clear picture of the rights given to a divorced woman.

27. Section 5 of the Act gives an option to the parties to be governed by the provisions of Sections 125 to 128 of the Code 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.

28. Section 6 of the Act gives power to the Central Government to make rules for carrying out the purposes of the Act.

29. Section 7, a transitional provision, provides that every application by a divorced woman under section 125 or under section 127 of the Code, pending before a Magistrate on the Commencement of the Act, shall, notwithstanding anything contained in the Code and subject to the provisions of Section 5 of the Act, be disposed of by the Magistrate in accordance with the provisions of the Act.

30. As observed earlier, the Parliament took opportunity to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interest in view of some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife arose in view of the decision of the Supreme Court in Mohd. Ahmed Khan's case (1985 Cri LJ 875). The preamble, referred to earlier, shows that the Act is enacted to protect the rights of Muslim women who have been divorced by, or obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto. The Act, which received the assent on 19-5-1986, came on the statute book the same day.

31. The question is, whether the Act is retrospective or prospective.

32. It is a fundamental rule that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and

distinct implication. On the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. Such statutes are construed as operating only in cases on facts which come into existence after the statutes are passed. A rule of construction more firmly established is that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is capable of either interpretation, it has to be construed as prospective only.

33. It is said in Craies on Statute Law, 7th Edn., page 387 :

"A statute is to be deemed to be retrospective, which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. But a statute is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing."

34. If the provisions contained in the Act, keeping in mind the preamble, are examined, applying the test stated above, it cannot but be held that the Act is prospective. There is no provision in the Act taking away or impairing any vested right acquired by a divorced woman to claim maintenance under the existing general law or personal law. The Act does not create a new obligation, does not impose a new duty and does not attach a new liability in respect of past transactions or considerations. It only specifies the rights of a divorced Muslim woman at the time of divorce and protects her interests.

35. Both Sections 3 and 4 begin with non-obstante clauses. The words "non-obstante" were in use while preparing public and private instruments. They were intended to preclude in advance any interpretation contrary to certain declared objects or purposes. The clause frequently appeared in the old English statutes and letters patent importing a licence from the Crown to do a thing which otherwise a person would be restrained by Act of Parliament from doing. It was a power in the Crown to dispense with the laws in any particular case. All that can be said is that by the use of non-obstante clause in Section 3 of the Act the Parliament intended that a divorced Muslim woman should be conferred with the rights mentioned in Section 3 with a right to enforce the rights given to her notwithstanding anything contained in any other law for the time being in force. The non-obstante clause in Section 4(1) of the Act shows that notwithstanding anything contained in Section 3 or in any other law for the time being in force, a divorced woman is entitled to make an application for grant of maintenance if she has not re-married and if she is not able to maintain herself after the period of Iddat.

36. From the discussion made above, we cannot escape the conclusion that the Act is prospective and not retrospective in operation.

37. This takes us to the next question as to whether the order of maintenance acquired by the respondent on 20-3-1985, i.e., long before the Act came into force, could be defeated or impaired in

any manner under the provisions of the Act.

38. Till the decision in the case of Mohd. Ahmed Khan (1985 Cri LJ 875) (SC) (supra) (decided on 23-4-1985), the view with regard to the liability of the husband to maintain a divorced wife under the Muslim personal law, was that the liability of the husband to maintain a divorced wife is limited to the period of Iddat. In Mulla's Mahommedan Law (18th Edition, Para 279, page 301), it is stated :

"After divorce, the wife is entitled to maintenance during the period of Iddat."

At page 302, the learned Author observes :

"Where an order is made for the maintenance of a wife under section 488 of the Criminal Procedure Code and the wife is afterwards divorced, the order ceases to operate on the expiration of the period of iddat. The result is that a Mahommedan may defeat an order made against him under section 488 by divorcing his wife immediately after the order is made. His obligation to maintain his wife will cease in that case on the completion of her iddat."

39. In Tyabji's Muslim Law (4th Edition, Para 304, Pages 268-269, the relevant statement made reads as under :

"On the expiration of the iddat after talaq, the wife's right to maintenance ceases, whether based on the Muslim Law, or on an order under the Criminal Procedure Code."

40. In Muslim Law in Modern India, 1982 Edition, Page 130, it is stated :

"When a marriage is dissolved by divorce the wife is entitled to maintenance during the period of iddat. On the expiration of the period of iddat, the wife is not entitled to any maintenance under any circumstances. Muslim law does not recognise any obligation on the part of a man to maintain a wife whom he had divorced."

41. Relying upon the statement of law on the point in the Text Books, it was contended before the Supreme Court in the case of Mohd. Ahmed Khan (1985 Cri LJ 875) that the liability of the husband to maintain a divorced wife is limited to the period of Iddat. The Supreme Court, dealing with the contention, observed (at p. 881 of Cri LJ) :

"14. These statements in the text books 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 in duration, 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 an 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 that 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."

42. The Supreme Court after referring to Arabic version and English version of Ayat Nos. 241 and 242 of the Quran and on consideration of the translation of the said Ayats in certain books and the observations of Dr. K. R. Nuri in his book "The Running Commentary of The Holy Quran", concluded :

"22. These Ayats leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teachings of the Quran. As observed by Mr. M. Hidayatullah in his introduction to Mulla's Mahomedan Law, the Quran is *Alfurqan*, that is, one showing truth from falsehood and right from wrong."

43. In the case of Mohd. Ahmed Khan (1985 Cri LJ 875) (SC), it was contended that the application filed by Shah Bano Begum, the respondent, under section 125 of the Code was liable to be dismissed because of the provision contained in Section 127(3)(b). The said provision provides to the extent relevant and material that the Magistrate shall cancel the order of maintenance if the wife is divorced by the husband and she has received "the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce."

44. Thus, the question raised before the Supreme Court was, whether, under the Muslim Personal Law, any sum is payable to the wife on divorce. It was urged that Mahr is the amount payable by the husband to the wife on divorce. The Supreme Court felt that it was impossible to accept the argument. Quoting with approval the decisions of the Privy Council in *Hamira Bibi v. Zubaide Bibi* 43 Ind App 294 : AIR 1916 PC 46 at p. 48 and in *Syed Sabir Husain v. Farzand Hasan* 65 Ind App 119 at p. 127 : AIR 1938 PC 80 at P. 83 and examining the contention with reference to the statements made in the Mulla's Principles of Mahomedan Law and Muslim Law and Muslim Law in Modern India by Dr. Paras Diwan, the Supreme Court ruled that Mahr is not a sum under the Muslim Personal Law as payable on divorce.

45. In the case of Mohd. Ahmed Khan, the Supreme Court held on an exhaustive consideration of the contention that its judgments in *Bai Tahira* and *Fuzlunbi* were correct.

46. The respondent as on 19-5-1986 and till 25-11-1986, the date of divorce under the Muslim Personal Law was entitled to maintenance from the petitioner. The petitioner was bound to maintain her. She was not in that category of wives coming within the expression "too young for matrimonial intercourse." No doubt the petitioner contended in his application filed under section 127(3)(b) of the Code that the respondent was disobedient and refused herself to him. This attitude of the respondent, according to him, compelled him to give divorce. True, she could not have maintained a suit for maintenance in the absence of a specific agreement. But the petitioner had a duty to maintain her. Even after 25-11-1986, the date on which, according to the trial Court and Revisional Court, the divorce given on 17-11-1986 came into effect and after the expiry of the period of Iddat, under the Muslim Personal Law, as interpreted by the Supreme Court in the case of Mohd. Ahmed Khan (1985 Cri LJ 875), in the absence of the Act, if she remained unmarried and if she was not able to maintain herself, she was entitled to claim maintenance both during the period of Iddat and thereafter. That would have been the position in the absence of the Act notwithstanding the offer of maintenance made by the petitioner for the period of Iddat refused by her and notwithstanding the offer of payment made by the petitioner towards the Mahr amount also refused by her.

47. Section 125 of the Code, which deals with the right of maintenance, reads thus :

"Order for maintenance of wives, children and parents."

125. (1) If any person having sufficient means neglects or refuses to maintain -

(a) his wife, unable to maintain herself,

(b) to (d)

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 at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit

Explanation - For the purposes of this Chapter, -

(a)

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

(2)

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made :

Provided

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."

48. Under Section 125(1)(a), a person, who has sufficient means, neglects or refuses to maintain his wife unable to maintain herself, can be directed by a Magistrate of the First Class upon proof of the neglect or refusal referred to in the section to pay a monthly maintenance to her at a rate not exceeding five hundred rupees.

49. Under Clause (b) of the Explanation to Section 125(1), "wife" includes a divorced woman, who has not remarried.

50. The precursor of Chapter IX of the Code in which Section 125 appears, was a mode of preventing vagrancy or at least of preventing its consequences. In *Jagir Kaur v. Jaswant Singh*, , the Supreme Court said that Chapter XXXVI of the Code of Criminal Procedure 1898, which contained Section 488 corresponding to Section 125, "intends to serve a social purpose".

51. In the case of *Mohd. Ahmed Khan* (1985 Cri LJ 875), (supra), the Supreme Court held that the liability imposed by Section 125 to maintain close relatives who are indigent is founded upon the individual's obligation to the society to prevent vagrancy and destitution, that is the moral edict of the law and that the morality cannot be clubbed with religion. The Supreme Court held, relying on the definition of the expression "wife" in Clause (b) of the Explanation to Section 125(1), that the scope of Section 125 is truly secular in character. The Supreme Court further held that there is no

conflict between the provisions of Section 125 and those of 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. The Supreme Court quoted its decision with approval in *Nanak Chand v. Chandra v. Chandra Kishore Agarwala* : , to the effect that Section 488 was applicable to all persons belonging to all religions and has no relationship with the personal law of the parties.

52. The decision in *Mohd. Ahmed Khan* (1985 Cri LJ 875) (SC) lays down that the statutory right available to a divorced Muslim woman, so long as she comes within the inclusive definition of the expression "wife" in Clause (b) of the Explanation to Section 125, is unaffected by the provisions of the personal law applicable to her.

53. In the instant case, the respondent applied for maintenance and obtained an order for maintenance from the Magistrate when she had the status of a married wife. The statutory right available to her availed of by her, thus stood crystallised into a vested right long before 19-5-1986, the date on which the Act came into force. That vested right was not in any way affected or impaired in any manner by the fact of divorce on 25-11-1988 after the coming into force of the Act, in view of the definition of the expression "wife" as including a divorced wife. The definition contains no words of limitation to justify the exclusion of Muslim women from its scope.

54. The question that remains to be considered in this context is, whether the rights of the respondent to claim maintenance from the petitioner as his divorced wife under the Muslim Personal Law, as interpreted by the Supreme Court in the case of *Mohd. Ahmed Khan* (1985 Cri LJ 875) and the order secured by her under section 125 of the Code directing the petitioner to pay a monthly maintenance at the rate of Rs. 100/- per month were taken away by the enactment of the Act. The precise question is, whether the order obtained by the respondent against the petitioner under section 125 of the Code became non est consequent on the coming into force of the Act.

55. I have examined the provisions of the Act in detail with reference to the rights conferred on a divorced Muslim woman under sections 3 and 4 in the matter of claiming maintenance, the obligations imposed on the husband, relatives, etc. I have also referred to the provisions contained in Section 5 and the transitory provisions contained in Section 7 of the Act.

56. There is no section in the Act which renders an order passed by a Magistrate under section 125 void. The non obstante clause with which Section 3 begins, supersedes the existing law relating and relevant to the matter covered by the said section. The non obstante clause with which Section 4 begins shows that the provisions contained in Section 4 override the provisions contained in Section 3(1) or in any other law for the time being in force in respect of the subject dealt with by it. The respondent had obtained the order under section 125, that is, an order granting maintenance to her as the wife. The order continued to enure to her benefit even after divorce, since she did not remarry and presumably was unable to maintain herself, her status coming within the inclusive definition of the term in Clause (b) of Explanation to Section 125(1) of the Code. Her rights came to be crystallised and she acquired a vested right to receive maintenance from the petitioner as her husband till the date of divorce and from the date of divorce from the petitioner as her former husband.

57. There is no provision in the Act taking away the vested rights. Section 5 gives only option to be governed by the provisions of Sections 125 to 128 of the Code 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 the form prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128, and file such affidavit or declaration in the Court hearing the application. Section 7 provides that every application by a divorced woman under section 125 or under section 127 of the Code pending before a Magistrate on the commencement of the Act shall be disposed of in accordance with the provisions of the Act notwithstanding anything contained in the Code and subject to the provisions of Section 5.

58. The learned counsel for the petitioner made an attempt to contend that the transitional provisions were attracted to the case. It is true that the order of maintenance obtained by the respondent on 20-3-1985 was challenged by the petitioner in Criminal Revision Petition No. 48/85. That Revision Petition was allowed in part, reducing the quantum from Rs. 150/- to Rs. 100/- per month. The order in Revision came to be passed on 21-10-1986, that is, after the Act came into force. As on 19-5-1986, the status and position of the respondent was of a married wife and not of a divorced woman.

59. In the first place, the principle laid down by the Supreme Court in *Maru Ram v. Union of India*, on which considerable dependence was placed, that when a person is convicted in appeal, it follows that the Appellate Court has exercised its power in the place of the original Court and the guilt, conviction and sentence must be substituted for and shall have retroactive effect from the date of judgment of the Trial Court and that an appeal is a continuation of an appellate judgment as a replacement of the original judgment cannot be applied to the case of the petitioner inasmuch as the challenge to the order of maintenance which was not met with success, though the petitioner succeeded in getting the quantum reduced, was in Revision, a power preserved in superior Courts to see that justice is done by subordinate Courts. Added to that, Section 7 of the Act envisages and contemplates an application by a divorced woman either under section 125 or under section 127 of the Code in order to make it applicable. In the case on hand, there could not have been any application by the respondent as on 19-5-1986, since by that date the respondent had obtained an order of maintenance in her application under section 125. There was no application filed by her under section 127 of the Code as on the material date. As a matter of fact, the respondent had not filed any application much less under section 127(1) of the Code. Only a Revision Petition filed by the petitioner was pending in the Court of Session on 19-5-1986.

60. Having regard to the clear and unambiguous language employed in Section 7 of the Act, it cannot but be held that the petitioner cannot harness Section 7 of the Act to buttress his contention that the provisions of the Act govern the case of the respondent and that her application for maintenance should be decided in accordance with the provisions of the Act. When it cannot be held that her application for maintenance was pending as on 19-5-1986, notwithstanding the fact that the Revision preferred by the petitioner was pending as on 19-5-1986 and that it was disposed of after coming into force of the Act, the argument does not merit any further consideration. Be that as it may, on the clear and explicit language employed in Section 7, the petitioner cannot contend that his application filed under section 127(3)(b) of the Code should be decided in accordance with the

provisions of the Code.

61. Section 127 of the Code reads as under :

"127. (1) On proof of a change in the circumstances of any person, receiving under section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit :

Provided that if he increases the allowance, the monthly rate of five hundred rupees in the whole shall not be exceeded.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that -

(a) the woman has, after the date of such divorce, remarried cancel such order as from the date of her remarriage;

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order, -

(i) in the case where such sum was paid before such order, from the date on which such order was made;

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a monthly allowance has been ordered to be paid under section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowance in pursuance of the said order."

62. Sub-section (3) of Section 127 which is a new provision provides for cancellation of an order for maintenance passed under section 125 under the three circumstances mentioned and specified in Clauses (a), (b) and (c). Sub-section (3) deals with cancellation of the order of maintenance in the case of divorced woman. Under Clause (a), if the Magistrate is satisfied that the woman has

remarried after divorce, he has to cancel the order of maintenance from the date of remarriage. Under Clause (b), the order of maintenance can be cancelled where the Muslim wife on divorce has received the whole sum payable to her under any customary or personal law. Under Clause (c), the Magistrate can cancel the order of maintenance while the Muslim woman obtains a divorce from her husband and voluntarily surrenders her right of maintenance.

63. The petitioner sought cancellation on the ground that he had divorced the respondent on 17-11-1986 and that he had offered to pay the maintenance for the Iddat period and the Mahr amount. But it is significant to note that he did not state that the respondent was able to maintain herself. In view of the decision of the Supreme Court in the case of Mohd. Ahmed Khan (1985 Cri LJ 875), both the grounds urged by the petitioner for cancellation of the order of maintenance would not be available to him.

64. The learned Chief Judicial Magistrate, without bestowing the attention and care expected of him, proceeded to hold that since the petitioner had established the divorce pleaded by him, the remedy of the respondent was under section 4 of the Act. The learned III Additional Sessions Judge in Revision noticed the error committed by the learned Chief Judicial Magistrate and corrected it. If the respondent remained unmarried and was not able to maintain herself, which must have been her case in the application for maintenance, the liability of the petitioner to maintain the respondent even after the expiry of the period of Iddat continued. If the Mahr is not the amount payable by husband to wife on divorce under the Muslim Personal Law, it cannot be said that the offer to pay the Mahr refused by the respondent would amount to the receipt of the whole sum payable to the respondent under the personal law. As a matter of fact, the Supreme Court in the case of Mohd. Ahamed Khan (1985 Cri LJ 875) observed that the provisions contained in Section 127(3)(b) of the Code may have been introduced because of the misconception that the dower is an amount payable on divorce and that that cannot convert an amount payable as a mark of respect for the wife into amount payable on divorce.

65. The analysis of the questions would clearly show that the respondent had acquired a right to claim maintenance from the petitioner much prior to 19-5-1986, the date on which the Act came into force and that right had stood crystallised before 19-5-1986. The fact that the petitioner divorced the respondent on 25-11-1986, i.e., after coming into force of the Act, does not alter the position in any material way because of the inclusive definition of the term "wife" in Clause (b) of the Explanation to Section 125(1) of the Code.

66. In view of the aforesaid reasons and the answer on question No. 1 that the Act is prospective in operation, it cannot but be held that the provisions of the Act cannot defeat the vested rights acquired by the respondent to recover maintenance from the petitioner under the order dated 20-3-1985. It has also to be held on facts that the application filed by the petitioner under section 127(3)(b) of the Code was misconceived and that the learned Chief Judicial Magistrate grossly erred in allowing the application. The view taken by the learned III Additional Sessions Judge, which according to me, is a correct and proper view, needs to be maintained and affirmed.

67. The learned counsel for the petitioner reading the non obstante clause with which Section 4 of the Act opens and the decision of the Supreme Court in *Boucher Pierre Andre v. Superintendent, Central Jail, Tihar, New Delhi*, , contended that notwithstanding the obtainment of an order of maintenance against the petitioner by the respondent long prior to 19-5-1986, the grant of maintenance to the respondent under the order has to be regulated under the provisions of Section 4 of the Act. I find it difficult to concede to the contention. In the case of *Boucher Pierre Andre*, the petitioner had been arrested on November 10, 1971 and had been convicted on July 16, 1973 by the Sessions Court for an offence under section 380 of the Indian Penal Code. He had been sentenced to Rigorous Imprisonment for four years and a fine of Rs. 10,000/- with a direction to suffer further Rigorous Imprisonment for one year in default of payment of fine. In the appeal, the High Court by its order on April 4, 1974, had confirmed the conviction and had reduced the imprisonment to two years. It had enhanced the fine to Rs. 15,000/- with one year's Rigorous Imprisonment in default. As the petitioner had not paid the fine, he was liable to serve three years' imprisonment.

68. Claiming the benefit of section 428 of the Code, which came into force on 1-4-1974, the petitioner had challenged the validity of his detention after August 12, 1974. According to him, the rest of the period of imprisonment had to be set-off against his imprisonment as under-trial from November 10, 1971 to July 16, 1973 and the period of remission earned by him. The High Court had dismissed the petitioner's petition under Art. 226 of the Constitution. He had filed a fresh petition before the Supreme Court under Article 32.

69. The Supreme Court, interpreting Section 428 of the Code, held that on a plain natural construction of the language, Section 428 posits for its applicability a fact situation which is described by the clause "where an accused person has, on conviction, been sentenced to imprisonment for a term". Noticing absence of anything in the clause, suggesting either expressly or by necessary implication that the conviction and sentence must be after coming into force of the Code, the Supreme Court held that the language was neutral and that where an accused person has been convicted and he is still serving his sentence at the date when the Code came into force, Section 428 would apply and he would be entitled to claim that the period of detention undergone by him during the investigation, enquiry or trial of the case should be set-off against the term of imprisonment imposed on him and he should be required to undergo only the remainder of the term.

70. In view of the interpretation put by it on the language of Section 428, the Supreme Court held that though Section 428 is not given any retrospective effect, the section operates prospectively on the sentence which had remained to be served. It negatived the contention urged on behalf of the respondent on the basis of the prospective operation of Section 428 holding that the contention was not relevant in view of the plain and natural construction of the language employed in Section 428.

71. I have already held that the Act is prospective in operation. By 19-5-1986 the respondent had acquired a vested right to claim maintenance from the petitioner under the order dated 20-3-1985. That vested right having not been taken away by the provisions of the Act, she would be entitled to enforce the order of maintenance so long she remains without remarrying and is unable to maintain herself. The fact that she was divorced by the petitioner after 19-5-1986 cannot make the provisions

contained in Section 4 of the Act applicable to her case.

72. For these reasons, I hold that the provisions contained in Section 4 of the Act cannot be attracted to the case of the respondent in the matter of her right to claim maintenance. I accordingly answer question No. 3.

73. In the result, for all the reasons aforesaid, I hold that the Revision is devoid of substance and merit. I, therefore, dismiss it at this stage only, affirming the order made by the learned III Additional Sessions Judge in Criminal Revision Petition No. 242/88 for the reasons stated by me.

74. After the order was pronounced, the learned counsel for the petitioner submitted that liberty may be reserved to the petitioner to apply for cancellation of the order of maintenance on grounds other than those taken by him in his application filed earlier the subject-matter of these proceedings.

75. No liberty need be reserved. It would be open to him to apply for cancellation of the order of maintenance on grounds other than those urged by him in his application filed on 11-3-1987 before the learned Chief Judicial Magistrate, Belgaum.

76. Revision dismissed.