

Calcutta High Court

Abdul Latif Mondal vs Anuwara Khatun And Anr. on 7 December, 2001

Equivalent citations: (2002) 2 CALLT 179 HC, 2001 (1) CHN 77, 2002 CriLJ 2282

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Bench: A Barua

JUDGMENT A. Barua, J.

1. This revisional application is directed against the Judgment and order date 17.2.2001 passed by the learned Chief Judicial Magistrate, Bankura in Misc. Case No. 94 of 1996 directing the petitioner [husband) to give maintenance @ Rs. 800/- per month to the opposite party No. 1 (wife) and Rs. 400/- per month for her minor son, in all Rs. 1,200/-per month.

2. We may briefly state the facts of the case as follows:

Anuvvara Khatun, O.P. No. 1, petitioner in the Court of learned Chief Judicial Magistrate, Bankura, under Section 125 of the Code of Criminal Procedure for maintenance @ Rs. 1,000/- per month for herself and Rs. 500/- per month for her minor son from her husband, that is the petitioner in this revision, in Misc. Case No. 94/96. The wife alleged that their marriage took place on 18.6.92 according to Muslim rites and customs and that the marriage was still subsisting. In the said marriage Den-Mohar was fixed at Rs. 5,001/-. Gold ornaments, cash money and other things were given to the husband at the marriage. Few days after the marriage, the husband demanded more money and on her expressing inability to fetch the same the husband and the inmates of his house starting torturing her physically and mentally. A male child was born to them and he was then aged three years. The torture on her had increased by the day thereafter and eventually her husband having assaulted her, drove her out of her matrimonial home on 18.1.96 and since then she had been living in her father's house with her minor son. The husband totally neglected to maintain her and the minor son and the wife had also no means to maintain herself and the child. The husband dealt in rice and paddy, also possessed 12/15 bighas of agricultural lands from which he used to earn Rs. 6,000/- per month.

3. The husband in his written objection denied all the materials allegations of the wife and contended that the petitioner could not adjust with the family of the husband because of her higher status and hence the husband divorced the wife by pronouncement of Talak on 22.12.94 in pursuance of a village committee resolution date 29.5.94. He further contended that a criminal case under Section 498A of the IPC was also filed by the wife against the husband and the inmates of his house. Accordingly, the husband prayed for dismissal of the case.

4. The learned Chief Judicial Magistrate, Bankura, allowed the application and directed payment of Rs. 800/- per month for the wife and Rs. 400/- per month for her minor son from the date of the order. The husband made a revisional application against that order and the learned Sessions Judge, Bankura, had set aside the judgment of the learned Chief Judicial Magistrate in the said Misc. Case No. 94/96 and sent the case back to the learned Court below on remand with direction to dispose of the application under Section 125 Cr.PC after giving opportunity to both the parties to produce proper documents to establish their respective claims,

5. The said application under Section 125 Cr.PC was again came up for hearing before the learned Chief Judicial Magistrate, Bankura and on completion of all evidence having been taken, the learned Chief Judicial Magistrate, Bankura, passed the said impugned judgment and order dated 17.2.2001 whereby he allowed the said Misc. Case No. 94/96 and ordered maintenance allowance & Rs. 800/- per month in favour of the wife and Rs. 400/- per month for her minor son, totally Rs. 1,200/- per month to be paid by the O.P. husband. And hence, this revisional application by the aggrieved husband.

6. What precisely is challenged by way of this revisional is the order of the learned Chief Judicial Magistrate, Bankura, is Misc, Case No. 94/96 whereby the O.P. No. 1, that is, the wife, Anuwara Khatun was granted maintenance @ Rs. 800/- per month for herself and Rs. 400/- per month for her minor son. In all Rs. 1,200/- per month, to be paid by the petitioner-husband and this impugned order of the learned Chief Judicial Magistrate was the result of an application made by the O.P. No. 1(wife) under Section 125 of the Code of Criminal Procedure in the said Mfsc. Case No. 94/96. The mainstay of the petitioner-husband's contention is that the said application by the wife under Section 125 Cr.PC was itself not maintainable and consequently the learned Magistrate could not have granted the maintenance allowance in favour of the wife and against the husband in the way he did in view of specific restrictions and mandatory provisions embodied in The Muslim Women (Protection of Rights on Divorce) Act, 1986".

7. In fact, the learned Advocate for the petitioner-husband has plainly submitted that a divorced muslim woman in order to maintain her claim of maintenance must take recourse to The" Muslim Women (Protection of Rights on Divorce) Act, 1986" and that in this new Act there are ample provisions in Sections 3, 4 and 5 which will entitle a divorced muslim wife to get maintenance from her husband and that her claim shall be guided only by the provisions of this new Act of 1986 and not by Section 125 Cr.PC. In support of his contention the learned advocate for the petitioner has cited some important decisions of different High Courts and the Hon'ble Supreme Court. These important decisions are :-

. (F.B), 1989 C.Cr. LR (Cal) 197, 1995 CrL. LJ 604 (Orissa), 1996 (1) Crimes 73 (H.C), Karnataka. 1996(2) Crimes 388 (Andra Pradesh).

8. The learned advocate for the O.P. No.1 (wife) has contended) that the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, hereinafter referred to as MW Act, for short, does not take away the rights of the Muslim women to claim maintenance from her husband under the general law that is under Section 125 Cr.PC and that the enactment of MW Act, will not render an order of maintenance passed by the Magistrate under Section 125 Cr.PC non-est because there is no provision in the M.W.Act which will make an order passed by the Magistrate under Section 125 Cr.PC a nullity. He has further submitted that the maintenance in favour of a Muslim woman should not be restricted to the Iddat period only but it must be extended till a divorced Muslim woman remarries. To buttress his contention the learned advocate for the O.P. No. 1(wife) has primarily relied upon a decision of a single Bench of the Calcutta High Court itself in Shakila Parveen's case, before Hon'ble Justice Basudeb Panigrahi, reported in 2000(1) CLJ 608, and an important single Bench decision of Gujarat High Court (M.B. Shah, J.) in . which was also followed by this Court in

the said 2000(1) CLJ 608. Besides, among some other Judgments prior to the MWA the learned advocate for O.P. has relied upon an important decision of the Hon'ble Supreme Court .

9. Before us, therefore, the following points emerge for determination.

(a) Whether the enactment and, for that matter, the provisions of "The Muslim Women (Protection of Rights on Divorce) Act. 1986", MW Act, for short, render the Impugned order of maintenance, passed by the learned Chief Judicial Magistrate date. 17.2.2001 under Section 125 Cr.PC a nullity.

(b) Whether the claim of maintenance is limited only upto the period of Iddat.

(c) Whether the learned Chief Judicial Magistrate was Justified in granting maintenance allowance of Rs. 800/- per month for the wife and Rs. 400/- per month for her minor son.

10. Now, in order to appreciate the legal position arising out of different decisions of the Hon'ble High Courts and Supreme Court and the fact-situation Involved therein and also here in this case, we may start with the important provisions of "The Muslim Women (Protection of Rights on Divorce) Act, 1986", which are relevant for our purpose.

Section 3(1) 'Notwithstanding anything contained in any other law for the time being in force, a divorced women 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 the 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 mohar or dower agreed to be paid to her 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 women on her divorce, she or any one duly authorised by her may, on he 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 subsection (3) falls 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."

Section 4(1) "Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not remarried 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.

(5) 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 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."

Section 5 "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 Sections 125 to 128 of the Code of Criminal Procedure, 1973 (2 of 1974). and filed such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly, For the purposes 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."

Section 7 "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."

11. The Muslim Women (Protection of Rights on Divorce) Act. 1986 could be termed as one of the most controversial legislations of our times. Earlier a Constitutional Bench of the Supreme Court pronounced its landmark Judgment in the case of "Modh. Ahmed Khan v. Shah Bano Begum" which is popularly known as the "Shah Bano case" . In the case of "Bal Tahirav. All Hussain Fissall Chothia", and in the case of "Fuzfunbf v. K. Khader Valt, , the Supreme Court took a view that a divorced Muslim woman was entitled to apply for maintenance under Section 125 of the Criminal Procedure Code. In "Shah Bano case" the apex Court held that the law laid down in the case of "Bal Tahtra" and "Fuziunbi" was correctly decided and confirmed that a Muslim divorced woman is entitled to the benefits of Section 125 of the Criminal Procedure Code and that the said provision overrides the Personal Law, if there is any conflict between the two. The Supreme Court asserted and reaffirmed the supremacy of the Code over the personal law of the parties. The present Act that is the Muslim Women (Protection of Rights on Divorce) Act, 1986, M.W. Act, for short, which came in the wake of the Shah Bano case had been enacted apparently to undo the effect of the said Supreme Court Judgment in the Shah Bano case because the said decision in the Shah Bano case was strongly opposed by a sizeable section of the Muslim Community. On the other hand, the M.W. Act was enacted amidst protests from Women's organizations and Muslim Intelligentsia since the Act symbolized the loss of secular values in public policy. It was also felt that the Act deprived Muslim women of the rights granted under a secular provision, Section 125 of the Criminal procedure (Cr.PC) on the basis of religion alone and thus violated the Constitutional mandate of equality and that the Act was also a clear departure from the directive principle of enacting a uniform Civil Code. It was as though a crucial right of subsistence and survival had suddenly been

snatched away from an extremely vulnerable section, the divorced Muslim woman.

12. The law as stated in Shah Bano Case by the Supreme Court was : Section 125 is truly secular in character. It was enacted in order to provide the quick and summary remedy to a class of persons who are unable to maintain themselves. Such provisions, which are essentially of a prophylactic nature, cut across the barriers of religion. They may not supplant the personal law of the parties but, equally, the religion professed by the parties or the state of the personal law by which they are governed, cannot have any repercussion on the applicability of such laws unless, within the framework of the Constitution, their application is restricted to a defined category of religious groups or classes. The law 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 morality cannot be clubbed with religion.

13. 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 his divorced wife who is unable to maintain herself. The Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The statements as contained in text books on Muslim personal law 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. 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. The argument that according to the Muslim personal law, a husband's 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. 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.

14. Importantly, the law laid down by the apex Court in the case of Shah Bano has given a right to a divorced Muslim woman to claim maintenance under Section 125 of the Cr.PC against her former husband and there is nothing in the M.W, Act of 1986 which states that the provisions of Section 125 Cr.PC are not available to such a woman as soon as the safd Act was brought into force.

15. In this connection it would be pertinent to refer a case law decided by the apex Court in the case of S.S. Bola v. B.D. Sardana, . There it was held by the Hon'ble Supreme Court that if a decision is rendered by it or by the High Court, that decision can be made ineffective either by enacting a law which specifically does away with the effect of the said decision or by filing a review before the same Court and that till the time this is not done the law laid down cannot be undone or made nugatory. At page 3193 paragraph 155(G) of the said Judgment, the Supreme Court observed thus :--

(G) "The Legislature has no power to overrule the decision of a Constitutional Court by mere declaration, without properly and constitutionally removing the base upon which the previous decision was founded; nor has it the power to direct that the decision of the Court does not bind the State or its instrumentality".

16. In this connection I might specifically refer to paragraph 155(H) which runs thus:

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

17. It follows from the above observation of the apex Court that the law laid down by the Constitutional Court cannot be made ineffective or that it ceases to become good law unless the subsequently enacted statute by the Legislature or the Parliament specifically uses asphraseology nullifying the effect of the earlier law laid down by the constitutional Court. However, much it was said or meant to be said that the Parliament enacted the Act, that is the M.W. Act, to undo the effect of the Constitutional Bench decision--the Shah Bano case here that is--a conclusion cannot be arrived at that the law laid down by the Supreme Court has been actually undone by the enactment of the M.W. Act. As a matter of fact, the Preamble of the M.W. Act, 1986, does not. In any manner, Indicate that the said Act has been enacted to take away the effect of the law laid down by the Supreme Court in the case of Shah Bano. The Preamble rather states that it is an Act to protect the rights of Muslim divorced women and to provide for matters connected therewith or incidental thereto. The Act nowhere provides that the divorced Muslim woman is not entitled to file an application under Section 125 of the Code of Criminal Procedure independent of the new M.W. Act.

18. It is true that under Section 5 of the M.W. Act an option is left open to be governed by the provisions of Section 125 to 128 Cr.PC. But this looks like very hard to come by, Despite the new Act, many a woman approach the Courts with a claim for maintenance under Section 125 Cr.PC. One reason for this is that a significant number of women are not divorced at the time of approaching the Court for maintenance. These women are divorced after filing for maintenance as a retaliatory measure. The usual tendency of a husband who is called upon by the Courts to defend himself against this claim of maintenance, Irrespective of religious affiliations, is to exploit any legal loophole which will enable him to escape from his financial obligation towards his wife and children. The wife having been driven away and divorced by the husband, in utter distress and in desperate need of money and material to sustain herself and for that reason, requiring the speedy remedy of Section 125 Cr.PC, is not likely to get her embittered ex-husband easily to join hands for an affidavit or declaration that they prefer to be governed by the provisions of Section 125 to 128 Cr.PC as Section 5 of the M.W. Act enjoins, specially a husband who by all means is bent on evading the financial obligation.

19. Section 125 of the Code of Criminal Procedure is a measure of social justice and is specially enacted to protect women and children and falls within the Constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution. Section 125 is certainly meant to achieve a social purpose. The object is to prevent vagrancy and destitution. The right to maintenance conferred by this Section is a statutory right which the Legislature has created irrespective of nationality or creed of the parties. It was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. Section 125 Cr.PC, therefore, must stand Independently on its own strength, must sustain in its own substance.

20. Now, the Constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 was in challenge before the Supreme Court by way of a number of writ petitions under Article 32 of the Constitution of India. The verdict of the Hon'ble Supreme Court which came very recently in September, 2001 is now before us. It has since been reported in the Calcutta High Court Notes--Dantal Lattjl and Anr. v. Unton of India, 2001(3) CHN SC 87 (in part). We have also since obtained a reportable copy of the entire judgment of the apex Court. The Hon'ble Supreme Court has upheld the validity of the said Act.

21. It would be extremely Important and useful for our purpose to state some observations and findings of the Supreme Court in the above case, as under :--

(1) in interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family. In particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life. It is small solace to say that such a woman should be compensated in terms of money towards the livelihood arid such a relief which partakes basic rights to secure gender and social justice is universally recognised by persons belonging to all religions and it Js difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constrains. Bearing this aspect in mind, we have to interpret the provisions of the Act in question.

(ii) 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 Cr.PC 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.



(iii) The Judicial enforceability of the Muslim divorced woman's right to provision and maintenance under Section 3(1)(a) of the Act has been subjected to the condition of husband having sufficient means which, strictly speaking, is contrary to the principles of Muslim law as the liability to pay maintenance during the Iddat period is unconditional and cannot be circumscribed by the financial means of the husband. The purpose of the Act appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of iddat.

(iv) A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. At the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her cloths, and other articles. The expression "within" should be read as "during" or "for" and this cannot be done because words cannot be construed contrary to their meaning as the words "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere the Parliament has provided that reasonable and fair provision and maintenance is limited only for the Iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

(v) The Important section in the Act is Section 3 which provides that divorced woman is entitled to obtain from her former husband 'maintenance', 'provision' and 'mahr' and to recover from his possession her wedding presents and dowry and authorizes the Magistrate to order payment or restoration of these sums or properties. The crux of matter is that the 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. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations: (1) to make a 'reasonable and fair provision' for his divorced wife; and (2) provide 'maintenance' for her. The emphasis of this section is not on the nature or duration of any such 'provision' or 'maintenance', but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, 'within the iddat period'.

(vi) if the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both 'reasonable and fair provision' and 'maintenance' by paying these amounts in a lump sum to his wife.

in addition to having paid his wife's mahr and restored her dowry as per Sections 3(1)(c) and 3(1)(d) of the Act. Precisely, the point that arose for consideration in Shah Bano's 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 Cr.PC. 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 Bano's 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 Bano's case had provided anything at all by way of 'mata' to his divorced wife.

(vii) 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 decisions in Shah Bano's case, actually codifies the very rationale contained therein.

(viii) A comparison of these provisions with Section 125 Cr.PC 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 arguments 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 Cr.PC 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.

(ix) Even under the Act, the parties agreed that the provisions of Section 125 Cr.PC 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 Cr.PC would now be granted under the very Act itself. This being the position the Act cannot be held to be unconstitutional.

(x) in this case to find out the personal law of Muslims with regard to divorced women's rights, the starting point should be Shah Bano's case. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Bano's case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Bano's case. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts

in enacting the law will not be of much materiality.

(xi) if for any reason the interpretation placed, by us on the language of Sections 3(1)(a) and 4 of the Act is not acceptable, we will have to examine the effect of the provisions as they stand, that is, a Muslim woman will not be entitled to maintenance from her husband after the period of iddat once the Talaq is pronounced and, if at all, thereafter maintenance could only be recovered from the various persons mentioned in Section 4 or from the Wakf Board. Thus the provisions of the Act depriving the divorced Muslim women of such a right to maintenance from her husband and providing for her maintenance to be paid by the former husband only for the period of iddat and thereafter to make her run from pillar to post in search of her relatives one after the other and ultimately to knock at the doors of the Wakf Board does not appear to be reasonable and fair substitute of the provisions of Section 125 Cr.PC. Such deprivation of the divorced Muslim women of their right to maintenance from their former husbands under the beneficial provisions of the Code of Criminal Procedure which are otherwise available to all other women in India cannot be stated to have been effected by a reasonable, right, Just and fair law and, if these provisions are less beneficial than the provisions of Chapter IX of the Code of Criminal Procedure, a divorced Muslim woman has obviously been unreasonably discriminated and got out of the protection of the provisions of the general law as indicated under the Code which are available to Hindu, Buddhist, Jain, Parsi or Christian women or women belonging to any other community. The provisions *prima facie*, therefore, appear to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and also violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion.

(xii) it is well settled that on a rule of construction a given statute will become 'ultra vires' or 'unconstitutional' and, therefore, void, whereas another construction which is permissible the statute remains effective and operative the Court will prefer the latter on the ground that Legislature does not intend to enact unconstitutional laws. We think, the latter interpretation should be accepted and, therefore, the interpretation placed by us results in upholding the validity of the Act. It is well settled that when by appropriate reading of an enactment the validity of the Act can be upheld, such interpretation is accepted by Courts and not the other way.

22. For our purpose. In finding answers to the points of determination in our instant case, in respect of one of them viz. whether the claim of maintenance is limited only upto the period of iddat, the verdict of the Supreme Court in the aforesaid case is clear. It is that 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) of the Act and that law 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.

23. Yet on another point as to the rights of the children, there is no dispute that so far as the rights of the children are concerned, for claiming maintenance against the father, they are governed by the provisions of Section 125 of Cr PC and the provisions of the M.W. Act in any manner do not come in their way from claiming such a right. This position of law has been well recognized by the Supreme

Court in the case of Noor Saba Khatoon v. Modh. Quasim, .

24. Now, with regard to the most important point whether the enactment of the M.W. Act and the provisions contained therein has rendered the Impugned order of the learned Magistrate under Section 125 Cr.PC a nullity, I have essayed to discuss some propositions of law which tend to lean in favour of the existence and operation of Section 125 Cr.PC in spite of the new M.W. Act being already there. Having now come across with the latest landmark Judgment of the Hon'ble Supreme Court by its Constitutional Bench and having carefully tried to go through the observations and findings by the apex Court, we possibly have still enough reason to maintain that the position of Section 125 Cr.PC has not been materially changed.

25. In this Judgment of the Supreme Court, it is no doubt that the Hon'ble Supreme Court has made a comparison of the provisions of the M.W. Act with Section 125 Cr.PC and had said that the requirement, purpose, object and scope of Section 125 Cr.PC are satisfied. The Supreme Court had further observed that even under the Act, that is the M.W. Act, the parties agreed that the provisions of Section 125 Cr.PC would still be attracted. But the point, to my mind, is, these observations were only in connection with the finding, constitutional validity of the provision of the M.W. Act itself which was challenged in the writ petitions before the Supreme Court under Articles 32 of the Constitution and that was precisely the only focal point for determination before the Hon'ble Supreme Court. Thus the Supreme Court observed in para 20 of the aforesaid Judgment is follows:--

"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. The above observations of the Hon'ble Supreme Court possibly allow us to highlight a few more propositions of law in support of my stance. In this connection I am Inclined to follow the lines of decisions in Arab Ahemadhia Abdulla and etc. v. Arab Bait Mohmuna Satyadbhal and Ors. etc., , which incidentally, was also accepted by the Supreme Court in the above decision of the Constitution Bench. In an earlier single Bench decision by this Court itself (Basudev Panlgrahi, J.) in the case of Shakila Parveen v. Holder All @ Halder and Anr., 2000(1) CLJ 608, the above decision of the Gujarat High Court in Arab Ahemadhia's case was followed almost in its entirety. In the said case, the learned single Judge of the Gujarat High Court (M.B. Shah, J.) as then he was) held that by the enactment of Muslim women (Protection of Rights on Divorce) Act, 1986, the order passed by Magistrate under Section 125 of Cr.PC ordering Muslim husband to pay maintenance to his divorced wife would not be non-est. There is no section in the Act which nullities the orders passed by the Magistrate under Section 125 of the Cr.PC. Further, once the order under Section 125 of the Cr.PC granting maintenance to the divorced woman is passed, then her rights are crystalized and she gets vested right to recover maintenance from her former husband. That vested right is not taken away by the Parliament by providing any provision in the Act and that there was no Inconsistency between the provisions of the said Act and the provisions of Sections 125 to 128 of the Code of Criminal Procedure. The conclusion is that the provisions of M.W. Act as made available to the

divorced muslim woman are in addition (emphasis mine) to the claims available to them under Section 125 of the Code of Criminal Procedure.

27. By the Impugned order dated 17.2.2001, the learned Chief Judicial Magistrate had granted maintenance of Rs. 800/- per month for the wife and Rs. 400/- per month for her minor son under Section 125 Cr.PC for adequate reasons on an appreciation of the evidence on record. The Impugned order does not suffer from any legal infirmity. Even if the claimant is a divorced wife, she had still the right to claim maintenance under Section 125 Cr.PC. The provisions of the M.W. Act in the Instant case do not come in her way to claim maintenance under Section 125 Cr.PC from her former husband i.e. the present applicant. As already said, the provisions of the M.W. Act as made available to the divorced Muslim woman are in addition to the claims available to them under Section 125 Cr.PC. Moreover, it might be borne in mind that Section 125 Cr.PC provides for a speedy and summary remedy (emphasis mine) to the indigent wife and children driven to destitution, the prevention of which is the whole purpose of the welfare legislation. In a given situation, desperate that it is, if the destitute woman in dire straits Instead of taking the long, winding and difficult path in pursuit of Justice under the M.W. Act, goes straightway by Section 125 of the Code of Criminal Procedure which promises speedy and summary remedy and can thereby secure for her the basic right to life and a life with dignity, then I believe, there is no stopping her--morally as well as legally.

28. The impugned order of the learned Magistrate calls for no Interference. The revision application, having had no merits is accordingly dismissed.

Let an urgent xerox certified copy of this order, if applied for, be given to the learned Advocates within seven days from the date of such application.