Kerala High Court
Kunhimohammed vs Ayishakutty on 17 March, 2010

IN THE HIGH COURT OF KERALA AT ERNAKULAM

RPFC.No. 53 of 2006()

1. KUNHIMOHAMMED, S/O.MAMMIKKANAKATH
... Petitioner

Vs

1. AYISHAKUTTY, D/O.ALAVI, ARAKKALAKATH
... Respondent

For Petitioner :SRI.K.P.SUDHEER

For Respondent :SRI.K.P.MUJEEB

The Hon'ble MR. Justice R.BASANT
The Hon'ble MRS. Justice M.C.HARI RANI

Dated :17/03/2010

O R D E R

R. BASANT &
M.C. HARI RANI, JJ.

R.P.(FC) No. 53 of 2006

Dated this the 17th day of March, 2010

ORDER

Basant,J.

(i) Does a divorce valid under the Muslim Law ipso facto extinguish the liability of the husband under Sec.125 of the Code of Criminal Procedure (hereinafter referred to as `the Code') to pay maintenance to his wife even when it is admitted or proved that amounts due under the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as `the Act') have not been paid?

(ii) Is unilateral pronouncement of divorce without offering any reason and without any attempt for reconciliation by the arbiters as mandated by Ayat 35 of Sura IV of the Holy Quran valid under the Muslim Law after the decision of the Supreme Court in Shamim Ara v. State of U.P. (2002 (3) KLT 537 SC)?

2. These two questions of crucial relevance and contextual significance arise for consideration in this RP(FC) which has been referred to a Division Bench under Sec.3 of the Kerala High Court Act by a Single Judge (one of us). The learned counsel for the contestants have been heard in detail. As it was felt that larger questions of public importance are involved, we had requested the learned counsel who are willing, to offer assistance to us as amicus curiae and accordingly M/s M.P.M. Aslam, K.I. Mayankutty Mather, P.K. Ibrahim, C.S. Dias, Rajith and V.G. Arun have offered assistance to us. We record our appreciation for the valuable assistance rendered to us by the learned counsel appearing for the parties as also the learned counsel who rendered assistance to us as amicus curiae.

3. The relevant facts can be summarised in a nutshell. Marriage between the petitioner/husband and respondent/wife is admitted. They are referred to hereinafter as the `husband and wife'. There was acrimony in their matrimony and as early as in the early eighties the learned Judicial Magistrate of the First Class, Tirur, in M.C.No.6/81 had directed payment of maintenance at the rate of Rs.60/- per mensem to the respondent/wife. That order was passed on 18/3/82. We are not adverting to the claim of the children as the same has now become irrelevant.

4. Long later vide order dated 16/5/88, which was passed on the basis of an agreement between the parties, the claim for enhancement was allowed under Sec.127 of the Code and the husband was directed to pay maintenance at the rate of Rs.80/- per mensem to the wife.

5. Subsequently in 1998 another application under Sec.127 of the Code was filed claiming further enhancement of maintenance. That petition was transferred to the Family Court, Malappuram in accordance with the provisions of the Family Courts Act, 1984 and by order dated 19/9/01 in M.C.No.870/99 the learned Judge of the Family Court granted enhancement of maintenance. Accordingly, an amount of Rs.500/- per mensem is payable thereafter by the husband to the wife.

6. The maintenance amount for the period from 23/4/03 to 24/4/04 (Rs.500/- x 12 months = Rs.6,000/-) remained unpaid and this obliged the wife to file C.M.P.No.1006/04 on 29/4/04 for recovery of the amount under Sec.128 of the Code. In that petition, a counter statement was filed by the husband raising the contention that he had pronounced talaq on 8/12/03. Admittedly, it was a unilateral pronouncement of talaq. There is no contention that any attempt for reconciliation by the arbiters, in accordance with the mandate of Ayat 35 of Sura IV, had taken place. It is also admitted that no cause was shown in the communication of talaq to justify the pronouncement of talaq. Ext.D1, it is claimed by the petitioner, was sent to the respondent. It was not served and was returned with an endorsement "Not known. Returned to the sender". Ext.D2 is the copy of the letter allegedly sent to the Khasi and Ext.D3 is the acknowledgment received from the Khasi of the local Mosque for receipt of the intimation of talaq by him.

7. The learned Judge of the Family Court, on an anxious consideration of all the relevant inputs, came to the conclusion that the alleged divorce has not been proved satisfactorily. No reasonable cause having been shown in the communication of talaq and no attempts for reconciliation by the arbiters having preceded the pronouncement of talaq, the alleged talaq is not valid and cannot be recognised as valid in the light of the dictum in Shamim Ara (supra), held the learned Judge of the Family Court. It was hence held that the order directing payment of enhanced maintenance is liable to be enforced. Accordingly, Crl.M.P.No.1006/04 was allowed as per the impugned order.

8. The learned counsel for the revision petitioner Sri. K.P. Sudheer contends that under the Muslim Law, a husband can exercise his prerogative to terminate the matrimony by unilateral pronouncement of talaq without assigning any reason. The Muslim Law does not oblige him to reveal reasons. In fact, the humanist stipulations in the Muslim Law do not oblige him, and do actually discourage him, from revealing the reasons. Non- revealing of reasons cannot, at any rate, be held to vitiate the divorce effected. It is submitted that the husband has valid reasons to divorce his wife. Actually the spouses were residing separately from early eighties and it was only reasonable and just to invoke the power to terminate such a dead matrimony which remains only in the eye of law and not actually. The learned counsel further contends that the Muslim Personal Law - the Quranic injunctions, the Sunnahs or the Ijtihads do not catalogue what reasons are reasonable and what reasons are not reasonable. The legislature or the courts have not intervened to prescribe what reasons can be reckoned as reasonable and what as not reasonable. The learned counsel hence argues that reasonability of the causes for divorce is not justiciable. It would be dangerous and impermissible to leave it to the individual Judges without guidelines to decide what causes would be reasonable and what causes will not be reasonable. In these circumstances, the dictum in Shamim Ara (supra) properly understood cannot lead a court to the conclusion that reasonableness of the substantive cause of divorce is justiciable, argues the counsel. Consequently, the husband is not liable to reveal reasons or justify and substantiate those reasons.

9. The learned counsel for the husband then contends that reconciliation by the arbiters, though laudable, is only optional and cannot be reckoned as a condition precedent for a valid divorce. In this view of the matter, the impugned order holding the divorce effected under Exts.D1 to D3 invalid or unacceptable cannot be held to be correct, argues counsel.

10. The learned counsel for the wife, on the contrary, contends that even assuming that the marriage has been validly terminated, an order directing payment of maintenance under Sec.125 of the Code which was passed long prior to the commencement of the Act cannot be held to lapse by the mere enactment of the Act. Not the enactment of the Act, not even the passing of an order for payment of amounts under Sec.3 of the Act, but the actual payment of the amount payable under the Act - a piece of statutory Personal Law, will alone extinguish the liability to pay maintenance under Sec.125 of the Code. In this view of the matter, the respondent contends that even if the divorce is proved and is valid, that cannot extinguish the rights under Sec.125 of the Code and, at any rate, the order passed long earlier under Sec.125 of the Code duly modified under Sec.127 of the Code will be enforcible even after such divorce.

11. It is in the light of the above contentions, that the two questions referred above arise for consideration in this case. We shall initially consider Question No.(i).

12. Question No.(i): As stated earlier, the contention of the petitioner is that a valid divorce would extinguish the right of the divorced Muslim woman to claim maintenance under Sec.125 of the Code. Reference to this question has already been made by one of us in the decision in Aboobacker v. Rahiyanath (2008 (3) KLT 482).

13. The journey must start with the provisions of Sec.488 in the 1898 Code. That was followed by Sec.125 of the present Code. The Code of Criminal Procedure 1898 and 1973 and Sec.488/125 therein are pieces of secular law which oblige all Indian husbands/parents/children having sufficient means to maintain their wives, children and parents who are unable to maintain themselves. Religious identity of the individual has absolutely no bearing or significance on the liability. The purpose of the law is to prevent vagrancy and thus avoid the consequent threat to peace, tranquility and law and order in the society. Your religious identity is totally irrelevant while applying the provisions of Sec.488/125 of the Code. Though there was no similar provision in Sec.488 prior to the amendment, Sec.125 of the 1973 Code obliged the husbands to pay maintenance not only to their wives in current matrimony, but also their divorced wives.

14. The provisions of Sec.488/125, it is now trite beyond pale of controversy, are applicable to all Indians including those who owe allegiance to Islam. By reference to the provisions of the Muslim Personal Law (Shariat) Application Act, 1937 (for short `the Shariat Act') the liability cannot be avoided at all. In this context, we extract Sec.2 below:

> "Application of Personal Law to Muslims.-- Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, illa, zihar, lian khula and Mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakhs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."
>
> (emphasis supplied) It is eloquently clear from the language employed in the said Act that a statutory stipulation in conflict with the Muslim Personal Law (Shariat) shall prevail over the Muslim Personal Law (Shariat). The non-obstante clause applies only to custom or usage to the contrary. Stipulations in the Code under Sec.125 are therefore applicable to all Indians including the followers of Islam. Muslim husbands are also made liable to pay maintenance not only to their wives in existing matrimony but also their divorced wives.

15. However, it is worthwhile to note that prior to the passing of the amended Code in 1973, Sec.127(3)(b) was introduced into the Code whereby it was declared that receipt of the whole of the

sum which, under any customary or personal law applicable to the parties, was payable on such divorce would absolve the husband of his liability to pay maintenance to his divorced wife. This provision - Sec.127(3)(b) found its way into the amended Code at some point of time before its final acceptance and it is transparent that it is only the followers of Islam who are entitled to the benefit of that provision. Our attention has not been drawn to the customary or personal law applicable to any others which mandates payment of any such amounts on divorce. A Muslim husband can thus claim under the 1973 Code, that his liability under Sec.125 must stand extinguished if he establishes that he has discharged the liability to pay amounts under the customary or personal laws applicable to him while/after effecting the divorce.

16. A spate of litigations followed on the ambit and scope as well as the nature and quantum of the amounts payable under Sec.127(3)(b) of the Code which would extinguish the liability to pay maintenance under Sec.125 of the Code. Reference can advantageously be made to the decisions of the Supreme Court in Bai Tahira v. Ali Hussain (AIR 1979 SC 362) and Fuzlunbi v. Khader Vali (AIR 1980 SC 1730). It was held unambiguously that what is payable under Sec.127(3)(b) of the Code, though not a mathematical equivalent, must be a reasonable substitute for the liability to maintain the divorced wife under Sec.125 Cr.P.C. The object of Sec.127(3)(b) of the Code, it was clarified in those decisions, is not to bail out a Muslim husband from his liability to pay maintenance under Sec.125 of the Code; but only to ensure that a devout Muslim husband who has already discharged such liability to provide for his divorced wife, in accordance with his personal law, is not obliged to pay further amounts again under Sec.125 of the Code. These decisions of the Supreme Court declare that the purpose was only to ensure that no double benefit is claimed by the divorced wife.

17. Though it appeared that the law was settled beyond controversy for some period of time, a two Judges Bench of the Supreme Court made a reference to a larger Bench and the Supreme Court in what is now well known as the Sha Bano's case (Mohd. Ahmed Khan v. Shah Bano Begum & Others (AIR 1985 SC 945)) held that the payment under Sec.127(3)(b) of the Code must be of such an amount - whether the translation of `Mata' in Ayat 241 in Sura II be maintenance, gift or provision, which will be a reasonable substitute for the duty to maintain the divorced wife under Sec.125 of the Code.

18. This pronouncement of the Supreme Court led to a furore across the length and breadth of India. There was criticism that the interpretation of 'Mata' as maintenance by the Supreme Court is not correct and there was no obligation for the Muslim husband to pay any amount as maintenance under the personal and customary laws to claim extinguishment of liability under Sec.127(3)(b) of the Code. Mata had to be paid. There was no controversy on that at all. What ought to be the quantum of payment due as Mata was the only controversy.

19. The Act was born in this legal and factual background. The purpose of the statute was very clear. What is the amount payable under Sec.127(3)(b) of the Code under the personal and customary law of the Muslims to claim absolution from liability under Sec.125 of the Code had to be clarified. The statement of objects and reasons of the Act makes it clear that the Parliament had only seized the opportunity to specify the rights which a divorced woman is entitled to at the time of divorce to protect her interest. We would like to clarify that in Shah Bano (supra) the controversy was only

about the amount payable under Sec.127(3)(b) of the Code to justify the claim for absolution of the liability under Sec.125 of the Code. There was no controversy at all as to whether Sec.125 of the Code was applicable to the divorced Muslim wife or not. What payment was to be made under Sec.127(3)(b) of the Code by a divorced Muslim husband to his divorced Muslim wife to avoid liability under Sec.125 of the Code was the only question in Shah Bano (supra). The Parliament seized the opportunity to authentically resolve that controversy.

20. A plain and simple reading of Sec.2 of the Shariat Act, Secs.125 and 127(3)(b) of the Code, the dictum in Bai Tahira; Fuzlunbi and Shah Bano (supra) and the provisions of the Act makes the following crystal clear:

(i) The liability under Sec.125 of the Code is there on all Indians irrespective of their religious identity. The provision in the Code about payment of maintenance to divorced wives is a secular stipulation applicable universally to all Indians whatever their religious identity.

(ii) That liability under Sec.125 of the Code can be extinguished by making payment of the amounts payable under the customary and personal law applicable to a particular community. Persons owing allegiance to Islam are the only persons who can take advantage of that provision. They can claim extinguishment of their liability under Sec.125 of the Code on proof that the divorced wife has received such amounts. On proof of such payment the liability under Sec.125 of the Code of a divorced husband shall stand extinguished.

(iii) There was a dispute as to what are the amounts payable under the Muslim Personal Law as Mata at the time of divorce. The Parliament intervened and enacted the Act which in Sec.3 stipulated the amounts that are payable.

(iv) Once the amounts are paid, the liability under Sec.125 of the Code which has already crystalled into an order shall also stand extinguished. Not the enactment of the Act; not the passing of the order under Sec.3 of the Act; but only the actual payment of the amounts payable under Sec.3 of the Act shall extinguish the liability under Sec.125 Cr.P.C. in accordance with Sec.127(3)(b) of the Code.

21. The constitutionality of the Act was challenged before another Constitution Bench of the Supreme Court and the Bench as per the decision in Danial Latifi & Another v. Union of India ((2001) 7 SCC 740) held the statute to be legally and constitutionally valid. To us, in these circumstances, it appears to be evident that the Act has only specified the amounts that will be payable under Sec.127(3)(b) of the Code under the Personal/Customary Law to justify the claim for extinguishment of the liability under Sec.125 of the Code. That amount can be claimed in accordance with the provisions of the Act also.

22. A contention is raised that this approach is not correct. It is contended that with the enactment of the Act, Sec.125 of the Code in its application to Muslim divorced husbands and wives is repealed/abrogated impliedly. The divorced Muslim woman cannot claim any rights under Sec.125 of the Code, argues the learned counsel for the petitioner vehemently. Admittedly, there is no express extinguishment of such right of the divorced Muslim wife under Sec.125 Cr.P.C. Is there

implied extinguishment of the right of the divorced Muslim wife under Sec.125 of the Code, by enactment of the Act? This appears to be the crucial question to be considered by us.

23. One who surveys the provisions of Sec.125 of the Code must certainly take note of the fact that the Muslim husband, unlike the husbands in any other religion, has a unilateral right to divorce his wife without intervention of the court. Considering the vulnerability of such a wife, the Act has been enacted to confer on the divorced Muslim wife higher and superior rights than her counter parts in other religions. In this context we need only refer with approval to what one of us has held in Aboobacker v. Rahiyanath (2008 (3) KLT 482) in paragraphs 30 and 31. Undoubtedly, the Muslim divorced wife has a higher right than her counter parts in other religions. The comparison of the nature of rights of the divorced wife under Sec.125 of the Code and the Act would clearly show that a larger and superior right is available to the Muslim wife who faces the vulnerability of arbitrary and unilateral divorce at the hands of her husband without intervention of any court. Even when she is able to maintain herself, she can claim amounts under Sec.3 of the Act. While the other divorced wives shall get the maintenance amounts only in monthly doles, the Muslim divorced wife can get the capitalised payment of amounts under Sec.3 of the Act. Even a millionaire wife can claim amounts from her billionaire husband, it is trite. While the remarriage puts an end to the claim of other divorced wives, the Muslim divorced wife on re-marriage can keep the capitalised amount with herself with no liability to return the same. Thus viewed from any angle, the Muslim divorced wife under her personal law (i.e., the Act) has a larger and superior rights than what her counter parts of other religions have under Sec.125 of the Code.

24. It is then that the question comes up whether the rights under the Act to receive amounts is additional and supplemental to the rights under Sec.125 of the Code. The contention that we have to consider is whether the Act extinguishes the right of the divorced Muslim wife under Sec.125 of the Code.

25. The legislature was fully aware that Muslim divorced wives have the rights under Sec.125 of the Code. Fully conscious of the existence of such rights, the Act has been enacted. There is not the semblance of an indication in the Act that the right of the Muslim divorced wife under Sec.125 of the Code shall stand extinguished. Extinguishment of an existing right is not to be assumed or presumed lightly. If the Parliament had the intention to extinguish such rights of the Muslim divorced wife, it would only be reasonable to expect the Parliament to speak in definite and specific language about such extinguishment. The Parliament must have been aware that by 1986 when the Act was enacted, a number of orders must have been passed in favour of divorced Muslim wives from 1973 under Sec.125 of the Code. It is crucial to note that in spite of Sec.6(c) of the General Clauses Act, the Parliament did not choose to enact a provision extinguishing the rights of the divorced woman under Sec.125 of the Code or to extinguish her rights claimable under orders passed already under Sec.125 of the Code. The message appears to us to be loud and clear. No extinguishment of existing rights was intended or conceived. Both rights - under Sec.125 of the Code and Sec.3 of the Act were conferred on the divorced Muslim woman. She has the right to choose. Normally, any Muslim divorced wife in her senses was likely to choose only the larger and superior rights under the Act. If she chooses to claim amounts under Sec.3 of the Act and if such payments were actually made either voluntarily or in response to an order of court, such payment of the

amount shall extinguish the liability under Sec.127(3)(b) of the Code; not earlier. The mere enactment of the Act and Sec.3 therein cannot satisfy the Muslim woman. Until she gets the larger amount under the Act, her right under Sec.125 must remain live. Implied repeal of Sec.125 of the Code in its application to the Muslim wives cannot be lightly inferred. It is crucial that even after the enactment of the Act, Sec.127(3)(b) of the Code continues on the statute book. Sec.125 may be applicable to the wives including divorced wives of other communities. That may justify the Parliament not repealing Sec.125 in its application to Muslim wives specifically. But certainly that cannot be said about Sec.127(3)(b) of the Code. No instance has been pointed out to us, other than persons belonging to the Muslim faith, to whom Sec.127(3)(b) of the Code can apply. The fact that Sec.127(3)(b) was not repealed consequent to the enactment of the Act is again a crucial indication to conclude that the Parliament did not intend that the rights of the divorced Muslim woman under Sec.125 of the Code must be extinguished. The theory of implied repeal is convincingly contra indicated by the act of Parliament not repealing Sec.127(3)(b) of the Code.

26. The section starts with the words:

> "Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to".

It is argued that the non-obstante clause has the effect of repeal of the provisions of Sec.125 of the Code in its application to the divorced Muslim woman. We are unable to agree. A non- obstante clause cannot readily and instantly be assumed to supersede or extinguish the other existing rights. Very strong indications must be available in the specific provisions and the scheme of the Act to infer such supersession and implied repeal. The non-obstante clause in Sec.3 to our mind only means that Sec.125 (in its application to Muslim divorced women) may have conferred on them rights to claim maintenance; but notwithstanding that, such woman shall be entitled to the following rights if she is a divorced Muslim woman. The mere fact that a non-obstante clause has been included cannot, according to us, in the facts and circumstances, lead to the conclusion that there is implied repeal of the right of the Muslim divorced wife under Sec.125 of the Code.

27. The special excludes the general and therefore Sec.3 of the Act must be held to extinguish the rights of the Muslim divorced woman under Sec.125 of the Code, it is urged. We are unable to agree. Under their personal laws wife belonging to other religions may also be entitled for permanent alimony etc. This does not admittedly take away their rights under Sec.125 of the Code. The mere fact that the personal law provides for certain claims on divorce cannot ipso facto lead to the conclusion that to such persons provisions of Sec.125 of the Code providing for maintenance to the divorced wives will not apply. The stipulation in the personal law has a totally different purpose and object to be achieved. The motivations under Sec.125 of the Code are totally different from the stipulations in the personal law applicable to different religious groups;. Prevention of vagrancy is the primary and dominant rationale of Sec.125 of the Code. That stipulation is in the domain/zone of secular universal law applicable to all Indians. Inability to maintain oneself is the manthra that unlocks the lock of the secular Sec.125; whereas Sec.3 of the Act has no reference to ability or inability to maintain oneself. The domains of the two statutes - Code of 1973 and the Act, are thus entirely different. According to us, it would be improper to reckon the Act as special as to exclude

the general code. Inasmuch as they belong to two totally different zones/domains, the theory that special excludes the general cannot certainly apply and that theory cannot justify the argument that the Act extinguishes the rights of the Muslim divorced wife under Sec.125 of the Code. A divorced Muslim wife unable to maintain herself must survive to claim other rights under the personal law. Sec.125 provides relief to her only if she is unable to maintain herself.

28. We further see that both the stipulations can harmoniously co-exist A divorcee husband, within the period of Iddat has the option to pay amounts due under Sec.3 of the Act. If he has made such payments, he can claim absolution from the liability under Sec.125 of the Code with the help of the provisions under Sec.127(3)(b) of the Code. In such a situation Sec.127(3)(b) of the Code must telescope as a proviso into the main section i.e., Sec.125 of the Code. Sec.127(3)(b) of the Code can then be read as a proviso to Sec.125 Cr.P.C. No court worth its salt is likely to pass an order under Sec.125 of the Code, if on the date of passing such order it is liable to be cancelled/vacated under Sec.127(3)(b) of the Code. Until the amounts payable under Sec.3 of the Act are paid, the Muslim divorced wife, to effectively implement the scheme of Sec.125 of the Code must be held to be entitled to claim maintainance under Sec.125 of the Code. If the amounts under Sec.3 of the Act are paid, that would lead to absolution from liability under Sec.125 of the Code by the operation of Sec.127(3)(b) of the Code. Not before such actual payment, can a Muslim divorced husband put up Sec.3 of the Act as a shield against the claim under Sec.125 of the Code. We note that both provisions can hence simultaneously and harmoniously co-exist. This contention, we agree, effectively repels the argument of implied repeal on the theory of the special overriding the general. If the two provisions can co- exist, we are of the view that such an interpretation must certainly be accepted which shall not deny the target group of the benefit of either provision. The target group/beneficiary under Sec.125 Cr.P.C. is the divorced Muslim women who are unable to maintain themselves and unless driven to the wall we should not to accept an interpretation which would deprive the divorcee in distress of her right to efficacious remedy under Sec.125 Cr.P.C. until she claims and obtains the larger and superior relief under Sec.3 of the Act. Such an interpretation shall facilitate the survival on a month to month basis of the neglected divorcee until she gets the amount under Sec.3 of the Act and shall serve the laudable motivation of the legislature in favour of such helpless women.

29. An argument is advanced that Sec.5 of the Act speaks of an option and this option that is given to the parties must necessarily lead to the conclusion that except under Sec.5 of the Act that option is not available. We do not find it possible to accept this argument. Sec.5 speaks of a wife having already chosen to file an application under Sec.3. If such an application has been filed by her claiming larger and superior rights, her former husband can prevail upon her and persuade her to claim the lesser rights under Sec.125 of the Code. The option under Sec.5 is available not prior to the filing of Sec.3 but only after the filing of the application under Sec.3. It is only an enabling provision which can operate to the advantage of the husband to enable him to prevail upon his wife to settle for the lesser relief under Sec.125 of the Code. She has both options. She having embarked on the latter option under the Act, her divorced husband can prevail upon her to fall back on the former option under Sec.125 Cr.P.C. This, according to us, is the only way to understand the provisions of Sec.5 of the Act. In the absence of a provision extinguishing the liability of the divorced husband under Sec.125 of the Code, we are unable to agree that Sec.5 must lead to an assumption of implied extinguishment.

30. We now come to Sec.7 which is also put forward as a reason to conclude that there has been implied extinguishment of the right of the Muslim divorced wife under Sec.125 of the Code to claim maintenance. To us, it appears that there was an underlying assumption that all divorced Muslim wives would prefer to make a claim under Sec.3 of the Act and not under Sec.125 of the Code. It is this assumption that led to Sec.7 of the Act. The Parliament wanted the divorced wives to be relieved of the obligation/responsibility to file a fresh application under Sec.3 of the Act and declared that all pending applications under Secs.125 and 127 of the Code shall be reckoned as applications under Sec.3 subject to Sec.5 of the Act. This transitional provision cannot also justifiably lead to the conclusion that there has been extinguishment of the right of the divorced woman to claim maintenance under Sec.125 of the Code.

31. Sec.4 of the Act is also of no help to the petitioner. Sec.4 speaks of a situation where the divorced Muslim woman, who has received the amounts due from her husband under Sec.3 finds herself unable to maintain herself later. Other divorced wives until re-marriage or until their death can look upto their divorced husbands to maintain them. Vagrancy can thus be avoided. The divorced Muslim woman who has received amounts under Sec.3 may still find the wolf at the door later. She will not have her divorced husband to help her to fight the wolf. Her legal heirs who may have inherited her property if she had any and in their absence the Wakf Boards are statutorily mandated under Sec.4 of the Act to offer her assistance to keep body and soul together. This stipulation in the statute only shows the anxiety of the legislature to avoid possible vagrancy and misfortune later. That has no bearing on the liability of the divorced husband to pay maintenance, if he has not actually paid the amounts under Sec.3 of the Act, and entitled himself for absolution under Sec.127(3)(b) of the Code.

32. A contention is raised that the observations of the Supreme Court in Danial Latifi (supra) must also lead to the conclusion that there has been extinguishment of existing rights under Sec.125 of the Code in favour of the divorced Muslim woman. We have been taken through Danial Latifi (supra) in detail. We are unable to find any specific advertence by the Constitution Bench to this aspect of the matter. To us, it appears that the Constitution Bench was only considering the challenge against the constitutionality of the Act and in the course of such discussions, the Supreme Court had to consider whether the extinguishment of the rights under Sec.125 of the Code by resort to the provisions of Sec.127(3)(b) of the Code (by making payments of the amounts under Sec.3 of the Act) would justify the deprivation of rights of the divorced woman under Sec.125 of the Code. It is only in that context that we find discussions in Danial Latifi (supra). The specific question whether rights of the divorced Muslim woman to claim maintenance under Sec.125 of the Code has been extinguished and whether such right is still available to her under Sec.125 of the Code did not arise for consideration in Danial Latifi (supra) and was not actually considered by the Supreme Court.

33. The learned counsel for the petitioner by relying on the two decisions of this Court - both by Single Judge Benches - Saidalavi v. Safia (1987 (2) KLT 271) & Abdul Gafoor Kunju v. Pathumma Beevi (1989 (1) KLT 337) contends that contra view has already been taken by this Court. We have gone through these decisions. We are unable to accept the dictum in those decisions. Detailed reasons are given only in Abdul Gafoor Kunju (supra). The learned single Judge appears to have founded his conclusion on the theory of implied repeal on the basis of the history of the legislation,

the non-obstante clause as also Secs.5 and 7 of the Act. We have already adverted to these aspects and we are of the view that the reasons given by the learned single Judge cannot justify the conclusion that there has been implied extinguishment of the right of the divorced Muslim woman to claim maintenance under Sec.125 of the Code. Those decisions shall stand overruled.

34. Our attention has been drawn to the decisions of the other High Courts either way on this aspect. We are of the opinion that it is not necessary to advert to those decisions in detail. We hold so because we find that a two Judge Bench of the Supreme Court in Sabana Bano v. Imran Khan (AIR 2010 SC 305) has taken the view unambiguously that a petition under Sec.125 of the Code by a divorced Muslim wife will be maintainable notwithstanding the enactment of the Act. We need only refer to the dictum which appears in para-30 in the following words:

> "30. It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of period of iddat also, as long as she does not remarry."

35. The learned counsel argues that the Supreme Court appears to have wrongly concluded that the expression "relatives of the woman" in Sec.4 of the Act includes the divorced husband. It would be puerile and unreasonable for us to make such a grossly unacceptable assumption. The learned counsel further argues that the Hon'ble Supreme Court appears to have not considered the question that a claim under Sec.125 of the Code is cognizable by a Family Court not under the provisions of Sec.7 (1) but only under the provisions of Sec.7(2) of the Family Courts Act. The learned counsel further argues that the Hon'ble Supreme Court does not also appear to have taken note of the fact that a claim under Sec.3 of the Act is not maintainable before the Family Court at all inasmuch as a Magistrate and not a civil court is the authority to decide the claims under Sec.3 of the Act and Sec.7(1) can have no relevance while considering a claim under the Act. We are unable to agree with the learned counsel that the Supreme Court has made any such wrong assumption in laying down the dictum in para-30 extracted above. It is of course true that the Supreme Court had not gone into the question in detail as to whether there is implied extinguishment of the right of the divorced woman under Sec.125 of the Code consequent to the enactment of the Act. But the dictum of the Supreme Court must be held to occupy the field and it is impermissible to pick holes in the dictum by advancing the argument that the Supreme Court has not considered certain aspects. The dictum in para-30 above completely supports our conclusion that a claim under Sec.125 of the Code by a divorced Muslim woman who has not remarried is perfectly maintainable before the Family Court under Sec.7(2) of the Family Courts Act. The theory of implied extinguishment cannot help such a divorced husband to resist such plea. If she remarries or receives the amounts payable under Sec.3 of the Act, her rights would get extinguished by the play of Sec.127(3) of the Code.

36. We do, in these circumstances, take the view that there is no extinguishment of the rights of the divorced woman under Sec.125 of the Code by the mere enactment of the Act. Consequently, the wife herein is entitled to have the order under Sec.125 of the Code (duly modified under Sec.127 Cr.P.C.) enforced under Sec.128 of the Code. The decision of the Supreme Court in Sabana Bano (supra) holds the field convincingly. The petitioner will be liable to continue to make such payment until he discharges the liability under Sec.3 of the Act and proves to the satisfaction of the court that

such payment has been made and consequently the order under Sec.125 of the Cr.P.C. is liable to be vacated under Sec.127(3)(b) of the Code. We overrule the decisions in Saidalavi v. Safia (1987 (2) KLT

271) & Abdul Gafoor Kunju v. Pathumma Beevi (1989 (1) KLT 337) to the extent that they hold that there is implied extinguishment of the right of the divorced Muslim woman under Sec.125 of the Code by the enactment of the Act.

37. In the light of the view that we have taken above, we do not think it necessary to consider the question whether a crystallized liability under Sec.125 of the Code which is enforcible in the form of an order that has been passed prior to the enactment of the Act would survive in view of Sec.6(c) of the General Clauses Act. We extract Sec.6(c) of the General Clauses Act below:

"6. Effect of repeal.-- Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not--

(a) x x x x x x x

(b) x x x x x x x

(c) affect any right, privilege,

obligation or liability acquired, accrued or incurred under any enactment so repealed;

or

(d) x x x x x x

(e) x x x x x x and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

We need only mention that our attention has been drawn to two decisions of the Calcutta High Court in Motiar Rahaman v. Sabina Khatun and another (II (1994) DMC 57) and S.K. Abubakkar v. Mst. Ohidunneessa Bibi (1992 (I) C.H.N. 538). Inasmuch as we hold that there is no extinguishment of the right under Sec.125 of the Code it is unnecessary to go into that question again in any greater detail.

38. We think it is necessary to advert to two aspects which have been brought to our notice by the learned counsel for the petitioner Sri.K.P. Sudheer. We do place on record our appreciation for the competent assistance rendered by this young counsel to the Court in this case. We extract Sec.127(3) of the Code to facilitate easy reference:

"127. Alteration of allowance.--

(1) x x x x x x x (2) x x x x x x x (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 or interim maintenance, as the case may be after her divorce, cancel the order from the date thereof."

The learned counsel points out that Sec.127(3)(b) of the Code can apply only to a woman who has been divorced by her husband. To a woman who has obtained divorce from her husband, Sec.127(3)(b) of the Code does not apply. For extinguishment of her rights, it is Sec.127(3)(c) of the Code which will apply. The learned counsel points out that an anomalous situation may arise if the woman obtains a divorce from her husband and does not voluntarily surrender her rights. In that event Sec.127(3)(b) of the Code will not be applicable to her; whereas Sec.127(3)(c), though applicable, will not operate in the absence of voluntary surrender of her rights. The learned counsel argues that if there is no extinguishment of the right under Sec.125 of the Code, the woman who has obtained a divorce from her husband and does not voluntarily surrender her rights will be entitled to merrily claim both the amounts under Sec.3 of the Act as also the amount under Sec.125 of the code. To avoid this anomaly, the learned counsel contends that the theory of extinguishment may have to be accepted. We are unable to agree. Sec.125 of the Code will apply at the first instance only if the husband has neglected or refused to maintain his wife. If he had already paid the amount under Sec.3 of the Act, it cannot be held that he has refused or neglected to pay maintenance to his wife and her claim will have to be rejected for the reason that such fundamental requisite of Sec.125 of the Code has not been proved. If she has received such amounts under Sec.3 of the Act, it cannot also be held that she is unable to maintain herself. For both these reasons, this argument is found to be not acceptable.

39. The learned counsel Sri.K.P. Sudheer further points out that if the wife does not seek to claim under Sec.3 of the Act, the husband will continue to be liable under Sec.125 of the Code for all time to come. Under the Act there is no provision by which a husband on his own can get the amount payable under Sec.3 determined by a court. This would mean that whatever amount he pays under Sec.3 of the Act he will not be able to claim absolution from liability under Sec.125 of the Code as it is only actual payment/receipt of such amounts which can entitle him to claim absolution from liability under Sec.127(3)(b) of the Code. We do not find much merit in this contention also. The husband is liable to pay amounts under Sec.3 of the Act within the period of iddat. If he has made such payment and the Family Court considering the claim under Sec.125 of the Code is satisfied that he has substantially paid the amount under Sec.3, notwithstanding the absence of an adjudicated order determining such liability, the Family Court would certainly not be directing payment under Sec.125 of the Code and shall only be leaving it to the wife to claim further amount if any payable under Sec.3 by resort to the provisions of the Act. The husband can still show the court that substantially the amount payable under the Personal and Customary Law applicable to the parties had been paid. If the court is satisfied about such payment, notwithstanding the non-adjudication of that liability under Sec.3 no maintenance shall be ordered under Sec.125 of the Code and the claimant shall be left/ directed to stake a claim under Sec.3 and claim further amounts if any payable to her under Sec.3 of the Act. These two contentions raised by the learned counsel for the petitioner do not also persuade us to hold that there has been implied extinguishment of the right under Sec.125 of the Code.

40. We do, in these circumstances, answer Question No.(i) as follows:

The divorced Muslim wife's right to claim maintenance under Sec.125 Cr.P.C. does not stand extinguished by the enactment of the Muslim Women (Protection of Rights on Divorce) Act. Her right under Sec.125 Cr.P.C. shall stand extinguished only when the payment under Sec.3 is actually made and absolution is granted by the court under Sec.127(3)(b) of the Code. Till then, or till she remains a divorced Muslim wife, she will be entitled to claim maintenance from her divorced husband. Death, remarriage or actual payment of the amount payable under Sec.3 of the Act alone shall extinguish her right under Sec.125 Cr.P.C. to claim maintenance.

41. Question No.(ii): We now come to question No.(ii). It has always been assumed in India that a Muslim husband can unilaterally bring a marriage to termination by pronouncement of talaq without intervention of court. This provision for arbitrary and unilateral divorce is valid even in the post constitutional era, it has been assumed. Though it may offend the modern notions of gender justice, it was assumed to be well settled in India that under the Muslim Law "the only condition necessary for the valid exercise of the right of divorce by a husband is that he must be a major and of sound mind at that time. He can effect divorce whenever he desires. Even if he divorces his wife under compulsion or, in jest, or in anger that is considered perfectly valid." (See Pathayi v. Moideen - 1968 KLT 763). The three Judges Bench of the Supreme Court speaking through Justice V.R. Krishna Iyer as early as in Fuzlumbi v. K. Khader Vali (AIR1980 SC 1730) had referred to the need to have a re-look at the die hard view of Batchelor, J. in (1906) ILR 30 Bom. 537 that such an arbitrary divorce "is good in law, though bad in theology." Justice V.R. Krishna Iyer had hoped that when the point strictly arises, the question will have to be considered by the Supreme Court. But

notwithstanding the lapse of 30 years that question does not appear to have been considered by the Supreme Court so far. This patently and apparently inequitable and anachronistic understanding of the Muslim Personal Law has not been tested on the core concepts of Islamic Law or the core values of our constitution. The impact of the constitutional fundamental right to equality under Art.14 and the fundamental right to life under Art.21 of the Constitution and the play of Art.13 have not been considered by the civil society in India, the Parliament of India or even the courts in India. The stipulation in Muslim Law tolerating polygamy and the further stipulation enabling arbitrary unilateral pronouncement of talaq, which stipulations have been grossly misused by some unprincipled who have no commitment to the dynamism, liberalism and humanism underlying these stipulations in Muslim Law, have not been modified by the Parliament or subjected to judicial review under Art.13 of the Constitution so far. Most unfortunately despite the mandate of Art.44 of the Constitution, legislatures - Central and State, have not addressed themselves to the question. It is perhaps more unfortunate that the courts have not so far tackled the bull by the horns and had not tested the constitutional validity of these stipulations which get the mandate for enforcement under the provisions in the Muslim Personal Law (Shariat) Application Act, 1937. Whether the stipulations of Muslim Personal Law tolerating polygamy, and permitting arbitrary and unilateral termination of marriage by pronouncement of talaq by the husband offend the constitutional fundamental rights to equality and life under Articles 14 and 21 of the female half of Muslim population will certainly have to be considered by the constitutional courts.

42. Personal Law is also, according to us, `law'. It is 'existing law' and 'law in force' as contemplated by the constitutional provisions. Such stipulations in personal law cannot be out of bounds for Art.13 of the Constitution. Any stipulation of personal law which offends the fundamental right to equality and life under Arts.14 and 21 of the Constitution will also have to be declared void under Art.13. According to us, the decision of the Bombay High Court in The State of Bombay v. Narasu Appa (AIR (39) 1952 Bombay 84) does not lay down the law correctly. We respectfully disagree with the learned Judges. The Supreme Court, according to us, has not accepted and endorsed the dictum in Narasu Appa (supra) in Srikrishna Singh v. Mathura Aahir & Others ((1981) 3 SCC 639). The Division Bench of this Court in Mathew & Another v. Union of India (1999 (2) KLJ 824) has not considered the question in depth. The question whether these stipulations of Muslim law are constitutionally valid will have to be referred to a larger Bench in an appropriate case. We have addressed ourself to this aspect in detail in the judgment dated 25/2/2010 in Mat. Appeal No.20076/09 in Saumya Ann Thomas v. Union of India & Another (2010 (1) KLT 869). (See paragraphs 18 to

27). In this case the constitutional validity of the stipulations of the enforced law applicable to Muslims relating to polygamy and unilateral pronouncement of divorce on the anvil of Art.13 on the ground that the same offend the fundamental right to equality under Art.14 and fundamental right to life under Art.21 is not challenged. We need only reiterate our opinion that the State (Parliament and the judiciary included) having commitment to the core values of the constitution cannot avoid and delay consideration of this crucial issue. The obligation of the hapless Muslim women to suffer polygamy and arbitrary unilateral termination of marriage by pronouncement of talaq without intervention of the court appear to offend the constitutional fundamental rights. The question will certainly have to be addressed by the secular socialist State sooner (we hope) if not later. The issue

cannot any more be shelved or pushed under the carpet by the legislature or the constitutional courts.

43. The learned counsel for the revision petitioner contends that the court below erred in not accepting his plea that the marriage has been dissolved. Though there has been meek acceptance by the system that the husband has the prerogative to unilaterally liquidate the marriage for good, bad or indifferent reasons and such divorce will be perfectly valid whether he has done it under compulsion or in jest or in anger, winds of change have started blowing and the Supreme Court in Shamim Ara (supra) has without the trace of any doubt declared that this view is not acceptable to the court in the present time. We feel that it would be advantageous to extract the relevant passages in paragraphs-13 and 14 of the decision in ShamimAra (supra):

> "13. There is yet another illuminating and weighty judicial opinion available in two decisions of Gauhati High Court recorded by Baharul Islam, J. (later a Judge of the Supreme Court of India) sitting singly in Sri. Jiauddin Ahmed v. Mrs. Anwara Begum, (1981) 1 GLR 358, and later speaking for the Division Bench in Must. Rukia Khatun v. Abdul Khalique Lasker, (1981) 1 GLR 375. In Jiauddin Ahmed's case a plea of previous divorce, ie., the husband having divorced the wife on some day much previous to the date of filing of the written statement in the court was taken and upheld. The question posed before the High Court was whether there has been valid talaq of the wife by the husband under the Muslim law? The learned Judge observed that though marriage under the Muslim law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage-tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution.
>
> (Para 6). Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well-recognised scholars of great eminence, the learned Judge expressed disapproval of the statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook. The correct law of talaq as ordained the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters - one from the wife's family and the other from the husband's; if the attempts fail talaq may be effected. (Para 13). In Rukia Khatun's case, the Division Bench stated that the correct law of talaq as ordained by Holy Quran, is (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay view which, in their opinion, did not lay down the correct law.

> 14. We are in respectful agreement with the abovesaid observations made by the learned Judges of the High Court. We must note that the observations were made 20-30 years before and our country has in recent times marched steps ahead in all walks of life including progressive interpretation of laws which cannot be lost sight of except by compromising with regressive trends. What this Court observed in Bai Tahira v. Ali Hussain, AIR 1979 SC 362, dealing with right to maintenance of a Muslim divorcee is noteworthy. To quote:
>
> "The meaning of meanings is derived from values in a given society and its legal system. Art. 15 (3) has compelling compassionate relevance in the context of S. 125 and the benefit of doubt, if any, in statutory interpretation belongs to the ill-used wife and the derelict divorcees. This social perspective granted, the resolution of all the disputes projected is easy. Surely, Parliament, in keeping with Art. 15 (3) and deliberate by design, made a special provision to help women in distress cast away by divorce. Protection against moral and material abandonment manifest in Art. 39 is part of social and economic justice, specificated in Art.38 fulfilment of which is fundamental to the governance of the country (Art. 37). From this coign of vantage we must view the printed text of the particular Code". (para 7) Law is dynamic and its meaning cannot be pedantic but purposeful". (para 12)"

(emphasis supplied)

44. The Supreme Court has stated unambiguously that the law of talaq as declared in the two decisions of the Gauhati High Court is correct. The requirements of a valid talaq are:

(i) That the talaq must be for a reasonable cause; and

(ii) It must be preceded by attempts of reconciliation between the husband and the the wife by two arbiters - one chosen by the wife from her family and the other by the husband from his family. If their attempts fail, talaq can be effected.

45. These are the conditions precedent for a valid divorce as declared by the Supreme Court in Shamim Ara (supra). To us, it appears that this declaration of law rhymes well with modern notions of marriage and the true Islamic concepts of marriage and divorce. The argument that these observations of the Supreme Court are only obiter does not appeal to us at all. Even if obiter, we hold that we are bound by the same. That declaration of law is consistent with modern notions of marriage and rhymes better with the human right to life recognized under Art.21. It rhymes well with the concepts of equality under Art.14 of the Constitution. Any contra interpretation does appear to us to be not valid, just or right; but arbitrary, unjust fanciful and oppressive. The contra understanding of the Muslim law of divorce would thus offend the concept of fundamental right to life and right to equality as explained in Maneka Gandhi v. Union of India (AIR 1978 SC 597).

46. We have been taken through the decision of Justice Baharul Islam in Jiauddin Ahmed v. Anwara Begum ((1981) 1 GLR 358) and later by the same Judge speaking for the Division Bench in Rukia

Khatun v. Abdul Khalique Laskar ((1981) 1 GLR 375). We have also been taken through the decision of the Bombay High Court in Dagdu v. Rahimbi Dagdu Pathan & Others (II (2002) DMC 315 (FB))

47. Another Division Bench of this Court has unambiguously reckoned the decision of the Supreme Court as dictum in Ummer Farooque v. Naseema (2005 (4) KLT 565). We extract the following passage in para-5 rendered by Justice R.Bhaskaran for the Bench in Ummer Farooque (supra):

> "5. ..... The question to be considered is whether in this case there is any evidence of a valid divorce by pronouncement of talaq under Mohammadan Law. The general impression as reflected in the decision of a Division Bench of this Court in Pathayi v. Moideen (1968 KLT 763) was that the only condition necessary for a valid exercise of the right of divorce by a husband is that he must be a major and of sound mind at the that time and he can effect divorce whenever he desires and no witnesses are necessary for dissolution of the marriage and the moment when talaq is pronounced, dissolution of marriage is effected; it can be conveyed by the husband to the wife and it need not even addressed to her and it takes effect the moment it comes to her knowledge etc. But this can no longer be accepted in view of the authoritative pronouncement of the Supreme Court in Ara v. State of U.P. (2002 (3) KLT 537 (SC))."
>
> (emphasis supplied) The learned Judges of the Division Bench later in para-6 proceeded to observe as follows:
>
> "6. ..... The mere pronouncement of talaq three times even in the presence of the wife is not sufficient to effect a divorce under Mohammadan Law. As held by the Supreme Court in Ara's case (2002 (3) KLT 537 (SC)), there should be an attempt of mediation by two mediators; one on the side of the husband and the other on the side of the wife and only in case it was a failure that the husband is entitled to pronounce talaq to divorce the wife."
>
> (emphasis supplied) There can, in these circumstances, be absolutely no doubt that both the above pre-requisites must be satisfied before a valid divorce can be said to be effected.

48. The learned counsel contends that there is no guideline as to what will be a reasonable cause and what will not be a reasonable cause to satisfy pre-condition No.(i). Such a vague state of law would create a lot of confusion and would virtually make the law uncertain. What are the causes that can be legally reckoned as reasonable? What are the causes which are to be reckoned as not reasonable? Different systems of personal law over different periods of time have reckoned different reasons as reasonable and different reasons as not reasonable consistent with the time and the mind set of persons belonging to such groups. In these circumstances, it is argued that in the total absence of any stipulations, it cannot be held that the reasonableness of the cause of divorce is justiciable before a court. If such wide discretions were conceded to individual Judges without any guidelines, it would be anarchic and the state of law will be absolutely confusing and uncertain.

49. We find force in the contention. The decisions of the Gauhati High Court, the decision of the Bombay High Court and the decision of the Supreme Court in Shamim Ara (supra) do not at all show that the reasonableness of the cause for divorce is justiciable. The reasonableness of the substantive cause for divorce cannot, in these circumstances, be held to be justiciable. But the fact remains that procedural reasonableness must be insisted. That clearly appears to be the mandate of the Supreme Court.

50. The learned counsel points out that in Muslim Law the primary purpose of the marriage is that the spouses must dwell in tranquility. Reliance was placed on Ayat 21 of Sura XXX which reads as follows:

> "21. And among His Signs Is this, that He created For you mates from among Yourselves, that ye may Dwell in tranquility with them, And He has put love And mercy between your (hearts): Verily in that are Signs For those who reflect."

We extract below the commentary by Abdullah Yusuf Ali on this verse:

> "This refers to the wonderful mystery of sex. Children arise out of the union of the sexes. And it is always the female sex that brings forth the offspring, whether female or male. And the father is as necessary as the mother for bringing forth daughters.
>
> Unregenerate man is pugnacious in the male sex, but rest and tranquility are found in the normal relations of a father and mother dwelling together and bringing up a family. A man's chivalry to the opposite sex is natural and God-given.
>
> The friendship of two men between each other is quite different in quality and temper from the feeling which unspoilt nature expects as between men and women. There is a special kind of love and tenderness between them. And as woman is the weaker vessel, that tenderness may from a certain aspect be likened to mercy, the protecting kindness which the strong should give to the weak."

The learned counsel has also pointed out to us Ayat 33 of Sura XXIV in the following words:

> "33. Let those who find not The wherewithal for marriage Keep themselves chaste, until God gives them means."

It is the religious duty of a Muslim to marry and live in tranquility. He has to wait patiently until God gives him the means. Reliance is also placed in Al-Bukhari No.5066 and Muslim No.1400 which state as follows:

> "O you young men! Those among you who can afford it should marry, for it restrains the eyes (from casting evil glances) and preserves one from immorality; but he who cannot afford it should observe fasting, for it is a means of controlling the sexual desire."

51. The counsel relies on those passages to contend that under Islam it is the religious duty of righteous followers to marry so that they may dwell in tranquility with their mates.

52. Islam does not reckon marriage as indissoluble. It is a human contract, though a solemn one. Islam reckons divorce as the most detestable of all things permitted by law. The throne of Alla would shiver and tremble when a divorce takes place on earth. But the Islamic law permits divorce. Where it is not possible for mates to dwell in tranquility, Islam permits divorce. Islam does not reckon marriage as a cage where those who have entered have no key to unlock the same. If marriage does not work out happiness and tranquility, Islam in its liberal humanism reluctantly permits divorce. The story of Jameela which we have referred to in Abdurahiman v. Khairunneesa (2010 (1) KLT 891) shows that in its sublime idealism, Islam offers such freedom to liberate oneself from a burdensome marriage to both spouses. This is clear from Ayat 130 of Sura IV which we extract:

> "But if they disagree (And must part), God Will provide abundance For all from his All-reaching bounty:
>
> For God is He That careth for all And is Wise."

The Muslim Law - either the Quranic injunctions or the Sunnahs or ahadis do not enumerate causes for divorce that are reasonable or the causes that are unreasonable. There is no obligation under the Muslim law to give reasons. Giving reasons is different from having reasons. Reasonable cause must be there. But there is no obligation to give reasons or satisfy any one else of such reasons. This stipulation of Islamic law is not modified by any legislative intervention. The Muslim husband is not hence bound to show reasons for the divorce. Nor is the personal reason that prompts him to effect divorce justiciable, contends counsel. We find merit in that contention.

53. How then is pre-condition Nol.1 in ShamimAra (supra) to be understood? We sought assistance from the counsel.

54. Ayats 34 and 35 of Sura IV in the following words as to how a husband should act before divorce is effected:

> " 34. x x x x x x x x x x x x x x x x x x x x x x x x x x x x x As to those women On whose part ye fear Disloyalty and ill-conduct, Admonish them (first), (Next), refuse to share their beds, (And last) beat them (lightly); But if they return to obedience, Seek not against them Means (of annoyance):
>
> For God is Most High, Great (above you all).
>
> 35. If ye fear a breach Between them twain, Appoint (two) arbiters, One from his family, And the other from hers;
>
> If they wish for peace, God will cause Their reconciliation:

For God hath full knowledge, And is acquainted With all things."

55. It is in Ayat 35 of Sura IV that this essential pre-

condition for a valid divorce is enumerated in the Quran.

56. Following the decision of the Supreme Court in Shamim Ara (supra) and the decision of the Division Bench in Ummer Farooque (supra), it is evident that compliance with the mandate of Ayat 35 of Sura IV that two arbiters must be appointed and an attempt for reconciliation by them must precede the divorce is an essential, non-negotiable and unavoidable pre-requisite. We prefer to take the view that if such attempt for conciliation by two arbiters has taken place, and they have not succeeded in bringing about reconciliation, it can be held that there is reasonable cause for pronouncement of talaq and the specific reason for divorce need not be established before court. The specific reason we further hold will not be justiciable also. Until the legislature intervenes, and until it chooses to prescribe the reasonable grounds for divorce, the procedural reasonableness must be held to be sufficient i.e., if the attempt for reconciliation by the two arbiters in accordance with Ayat 35 of Sura IV has taken place and in spite of attempts for such reconciliation there has been no reconciliation, the same must be held to satisfy both the requirements stipulated by the Supreme Court. The arbiters under Ayat 34 of Sura IV, we must hasten to observe, are not Judges or Arbitrators but only facilitators who must attempt reconciliation. That shall be their limited brief. If we hold contra, law relating to divorce in Muslim law will be rendered vague and uncertain. There will be as many interpretations about the reasonableness of the cause for divorce as there are Judges, making the law of divorce in Muslim law uncertain, vague and confusing. We have already been coming across decisions by Family Courts where Judges on their personal concepts have been reckoning some causes to be reasonable and some not. We therefore feel that the position must be clarified to avoid confusion and uncertainty.

57. What will happen if the wife does not co-operate and does not signify her choice of an arbiter? Is the husband to wait indefinitely? Is he to come to court to compel her to choose an arbiter? Would not that affect the provisions of the Muslim Law providing for an easy, simpler and expeditious procedure to secure divorce without intervention of courts? These queries are raised. We need only mention that if there is substantial compliance on the part of the husband with the provisions of Ayat 35 of Sura IV and the reconciliation by arbiters does not take place on account of the recalcitrance of the wife, pre- condition No.2 in Shamim Ara (supra) must be held to have been satisfied.

58. What if the wife accepts a divorce or does also want such a divorce? Will the divorce accepted by the wife be held to be void for the reason that the preconditions of Shamim Ara (supra) have not been complied with. We may hasten to observe that the procedural reasonableness insisted by ShamimAra (supra) on the basis of Ayat 35 of Sura IV can only enable the wife to dispute her divorce and when she accepts such divorce there can be no question of the divorce being assailed by any one on that ground.

59. We do note that Shamim Ara (supra) throws up several interesting questions and those will have to be tackled. If legislature does not intervene and make stipulations, we may have to wait for bridges to cross the rivers. Judicial innovations may become necessary and unavoidable to build such bridges.

60. For the moment with the hope that legislature shall soon intervene to clarify, we may answer Question No.(ii) thus:

(i) For a termination of Muslim marriage by unilateral pronouncement of talaq by the husband to be valid, attempt for reconciliation by two arbiters in accordance with Ayat 35 Sura IV must precede.

(ii) If such a failed attempt for reconciliation had preceded such pronouncement of divorce, it shall be deemed that there has been a reasonable cause for such divorce. The reasonableness of the substantive cause for divorce shall not be justiciable by courts.

61. In the instant case, there has neither been any cause shown nor has there been even a contention that any such attempt for reconciliation had preceded the divorce effected by Exts.D1 to D3. It follows therefore that there has been no valid divorce in accordance with the law laid down by the Supreme Court in Shamim Ara (supra) as followed by this Court in Ummer Farooque (supra).

62. The upshot of the above discussions is that even assuming that there is a valid divorce, the right of the Muslim divorced wife claiming maintenance under Sec.125 of the Code remains unextinguished until the actual payment of the amount under Sec.3 of the Act is established and absolution is granted under Sec.127(3)(b) of the Code. That having not been done admittedly in this case, the petitioner is not entitled to succeed. We further conclude on the basis of the discussions on Question No.(ii) that there has been no valid divorce also to support the contention that the liability stands extinguished. In any view of the matter, we are satisfied that there is no merit in this revision.

63. In the result:

(a) We answer Question No.(i) and Question No.(ii) as given in paragraphs 40 and 60 respectively.

(b) This revision petition is accordingly dismissed.

(c) The impugned order is upheld.

64. We direct the Registry to forward a copy of this order to the Law Commission of India.

Sd/-

R. BASANT (Judge) Sd/-

M.C. HARI RANI (Judge) Nan/ R. BASANT, J.

RP.(FC) No.53 of 2006

---------- Dated this the 14th day of July, 2009 ORDER OR REFERENCE Various interesting questions of law are raised in this RP (FC). The matter was heard in detail with the help of amicus curiae. I am of opinion that the following interesting questions of law arise for consideration and will have to be resolved:

(1) Is a unilateral pronouncement of divorce by a Muslim husband without offering any reason whatsoever, legally valid in the light of the dictum in Ara v. State of U.P. (2002 (3) KLT 537 (SC)?

(2) Is such unilateral pronouncement of divorce, which is not admittedly preceded by any attempt for reconciliation by any one, legally valid in the light of the dictum in Ara?

(3) Does such divorce, even if legally valid, ipso facto extinguish a crystalised liability under an existing order passed under Sec.125 Cr.P.C. to pay maintenance to such wife?

(4) Do Exts.D2 and D3 in which it is not specifically recited that `talak' thrice is pronounced constitute a valid divorce under the Muslim Law?

2. I am of opinion that considering the conflict of judicial opinion on the subject and considering the public importance of the questions raised, this RP(FC) deserves to be heard and disposed of by a Division Bench of this Court.

3. The matter is hence adjourned under Sec.3 of the Kerala High Court Act. The Registry shall take orders of the Hon'ble Chief Justice and post the matter before the Division Bench at the earliest.

Sd/-

(R. BASANT, JUDGE) Nan/ //true copy//