

Bombay High Court

Karim Abdul Rehman Shaikh vs Shehnaz Karim Shaikh & Others on 11 July, 2000

Equivalent citations: 2000 (5) BomCR 758, 2000 CriLJ 3560, II (2000) DMC 634

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Bench: A P Shah, S R Desai, J Patil

ORDER Smt. Ranjana Desai, J.

1. In this reference we are called upon to decide certain issues, which are very vital to Muslim women. The learned Single Judge of this Court, Justice Bhairavia came to a conclusion that the decision of this Court in Allabuksh Karim Shaikh v. Noorjahan Allabuksh Shaikh and another, 1994 Mh.L.J. 1376 is contrary to the object and spirit of the Muslim Women (Protection of Rights on Divorce) Act, 1986 ("Muslim Women Act" for short). The learned Single Judge was of the view that, and we quote his words: "in the interest of fair justice, this matter requires to be referred to Full Bench for decision." He has stated that having gone through the various authorities, he had noticed that the consistent view of the various courts after coming into force of the Muslim Women Act was that, the Muslim Woman is entitled to claim post iddat period maintenance under section 4 of the Muslim Women Act and not under section 125 of the Criminal Procedure Code ("the Code" for short). According to him he had his own doubts in accepting the ruling in Allabuksh's case (supra). The learned Judge has directed that the matter should be referred to Full Bench.

2. In our opinion, in view of Rule 7 of Chapter I of Part I of the Bombay High Court Appellate Side Rules, 1960, it was no open for the learned Single Judge to give any such direction. Rule 7 reads thus :

"7. If it shall appear to any Judge, either on the application of a party or reference otherwise, that an appeal or matter can be more advantageously heard by a Bench of two or more Judges, he may report to that effect to the Chief Justice who shall make such order thereon as he shall think fit"

If the learned Single Judge was of the view that the matter could more advantageously be heard by a Bench of two or more judges, he should have made a report to that effect to the learned Chief Justice. The ultimate decision as to whether a larger Bench should be constituted or not would obviously lie with the learned Chief Justice. For ought we know, in a given case the learned Chief Justice may come to a conclusion that the matter does not require to be referred to a larger Bench and he may not constitute a larger Bench. Judicial propriety demands this procedure to be strictly followed. We also feel that rather than merely reproducing the arguments of the learned Counsel appearing for the petitioner, the learned Single Judge ought to have given reasons which prompted him to draw the conclusions which he has drawn. In any case since we have noticed conflict between the various decisions cited before us, we proceed to decide this reference.

3. The learned Single Judge has formulated the following question which in his opinion requires consideration.

"Is the Family Court empowered to entertain an application under section 125 of the Code filed by a divorced woman against the former husband for post - iddat period maintenance?"

4. In our opinion basically this Court will have to consider whether claim of maintenance by a divorced Muslim wife under the provisions of section 3 of the Muslim Women Act must be restricted only to the period of iddat or it has to be a fair and reasonable provision and maintenance even for a period subsequent thereto. This Court will also have to resolve the controversy about the scope and effect of the provisions of sections 125 to 128 of the Code after the commencement of the Muslim Women Act, keeping in view the provisions of the Family Courts Act, 1984. At the appropriate stage we shall formulate the questions which need to be answered by us. But before that we will refer to the judgments of this Court in which divergent views are discernible.

5. We will have to first refer to Allabuksh's case (supra). In that case, there was a challenge to the grant of maintenance to the daughter on the ground that the application was not maintainable under the provisions of the Muslim Women Act. Though the questions with which we are concerned here were not before the Division Bench it observed that, since an impression had gained ground that after the commencement of the Muslim Women Act, an application for maintenance by a divorced Muslim woman shall and cannot but be governed by that Act, it has thought it fit to declare for the guidance of the courts concerned that the said impression is absolutely erroneous.

6. The Division Bench considered the relevant provisions of the Family Court's Act, 1984 and the Muslim Women Act. After considering section 8(c) of the Family Court's Act, 1984 and section 7 of the Muslim Women Act the Division Bench observed that there is nothing in the Muslim Women Act to indicate that if the application under section 125 or 127 of the Code was pending not before a Magistrate but before the Family Court, whether by way of original initiation or by transfer under section 8 of the Family Court's Act, the same would be disposed of in accordance with the provisions of the Muslim Women Act and not by the Code. The Muslim Women Act provides that after its commencement application filed by Muslim women under section 125 or 127 of the Code, pending before a Magistrate shall be disposed of in accordance with the provisions of the Muslim Women Act but the Division Bench held that this would be so where Family Court is not established but where Family Court has been established, the power and jurisdiction of the Family Court under section 7(2) of the Family Court's Act, 1984 to entertain an application for maintenance even by a divorced Muslim wife under Chapter IX of the Code has not been taken away either expressly or even by implication by the Muslim Women Act. On such an application being made to a Family Court under section 7(2) of the Family Court's Act and not to a Magistrate, the same has got to be disposed of in accordance with the provisions of Chapter IX of the Code.

7. The Bench held that, a Muslim divorced woman may apply for maintenance before a Magistrate under section 3 of the Muslim Women Act payable to her only during the period of iddat. Thereafter, if she is unable to maintain herself, she may apply for maintenance for the post iddat period also before a Magistrate where no Family Court has been constituted under Chapter IX of the Code and such application shall be governed and disposed of in accordance with the provisions of Chapter IX only. But where a Family Court has been constituted such a divorced woman intending to apply for maintenance under Chapter IX of the Code shall have to apply for maintenance under that Chapter in and before the Family Court and the Family Court shall have to dispose of such application in accordance with the provisions of Chapter IX of the Code notwithstanding anything said in the Muslim Women Act. For the post iddat period maintenance, therefore, the divorced Muslim woman

has clear option either to move a Magistrate under section 4 of the Muslim Women Act or to apply to the Family Court, if there is one for maintenance under Chapter IX of the Code.

8. In *Mahboobkhan v. Parvinbanoo and another*, 1988 Mh.L.J. 781 the learned Single Judge of this Court (Mohata, J. as he then was) held that after coming into force of the Muslim Women Act, the provisions of sections 125 and 127 of the Code stand repealed. At exception can be made as regards sub-section (3) of section 125, which sets out the consequences of breach of order of maintenance. The learned Single Judge held that neither the order passed under section 125 of the Code nor liability already incurred earlier to the Act has been saved. According to the learned Single Judge, the inevitable consequence was that not only right under section 125(1) but also remedy under section 125(3) are lost. Section 7 envisages complete effacement of the right and remedy under section 125 of the Code and, therefore, there can be no question of enforcing the same under sub-section (3) of section 125 of the Code.

9. In the case of *Noor Jamaal Habib Momin v. Hasina Noor Jamaal*, , the Division Bench of this Court (Mohata & Saldhana, JJ.) had an occasion to consider whether the Family Court had jurisdiction to entertain proceedings under the Muslim Women Act. The Division Bench held that the Muslim Women Act is a complete code in itself in respect of the rights of divorced Muslim wife conferred under section 3 thereof. It provides for complete machinery to get the reliefs conferred under the said Act. Rule 4 of the Muslim Women (Protection of Rights on Divorce) Rules, 1986 ("the Rules" for short) made under section 6 of the Muslim Women Act, provides for recording of evidence in a manner specified for summary trials under the Code. Both the jurisdictions i.e. jurisdiction of the First Class Magistrate under Chapter IX of the Code and the jurisdiction of the First Class Magistrate under the Muslim Women Act are distinct. Therefore, the proceedings under the Muslim Women Act do not fall under section 7(1) or 7(2a) of the Family Court's Act.

10. In *Jaitunbi Mubarak Shaikh v. Mubarak Shaikh and another*, 1993(3) Mh.L.J. 694 a Division Bench of this Court, upon consideration of the various judgments on the point came to a conclusion that on a true construction of the meaning of the words "provision" appearing in section 3(1)(a) of the Muslim Women Act, a Muslim husband is liable to make a reasonable and fair provision for the future of the divorced wife which would obviously include maintenance for her future as well. The observations of the Division Bench in paragraphs 25 and 26 are rather material for the present purpose and are reproduced below.

"25. Thus, on the third question framed above, our answer is in two parts. As far as making of a reasonable and fair provision for the future of the divorced wife under section 3(1)(a) of the Act, the liability is not restricted to the iddat period having regard to the dictionary meaning of the word "provision" quoted in para 22 above. In our view, the dictionary meaning of the words "provision" would make it clear that the Muslim husband is required to visualise the future needs of his divorced wife and make a reasonable and fair provision for the future needs of his wife. Such needs may include food, shelter, clothing, medical relief and such other factors as may be relevant depending upon the status of the parties which would include their standard of living. A reasonable and fair provision for the future would, therefore, include maintenance for the future also viz. beyond the iddat period and under 3(1)(a), it is the husband who must make the provision within the iddat

period.

26. However, on the second part of the third question viz. the extent of the liability to pay maintenance, we are of the view that having regard to the scheme of the provisions of sections 3 and 4 read together, the liability to pay maintenance under section 3(1)(a) can be restricted only till the iddat period. After the iddat period expires, despite the husband having made a reasonable and fair provision, if the divorced wife who has not remarried, is still unable to maintain herself, she has to apply under section 4 of the Act which gives her distinct rights against her relatives and the Wakf Board. It would be difficult to fasten the liability on the husband as well in respect of payment of regular monthly maintenance after the iddat period, which, in our view, would render the provision of section 4 totally redundant. We do not think that Parliament intended to provide for two parallel remedies to the wife in respect of her regular maintenance after the iddat period, namely, one against the husband under section 3(1)(a) and the other against her relatives of the Wakf Board under section 4. Such an interpretation would be contrary to the avowed object of the 1986 Act and the scheme of the provisions of sections 3 and 4 read together."

It is thus clear from the above observations that although the Bench held that under section 3(1)(a) of the Muslim Women Act, the husband is bound to make a reasonable and fair provision for the future of the divorced wife including the maintenance for the future beyond the iddat period the Bench made it clear that after the iddat period expires, despite the husband having made a reasonable and fair provision, if the divorced wife is still unable to maintain herself she has to apply under section 4 of the Muslim Women Act which gives her distinct rights against her relatives and the Wakf Board.

11. While dealing with the divergent views of this Court, we will also have to take a resume of some judgments of different High Courts which also have had an occasion to deal with similar questions. We shall briefly refer to them.

12. The majority view of the Full Bench of Andhra Pradesh High Court in *Usman Khan Bahamani v. Fathimunnisa Begum & ors.*, is that after passing of the Muslim Women Act a divorced women cannot claim maintenance under section 125 of the Code. It has further held that the fair and reasonable provision and maintenance contemplated under section 3(1)(a) payable by the husband is restricted only for the period of iddat and the liability of the husband to provide for any provision of maintenance after the period of iddat does not arise. It also ruled that sections 125 to 128 of the Code are not applicable after coming into force of the Muslim Women Act, save in so far as the parties exercise their option under section 5 of the said Act, to be governed by the provisions of sections 125 to 128 of the Code. Naidu, J., while concurring on other aspects struck a dissenting note by saying that he was of the view that the husband has to make a fair and reasonable provision for the divorced wife who has not remarried and who is unable to maintain herself beyond the period of iddat.

13. In *Sakinabai v. Fakruddin*, 1999(11) D.M.C. 576, a learned Single Judge of the Madhya Pradesh High Court held that in respect of a divorced woman if any application under section 125 or section 127 of the Code is pending on the date when the Muslim Women Act came into force, the application

has to be disposed of by the Magistrate in accordance with the provisions of the Act.

14. In *Mh. Yunus v. Bibi Phenkan @ Tusrun Nisa & anr.*, 1997(2) Crimes 241, the Patna High Court has held that the Muslim Women Act has completely obliterated the rights of divorced women to get maintenance. The repeal without saying such right means that such women had never such right and therefore the said right cannot be enforced under section 125(3) of the Code.

15. Again the same High Court in *Bibi Shahzaz @ Munni v. State of Bihar & anr.*, 1999(11) D.M.C. 589, has held that after enactment of the Muslim Women Act, divorced women is not entitled to bring action under section 125 of the Code. She can only claim maintenance under the provisions of the Muslim Women Act. She is entitled to claim maintenance from her former husband for and during the iddat period.

16. Some Courts have however taken a contrary view. A Full Bench of Punjab & Haryana High Court in *Kaka v. Hassan Bano & another*, 1998(II) D.M.C. 85(F.B.) has held that the provisions of the Muslim Women Act do not divest the party vested with determined rights and benefits under section 125 of the Code. The claim of maintenance by a divorced Muslim Wife necessarily need not be restricted only to the iddat period. The husband will have to show that within the iddat period, he has provided, made and paid reasonable and fair provision and maintenance to the wife which is an adequate provision for her life or till she remarries. The Full Bench further held that a divorced Muslim Women cannot have recourse to the provisions of sections 125 to 128 of the Code after the commencement of the Muslim Women Act. However, recourse to the said provisions is permissible if parties agree as provided under section 5 of the Muslim Women Act.

17. A learned Single Judge of Kerala High Court has in *Ali v. Sufaira*, 1988(3) DMC 147 held that under section 3(1)(a) of the Muslim Women Act, a divorced Muslim Women is not only entitled to maintenance for the period of iddat from her former husband but also to a reasonable and fair provision for her future.

18. In *Arab Ahmadia Abdulla v. Arab Bail Mohmuna Saiyadbhai & ors.*, , the learned Single Judge of Gujarat High Court held that a divorced Muslim women is entitled to maintenance after contemplating her future needs and the maintenance is not limited only upto iddat period. He further held that the Muslim Women Act does not take away rights which divorced Muslim women has either under the personal law or under general law i.e. section 125 to section 128 of the Code. He also ruled that orders passed by the Magistrate under section 125 of the Code are not nullified on coming into force of the Muslim Women Act.

19. In *K. Zunaideen v. Ameena Begum & anr.*, 1998(II) D.M.C. 468, the Division Bench of Madras High Court has held that section 3 of the Muslim Women Act has to be given a broader interpretation considering the object of the Act. Maintenance is not limited to iddat period and future livelihood of the women has to be taken into consideration.

20. We will now note the submissions of learned Counsel Shri A.N. Mulla, who appears for the petitioner in Criminal Writ Petition No. 1296 of 1995 and Shri A.R. Shaikh, who appears for the

petitioner in Criminal Revision Application No. 150 of 1998. Considering the importance of the question, we have also heard learned Counsel Shri Muchala, who represents All India Muslim Personal Law Board and Shri Solkar, who represents All India Milli Council Jamaetul Ulma (Maharashtra). Shri Hiranandani learned Counsel appearing on behalf of respondent No. 1 in Criminal Writ Petition No. 1296 of 1995 and Shri P.B. Shaligram learned Counsel appearing for respondent No. 1 in Criminal Revision Application No. 150 of 1998, have also addressed us. Shri I.S.

Thakur the learned A.P.P. represented the State of Maharashtra in both the matters. Shri Shaikh and Shri Mulla submitted that the Muslim Women Act is a complete Code in itself. It takes care of a divorced Muslim Women and prevents vagrancy. They contended that after coming into force of the Muslim Women Act, it is not open for a divorced Muslim women to resort to remedies under Chapter IX of the Code. Shri Shaikh and Shri Mulla laid particular emphasis on section 7 of the Muslim Women Act and contended that Allabuksh's case (supra) clearly tries to override the Muslim Personal Law which is not permissible. According to the learned Counsel, the majority view of the Full Bench decision of the Andhra Pradesh High Court in Usman Bahamani's case (supra) lays down the correct law and that needs to-be followed by this Court. The learned Counsel submitted that after coming into force of the Muslim Women Act not only right under section 125(1) but also remedy under section 125(3) are lost. According to the learned Counsel a Muslim divorced women has no right to apply for maintenance beyond iddat period under the provisions of the Code unless the husband has consented under section 5 of Muslim Women Act. It is also contended that the Faintly Court has no jurisdiction to deal with the application made by the Muslim divorced women under section 3(a) of the Muslim Women Act and the decision in the case of Allabuksh (supra) is contrary to law.

21. Shri Muchala and Shri Solkar contended that if legislative history of the Muslim Women Act is taken into consideration the irresistible conclusion would be that the intention of the legislature was to declare that, the liability of the Muslim husband to pay maintenance to a divorced wife extends only to the period of iddat. This would be in consonance with the Holy Quran and the other authoritative texts on Muslim Law. They contended that the Supreme Court in Mohd. Ahmed Khan v. Shah Bano Begum and others, held that although Muslim law limits the husband's liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate a situation envisaged by section 125 of the Code, namely the plight of divorced women who are unable to maintain themselves after the period of iddat. The Supreme Court held that in such a situation such a women is entitled to have recourse to section 125 of the Code. The Counsel urged that the Parliament enacted the Muslim Women Act to undo the effect of the decision of the Supreme Court in Shah Bano's case (supra) because the said decision was strongly opposed by a sizable section of the Muslim community. The Counsel contended that the Statement of Objects and Reasons recognised the fact that the Muslim law limits the liability of the Muslim husband to provide maintenance to the divorced wife to the period of iddat only. In fact it is because in Shah Bano's case (supra) the Supreme Court held that if the divorced wife is unable to maintain herself beyond the period of iddat she can get back to her husband and get maintenance from him for a period beyond the period of iddat through the provisions of Chapter IX of the Code, that the Muslim Women Act had to be enacted. Therefore to put any contrary interpretation on the provisions of Muslim Women Act, would make it a redundant piece of legislation. The provisions of this Act will have to be so

construed as to further and carry out its object and not to extend it to something which was not intended. The Counsel submitted that the Full Bench decision of Andhra Pradesh High Court in Usman Bahamani's case (supra) is the decision on the point and deserves to be followed.

22. Shri Hiranandani and Shri Shaligram submitted that the phrase "reasonable and fair provision and maintenance to be made and to be paid to her" indicates that the parliament intended to see that the divorced women gets sufficient means of livelihood after divorce. It seeks to protect such women against destitution and vagrancy. It cannot be said that under section 3(1)(a) a divorced Muslim women is entitled to provision and maintenance only for iddat period. The Muslim Women Act does not take away the rights which a Muslim women has under section 125 to section 128 of the Code. The learned Counsel urged that the judgment in Allabuksh's case (supra) is rightly decided and calls for no interference. They also placed reliance on the minority view of Andhra Pradesh High Court in Usman Bahamani's case (supra). They drew support from the judgment of the Punjab and Haryana High Court in Hassan Bano's case (supra) and the judgment of the Madras High Court in Zunaiuddeen's case (supra). Mr. Thakur the learned A.P.P. supported Shri Hiranandani and Shri Shaligram.

23. In the light of the above submissions and after going through the above mentioned judgements, we may formulate the questions which arise in this case and which fall for our consideration.

(i) Whether the Muslim husband's liability under section 3(a) of the Muslim Women Act to make a reasonable and fair provision and pay maintenance is only restricted to the iddat period or whether it extends beyond the iddat period?

(ii) Whether the Muslim Women Act has the effect of invalidating the orders/judgments passed under section 125 of the Code, i.e. whether the Muslim Women Act operates retrospectively so as to divest parties of vested rights?

(iii) Whether after the commencement of the Muslim women Act, a Muslim divorced wife can apply for maintenance by invoking the provisions of Chapter IX of the Code?

(iv) Whether the Family Court has jurisdiction to try applications of the Muslim divorced women for maintenance after the coming into force of the Muslim Women Act?

24. Before we deal with the rival submissions and undertake the task of finding answers to the question which we have formulated, we will have to bear in mind a few oft-quoted and well settled principles of interpretation of statutes which have been repeated by the Supreme Court in number of cases. In *M/s. Girdhari Lal and Sons v. Balbir Nath Mathur*, , the Supreme Court reiterated that it is well settled that while interpreting the statute, the primary and foremost task of a Court is to ascertain the intention of the legislature, actual or imputed. Having ascertained the intention the Court must then strive to so interpret the statute as to promote and advance the object and purpose of the enactment by supplementing the written words "if necessary".

25. The Supreme Court quoted the following passage from Lord Denning's book "The Discipline of Law" in *Fuzlunbi v. K. Khader Vali* and another, .

"... the schematic and teleological method of interpretation. It is not really so alarming as it sounds. All it means is that the Judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design of purpose which lies behind it. When they come upon a situation which is to their minds within the spirit- but not the letter - of the legislation, they solve the problem by looking at the design and purpose of the legislature - at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: What is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly. If you study the decisions of the European Court, you will see that they do it every day. To our eyes short-sighted by tradition - it is legislation, pure and simple. But, to their eyes, it is fulfilling the true role of the courts. They are giving effect to what the legislature intended, or may be presumed to have intended. I see nothing wrong in this. Quite contrary."

We must therefore so read the meaning of a statute as to advance its purpose and suppress the mischief according to the design of the statute. We must also not be oblivious of the fact that before us is a piece of beneficial legislation and we shall lean in favour of the beneficiaries to help them to get the maximum which this legislation purports to give them. We would be wary of overriding the personal law of Muslims, but we shall within its framework and without doing any violence to it reconcile it with the provisions of the Code if legally permissible. We shall also keep in mind the fact that our Constitution strives to preserve and enhance the dignity of women and therefore laws will have to be interpreted as far as practicable, possible and permissible with that end in view.

26. The preamble of the Muslim Women Act reads as under :

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

27. It is also necessary to have a look at the Statement of Objects and Reasons of the Muslim Women Act. It reads as under :

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

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

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

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

28. In Shah Bano's judgment the Supreme Court held that the Muslim Law limits the husband's liability to provide for maintenance of the divorced wife to the period of iddat. However it does not contemplate the situation envisaged by section 125 of the Code. The Supreme Court held that if a divorced wife is able to maintain herself the husband's liability ceases with the expiration of the period of iddat, but if she is unable to maintain herself after the period of iddat she is entitled to have recourse to section 125 of the Code if she has not remarried. This created some controversy about the rights of such women. Because her rights were questioned and were in danger, it became necessary to clearly specify them. The rights which were in existence but which became subject matter of debate and doubt had to be clearly stated and hence the Muslim Women Act came to be enacted. It was not enacted to take away the rights which were in existence. Being a beneficial legislation putting such an interpretation on it would be against all canons of judicial interpretation. Even apart from this, plain construction of the sections also persuades us to so interpret it. We also feel that even Muslim Personal Law seeks to protect such women. It shuns vagrancy of such women and does not absolve Muslim husbands from their obligation to look after them after iddat period.

29. It is necessary to briefly refer to the provisions of the Muslim Women Act. It contains only seven sections. Section 2 defines inter alia the terms 'divorced woman', 'iddat period', 'Magistrate'. Section 3(1) states that 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 she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made or paid by her former husband for a period of two years from the respective dates of birth of such children;
- (c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim Law; and
- (d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

Sub-sections (2) and (3) of section 3 are procedural. An application can be made to a Magistrate for an order of payment of dues under sub-section (1) of section 3. Sub-section (4) deals with the subject of execution of the order of payment. It is *pan materia* with section 125(3) of the Code and reads as under :

"If any person against whom an order has been made under sub-section (3) fails without sufficient causes 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) deals with the order for payment of maintenance to a divorced women who has not remarried and who is not able to maintain herself after the iddat period, against her relatives who would be entitled to inherit her property on her death according to Muslim Law. Similar provision is made also for maintenance allowance for the children of such divorced women. Sub-section (2) of section 4 provides that if a divorced women has no relatives as mentioned in sub-section (1) or such relatives do not have sufficient means to pay the maintenance, the Magistrate may by order direct the State Wakf Board established under section 9 of the Wakf Act, 1954 to pay such maintenance as determined by him or to pay the shares of such of the relatives who are unable to pay. Section 5 deals with the option to be governed by the provisions of section 125 to section 128 of the Code. Section 6 is rule making power. Section 7 which contains transitional provision provides that applications under section 125 or under section 127 of the Code pending before a Magistrate on the commencement of the Muslim Women Act shall be disposed of in accordance with the provisions of the said Act.

30. Section 3(1)(a) says that, notwithstanding anything contained in any other law for the time being in force, a divorced Muslim women 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. There was not much debate before us on the question whether a Muslim divorced women is entitled to maintenance beyond the period of iddat. That a former husband's liability to pay maintenance to the wife does not exceed beyond the period of iddat is an accepted position. The Supreme Court in Shaha Bano's case after considering the provisions of Holy Quran and authoritative books on Muslim Law has held that the Muslim Personal Law limits the husband's liability to provide for the maintenance of the divorced wife to the period of iddat. The said position therefore can no longer be debated. The question is whether the husband is absolved of any responsibility towards his wife after the iddat period? Why has the legislature used the words reasonable and fair provision? What meaning do these words carry?

31. In our opinion, a reasonable and fair provision has got to be distinct from maintenance. If we have a look at the dictionary meaning of the words 'provision' and maintenance', the difference between the two is very clear. The word 'provision' as per the Concise Oxford Dictionary, Seventh Edition, means:

"provision-providing (for, against; esp. make provision); provided amount of something."

In the Random House Dictionary of the English Language, Unabridged Edition, the word 'provision' has been given the following meaning:

"provision-1. a clause in a legal instrument, a law etc., providing for a particular matter; stipulation, proviso. 2. the providing or supplying of something, esp. of food or other necessities. 3. arrangement or preparation before hand, as for the doing of something, the meeting of needs, the supplying of means etc. 4. something provided; a measure or other means for meeting a need. 5. a supply or stock of something provided."

32. In Metal Box Company v. The Workmen, , the Supreme Court has described 'provision' as an amount set aside out of the profits and other surplus to provide for any known liability to which the amount cannot be determined with substantial accuracy. Therefore, the word 'provision' has a future content. It is an amount kept aside to meet a known liability, the amount of which cannot be decided with accuracy. In the context of section 3(1)(a) it would therefore mean such amount as would be necessary for the divorced Muslim women to look after herself after the period of iddat. This may involve amount for her residence, food, clothing, medicine and like expenses. It is precisely for this reason that like section 125 of the Code no maximum amount is fixed here and the quantum has got to be substantial having regard to the future needs of the women. The word 'maintenance' is described in the Concise Oxford Dictionary, Seventh Edition, as follows:

"maintenance" maintaining or being maintained; (provision of) enough to support life (SEPARATE maintenance); =ALIMONY."

The meaning of the word 'maintenance' found in the Random House Dictionary of the English Language is as under:

"3. means of upkeep, support or subsistence, livelihood."

The word 'maintenance' as per Webster Third International Dictionary means:

"the act of providing means of support for something, means of sustenance designed or adequate to maintain a living body in a suitable condition without providing reserves for growth, functional change or healing effect."

Therefore, provision and maintenance is not one and the same thing.

33. That the two phrases 'reasonable & fair provision' and 'maintenance' carry distinct meaning is also clear from the fact that the legislature has chosen to employ the said expressions in one section. If they were to convey the same meaning there was no reason for the legislature to use two different expressions. The legislature does not use tautologous language in this manner. It does not use words unnecessarily. Every part of a statute should be given as far as possible its full meaning and effect and no word or clause should ordinarily be rejected as superfluous. Lord Hewart. C.J., in *Spillers, Limited v. Cardiff (Borough) Assessment Committee and Pritchard (Revenue Officer for the Cardiff Assessment Area)*, 1931(2) K.B. 21 observed:

"It ought to be the rule, and we are glad to think that it is the rule, that words are used in an Act of Parliament correctly and exactly, and not loosely and inexactly. Upon those who assert that rule has been broken the burden of establishing their proposition lies heavily. And they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred."

The two expressions must therefore carry two different meanings. This view of ours is fortified by the manner in which these two words are employed in the sections. Section 3(1)(a) says "reasonable and fair provision and maintenance to be made and paid to her within the iddat period". The words 'to be made' must obviously follow the words "reasonable and fair provision" to make it read as reasonable and fair provision to be made to her within the iddat period. The words 'to be paid' must follow the words maintenance to make it read as "maintenance to be paid within the iddat period". Any other arrangement of the words would make no sense. The section becomes intelligible only when read thus.

34. The word 'within' has been given the following meaning in Concise Oxford Dictionary, Ninth Edition. Within-not further off than". Therefore the reasonable and fair provision has to be made and maintenance has to be paid to the wife not further off than the period of iddat. The word within gives the outer limit in which the provision must be made and maintenance must be paid. In our opinion it signifies the urgency of action on the part of the husband. This obligation cannot be differed by the husband beyond the iddat period. The word 'within' can not be substituted by the words 'for' because the word 'within' is used by legislature with a design that is to protect divorced women from vagrancy. The Courts are not to substitute words in an enactment. This principle will apply with more rigour in a beneficial legislation like Muslim Women Act To substitute 'within' by 'for' would frustrate the object of the Muslim Women Act.

35. Section 3(1)(a) makes it more clear. Sub-clause (b) uses the words "for". It says that where the wife maintains children a reasonable and fair provision has to be made and maintenance has to be paid by her husband for a period of two years from the respective dates of births of such children. This sub-section does not use the words within. The word 'for' used in this sub-section gives the period in respect of which the provision has to be made or maintenance has to be paid.

36. Under section 3(3)(a), where an application is made by a divorced women, against a defaulting husband, the Magistrate has to satisfy himself that the husband has failed to make a reasonable and fair provision or has failed to pay maintenance to the divorced wife within the iddat period. The word 'within' therefore fixes the outer limit for penal liability.

37. An argument was advanced by the petitioner's Counsel that sub-section (4) of section 3 which contains a provision under which the defaulting former husband can be dealt with, the words reasonable and fair provision are absent and the Magistrate can issue a warrant for levying the amount of maintenance or mahr only and if there is no remedy for a women who is denied the said reasonable and fair provision, there is no such right. Since in this section only the word maintenance is found the word maintenance and reasonable and fair provision mean one and the same thing. We are not impressed by this submission. In this respect we would refer to the judgment of Kerala High Court in *Ali v. Sufaira* (supra) where the Kerala High Court, while dealing with similar submission, has observed that :

"A divorced Muslim women has got the right to approach the Magistrate for an order directing her former husband to return all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends. The Magistrate is duty bound to adjudicate on that claim. The order directing former husband to return those properties has to be made by the Magistrate in case he comes to the conclusion that the former husband is retaining possession of those properties. No provision is made in Clause (4) of section 3 of the Muslim Women Act for executing that part of the order either. That does not mean that the Magistrate is not to adjudicate on the claim coming under section 3(1)(d) of the Muslim Women Act. Similarly the Magistrate has to direct former husband to make a reasonable and fair provision for the future of the divorced Muslim women."

We respectfully concur with this view.

38. Moreover significantly in section 4 the words reasonable and fair provision are absent. Section 4 which begins with a non-abstante clause says that, if such a women is unable to maintain herself after the iddat period, then the Magistrate 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 women, the standard of life enjoyed by her during the marriage and the means of such relatives. The 2nd proviso says 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. Sub-section (2) thereof says that if such a women has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso of sub-section (1), the Magistrate may direct the State Wakf Board to pay such maintenance. Therefore reasonable and fair provision is only the obligation of the husband, apart from maintenance obviously because of the very personal and intimate relationship enjoyed by her with her former husband because of the loss of which she is bound to incur some disadvantages. In the nature of things, there can be no such corresponding obligation in respect of relatives or Wakf Board. Therefore, these two provisions are not the same.

39. It is also pertinent to note that when a divorced women applies for maintenance under section 4 of the Muslim Women Act, the Magistrate has to satisfy himself that she is unable to maintain herself and then fasten the liability on her relatives or Wakf Board. Significantly the words unable to maintain herself are absent in section 3. Therefore the husband's obligation is wider. He has to therefore make such provision for her as would take care of her for rest of her life. It is not as if every women has to apply under section 3 as well as under section 4. This beneficial legislation does not contemplate driving a women from husband to relatives, then to children, then to parents and ultimately to Wakf Board. She does not necessarily have to follow this pattern. It is only in cases of extreme inability of the husband to fulfill his obligation that the women will be driven to make an application under section 4. To say that a women will have to follow this course to keep her body and soul together is to put premium on the husband's conduct of discarding his wife at his whims and fancies and also would amount to humiliating and degrading her. Therefore in our opinion the husband will have to make a fair and reasonable provision for the divorced women within iddat period which should take care of her for rest of her life or till she disentitles herself from getting it on account of any disqualification incurred by her under the Act.

40. It is contended on behalf of the husband that under section 3(1)(c), the divorced women is entitled from her former husband within the iddat period to an amount equal to the sum of Mahr or dower agreed to be paid to her at the time of her marriage or any time thereafter. Therefore section 3 takes care of a divorced women. Under this section she is also entitled to all the properties. There is therefore no justification to say that the husband has to pay her anything beyond the iddat period. We reject this argument. Mahr or dower is the sum of money which the wife is entitled to receive from her husband in consideration of marriage. It cannot be a consideration for divorce. It is an obligation of a husband arising from a contract, or otherwise imposed by law of custom on the husband as a token of his respect for his wife. The language of this sub-section itself makes it clear that this sum becomes payable to the wife on marriage or any time thereafter. By asking the husband to pay this amount within the iddat period the legislature has emphasised the urgency of payment. Mahr is a liability which does not get absolved as a result of any other payment or consequence. Therefore section 3(1)(c) is an additional benefit. The amount of maintenance or reasonable and fair provision cannot be confused with Mahr. Mahr is no substitute for it. In a given case a wife may take the Mahr amount from her husband even prior to divorce because of some exceptional circumstances and spend it. Can such a women be denied protection for the future? This

argument therefore deserves to be rejected.

41. It is also contended that if the word 'provision' is interpreted to mean payment which will take care of future events, it would lead to absurd results. How can a Court for see the future needs of a women? Is it not groping in uncertainty? What if a divorced women gets married? Is the husband entitled to get back the amount? While interpreting a statute meant for the benefit of a divorced women, we refused to get swayed by such arguments of inconvenience. The learned Single Judge of the Andhra Pradesh High Court has in Usman Bahamani's case (supra) rightly referred to the decision of the Supreme Court in Mysore State Electricity Board v. Bangalore W.C. & S. Mills, where the Supreme Court has stated that inconvenience is not a decisive factor in interpreting a statute. While interpreting beneficial legislation, we cannot adopt such approach. Besides such cases may be few and far between. This argument therefore does not appeal to us.

42. It was also argued that in Shah Bano's case (supra), the Supreme Court has held that there is no difference between the word provision and maintenance as are used in section 3 of the Muslim Women Act. When Ayat No. 241 of the Holy Quran was pointed out to the Supreme court, the Supreme Court merely observed that the contention that the word 'Mata' in Ayat No. 241 means provision and not maintenance is not correct because it is a distinction without a difference. In our opinion, the observations of the Supreme Court in Shah Bano's case have been torn out of context.

43. We may also mention at this stage the argument advanced by the learned Counsel of the husband that such an interpretation would be contrary to the Muslim Personal Law. To us this argument does not appear to be correct. In this regard we may refer to the observations of the learned Single Judge of the Kerala High Court in Ali v. Sufaira's case (supra) which rest on the authority of Holy Quran, and with which we respectfully concur.

"Translation and Commentary on the Holy Quran by Abdulla Usaf Ali in Ayat No 236 states :

"There is no blame on you If ye divorce women Before consummation Or the fixation of their dower, But bestow on them (A suitable gift), The wealthy According to his means, And the poor According to his means;

A gift of a reasonable amount Is due from those Who wish to do the right thing."

Ayat 237 states :

"And if ye divorce them Before consummation, But after the fixation of a dower for them, Then the half of the dower (Is due to them), unless They remit it Or (the man's half) is remitted By him in whose hands Is the marriage tie;

And the remission (Of the man's half) Is the nearest to righteousness And do not forget Liberality between yourselves.

For God sees well All that ye do."

From this, it is clear that the Muslim husband who divorced the lady must be very liberal to the women and should give her substantially for her future.

Ayat 241 states :

"For divorced women Maintenance (should be provided) on a reasonable (scale) This is a duty on the righteous."

Ayat 242 provides:

"Thus doth God Make clear His Signs To you; in order that ye may understand"

From this it is clear that the Muslim who believes in God must give a reasonable amount by way of gift or maintenance to the divorced lady. That gift or maintenance is not limited to the period of iddat. It is for her future livelihood because - God wishes to see all well. The gift, is to depend on the capacity of the husband. The gift, to be paid by the husband at the time of divorce, to be paid by the husband at the time of divorce, as commanded by the Quran, is recognised in sub-clause (a) of Clause (I) of section 3, of the Act. This liability is cast upon the husband on account of the past advantage received by him by reason of the relationship with the divorced women or on account of the past disadvantage suffered by her by reason of matrimonial consortium, is in the nature of a compensatory gift or a solatium to sustain the women for her life after the divorce. In accordance with the principles of Islamic equity the said provision or compensation or support from the former husband is wife's right. This right has been given legislative recognition in the above provision."

44. On the first question therefore we conclude that the husband's liability to pay maintenance to a wife ceases the moment iddat period gets over. He has to pay maintenance to her within the iddat period for iddat period. But he has to make reasonable and fair provision for her within iddat period, which should take care of her for the rest of her life or till she incurs any disability under the Muslim Women Act. While deciding the amount, regard will be had to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband. If the husband is unable to arrange for such a lumpsum payment he can ask for instalments and the Court shall consider granting him instalments. Further till the husband makes the fair and reasonable provision the Magistrate may direct monthly payment to be made to the wife even beyond the iddat period subject to the fixation of the amount of fair and reasonable provision.

45. The second question which has to be considered now is whether the Muslim Women Act has the effect of invalidating the orders passed under section 125 of the Code prior to its coming into force. That is whether the Muslim Women Act divests parties of vested rights/benefits.

46. On this point Shri Mulla and Shri Shaikh submitted that after coming into force of the Muslim Women Act, the provisions of section 125 and section 127 of the Code stand repealed. They contended that the Muslim Women Act is declaratory in character and therefore the usual presumption against retrospectivity does not arise. The Counsel argued that neither the orders passed under section 125 of the Code nor liability incurred earlier to the coming into force of the

Muslim Women Act has been saved and therefore the inevitable consequence is that not only the right under section 125(1) of the Code but also remedy under section 125(3) is lost.

47. We are unable to accept this contention. In our opinion vested rights of parties cannot be taken away by implication. Significantly while under section 5 of the Muslim Women Act there is a specific reference to section 125 to section 128 of the Code in the transitional provision contained in section 7, section 128 of the Code which speaks of enforcement of order of maintenance is absent which clearly indicates the intention of the legislature to protect the crystallised or vested rights of a divorced Muslim women. Every statute is prime facie prospective in operation unless it is expressly or by necessary implication made to have retrospective operation. The procedural laws are normally treated to be retrospective, while the laws relating to vested rights are prospective. Wider retrospective operation is not to be given to a statute if its language does not necessitate it. In our opinion the rights of a divorced women which have been finally determined and taken the shape of judgments or orders of Courts of law prior to the coming into force of the Muslim Women Act will have to remain untouched and protected. This rests on the sound principle that in respect of transactions which are complete at the time when the new enactment comes into force if new disabilities or obligations are created it will work great injustice. We are concerned with the problems of destitute women and their crystallised rights. The usual presumption against retrospectivity will operate with greater rigour in this case. The Muslim Women Act is not made retrospective by express words. We do not find manifestation of such intention either by express words or by necessary implication.

48. It was contended that to set at rest the controversy created by the Shah Bano's judgment (supra) the Muslim Women Act was enacted. Therefore it is a declaratory statute. It was argued that a statute which is declaratory in nature has to be construed as retrospective unless there is clear indication that such was not the intention of the legislature. We are not inclined to accept the submission that the Muslim Women Act is a declaratory statute. In our opinion as the Statement of Objects and Reasons of this Act indicates it was enacted to clearly specify the rights of Muslim Women in view of the controversy created by Shah Bano's judgment. But even if this statute is viewed as a declaratory statute it cannot affect decided cases. In this connection the observation of the Division Bench of Allahabad High Court need to be noted. In *Mt. Mohammadi Bibi v. Kashi Upadhya and others*, the Allahabad High Court has observed :

"A declaratory Act is an Act to remove doubts existing as to the meaning or effect of a statute, and the usual reason for passing a declaratory Act is to set aside what the legislative body deems to have been a judicial error. Declaratory Acts, like judgments decide cases pending when the judgments are given but do not reopen decided cases."

49. With respect, we are unable to follow the view taken by some High Courts, which includes Andhra Pradesh High Court in *Usman Bahamani's case* (supra), the Patna High Court in *Mh. Yunus's case* (supra) and the learned Single Judge of this Court in *Mahaboob Khan's case* (supra) that since the Muslim Women Act has repealed the right of a divorced women to get maintenance under the Code and since there is no saving clause, such right was never in existence because these decisions do not take into account the principle that statutes dealing merely with matters of

procedure may be attributed retrospective effect, but provisions of statutes which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. There is obviously no express provision in the Muslim Women Act. We do not see any necessary intendment suggesting retrospective operation. In fact while under section 5 of the Muslim Women Act the legislature has made a specific reference to the provisions of sections 125 to 128 of the Code, section 7 clearly omits reference to section 128. It merely refers to section 125 and section 127 of the Code. Nothing prevented the legislature from adding section 128 in section 7 of the Muslim Women Act. In our opinion this omission is intentional. It intends to keep the vested and crystalised rights of divorced Muslim women intact. The Full Bench of Punjab & Haryana High Court has arrived at similar conclusion in Hassan Bano's case (supra) by resting their reasoning on several authoritative pronouncements of the Supreme Court and we fully concur with the said view.

50. We therefore hold that the orders passed under section 125 of the Code prior to the enactment of the Muslim Women Act are not nullified by reason of the coming into force of the Muslim Women Act. Such orders are binding on both sides and can be executed under section 128 of the Code. The Muslim Women Act does not divest the divorced women of the right to get maintenance under section 125 of the Code vested in her by reason of orders of a Competent Court passed prior to its coming into force.

51. We must now address ourselves to the third question namely whether after the commencement of the Muslim Women Act, a Muslim divorced wife can apply for maintenance by invoking the provisions of Chapter IX of the Code. Under section 3 of the Muslim Women Act, the husband is liable to pay maintenance to the divorced wife during the iddat period. Under section 4, if the divorced Muslim women is unable to maintain herself after iddat period, then the liability devolves on her relatives or Wakf Board. Both these sections begin with a non obstante clause. Therefore for the situations envisaged under sections 3 and 4 of the Muslim Women Act, the divorced wife can only apply under the said sections to a Magistrate competent to deal with the said applications. Section 5 and section 7 make the intention of the legislature more clear.

52. Section 5 reads thus :

"5. Option to be governed by the provisions of sections 125 to 128 of Act 2 of 1974.---If, on the date of the first hearing of the application under sub-section (2) of section 3, a divorced women 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 file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose such application accordingly.

Explanation-For 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 5, therefore gives option to a divorced women and her former husband, if by affidavit and declaration they make their intention to be governed by the provisions of section 125 to 128 of the Code clear, to be so governed. The form of the said affidavit is given in the said rules. Clause two thereof reads as under.

"2. That I/we..... desire to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure 1973, in preference to the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986."

The declaration under Rule 8 is also similar. This undoubtedly indicates that ordinarily a divorced Muslim women has to apply for reasonable and fair provision and maintenance under the provisions of the Muslim Women Act. It is only by agreement under section 5 can they decide to be governed by the provisions of section 125 to 128 of the Code in preference to the provisions of the Muslim Women Act.

53. Section 7 reads thus :

"7. Transitional provisions.---Every application by a divorced women 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."

54. A conjoint reading of sections 5 and 7 of the Muslim Women Act indicates that a divorced Muslim wife and husband can by agreement subject themselves to the jurisdiction of the Magistrate competent to deal with applications under section 125 and section 127 of the Code and agree to be governed by the said provisions. In all other cases they cannot have recourse to the said provisions. The fact that the legislature thought it necessary to enact section 7 of the Muslim Women Act which provides that all applications under section 125 and section 127 of the Code pending on the commencement of the said Act barring those governed by section 5 thereof have to be dealt with in accordance with the provisions of the Muslim Women Act, makes it abundantly clear that after commencement of the Muslim Women Act, a divorced Muslim women can not apply for maintenance by invoking the provisions of Chapter IX of the Code. We answer the third question accordingly. The Full Bench of Punjab & Haryana High Court has taken a similar view in Hassan Bano's case (supra). Full Bench of Andhra Pradesh High Court is also unanimous on this aspect in Usman Bahamani's case (supra). We respectfully concur with them on this point. We are unable to agree with the view expressed by the Division Bench of this Court in Allabuksh's case (supra) on this aspect.

55. The next question is whether the Family Court has jurisdiction to try applications of the Muslim divorced women for maintenance after the coming into force of the Muslim Women Act.

56. The Family Courts Act, 1984 was made applicable to the State of Maharashtra on 1st of December, 86. The Preamble to the Act states that it is an Act to provide for the establishment of

Family Courts with a view to promoting conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. Section 2(a) defines a "Judge" to be the Principal Judge, Additional Principal Judge or other Judge of a Family Court. Section 2(d) says that Family Court means a Family Court established under section 3. Section 3 says that State Government after consultation with High Court and by notification shall as soon as may be after the commencement of the Family Court's Act, establish Family Courts.

57. Section 7 talks of jurisdiction. Section 7(1)(a) says that subject to the other provisions of the said Act, a Family Court shall have jurisdiction exercisable by any District Court or subordinate Civil Court under any law for the time being in force in respect of the suits and proceedings of the nature referred to in the explanation. Section 7(1)(b) says that Family Court may be deemed for the purpose of exercising such jurisdiction under such law, to be a District Court or, as the case may be, such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends, Explanation to this section contains the suits and proceedings which the Family Court is to deal with. All the proceedings set out in the said explanation pertain to disputes relating to marriage and family affairs. Section 7(2)(a) says that the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 shall be exercisable by a Family Court. Section 7(2)(b) says that the Family Court shall have such other jurisdiction as may be conferred on it by any other enactment.

58. Section 8 specifically excludes the jurisdiction of other courts in respect of matters which the Family Court has to deal under the Family Court's Act. Section 8(a) says that where a Family Court has been established, no District Court or subordinate Civil Court referred to in section 7(1) shall have any jurisdiction in respect of proceedings referred to in Explanation to sub-section (1) of section 7. Section 8(b) says that no Magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code. Section 8(c) provides for transfer of such proceedings which are referred to in explanation to sub-section (1) of section 7 and every proceedings under Chapter IX of the Code which is pending before the establishment of the Family Court before any District Court or subordinate Court or any proceedings referred to in that sub-section as the case may be before any Magistrate under the said Code and which would have been required to be instituted or taken before or by such Family Court if before the date on which such suit or proceeding was instituted or taken, this Act has come into force and such Family Court had been established, to such Family Court on the date on which it is established. Section 20 gives overriding effect to the Family Court's Act, 1984. It says that the provisions of the Family Court's Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

59. Undoubtedly the Family Court Act has set up a machinery to deal with disputes relating to marriage. The provisions of the Act and the Rules made thereunder also show that a separate procedure is also provided for conducting the proceedings before the Family Court. The proceedings under Chapter IX of the Code are also now assigned to the Family Court. Any pending matters which are required to be attended to by the Family Court are transferred to Family Court the moment the Family Court is established and all these provisions have to have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

60. The Muslim Women Act was published in the gazette of India on 19th May, 1986. This Act, the provisions of which we have already quoted extensively is meant to protect the rights of Muslim women who have been divorced by, or have obtained divorce from their husbands, and to provide for matters connected therewith or incidental thereto. This Act is a later enactment Obviously, therefore, the provisions of the Family Court's Act, 1984 will not have overriding effect on this Act because as per section 20 of the Family Court's Act it can have overriding effect only in respect of anything inconsistent therewith contained in any other law for the time being in force. Admittedly, the Muslim Women Act was not in force when the Family Court's Act, 1984 was enacted. In section 2(c) of the Muslim Women Act, Magistrate is defined to mean a Magistrate of the First Class exercising jurisdiction under the Code of Criminal Procedure, 1973 in the area where the divorced women resides. Application under section 3 for reasonable and fair provision and maintenance has to be made before a Magistrate. Under section 4, a divorced women who has not remarried and who is not able to maintain herself after the iddat period has to make an application before a Magistrate to claim a fair and reasonable provision from the persons specified therein. As per section 2(c) of the Muslim Women Act, such Magistrate has to be a Magistrate of the First Class exercising jurisdiction under the Code. Section 7(2) of the Family Court's Act says that the Family Court shall also have a jurisdiction exercisable by the Magistrate of First Class under Chapter IX of the Code, but in view of our conclusion that a divorced Muslim women cannot apply for maintenance under Chapter IX of the Code except by agreement as provided under section 5, the question of Muslim women making an application under Chapter IX of the Code and preferring it before a Family Court does not arise at all. Section 7(2)(b) says that a Family Court shall have such other powers as may be conferred on it by any other enactment.

61. It is important to note that there is no enactment containing an express provision that the Family Court shall have jurisdiction to deal with applications made by a divorced Muslim women under sections 3 and 4 of the Muslim Women Act. On the contrary, the scheme of the Muslim Women Act shows that such application can be made only to the Magistrate of First Class exercising jurisdiction under the Code. The Family Court's Act is a prior enactment. Muslim Women Act does not even refer to the Family Court's Act. If it was the intention of the legislature to see that a Muslim women can file application before a Family Court an express provision to that effect would have been found in the Muslim Women Act. On the contrary, under section 5 of the Muslim Women Act, a divorced women and her former husband can declare that they prefer to be governed by sections 125 to 128 of the Code and then the Magistrate has to dispose of the application accordingly. Otherwise, the Magistrate has to deal with it as per the provisions of the Muslim Women Act. There is no provision under which a Muslim women can prefer to go to a Family Court by making a joint declaration with her husband. Section 7 says that application by a divorced women under section 125 or under section 127 of the Code pending before a Magistrate on the commencement of the Muslim Women Act shall notwithstanding anything contained in that Code and subject to the provisions of section 5 of the Muslim Women Act shall be disposed of by such Magistrate in accordance with the provisions of the Muslim Women Act. This makes the legal provision very clear. It is only a Magistrate of the First Class exercising jurisdiction under the Code who can dispose of even the pending applications and that too in accordance with the provisions of the Muslim Women Act. Therefore, there is nothing in the provisions of the Muslim Women Act to suggest that the Family Court has jurisdiction to entertain applications under sections 3 and 4 of the Muslim Women

Act.

62. Similar view has been taken by Division Bench of this Court in Noor Jamaal's case (supra) and we respectfully concur with the said view. We do not concur with decision of the Division Bench of this Court in Allabuksh's case (supra) which holds that, where a Family Court has been established, the power and jurisdiction of the Family Court to entertain an application by a divorced Muslim wife is not taken away expressly or by necessary implication by the Muslim Women Act and the remedy under the Muslim Women Act is an additional remedy. In our opinion, the fact that the Muslim Women Act does not refer to a Family Court or does not say that application under sections 3 and 4 can be filed before the Family Court is very material. If the jurisdiction of the Family Court was sought to be protected, there would have been an express provision making it clear that the Family Court has jurisdiction to entertain applications of divorced Muslim women under sections 3 and 4 of the Muslim Women Act. We therefore hold that after coming into force of the Muslim Women Act, a Muslim women can apply under sections 3 and 4 of the said Act only to the First Class Magistrate having jurisdiction under the Code. The Family Court cannot deal with such applications.

63. We will now summarise our answers to the questions raised before us.

The 1st question

(i) Whether the Muslim husband's liability under section 3(a) of the Muslim Women Act to make a reasonable and fair provision and pay maintenance is only restricted to the iddat period or whether it extends beyond the iddat period?

Answer

(i) The husband's liability to pay maintenance to a divorced wife ceases the moment iddat period gets over. He has to pay maintenance to her within the iddat period for the iddat period. But he has to make reasonable and fair provision for her within iddat period, which should take care of her for the rest of her life on till she incurs any disability under the Muslim Women Act. While deciding the amount regard will be had to the needs of the divorced women, the standard of life enjoyed by her during her marriage and the means of her former husband and the like circumstances. If the husband is unable to arrange for such a lumpsum payment he can ask for instalments and the Court shall consider granting him instalments. Till the husband makes the fair and reasonable provision, the Magistrate may direct monthly payment to be made to the wife even beyond the iddat period subject to the fixation of the amount of fair and reasonable provision.

The 2nd question

(ii) Whether the Muslim Women Act has the effect of invalidating the orders/judgments passed under section 125 of the Code i.e. whether the Muslim Women Act operates retrospectively so as to divest parties of vested rights?

Answer

(iii) The orders passed under section 125 of the Code prior to the enactment of the Muslim Women Act are not nullified by reason of the coming into force of the Muslim Women Act. Such orders are binding on both sides and can be executed under section 128 of the Code. The Muslim Women Act does not divest the divorced women of the right to get maintenance under section 125 of the Code vested in her by reason of orders of a competent Court passed prior to its coming into force.

The 3rd question

(iv) Whether after the commencement of the Muslim Women Act, a Muslim divorced wife can apply for maintenance by invoking the provisions of Chapter IX of the Code?

Answer

(ii) After commencement of the Muslim Women Act, a Muslim divorced wife can not apply for maintenance under the provisions of Chapter IX of the Code. It is only under section 5 of the Muslim Women Act by agreement can the husband and the divorced wife approach a Magistrate under Chapter IX of the code.

The 4th question

(iii) Whether the Family Court has jurisdiction to try applications of the Muslim divorced women for maintenance after coming into force of the Muslim Women Act?

Answer

(iv) After coming into force of the Muslim Women Act, a Muslim Women can apply under sections 3 and 4 of the said Act only to Magistrate of the First Class having jurisdiction under the Code. The Family Court cannot deal with such applications.

64. We are mindful of the fact that the decision of the Division Bench of this Court in Allabuksh's case (supra) was rendered on 22-6-94. It was followed by the learned Single Judge of this Court in Shaikh Babbu v. Sayeda Masarat Begum, 1999(3) Mh.L.J. 465. These decisions are holding the field till date. Obviously therefore the fate of a number of matters has been decided on the basis of the said judgment. Bearing the above fact in mind, after having answered the questions, we issue the following directions in the light of observations made by us in the present judgment:

(a) All pending applications under section 125 of the Code filed by divorced Muslim women pending after the commencement of the Muslim Women Act will be treated as applications under the Muslim Women Act and will be disposed of as per the provisions of the said Act.

(b) All applications under section 125 of the Code filed by divorced Muslim Women which are pending in the Family Court will be transferred to the concerned Magistrate's Court for disposal according to the provisions of the Muslim Women Act. Interim orders passed therein will be continued till the Magistrate disposes them of.

(c) All applications under section 125 of the Code filed by divorced Muslim women, which have been decided finally pursuant to the decision of the Division Bench of this Court in Allabuksh's case (supra) will not be reopened due to the present judgment.

65. We direct the office to place Criminal Writ Petition No. 1296 of 1995 and Criminal Writ Petition No. 15 of 1998 before the appropriate Court for disposal in the light of the observations made by us in this judgment.

66. The reference is disposed of accordingly.

67. Order accordingly.