Gauhati High Court
Md. Siddique Ali vs Mustt Fatema Rashid on 6 February, 2007
Equivalent citations: 2007 CriLJ 2363, (2007) 2 GLR 657, 2007 (2) GLT 1
Author: I Ansari
Bench: I Ansari
JUDGMENT I.A. Ansari, J.

1. Whether a Muslim woman, whose marriage has been dissolved by-pronouncement of talaq, can make or maintain an application, under Section 125 CrPC, seeking maintenance from her former husband, who has dissolved the marriage by pronouncement of talaq? If so, what are the conditions subject to which such a claim for maintenance by a Muslim divorced woman can be maintained under Section 125 Cr.PC? While dealing with a proceeding under the Muslim Women (Protection of Rights on Divorce) Act, 1986, (in short, 'the MW Act'), whether the court can direct a husband, who has dissolved his marriage by pronouncement of talaq, to pay maintenance allowance per month if he has already paid maintenance to his former wife for the period of iddat? Is a Muslim divorced woman entitled to make an application, under Section 3 of the MW Act, for direction to her former husband, who has dissolved the marriage by pronouncement of talaq and has also paid 'maintenance' to her for the period of iddat, to make 'provision' for her beyond the period of iddat and if so, subject to what conditions, such a direction can be given? Whether a proceeding under the MW Act is maintainable in a Family Court, constituted under the Family Court Act, 1984? These are some of the prominent questions, which the present set of revision petitions have raised.

2. I have heard Mr. H.R.A. Choudhury, learned senior counsel, appearing on behalf of the petitioner in Criminal Revision Nos. 283/2006 and 10/2006, and Mr. A.K. Goswami, learned senior counsel, appearing on behalf of the petitioner in Criminal Revision No. 532/2002. I have also heard Mr. A. Shariff, learned Counsel for the respondent in 10/2006, Ms. P. Talukdar, learned Counsel for the respondent in Criminal Revision No. 283/2006, and Mr. J. Roy, learned Counsel for the respondent in Criminal Revision No. 532/2002.

3. Before I deal with the specific questions, which have arisen in the present set of revision petitions for determination by this court, it is necessary to deal with the question as to when a woman can claim, from her husband, monthly allowance for maintenance under Section 125 Cr.P.C. For the purpose of finding a correct answer to the question, so posed, let me reproduce hereinbelow the relevant provisions of Section 125 CrPC, which run as follows:

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

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

(b) * * *

(c) * * *

(d) * * * a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife * * * at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit * * * Explanation. - For the purposes of this Chapter-

(a) * * *

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

(2) * * * (3) * * * Provided * * * Provided further * * * Explanation : - * * *

4. From a careful reading of Sub-section (1) of Section 125, it becomes abundantly clear that if a person, having sufficient means, neglects or refuses to maintain his wife, who is unable to maintain herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such a person to make monthly allowance for the maintenance of his wife as such Magistrate thinks fit and to pay the same to such person as the Magistrate may from time to time direct. Explanation (b), appended to Sub-section (1) of Section 125, clarifies that the term 'wife' includes a woman, who has been divorced by, or has obtained divorce from, her husband, and has not re-married.

5. Thus, a careful reading of Section 125(1) shows that but for explanation (b) to Sub-section (1) of Section 125, a woman, who has been divorced, or who has obtained divorce, would not have been able to maintain a claim for maintenance against her husband. Because of the fact that legislature has deemed it fit to include within the word 'wife', which occurs in Section 125 Cr.PC, a woman, who has been divorced by, or has obtained a divorce from, her husband, and has not remarried, it is possible for the Magistrate to order payment of maintenance allowance to a woman, whose marriage may have been dissolved and who has not remarried. In short, a Magistrate could not have, but for Explanation (b) to Section 125(1), ordered for payment of maintenance allowance to a divorced woman - be she a Hindu or Muslim or of any other faith.

6. Bearing in mind what has been indicated above, let me, now, turn to Section 127 Cr.PC and reproduce hereinbelow Sub-section (3) thereof, which states as under:

127. Alternation in allowance. - (1) (3) * * * (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) * * *

(b) the woman has been divorced by her husband and that she has received, whether before or after the data 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.

7. A cautious reading of Clause (b) of Sub-section (3) of Section 127 shows that a divorced woman would not be entitled to receive maintenance allowance under Section 125 Cr.PC if whole of the sum, which, under any customary or personal law applicable to the parties, was payable on such divorcee, has been paid to, and received by, the woman, who makes a claim for maintenance under the provisions of Section 125 Cr.PC.

8. Is a Muslim man, who has paid mahr (dower) to his former wife, still liable to pay maintenance under the provisions of Section 125 Cr.PC or, in other words, whether payment of mahr by a Muslim man to his former wife would exempt him from his obligation to pay maintenance under the provisions of Section 125 Cr.PC? This was the question, which fell for consideration by a Constitution Bench in Mohd. Ahmed Khan v. Shah Bano Begum (1985) 2 SCC 556. The Supreme Court, in Shah Bano's case (supra), pointed out that mahr is more closely connected with marriage than with divorce, though mahr is usually paid at the time the marriage is dissolved, whether by death or divorce. Therefore, the Apex Court held that the 'sum', payable, on divorce, by the Muslim husband to his former wife, is not 'mahr' within the meaning of Section 127(3)(b) CrPC and that mahr is not such a sum, which can ipso facto absolve the husband's liability to maintain his former wife under Section 125 Cr.PC. In other words, the Apex Court made it clear, in Shah Bano's case (supra), that a Muslim husband's liability to pay maintenance to his former wife, whom he has divorced, continues if she is incapable of maintaining herself until the time she has re-married irrespective of the fact that whether Mahr has already been paid by such a husband to his former wife or not.

9. Yet another question, which arose in Shah Bano's case (supra), was whether the amount of mahr constitutes a reasonable alternative to the order of maintenance, for, payment of mahr cannot absolve the husband from the rigour of Section 127(3)(b) if mahr does not constitute a reasonable alternative to the order for maintenance, though mahr, being a part of the resources available to a divorced Muslim woman, would be taken into account in considering her eligibility for an order of maintenance and the quantum of maintenance. Responding to this question, the Supreme Court pointed out that the divorced Muslim women were entitled to apply for maintenance orders against their former husbands under Section 125 Cr.PC and that such applications were not barred under Section 127(3)(b) Cr.PC.

10. From what have been pointed out above, it is clear that the issue, which fell for determination in Shah Bano's case (supra), was, thus : while the husband claimed exemption on the basis of Section 127(3)(b) Cr.PC by contending that he had given to his wife the whole of the sum, which, under the Muslim law applicable to the parties and within the meaning of Section 127(3)(b) Cr.PC, was payable to such a divorcee, the divorced woman contended that her former husband had not paid her whole of the sum, which Section 127(3)(b) Cr.PC envisages, and what he had, in fact, paid was

only mahr and maintenance for the period of iddat and as her former husband had failed to provide the mata, i.e., provision or maintenance referred to in The Holy Quran, he was bound under the law to pay to her mata, i.e., provision or maintenance. The Apex Court, after referring to the Holy Quran and various textbooks on Muslim law, held that a divorced woman's right to maintenance ceases on expiration of iddat period, but the general propositions, reflected in those textbooks, did not deal with the special situation, where the divorced woman was unable to maintain herself. The Apex Court concluded that these Aiyats (The Holy Quran, Chapter II, Suras 241-42) leave no doubt that The Holy Quran imposes an obligation on the Muslim husband to make provision for, or to provide maintenance to, the divorced wife. The Apex Court also clarified, in Shah Bane's case (supra), that the responsibility of the husband to pay maintenance to his divorced wife shall cease only in such cases, where there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. To put it a little differently, the Supreme Court, in Shah Bano case (supra), having considered the Holy Quran and authoritative books of Muslim law, held that the Muslim Personal Law limits the husband's liability to provide maintenance to his divorced wife for the period of iddat, but it does not contemplate the situation envisaged by Section 125 Cr.P.C. and that if a Muslim divorced woman is able to maintain herself, her 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 would be entitled to apply, under Section 125 Cr.P.C., for maintenance provided that she has not remarried. In short, thus, what the Supreme Court, in effect, held, in Shah Bano Begum (supra), is that when a Muslim divorced woman is unable to maintain herself, she can, by resorting to the provisions of Section 125 CrPC, seek maintenance from her former husband even after the period of iddat.

11. The decision, rendered in Shah Bano's case (supra), was followed by a big uproar by a sizeable section of Muslims on the ground, inter alia, that the decision, in Shah Bano Begum (supra), had altered the position of Muslim law with regard to the liability of a husband to pay maintenance to his divorced wife. The Parliament reacted by enacting the MW Act.

12. It is in the backdrop of the facts, indicated above, which had led to the passing of the MW Act by the Parliament, that I am, now, required to address the questions, which have been raised in the present set of revision petitions; but before I do so, it may be pointed out that while interpreting a statute, the preliminary and foremost task of a court is to ascertain the intention of the legislature, actual or imputed. Having ascertained the legislative intention, the court must 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.

13. In the light of the above principles governing interpretation of statutes, let me determine as to what the legislative intent behind enactment of the MW Act is. My quest for an answer to this question brings me to the Statement of Objects and Reasons to the Bill, which resulted into the enactment of the MW Act. The Statement of Object and Reasons read as follows:

The Supreme Court, in Mohd. Ahmed Khan v. Shah Bano Begum and Ors. AIR 1985 SC 945 has held that although the Muslim law limits the husband's liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by Section 125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect

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

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

14. A careful reading of the statement of objects and reasons to the MW Act shows that since it was held in Shah Bano's case (supra), that Muslim law limits the husband's liability to provide for maintenance of the divorced wife to the period of iddat, but it does not contemplate or countenance the situation envisaged by Section 125 Cr.P.C, it cannot be said that a Muslim husband, according to his personal law, is not under an obligation to provide maintenance beyond the period of iddat to his divorced wife, who is unable to maintain herself, in terms of the provisions of Section 125 Cr.PC, and this decision, in Shah Bano's case (supra), had led to controversy as to the obligation of the Muslim husband to pay maintenance to his divorced wife, the Parliament, with the help of MW Act, sought to resolve this controversy by not only specifying the rights, which a Muslim divorced woman is entitled to, at the time of her divorce, but also to protect her interest.

15. While interpreting the various provisions of the MW Act, what also needs to be borne in mind is that, since the Supreme Court itself had ruled, in Shah Bano's case (supra), that the Muslim Personal Law limits a husband's liability to provide for the maintenance of his divorced wife to the period of iddat, there can be no longer any doubt that so far as the personal law of the Muslims is concerned, it does not oblige a Muslim husband to provide maintenance to his divorced wife beyond the period of iddat. Having so clarified, let me, now, proceed further and determine if a Muslim divorced woman is entitled to maintain an application under Section 125 Cr.P.C. and if so, when and under what circumstances.

Is a Muslim divorced woman entitled to maintain an application under Section 125 Cr.P.C. and if so, when and under what circumstances.?

16. In order to, now, determine if a Muslim 'divorced woman' can claim maintenance under the provisions of Section 125, Cr.PC, one must take into consideration the meaning of the term 'divorced woman', as defined in the MW Act. Section 2(a) of the MW Act defines a "divorced woman" to mean a Muslim woman, who was married according to Muslim law, and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim law.

17. Let me, now, turn to Section 3 of the MW Act, which begins with a non-obstinate clause overriding all other laws and provides' that a 'divorced woman' shall be entitled to-

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

(b) where she maintains the children born to her before or after her divorce, a reasonable provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

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

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

18. It is Clause (a) of Sub-section (1) of Section 3, which is material for the present revision petitions. A careful reading of Section 31(a) shows that a Muslim divorced woman shall be entitled to a 'reasonable and fair provision and maintenance' to be made and paid to her within the iddat period by her former husband.

19. Section 4 of the MW Act, which opens up with an overriding clause as to what is stated in the foregoing provisions of the MW Act or in any other law for the time being in force, provides that where the Magistrate is satisfied that a divorced woman has not remarried and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death, according to Muslim law, to pay such

'reasonable and fair maintenance' to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and that such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as the Magistrate may specify in his order. If any of the relatives does not have the necessary means to pay the same, the Magistrate may order that the share of such a relative, 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. Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in Sub-section (1) or such relatives or anyone of them does not have 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 order by the Magistrate to be paid by other relatives under the second proviso to Sub-section (1), the Magistrate may, by order, direct the State Wakf Board, functioning in the area in which the divorced woman resides, to pay such maintenance as determined by him. It is, however, significant to note that Section 4 of the MW Act refers only to payment of "maintenance" and does not touch upon the "provision" to be made by the husband referred to in Section 3(1)(a) of the MW Act.

20. When Section 31(a) is read, in the light of the provisions of Section 4, it becomes apparent that a Muslim divorced woman's former husband must make a 'reasonable and fair provision and maintenance' for her and pay the same within the period of iddat. However, where such a woman is unable to maintain herself after the period of iddat, order of maintenance, in her favour, can be made, in terms of Section 4, against the relatives of the divorced woman and, when the relatives are not in a position to pay maintenance allowance to her, the liability to pay maintenance shall be imposed on the State Wakf Board.

21. Section 5 of the MW Act provides for option to be governed by the provisions of Sections 125 to 128 CrPC. It lays down that if, on the date of the first hearing of the application under Section 3(2) of the MW Act, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 CrPC, and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.

22. A careful analysis of the scheme of the MW Act shows that the legislature has made provisions regulating the obligations due to a Muslim divorced woman. Who shall be regarded as a divorced woman under the MW Act has been defined to mean, as already indicated above, a divorced woman, who was married, according to Muslim law, and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim law. Having, thus, defined a Muslim divorced woman, the MW Act obviously excludes from the application of the MW Act a Muslim woman, whose marriage has been solemnized under the Indian Special Marriage Act, 1954, or a Muslim woman, whose marriage has been dissolved either under the Indian Divorce Act, 1869, or Indian Special Marriage Act, 1954. Thus, except those Muslim women, whose marriage may have been solemnized either under the Indian Special Marriage Act, 1954, or those, whose marriage stands dissolved either under the Indian Divorce Act, 1869, or Indian Special Marriage Act, 1954, all those women, whose

marriages were solemnized according to Muslim law and who have been divorced by, or have obtained divorce from, their husbands, in accordance with Muslim law, would be governed by the provisions of the MW Act. As a corollary thereto, a Muslim woman, who was married according to Muslim law and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim law, would not be covered by, and fall outside the scope of, Section 125 Cr.PC. That such is the position of law does not remain in doubt, when one cautiously reads the decision in Danial Latifi v. Union of India reported in (2001) 7 SCP 740, wherein a Constitution Bench, speaking through Rajendra Babu, J, (as his Lordship then was) observed, "26. A reading of the MW Act will indicate that it codifies and regulates the obligations due to a Muslim woman divorcee by putting them outside the scope of Section 125 CrPC as the "divorced woman" has been defined as "Muslim woman who was married according to Muslim law and has been divorced by or has obtained divorce from her husband in accordance with the Muslim law". But the MW Act does not apply to a Muslim woman whose marriage is solemnised either under the Indian Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either under the Indian Divorce Act, 1869 or the Indian Special Marriage Act, 1954. The Act does not apply to the deserted and separated Muslim wives."

23. The fall-out of the above discussion is that ordinarily, a Muslim woman, who comes 'within' the meaning of the term 'divorced woman' as defined in MW Act, would not be entitled to claim maintenance by instituting a proceeding under Section 125 Cr.P.C. In short, thus, a Muslim woman, who falls within the meaning of the term 'divorced woman', as defined in the MW Act, has no right, with the coming into force of the MW Act, to institute or maintain an application under Section 125 Cr.PC except when, on the date of the first hearing of the application under Section 3(2), a divorced woman and her former husband, in terms of Section 5, 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 Cr.P.C.

24. What also emerges from the discussion held above is that even a Muslim woman, who falls within the meaning of the term 'divorced woman', as defined under the MW Act, can indeed, claim maintenance under Section 125 Cr.PC if both she and her husband prefer to be governed by Section 125 Cr.PC and make declaration or file affidavit in terms of the provisions of Section 5 of the MW Act.

25. What, thus, crystallizes from the above discussion is that ordinarily, a Muslim divorced woman is not entitled to make or maintain an application, under Section 125 CrPC, for maintenance against her former husband. However, if she does not fall within the meaning of the term 'divorced woman' as defined under the MW Act or when she and her former husband so agree, she can make and maintain an application for maintenance against her husband under Section 125 CrPC.

Whether a Muslim 'divorced woman' is entitled to claim maintenance, beyond the period of iddat, from her former husband?

26. Turning to the question as to whether a Muslim divorced woman is entitled to claim maintenance, beyond the period of iddat, from her former husband, I may point out that this

question stands clearly answered by the Apex Court, in DanialLatifi (supra), thus : "26... The maintenance under the Act is to be paid by the husband for the duration of the iddat period and this obligation does not extend beyond the period of iddat. Once the relationship with the husband has come to an end with the expiry of the iddat period, the responsibility devolves upon the relatives of the divorcee. The Act follows Muslim personal law in determining which relatives are responsible under which circumstances. If there are no relatives, or no relatives are able to support the divorcee, then the court can order the State Wakf Boards to pay the maintenance."

27. The above observations, made in Danial Latifi (supra), leave no room for doubt that the obligation of a Muslim husband to pay maintenance is confined to the period of iddat and once the period of iddat expires, the responsibility of providing maintenance falls on the relatives of the Muslim divorcee and when there is no relative or when there are relatives, but the relatives are not capable of supporting the divorcee, then, the court can order the State Wakf Board to pay the 'maintenance'.

Is a Muslim divorced woman entitled to make an application, under Section 3 of the MW Act, for direction to her former husband, who has dissolved the marriage by pronouncement of talaq and has also paid 'maintenance' to her for the period of iddat, to make 'provision' for her beyond the period of iddat and if so, subject to what conditions, such a direction can be given?

28. The question, posed above, make one naturally ask whether a Muslim divorced woman's former husband is completely absolved of the responsibility of making 'provision' for her beyond the period of iddat if he has already paid to her 'maintenance' for the period of iddat? This question necessarily brings us to a more important question and the question is this: what the expression 'a reasonable and fair provision', occurring under Section 3(1)(a), means and conveys and whether the expression 'a reasonable and fair provision' is distinguishable from, and independent of, the 'maintenance', which is required to be paid to a Muslim divorced woman by her former husband 'within' the period of iddat?

29. The question, posed above, necessarily requires one to determine the distinction, if any, between he words 'provision' and 'maintenance'. The word 'provision', according to the Oxford Universal Dictionary (Third Edition), means, the action of providing, seeing to things beforehand; the fact or condition of being made ready beforehand, something prepared or arranged in advance, a measure provided to meet a need. Similarly, according to the Webster's Third New International Dictionary, the word 'provision' means, the act or process of providing, the quality or state of being prepared beforehand, a measure taken beforehand. On the other hand, the word maintenance, according to Oxford Universal Dictionary (Third Edition), means, the action of maintaining, the state of fact of being maintained, means of sustentation. The Webster's Third New International Dictionary describes the word 'maintenance' to mean the act of providing means of support for someone, the action of preserving or supporting. The Supreme Court had the occasion to describe the word 'provision', in Metal Box Co. v. Workmen AIR 1962 SC 612, 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. The word 'provision', thus, means an act of providing something for future. In the context of Section 3(1)(a), it would obviously mean the amount necessary for the

Muslim divorced woman to look after herself after the period of iddat. The provision may include the amount necessary for the divorced woman's food, residence, clothing, etc. Maintenance, in the context of the MW Act, signifies the act of maintaining or the means of sustenance.

30. Thus, the two words, 'provision' and 'maintenance' signify two different things. When the two expressions 'provision' and 'maintenance' mean two different things, they must, in the absence of anything indicating to the contrary, be allowed to carry two different meanings or meanings as are, ordinarily, attributable to them. It is bearing in mind the distinction between the two words, 'provision' and 'maintenance', that the scheme of the MW Act needs to be analyzed.

31. Section 3(1)(a) of the MW Act states, 'a reasonable and fair provision maintenance' to be made and paid to her 'within' the iddat period 'by her former husband'. The words 'reasonable and fair provision' must precede the words to be made and if it is so done, it naturally conveys that 'reasonable and fair provision' must be made 'within' the period of iddat. Similarly, the words to be paid must follow the word 'maintenance' to make it read as 'maintenance to be paid within the iddat period'. Any other arrangement of the words, occurring under section in Section 3(1)(a), would carry no rational meaning. The word 'within', which occurs in Section 3(1)(a), gives outer limit within which the 'provision' for the divorced wife must be made by her former husband and 'maintenance' must be paid to her by him. The word 'within', which finds place in Section 3(1)(a), reflects the urgency of action in making 'provision' for the divorced wife by her former husband and in making payment of 'maintenance'. Since the words 'within' and 'for' signify two different things, these two words cannot be substituted for each other. It, therefore, clearly follows that the liability of the husband to make 'reasonable and fair provision' for his divorced wife has to be made 'within' the period of iddat and not for the period of iddat. Similarly, the 'maintenance' is also required to be paid 'within' the period of iddat, but the 'maintenance', so paid, is for the period of iddat.

32. The impression that 'reasonable and fair provision' for his divorced wife be made by her former husband 'within' the period of iddat and not 'for' the period of iddat also receives support from the fact that Section 3(3) of the MW Act provides that where an application is made by a divorced woman 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.

33. In support of the conclusion, which is reached above, it is also worth pointing out that Section 4 of the MW Act, which begins with a non-abstate clause, states that if such a woman 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 woman, the standard of life enjoyed by her during the marriage and the means of such relatives. The 2nd proviso states that, if any of the relatives 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 further clarifies that if such a woman has no relatives as mentioned in Sub-section (I) or such relatives or anyone 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 (I), the Magistrate may direct the State Wakf Board to pay such maintenance.

34. If one has to give a coherent meaning and an effective scheme to the MW Act, as indicated above, there can be no escape from the conclusion that making of a 'reasonable and fair provision' is the obligation of the husband alone, apart from, of course, making payment of maintenance for the period of iddat. If the husband is unable to provide necessary 'maintenance', the obligation to provide maintenance falls on the relatives of the divorced woman and if the relatives are also incapable of providing 'maintenance' to such a divorced woman, the State Wakf Board has the ultimate responsibility to provide maintenance beyond the period of iddat. The scheme of the MW Act also shows that a Muslim husband has to make a 'reasonable and fair provision', which includes all the imperative necessities of his divorced wife, such as, her residence, food and clothing, and if he is not capable of making such a 'provision', the divorced woman cannot be left high and dry. In order to protect her from vagrancy, the legislature makes her relatives, who may inherit her estate, to provide her 'maintenance' and if they are also incapable of providing 'maintenance' to her, the Wakf Board owes the responsibility to provide 'maintenance' to her.

35. Coupled with the above, it is also of great significance to note that, when a divorced woman applies for 'maintenance' under Section 4, the Magistrate has the responsibility to satisfy himself that she is unable to maintain herself and, only upon reaching such a conclusion, he can direct the woman's relatives or the Wakf Board, as the case may be, to pay maintenance. Interestingly enough, the words unable to maintain herself are absent in Section 3.

36. There remains, therefore, no doubt that so far as the former husband is concerned, his obligation is wider and he must make such provision for his divorced wife, 'within' the period of iddat, as would take care of her for the rest of her life. It is only when he is unable to make 'reasonable and fair provision' for the future of his wife that the obligation is cast on the relatives of the divorced woman to provide her 'maintenance' in terms of Section 4. It is, therefore, not necessary that in every case, a divorced woman has to apply, under Section 4, seeking 'maintenance' from her relatives or the Wakf Board. The necessity of resorting to Section 4 would arise only in such a case, where the husband has not only failed to maintain her, but also unable to make 'provision' for the future necessities of his divorced wife. In short, therefore, the husband, on divorcing his wife, has to make, 'within' the period of iddat, a 'fair and reasonable provision', which can take care of her necessities for the rest of her life.

37. The scheme of the MW Act, as reflected by the provisions of Section 3 of the MW Act; shows that a Muslim divorced woman's right to provision and maintenance has been made subject to the means of the husband. This, in turn, enables a Muslim husband to avoid, even during the period of iddat, his liability to pay maintenance to his erstwhile wife after divorce. In short, a Muslim husband, who has no sufficient means, may, in a given case, be absolved of his responsibility to provide

maintenance to his divorced wife even for the period of iddat. Though sounds unreal, such is the impact of the scheme of the MW Act. Having noticed this aspect of the MW Act, the Constitution Bench, in Daniel Latifi (supra), observed thus : "27... The Judicial enforceability of the Muslim divorced woman's right to provision and maintenance under Section 3(1)(a) of the Act has been subjected to the condition of the husband having sufficient means which, strictly speaking, is contrary to the principles of Muslim law as the liability to pay maintenance during the iddat period is unconditional and cannot be circumscribed by the financial means of the husband. The purpose of the Act appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of iddat."

38. From the discussions held above, it is plain that a Muslim divorced woman's former husband is not completely absolved of the responsibility of making 'provision' for her beyond the period of iddat even if he has already paid to her maintenance for the period of iddat.

39. Let me, now, revert to the question as to whether a Muslim divorced woman is entitled to make an application, under Section 3 of the MW Act, for direction to her former husband, who has dissolved the marriage by pronouncement of talaq and has also paid 'maintenance' to her for the period of iddat, to make 'provision' for her beyond the period of iddat and if so, subject to what conditions, such a direction can be given? A dispassionate analysis of the entire scheme of the MW Act and, particularly, of Section 3(1)(a) shows that the obligation of the husband to make and pay, within the iddat period, 'a reasonable and fair provision and maintenance' overrides all other laws, for, Sub-section (1) of Section 3 commences with a non obstante clause. The words "to be made and paid to her within iddat period", which occur in Section 3(1)(a), indicate, observed the Constitution Bench, in Danial Latifi (supra), that 'a fair and reasonable provision' has to be 'made', while 'maintenance' has to be 'paid'. A Muslim divorced woman is, thus, entitled to a fair and reasonable 'provision' to be made in her favour by her former husband. This reasonable' and fair provision may include provision for her residence, food, clothing, etc. This, in turn, shows that at the time of divorce, a Muslim husband is required to contemplate the future needs of his wife and make arrangement, in advance, for meeting those needs. Thus, the right to have 'a fair and reasonable provision' in her favour is a right enforceable only against the woman's former husband and not against others. To put it differently, a Muslim divorced woman has, in addition to her right to receive Mahr, the right to a reasonable and fair provision' to be made in her favour by her former husband within the period of iddat. The reasonable and fair provision' would mean that the former husband has to take into account the needs of his divorced wife, his own means and the standard of life, which his wife was enjoying during the subsistence of marriage.

40. What, thus, emerges is that Section 3 entitles a Muslim divorced woman to obtain from her former husband 'maintenance', 'provision' and 'Mahr' and also recover from his possession her wedding presents and dowry. A minute and cautious reading of the provisions, contained in Section 3 of the MW Act, indicate that the MW Act casts two distinct and separate obligations on the husband, namely, (i) to make a "reasonable and fair provision" for his divorced wife; and (ii) to provide "maintenance" for her. The emphasis of this section is not on the nature or duration of any such "provision" or "maintenance", but on the time by which an arrangement for payment of provision and maintenance ought to be concluded, namely, "within the iddat period". If the scheme

of the MW Act were so read, as the MW Act ought to be read, it becomes transparent, holds the Constitution Bench, in Daniel Latifi's (supra), that the Act MW would exclude, and does exclude, a man, who has already discharged both his obligations, namely, the obligation of making and paying 'reasonable and fair provision' and 'maintenance' by paying these amounts, in a lump sum, to his wife, in addition to having paid his wife's Mahr and restored her dowry as per Sections 3(1)(c) and 3(1)(d) of the MW Act. Such a man would have no further liability to provide post iddat period maintenance to his divorced wife. [See Daniel Latifi's case (supra)]

41. Having taken note of the fact that the MW Act makes it obligatory for a husband to provide maintenance and make provisions and also having noticed that preponderance of judicial opinion in the country, while interpreting the scheme of Section 3(1)(a) read with Section 4 of the MW Act, had been that a Muslim divorced woman is entitled to a 'fair and reasonable provision' for her future to be made by her former husband within the period of iddat and that making of such a 'fair and reasonable provision' must necessarily include 'provision' for her 'maintenance' beyond the period of iddat and that the liability of the husband to make a reasonable and fair provision is not restricted for the period of iddat only, the Apex Court, while upholding the validity of the MW Act, held, inter alia, as follows:

36. While upholding the validity of the Act, we may sum up our conclusions. - (1) A Muslim husband, is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.

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

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

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

(emphasis is supplied)

42. From what have been laid down by the Constitution Bench, in Danial Latifi (supra), there remains no room for doubt that though the responsibility of a Muslim divorced woman's former husband to pay 'maintenance' to her shall remain confined to the period of iddat, it does not completely absolve such a woman's former husband from the liability to make 'reasonable and fair provision' for her future. The 'provision', so made, would obviously include her 'maintenance' as well. This 'provision' must be made by the former husband within the period of iddat and not

thereafter. When the husband is unable to make 'provision' for his divorced wife, responsibility to maintain her falls, in terms of Section 4, on her relatives and, on their inability to provide 'maintenance' to her, responsibility to provide 'maintenance' to her falls on the State Wakf Board. The scheme of the MW Act further makes it clear that notwithstanding the fact that it is the legal obligation of a Muslim divorced woman's husband to make a 'fair and reasonable provision' for her within the period of iddat, he may, in a given case, be absolved of this responsibility if he is incapable of making such a provision and, in such an event, the liability to maintain such a divorced woman falls, as indicated in Section 4, on her relatives and, on their failure, on the State Wakf Board, which can, in no circumstance, shirk its responsibility to maintain her.

Is it permissible for a Magistrate, while entertaining an application under Section 3(1)(a), to direct a Muslim divorced woman's former husband to give her a lump-sump amount of money to enable her to maintain herself and, if so, under what circumstances and subject to what condition, such a direction can be given?

43. What further surfaces from the discussion held above is that a Muslim husband must pay, "within' the period of iddat, 'maintenance' to his divorced wife for the period of iddat and his liability to provide 'maintenance' ceases on expiry of the period of iddat. Notwithstanding the fact that the 'maintenance' shall be paid for the period of iddat, the Muslim husband has the liability to make, "within' the period of iddat, a 'reasonable and fair provision' for his divorced wife. Such 'reasonable and fair provision' is meant to enable the divorced woman to take care of herself for the rest of her life or until the time she incurs any disability under the MW Act. While deciding as to what shall be a 'reasonable and fair provision' for such a divorced woman, regard shall be had to the needs of the divorced woman, the standard of life she had been used to during her marriage and, above all, the means of her former husband. If the husband is unable to arrange for such a lump sum amount of money, which he is required to pay to his wife as a 'reasonable and fair provision', he may be granted installments by the court, should the court consider granting of such installments necessary and in the interest of justice. Till the husband makes a 'fair and reasonable provision', as envisaged under the MW Act, the Magistrate may direct monthly payment to be made to the divorced woman even beyond the period of iddat subject, of course, to the fixation of the amount of fair and reasonable provision'. I am fortified in coming to this conclusion from the decision in Karim Abdul Rehman Shaikh v. Shehnaz Karim Shaikh and Ors. (2000) Cri.L.J. 3560, wherein the Full Bench of Bombay High Court, having considered the issue at hand concluded, as follows:

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 lump sum payment he can ask for installments and the court shall consider granting him installments. 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.

(emphasis is supplied)

44. While dealing with the question as to whether a court, while in seisin of an application seeking maintenance under the MW Act, direct a husband to pay maintenance per month to his divorced wife, it may also be pointed out in the light of the authoritative pronouncement in Danial Latifi (supra), it becomes transparent that it is the legal obligation of the Muslim husband to make reasonable and fair provision for the future of his divorced wife. When a Muslim husband has not made such a 'provision' as the law obliges him to do, there is no impediment, on the part of a Magistrate, who is in seisin of an application made under Section 3 of the MW Act, to direct the Muslim husband to make such a provision. However, when a Muslim husband is not in a position to make, at a time, payment of such an amount, which can be regarded as a 'fair and reasonable provision' for future use of his divorced wife, a Magistrate may, in a given case and in appropriate circumstances, assess the 'fair and reasonable provision' and direct such a former husband to pay, in installments, the sum, which may be assessed by the Magistrate as the 'fair and reasonable provision'. Such installments may be monthly, half-yearly or annually. The 'fair and reasonable provision', which the MW Act envisages, are really aimed at making such a 'provision', which would enable the divorced woman to maintain the standard of life, which she had been used to. The need for making of 'fair and reasonable provision' is really aimed at providing such a sum., which would enable the divorced woman to maintain herself beyond the period of iddat. Hence, in a given case, the Magistrate may have to ask if the husband has made a 'fair and reasonable provision' for the divorced woman. If such a 'provision' has not been made and the husband does not have sufficient means to make such a 'provision' at a time, as the law obliges him to do, there can be no impediment, on the part of the Magistrate, to direct the husband to pay such sam of money, either at a time or in installments, which would amount to making of a 'reasonable and fair provision' to the divorced woman.

Whether a Family Court has the jurisdiction to entertain application of a Muslim divorced woman under the MW Act?

45. Turning to the question as to whether a Family Court has the jurisdiction to try applications of a Muslim divorced woman under Section 3 and/or 4 of the MW Act, it may be pointed out that this question was raised and formulated in Danial Latift (supra), but the Constitution Bench has left the question open for decision by the Bench, where the question may be raised. While answering the question, so posed, it may be noted that the Preamble to the Family Courts Act, 1984 (in short, 'the F.C. 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 matter connected therewith. Thus, the preamble to the F.C. Act shows that the Act aims at promoting conciliation in, and expeditious settlement of, disputes not only relating to marriage and family affairs, but also other matters connected therewith. The question, however, remains as to whether all disputes relating to marriage and family affairs and/or matters connected therewith can be dealt with by the Family Court or it is only those matters, which are, either under

the F.C. Act, or under any other enactment, made amenable to Family Courts. The Family Court, according to Section 2(d) of the F.C. Act means a Family Court established under Section 3 of the F.C. Act. Section 2(a) defines 'Judge' to mean the Judge or, as the case may be, the Principal Judge, Additional Principal Judge or other Judge of a Family Court. Sub-section (2) of Section 3 says that the State Government, after consultation with the High Court, specify, by notification, the local limits of the area to which the jurisdiction of a Family Court shall extend and may at any time, increase, reduce or alter such limits. It is Section 7 contained in Chapter III of the F.C. Act, which deals with the jurisdiction of the Family Courts.

46. Section 7(1)(a) states that subject to other provisions of the F.C. Act, a Family Court shall have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceeding of the nature referred to the Explanation. The Explanation to Section 7 contains suits and proceedings, which Family Court can deal with and decide.

47. What is important to note, now, is that all the proceedings, set out in the Explanation to Section 7, pertain to disputes relating to marriage and family affairs. It is Section 7(2), which defines jurisdiction of the Family Court, by bringing, within its jurisdiction, suits or proceedings other than what have been mentioned in Clauses (a) to (g) to Section 7. Sub-section (2) of Section 7 is, therefore, of immense importance. This sub-section states that a Family Court shall also have the jurisdiction, which is 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, and such other jurisdiction as may be conferred on it by any other enactment.

48. A careful reading of Sub-section (2) of Section 7 makes it clear that other than suits or proceedings, which are enlisted in Clauses (a) to (g) of the Explanation to Sub-section (1) of Section 7, the Family Court can exercise only such jurisdiction, which is exercisable by a Magistrate of the First Class under Chapter IX of the Code of Criminal Procedure, 1973 (in short, 'the Code'). The Family Court, thus, cannot exercise jurisdiction beyond those, which are conferred on it as indicated hereinbefore. Section 8 excludes the jurisdiction of other courts in respect of matters, which the Family Courts have to deal with under the F.C. Act. Section 8(a) states that no district court or any subordinate civil court, referred to in Sub-section (1) of Section 7, shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that subsection.

49. A patient scrutiny of the scheme of the F.C. Act clearly reveals that though, besides the disputes relating to marriage and family affairs, this Act deals with other matters connected therewith, it cannot exercise jurisdiction beyond those, which Section 7 confers on it. A careful reading of Section 7 shows that the Family Court can deal with suits and proceedings, which are enlisted under Clauses (a) to (g) to the Explanation appended to Sub-section (1) of Section 7. Section 7 further indicates that but for the fact that a Family Court has been specifically empowered to exercise the very same jurisdiction, which is exercisable by a Magistrate under Chapter IX relating to order for maintenance of wife, children and parents of the Code, the Family Court could not have exercised the power even under Chapter IX of the Code. The fallout of Section 8 is that when a Family Court is

established, no other court can exercise jurisdiction, within the territorial jurisdiction of the Family Court, in respect of matters, which are amenable to the jurisdiction of the Family Court.

50. In the backdrop of the above scheme of the F.C. Act, 1984, when one turns to the MW Act, what clearly becomes noticeable is that the MW Act is a later enactment and, hence, the provisions of the Family Courts Act, 1984, will not override the provisions of the MW Act, for, Section 20 of the F.C. Act shows that it has overriding effect only in respect of anything inconsistent therewith contained in any other law for the time being in force. The question of the Family Court, therefore, prevailing upon the MW Act does not arise at all. The MW Act is also a special mechanism for protecting the rights of the Muslim women, who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto.

51. What is, now, of significance to note is that Section 2(c) of the MW Act defines a Magistrate to mean a Magistrate of the First Class exercising jurisdiction under the Code in the area, where the divorced woman, within the meaning of the MW Act, resides. An application, under Section 3 and/or 4 of the MW Act, seeking Mahr or various reliefs incorporated therein or restoration of properties, must be made, under the MW Act, to a Magistrate of the First Class, who exercises jurisdiction under the Code. Though Section 7(2)(a) of the F.C. Act states that the Family Court shall also have jurisdiction, which is exercisable by a Magistrate of the first class under Chapter IX of the Code, yet in view of the fact that a Muslim divorced woman cannot apply for maintenance, under Chapter IX of the Code, except by way of an agreement as indicated in Section 5 of the MW Act, the question of Muslim divorced woman making an application, under Chapter IX of the Code, before a Family Court does not arise at all. Section 7(b) makes it clear that Family Court shall have such other powers as may be conferred on it by any other enactment. Since no other enactment confers jurisdiction on the Family Court to try applications under the MW Act, a Family Court cannot be held to have jurisdiction to deal with the applications made under the MW Act. Though a Family Court has the jurisdiction, which is exercisable by a Magistrate of first class under Chapter IX of the Code (which relates to order for maintenance of wife, children and parents), the fact remains that an application, made under Section 3 or 4 of the MW Act, is not covered by Chapter IX of the Code, Consequently, a Family Court cannot exercise jurisdiction in respect of matters, which are amenable to the jurisdiction of the Magistrate of first Class, under the MW Act.

52. Coupled with the above, one may also notice that there is no enactment containing an express provision that the Family Court shall have the jurisdiction to deal with applications made by a Muslim divorced woman under Sections 3 and/or 4 of the MW Act. On the contrary, the scheme of the MW Act shows that an application under Sections 3 or 4 can be made only to a Magistrate of the first Class. The F.C. Act is a prior enactment and the MW Act is a later one, but it makes no reference to the F.C. Act. Had the legislature intended to include, within the jurisdiction of the Family Courts, applications, which may arise under Sections 3 and/or 4 of the MW Act, legislature could have given such an indication either under the MW Act or by making necessary amendments to the F.C. Act. That the MW Act is beyond the jurisdiction of the Family Court can also be gathered from the fact that under Section 5 of the MW Act, a Muslim divorced woman and her former husband can, as already discussed above, declare that they would prefer to be governed by the provisions of Sections 125 to 128 of the Code and when such a declaration is made, the Magistrate

shall dispose of the application for maintenance accordingly; otherwise, the Magistrate has to deal with an application, made under Sections 3 and/or 4 of the MW Act, in terms of the provisions of the MW Act only. Thus, there is no provision express or implied, in the MW Act, suggesting that the Family Courts have the jurisdiction to entertain applications arising under Sections 3 and/or 4 of the MW Act.

53. In the light of the law discussed above, let me, now, deal with the present Criminal Revisions.

CRIMINAL REVISION No. 283/2006

54. By the impugned judgment and order, dated 2.6.2006, passed in FC(Crl.) No. 201/2004, the learned Judge, Family Court, Guwahati, has directed the present revision petitioner to pay Rs. 1,200 per month to the opposite party herein, (i.e., the first party) and Rs. 1,500 per month to each his two unmarried daughters from the date of making of the application under Section 125 Cr.PC.

55. The material facts leading to the present revision may, in brief, be set out as follows:

The opposite party herein made, as first party, an application, under Section 125 Cr.PC, seeking from the second party, (i.e., the petitioner herein) maintenance of a sum of Rs. 10,000 per month for her ownself and for her two unmarried daughters, her case being, in brief, thus : The parties to the proceeding are legally wedded husband and wife, their marriage having been solemnized, in the year 1971, according to Muslim Shariyat and out of their wedlock, two daughters were born to them, the elder one having been borne in the year 1972 and the younger one in the year 1975. For sometime after marriage, the first party was treated well by the second party and she lived with him with their minor daughters at the house of the second party. After the birth of their second female child, the second party, however, started ill-treating and torturing the first party. Unable to bear the torture to which she was subjected, the first party left her matrimonial house and started living with her minor children at her parental house. Since after she had left her matrimonial house, the second party never made any enquiry about her nor did he pay any maintenance to them. Finding no other alternative, she, again, joined the second party, but the second party obtained her signature on a blank paper and threw her out of his house saying that he had divorced the second party, whereupon the first party started living in a separate house, but within the compound of the second party's house. After about two years, the second party married again. Before the marriage of the second party, the second party provided maintenance to the first party, but after the marriage of the second party, he stopped paving any maintenance. Due to non-availability of any resources, the children had to stop their studies and, in the meanwhile, the first party's father expired and she has been left with no source of sustenance. The second party is a Central Government employee and draws salary of Rs. 20,000 per month. The first party, therefore, sought for a direction to the second party to pay a sum of Rs. 10,000 as maintenance for herself and for her said two unmarried daughters.

56. The second party contested the proceeding by filing his written statement, wherein, while admitting the marriage, the second party alleged that though the behaviour of the first party was not conducive to a happy conjugal life, they had, for sometime, lived separately and though he had tried his best for reconciliation, all his attempts proved futile and, then, by way of a khulla talaq, which

had been entered into by the parties in 1985, their marriage was dissolved. It was also alleged by the second party that the first party had illicit relation with another person and it is because of this reason that their conjugal life could not be continued. While denying that he had not been looking after and maintaining his daughters, the second party asserted that he has maintained them well and paid for their education.

57. Both the parties adduced evidence and, thereafter, the learned court below passed the impugned order. Aggrieved by the order, the second party has impugned the same before this court.

58. While considering the present revision, what needs to be noted is that the fact that the parties to the proceeding were husband and wife has not been in dispute nor has it been in dispute that the said two daughters of the parties to the proceeding live with their mother, i.e., the first party. The learned trial Court has held that marriage between the parties stood dissolved by khulla talaq. While considering this finding, it needs to be pointed out that for the purpose of proving the khulla talaq, the second party relied on a photostat of a talaqnama, (i.e., a deed of divorce), but nobody proved this talaqnama and, in fact, this talaqnama remained without being exhibited. In view, however, of the fact that the first party deposed that she had signed on a blank paper, the learned trial court concluded that the first party was proved to have been divorced on the strength of the said talaqnama. The finding, so reached, is wholly perverse inasmuch as there is no evidence except the said photostat to prove the talaqnama.

59. In view of the above, there can be no escape from the conclusion that the first party was legally wedded wife of the second party, their marriage having been solemnized according to the shariyat and this marriage could not be proved to have been dissolved. The first party is not, thus, a 'divorced woman' within the meaning of the MW Act. Viewed thus, it is clear that the first party remained a wife of the second party within the meaning of Section 125 Cr.PC and she could have claimed maintenance under Section 125 Cr.PC, for, she has proved that she has no source of sustenance and the second party is a person, who works as an employee of BSNL, a Central government undertaking.

60. Coupled with the above, it is also necessary to point out that though both the daughters of the parties concerned are major, they are still unmarried. The question, therefore, is as to whether a father, who is, otherwise, capable of maintaining his daughter, who is unmarried, but major, liable to pay maintenance to such a daughter under Section 125 CrPC? This question stands squarely covered by the decision of the Apex Court in Noor Saba Khatoon v. Mohd. Quasim reported in (1997) SCC 233, wherein the court, having thoroughly discussed the scope of the MW Act, Code of Criminal Procedure and the Muslim Personal Law with regard to liability of a Muslim man to maintain his unmarried but major daughter, concluded thus:

10. Thus, both under the personal law and the statutory law (Section 125 CrPC) the obligation of a Muslim father, having sufficient means, to maintain his minor children, unable to maintain themselves, till they attain majority and in case of females till they get married, is absolute, notwithstanding the fact that the minor children are living with the divorced wife.

11. Thus, our answer to the question posed in the earlier part of the opinion is that the children of Muslim parents are entitled to claim maintenance under Section 125 CrPC for the period till they attain majority or are able to maintain themselves, whichever is earlier and in case of females, till they get married, and this right is not restricted, affected or controlled by the divorcee wife's right to claim maintenance for maintaining the infant child/children in her custody for a period of two years from the date of birth of the child concerned under Section 3(1)(b) of the 1986 Act. In other words, Section 3(1)(b) of the 1986 Act does not in any way affect the rights of the minor children of divorced Muslim parents to claim majority or are able to maintain themselves, or in the case of females, till they are married.

(emphasis is added)

61. In the light of what has been laid down in Noor Saba Khatoon (supra), it is clear that both the daughters aforementioned, though major, are entitled to claim maintenance from their father, i.e., the petitioner herein, until they get married.

62. Because of what have been discussed and pointed out above, I do not find that the directions given by the learned court below to the petitioner herein to pay maintenance to the first party and their two major unmarried daughters, suffer from any infirmity of law.

63. In the result and for the foregoing reasons, this revision fails and the same shall accordingly stand dismissed.

64. Send back the LCR.

CRIMINAL REVISION 532/2002

65. By order, dated 7.6.2002, passed in Misc. Case No. 117/2000, the learned Chief Judicial Magistrate, Cachar, Silchar, has directed the petitioner herein, as second party, in the maintenance proceeding, under Section 125 Cr.PC, to pay, with effect from 1.6.2002, a sum of Rs. 500 per month as maintenance to the first party-opposite party and Rs. 400 per month as maintenance to the minor daughter of the parties concerned, the maintenance allowance being payable in the first week of every month.

66. The facts giving rise to the present revision may, in brief, be described thus : The opposite party herein, as first party, instituted a proceeding under Section 125 Cr.PC against the second party-petitioner herein, her case being, in brief, thus : The marriage between the parties was solemnized, on 30.10.1997, according to Muslim law, Mahr having been fixed at Rs. 40,000. After their marriage, the parties lived together. Prior to the first party's marriage with the second party, the second party was already married and after her marriage, the first party was tortured physically and mentally. On 28.6.1998, the second party was sent to her parental house. After the first party reached her parental house, the second party made no enquiry about her and on 30.8.1998, first party gave birth to a female baby. Though the second party was informed about the birth of the female child, he neither visited the first party nor did he pay any maintenance to her or to their

minor daughter. The first party and her child have no source of livelihood; whereas the second party earns about Rs. 5,000 per month.

67. In the maintenance proceeding, while the second party did not dispute that the first party was his wife and the said child was born out of their wedlock, the second party contended that he was forced to marry the first party and live with her as husband and wife. The second party, however, did not deny that he was already married, when he solemnized the marriage with the first party. It is the further case of the second party that the first party was very quarrelsome, she refused to live with him and in course of time, a 'bichaf (sitting of the elders) took place, on 11.12.1998, at the house of one Dr. Abdul Mannan Laskar and as, in the said sitting, the first party expressed her desire to be divorced, the second party divorced her by pronouncing talaq and as per the decision of the head-man, the second party paid Rs. 25,000 to the first party and the first party acknowledged receipt of this amount in settlement of all her claims for maintenance and some papers were also accordingly prepared and signed by the parties.

68. While considering the present revision, what needs to be noted is that the fact that first party's marriage was solemnized with the second party was not in dispute in the proceeding nor was the legality of the said marriage in question in the maintenance proceeding. Paternity of the said child was also not in question. The only question, therefore, was as to whether the second party stood divorced? To prove the divorce, the second party examined himself and two more witnesses, both of whom are his uncle. According to these witnesses, in the sitting, which was held at the house of Dr. Abdul Mannan Laskar, a talaqnama (i.e., a deed of divorce) was prepared and Rs. 25,000 was delivered to the second party and the second party acknowledged the receipt of the said amount by putting her signature on the said document, which has been proved as Exhibit 'Ka'. This aspect of the evidence given by the second party has been disbelieved by the court.

69. On a close scrutiny of the evidence on record, I find that though the second party claimed that he had given talaq and the second party had acknowledged receipt of the said sum of Rs. 25,000 by putting her signature on Exhibit 'Ka', the fact remains that the first party denied her signature on Exhibit 'Ka'. In these circumstances, the onus was on the second party to prove that Exhibit 'Ka' was talaqnama or acknowledgment of the sum of money received by the first party on her having been divorced by the second party and on her having settled all her claims against the second party on being so divorced.

70. What is, now, curious to note is that though the alleged sitting of the elders took place on 11.9.1998, the document, which was shown to have been executed by the first party, was purchased on 8.5.1998. This apart, no independent witness to the alleged dissolution of the marriage was produced. Even Dr. Mannan, at whose house the said sitting is claimed to have been held, has not examined as a witness. The witnesses examined by the second party, in proof of the divorce, are three, one of whom is the second party himself and the other two are his uncles, though a number of persons from their village were, admittedly, present at the said sitting. It was in these circumstances that the learned court below has pointed out that the evidence given by the second party is wholly unbelievable. I see no reason to take a contrary view on the basis of the evidence on record. In these circumstances, the sum of Rs. 500, which has been fixed as maintenance allowance for the first

party, who has not been proved to be a 'divorced woman', and a sum of Rs. 400 for maintenance of the minor daughter of the parties deserve no interference. I see, therefore, no merit in this revision and the same shall accordingly stand dismissed.

71. Send back the LCR.

CRIMINAL REVISION No. 10/2006

72. By order, dated 25.10.2005, passed, in MR Case No. 46/2004 under Section 3(2) of the MW Act, the learned Additional Chief Judicial Magistrate, Morigaon, directed the present petitioner to pay a sum of Rs. 50,000 as Mahr to the opposite party herein besides making payment to her of a sum of Rs. 2,500 as maintenance allowance for the period of iddat and monthly maintenance allowance @ Rs. 500.

73. The material facts, which have given rise to the present revision, may, in a nutshell, be set out as follows:

The opposite party herein made an application under Section 3(2) of the MW Act praying for direction to the second party, (i.e., the petitioner herein) to pay Rs. 50,000 as Mahr and Rs. 2,500 as her maintenance for the period of iddat, her case being, briefly stated, thus:

The marriage between the parties was solemnized according to Muslim law on 20.5.2000, the Mahr having been fixed at Rs. 50,000. As the second party raised more and more demands for money and the first party was unable to meet the demands, the second party pronounced talaq, dissolved the marriage and the information of the talaq was conveyed to her, while she was at her parental house. On receiving information, her elder brother went to the house of the second party, where the second party forcibly obtained signature of the first party's brother.

74. The second party contested the proceeding, wherein he claimed that Mahr fixed was Rs. 5,000 and not Rs. 50,000 and that it was the first party, who had sent the talaqnama, (i.e., deed of divorce), whereupon he went to the house of the first party, but no reconciliation took place and, then, a 'mel' (i.e., sitting of the elders) was held and in the sitting, so held, he paid Rs. 5,000 as Mahr and Rs. 2,500 as maintenance allowance for the period of iddat to the first party and, in acknowledgement thereof, the first party executed a document, which is Exhibit 'Ka'.

75. In support of their respective cases, both the parties adduced evidence. As the learned court below did not believe the evidence adduced by the second party in support of the case, which he had set up, the impugned directions have been passed.

76. While considering the present revision, what needs to be noted is that the fact that the parties to the proceeding were legally married husband and wife had not been in dispute. The only question to be decided was as to what the amount of Mahr was and if the same had not been paid, direction for payment thereof was to be made and if the first party had not been paid maintenance for the period of iddat, the maintenance was also to be directed to be paid to the first party by the second party.

77. Bearing in mind what is indicated above, when I come to the evidence on record, what attracts the eyes prominently is that according to the evidence of the second party, the said sitting was convened at his own house, where the first party and her brother were also present. In the said sitting, according to the evidence of second party, he pronounced talaq, paid Rs. 5,000 as Mahr and Rs. 2,500 as maintenance for the period of iddat. In his evidence, the second party (DW 1) did not prove Exhibit 'Ka', which the first party is claimed to have executed in acknowledgement of the amount received by her. This apart, according to the evidence of DW 2, when he was called to the house of the second party for the sitting, 30-40 persons were already present there and it was in their presence that the second party pronounced talaq and, apart from returning the household articles to the first party, the second party also paid a sum of Rs. 7,500 as Mahr amount to the first party and a memorandum of agreement was accordingly drawn and signed by the parties. In his cross-examination, however, DW 2 deposed that he kept the money on the table, but cannot say as to who took the said sum of money. This apart, though DW 2 claims that 2-3 documents were executed, he admits that he does not know who had put signatures on the documents. It is, thus, clear, as the learned court below correctly pointed out, that DW 2 does not know who received Rs. 7,500 nor does he know as to who had executed the said memorandum of agreement.

78. Close on the heels of the evidence of DW 2, DW 3 claims that he was called to the said sitting, the second party gave Rs. 5,000 as Mahr and Rs. 2,500 as maintenance allowance for the period of iddat to the first party and pronounced talaq and, then, both the parties executed a memorandum of agreement. The learned court below has correctly pointed out that this witness (DW 3) claims that the second party had given him the said sum of Rs. 7,500 and it was he, who had given it to Gaonburha (DW 2), who, in turn, gave the said amount to the first party. It is, thus, clear as noted by the learned court below, that while DW 2 says that he had kept the said amount of money on a table and that he did not know as to who had taken the said amount of money, DW 3 asserts that it was DW 2, who had been given the said amount of money, and DW 3 had, in turn, handed over the said money to the first party. In the face of these inconsistent and contradictory evidence, the learned court below refused to believe that Rs. 5,000 was fixed as Mahr or that any money, as alleged by the second party, had been paid to the first party. Having closely scrutinized the evidence, I find absolutely no infirmity in the conclusions so reached by the learned court below. I also find that the first party has clearly proved that at the time of marriage, Rs. 50,000 was fixed as Mahr and this part of her evidence remained completely unshaken. The question, therefore, is as to what reliefls) ought to have been granted to the first party.

79. In view of the fact that the first party had succeeded in proving that Mahr fixed was Rs. 50,000 and since it stood clearly proved that the Mahr had not been paid to the first party, the directions given by the learned court below to the second party to pay, to the first party, Rs. 50,000 as unpaid Mahr cannot be interfered with. It may, however, be noted that the learned court below has directed Rs. 5,000 to be paid to the first party as maintenance for the period of iddat, though the first party, in her application, had sought for a direction to be given to the second party to pay for her maintenance a sum of Rs. 2,500 for the period of iddat. However, in her evidence, I notice, the first party claimed Rs. 5,000 as maintenance for the period of iddat. In the facts and circumstances of the present case, I do not find that the learned court below acted illegally or improperly in directing Rs. 5,000 to be paid as maintenance for the period of iddat, when it is not the case of the second

party that the sum of Rs. 5,000 claimed by the second party, in her evidence, as maintenance for the period of iddat is reasonable.

80. What is, now, important to note is that the learned court below has also directed that a sum of Rs. 500 be paid as monthly maintenance allowance to the first party. It needs to be noted, in this regard, that though the first party had the option of seeking direction, as a divorced woman, to her former husband (i.e., the petitioner herein) to make 'provisions' for her in terms of Section 3(2) of the M.W. Act, she had made no such application or claim. In such circumstances, the learned court below could not have directed the second party to pay maintenance allowance. Had the first party sought for a direction to be given to her former husband to make 'provision' for her in terms of Section 3(2) of the MW Act, the learned court below could have been free to fix a reasonable sum of money "as provision' for the first party and this amount could have been realized, as already indicated above, even in monthly installments from the second party. The learned court below, however, passed direction to pay Rs. 500 per month as maintenance allowance without fixing a lump sum amount as 'provision', which the second party ought to have made. Thus, the directions given to the second party for payment of Rs. 500 as maintenance cannot be sustained.

81. In the light of what have been discussed above, this revision partly succeeds. While the impugned directions given to the second party to pay Rs. 50,000 as Mahr and Rs. 5,000 as maintenance for the period of iddat are not interfered with, the directions given to the second party to pay Rs. 500 per month as maintenance allowance is hereby set aside leaving, however, the first party at liberty to make appropriate application seeking directions to the second party to make 'provisions' for her in terms of the scheme of the MW Act.

82. With the above observations and directions, the revision shall stand disposed of.

83. Send back the LCR.