

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 2012 of 2019

With

CIVIL APPLICATION (FOR STAY) NO. 1 of 2019

In R/FIRST APPEAL NO. 2012 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

Sd/-

and

HONOURABLE MR.JUSTICE VIRESHKUMAR B. MAYANI

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No
Circulate this judgment in the subordinate judiciary.		

TARIF RASHIDBHAI QURESHI

Versus

ASMABANU D/O ALIMOHMMAD IDARBHAI QURESHI AND W/O TARIF RASHIDBHAI QURESHI

Appearance:

MR NISHANT LALAKIYA(5511) for the Appellant(s) No. 1

MR. JAVED S QURESHI(6999) for the Appellant(s) No. 1

MR SP MAJMUDAR(3456) for the Defendant(s) No. 1

SHASHVATA U SHUKLA(8069) for the Defendant(s) No. 1

CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA

and

HONOURABLE MR.JUSTICE VIRESHKUMAR B. MAYANI

Date : 19/03/2020

CAV JUDGMENT

(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1. This appeal under Section 19 of the Family Courts Act, 1984 (for short “the Act, 1984”) is at the instance of the original defendant (husband) and is directed against the judgment and decree passed by the Principal Judge, Family Court, Ahmedabad dated 10th January, 2019 in the Family Suit No.257 of 2017 instituted by the respondent herein original plaintiff (wife) for a decree of divorce under the provisions of the Dissolution of Muslim Marriages Act, 1939 (for short “the Act, 1939”).

2. The facts, giving rise to this appeal, may be summarized as under;

2.1 For the sake of convenience, the appellant herein shall be referred to as the original defendant and the respondent herein shall be referred to as the original plaintiff.

2.2 The plaintiff got married with the defendant on 13th June, 2009 in accordance with the Muslim rites and customs. In the wedlock, the plaintiff conceived, but unfortunately, as alleged on account of physical cruelty at the end of the defendant and his family members, the plaintiff gave birth to a still born child.

2.3 It appears from the materials on record that the defendant started harassing the plaintiff soon after the marriage. It appears that an FIR was also lodged by the plaintiff for the offence punishable under Section 498A of the

Indian Penal Code. As the plaintiff was unable to continue with the marriage on account of incessant harassment, she left her matrimonial home and went back to her parental home. The plaintiff also preferred an application being the Criminal Misc. Application No.870 of 2011 in the Family Court at Ahmedabad under Section 125 of the Criminal Procedure Code seeking maintenance. The Family Court passed an order awarding Rs.2000/- per month towards the maintenance. However, it appears that the defendant failed to comply with the order passed by the Family Court for maintenance. Later, an application was filed being the Criminal Misc. Application No.56 of 2011 in the Court of the Metropolitan Magistrate, Ahmedabad under the provisions of the Protection of Women from Domestic Violence Act, 2005. In those proceedings also, the Metropolitan Magistrate, Ahmedabad passed an order of maintenance of Rs.2000/- per month. However, the defendant ignored the same. Later, a private complaint was lodged by the plaintiff in the Court of the Metropolitan Magistrate, Ahmedabad for the offence punishable under Sections 403, 406 and 420 of the Indian Penal Code.

2.4 Ultimately, the plaintiff instituted the Family Suit No.257 of 2017 for the dissolution of marriage on the ground of cruelty and for appropriate permanent alimony.

2.5 It appears that the plaintiff preferred an application Exh.5 in the Family Suit No.257 of 2017 for interim alimony. The Family Court passed an order directing the defendant to pay Rs.10,000/- to the plaintiff towards the interim alimony. This order of interim alimony passed by the Family Court was challenged by the defendant by filing the Special Civil

Application No.14762 of 2017. The Special Civil Application No.14762 of 2017 ultimately came to be allowed by the learned Single Judge of this Court vide order dated 25th July, 2018. The order of interim alimony passed by the Family Court in favour of the plaintiff was quashed and set aside. The learned Single Judge of this Court observed as under;

"4. While the suit was filed under the Dissolution of Muslim Marriage Act, 1939 and interim prayer for alimony was made in the said suit, it could be noticed from the provisions of the Act of 1939 that the said law does not contain any provision regarding interim alimony. The learned Principal Judge of the Family Court had allowed application Exh.5, proceeded to allow the application Exh.5 for interim alimony. In paragraph 5, the learned Principal Judge, Family Court, noted that it was pertinent to notice that in the entire provisions of the Dissolution of Muslim Marriage Act, there was no provision for granting interim alimony.

4.1 Surprisingly, the learned Principal Judge, Family Court, thereafter adverted to the provisions of the Hindu Marriage Act, 1955 and adopted analogy of the said Act of 1955 finally to grant interim alimony. The learned Principal Judge proceeded by observing thus,

"..... At this juncture, if we take analogy and perused provisions of Hindu Marriage Act, 1955, there is provision for interim alimony, so that plaintiff and/or defendant having no source of income can survive during the period of pendency of entire suit. That on being applying same analogy, though there is no specific provision for interim alimony, this Court has inherent power and jurisdiction to grant interim alimony to plaintiff, so that, plaintiff is not required to depend upon anybody and/or beg from other including her father so as to survive herself and to contest this petition till suit is finally adjudicated."

5. Section 24 of the Hindu Marriage Act, 1955 which related to the maintenance pendente lite and expenses of proceedings was resorted to and relied on to hold that the plaintiff would entitle to get interim alimony till the final adjudication of the suit. The learned Principal Judge,

Family Court, went on to reason that the financial position of the petitioner was good and that his family members had been holding number of industries. Finally, Exh.5 application was allowed as aforesaid.

5.1 Thus, it can be evidently seen that though the statute of Dissolution of Muslim Marriage Act, under which the suit was institute, did not provide for grant of interim alimony and the Act did not have any such provision to be applied in favour of the petitioner, the learned Principal Judge misdirected himself to consider the provisions of the Hindu Marriage Act, 1955. These provisions were not applicable, however the learned Principal Judge applied analogy of Section 24 of the said Act and allowed interim alimony to the petitioner. The impugned order dated 15th June, 2017 below application Exh.5 is thus manifestly infirm in law. The provisions of the Hindu Marriage Act which was never applicable to the facts of the case, were applied by the learned Principal Judge, Family Court.

6. Therefore, order dated 15th June, 2017 below application Exh.5 is required to be quashed. It is expedient in the facts and circumstances of the case to remit back the proceedings of Exh.5 to the learned Family Court, Ahmedabad, for deciding the same afresh. Resultantly, order dated 15th June, 2017 passed by learned Principal Judge, Family Court, Ahmedabad, below application Exh.5 in Family Suit No.257 of 2017 is hereby set aside. The proceedings of Exh.5 application in the said suit stands remitted to the court of learned Principal Judge, Family Court, Ahmedabad, who shall take up the proceedings afresh and decide the same within a period of three months from the date of receipt of this order. Learned Principal Judge, Family Court, also endeavour to ensure that the suit itself is expeditiously decided.

6.1 It goes without saying that the exercise of taking decision shall be under the provisions of the Dissolution of Muslim Marriage Act, 1939 in respect of which parties through their learned advocates have no dispute.

6.2 Since order below Exh.5 application dated 15th June, 2017 is set aside as above, the challenge to order dated 14th July, 2017 below Exh.14 in the very Family Suit which is subject matter of challenge in Special Civil

Application No.14876 of 2017 would not survive."

2.6 The Family Court framed the following issues for the purpose of deciding the Family Suit No.257 of 2017 instituted by the plaintiff, seeking a decree of divorce;

"(1) Whether the plaintiff proves that defendant husband has neglected or has failed to provide her maintenance for a period of two years?

(2) Whether plaintiff proves that defendant husband has failed to perform, without reasonable cause, his marital obligations for a period of three years?

(3) Whether plaintiff proves that defendant husband has treated her with cruelty as alleged in the plaint?

(4) Whether plaintiff proves any other ground for divorce?

(5) Whether plaintiff is entitled to get decree of divorce as prayed for?

(6) Whether plaintiff is entitled to get "Stridhan" from defendant as prayed for?

(7) Whether plaintiff is entitled to get maintenance at the rate of Rs.25,000/- per month and/or any other amount?

(8) What order and decree?"

2.7 The issues framed by the Family Court, referred to above, came to be answered as under;

"(1) In the affirmative.

(2) In the affirmative.

(3) In the affirmative

(4) In the negative.

(5) In the affirmative

(6) In the negative.

(7) In the affirmative, Rs.10,00,000/- by way of permanent lifetime lump sum maintenance.

(8) As per the final order."

2.8 The issue No.7 with regard to permanent alimony/maintenance came to be answered by the Family Court as under;

"30. In Danial Latifi's case the constitutional validity of Section 3 of the 1986 Act was challenged. Upon considering in detail the Hon'ble Court summed up its conclusion as under;

"(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) of the Act.

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

(3) A divorced Muslim woman has not remarried and who is not able to maintain herself after Iddat period proceeds 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 effect Articles 14, 15 and 21 of the Constitution of India."

33. It was observed that even after divorce and the period of Iddat, the former husband will not be exonerated from his liability of making reasonable and fair provision for future of the divorced wife and also her maintenance. But these provisions are to be made by husband within the period of Iddat. This liability of former husband was considered under the Act itself and not beyond that including Section 125 of Cr.P.C.

34. It is, therefore, clear that the liability of a Muslim Husband to his divorced wife arising under Section 3(1) (a) of the Act to pay maintenance will not be confined to Iddat period only. He has to make reasonable and fair provision for future of the divorced wife which obviously includes her maintenance as well. It is obligatory for the husband to make these provisions within the period of Iddat. After divorce that liability of the Muslim husband is under 3 of the Act and not under section 125 of the Code of Criminal Procedure.

35. It was held in *Danial Latifi's case* that it cannot be accepted that Muslim husband is totally exonerated after giving divorce to his wife. In the aforesaid judgment the Apex Court held that the liability of the Muslim husband to his divorced wife arising under Section 3(1)(a) of Act to pay maintenance is not confined to Iddat period only. He has to make reasonable and fair provisions within the period of Iddat for future of the divorced wife. i.e., even for post Iddat period also which obviously included her maintenance as well. In case the husband does not make arrangement, court can direct him to make reasonable provision and if the respondent fails to comply the direction, coercive steps under sub-section (4) of section 3 of the Act are taken against him.

36. A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood, after the divorce, and therefore, the word provision indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her cloths and other articles. The expression within should be read as during or for and this cannot be done because words cannot be construed contrary to their meaning as the word within would mean on or before, not beyond and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an

application before the Magistrate as provided in section 3(3) but no where the Parliament has provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

37. L.A of the plaintiff has placed reliance on three judgments (1) *Iqbal Bano vs. State of U.P and Anr.* Delivered by Hon'ble Supreme Court of India on 5.6.2007 in Appeal (Cr.) No.795 of 2001; (2) *Shamim Bano vs. Asraf Kahn* delivered by Hon'ble Supreme Court of India on 16.04.2014 in Criminal Appeal No.820 of 2014; and (3) *Maria Munnisa Begum vs. Noore Mohammad Saheb* reported in AIR 1965 AP 231. This court has gone through the aforesaid judgments.

38. It is, thus, clear that Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well as 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.

39. So far as maintenance is concerned, plaintiff has submitted that defendant and his family members are rich; defendant, his father and brothers are engaged in the business of spare parts of mill machinery and hardware in the name and style of *Shama Industries*. The plaintiff has further submitted that defendant, his father and brothers are also engaged in the business of iron scraps in the names and style of "F.H. Scrap Traders" and "Gool Industries" and "R.H. Steel Enterprise" on wholesale basis at Vatva, Ahmedabad. The defendant is also holding godowns for storing iron scraps in different parts of Ahmedabad city and defendant earns Rs.1,00,000/- p.m. Out of his business and his father and brothers are earning Rs.5,00,000/- p.m. It has been submitted that plaintiff has no source of income to maintain herself as she does not know any skill or trade.

40. As against plaintiff, defendant has denied all allegations made against him and has submitted that defendant shall prove such allegations by strict proof. The defendant has submitted that defendant does not do

any kind of business and he does labour work and earns only Rs.4000/- p.m. The defendant has submitted that plaintiff is doing sewing and fashion designing work and plaintiff is also earning huge amount from boutique work.

41. There is no iota of evidence on record that plaintiff is engaged in any earning activity and plaintiff has independent income to maintain herself?

42. In view of the provisions of section 105 of the Indian Evidence Act burden lies upon the defendant/husband to prove his income by leading cogent and reliable evidence. The defendant has miserably failed to prove that he does only labour work and earns Rs.4,000/-.

43. It is pertinent to note that plaintiff wife has filed Cr.M.A No.870 of 2011 for obtaining maintenance under section 125 of the Code of Criminal Procedure, 1973, and after hearing the parties and recording the evidence of both parties, this Court has granted maintenance at the rate of Rs.7,000/- p.m. From 1.1.2016 and onwards on merit. The certified copy of the said judgment is produced on record.

44. It is clear from the appreciation of evidence on record that defendant is engaged in the joint family business of spare parts of mill machinery, hardware and iron scrap and such business is on wholesale basis.

45. As stated above, defendant failed to discharge his legal obligation to prove his income, and therefore, adverse inference can be drawn as provided under section 114(g) of the Indian Evidence Act. After taking into consideration the fact that defendant is engaged in joint family business of spare parts of mill machinery, hardware and iron scrape, the notional monthly income of defendant can safely be assessed at Rs.40,000/-

46. In view of what is discussed herein above, defendant is liable to make reasonable and fair provision and maintenance for plaintiff/wife, and considering the requirement of plaintiff and ever increasing prices of essential commodities, it would be just and proper to grant Rs.10,00,000/- to the plaintiff towards her lifetime permanent lump sum maintenance, which in the opinion of this court is reasonable and fair provision for future

maintenance of plaintiff.

47. *Admittedly, the defendant is ordered to pay maintenance to plaintiff in other proceedings under other statutes. It is obvious that if the defendant pays aforesaid permanent lump sum maintenance to plaintiff, the orders passed to pay maintenance to plaintiff under other Acts in different proceedings shall come to an end and plaintiff shall not be entitled to claim maintenance as ordered in other proceedings under different statutes as the aforesaid amount of maintenance is full and final for lifetime maintenance of plaintiff."*

2.9 The operative part of the order passed by the Family Court, partly allowing the family suit instituted by the plaintiff reads thus;

"(1) *This suit is hereby partly allowed and decreed.*

(2) *it is hereby ordered that marriage solemnized by and between plaintiff and defendant on 13.06.2009 to this suit is hereby dissolved on the grounds of (a) defendant has neglected and has failed to provide maintenance to plaintiff for a period of two years; (b) defendant has failed to perform, without reasonable cause, his marital obligations for a period of three years; and (c) defendant has treated plaintiff with cruelty under Sections 2(ii), 2(iv) and 2(viii) of the Dissolution of Muslim Marriages Act, 1939, respectively.*

(3) *It is hereby ordered that defendant shall pay Rs.10,00,000/- (Rupees Ten Lacs only) to the plaintiff towards her permanent life time lump sum maintenance as provided under Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986. It is hereby made it clear that if the defendant pays aforesaid amount to plaintiff, the plaintiff shall not be entitled to claim maintenance granted to her by different orders in different proceedings under different statutes.*

(4) *The prayer prayed by plaintiff to order the defendant to return her Stridhan is hereby rejected.*

(5) *it is hereby ordered that defendant shall pay*

Rs.10,000/- (Rupees Ten Thousand Only) to plaintiff towards the costs of this suit and shall bear his own costs.

(6) *The decree shall follow accordingly."*

2.10 Being dissatisfied with the judgment and decree passed by the Family Court, the defendant (husband) is here before this Court with the present appeal.

Submissions on behalf of the appellant-original defendant:

3. Mr. Mehul Suresh Shah, the learned senior counsel appearing for the appellant at the outset submitted that he is confining his challenge in this appeal only to that part of the decree by which the Family Court has awarded Rs.10,00,000/- in favour of the wife towards lump sum permanent alimony for her maintenance. Mr. Shah would submit that the order passed by the Family Court, awarding permanent alimony in favour of the wife is without jurisdiction. Mr. Shah would submit that the suit instituted by the wife could be said to be under the provisions of the Dissolution of Muslim Marriage Act, 1939 and the Act of 1939 does not provide for any maintenance. It is further submitted that after coming into force of the Muslim Women Act, 1986, a Muslim woman can apply under Sections 3 and 4 of the said Act only to the Magistrate of the First Class having jurisdiction under the Criminal Procedure Code for maintenance. The Family Court cannot deal with such applications. In other words, after the commencement of the Muslim Women Act, 1986, a Muslim divorced wife cannot even 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.

4. The learned senior counsel would argue that the liability of the husband to pay maintenance to a divorced wife ceases the moment the Iddat period gets over. He has to pay maintenance to her within the Iddat period for the Iddat period. According to the learned senior counsel, the husband, of course, has to make reasonable and fair provision for his wife within the Iddat period which should take care of her for the rest of her life or till she incurs any disability under the Act, 1986.

5. Mr. Shah would submit that the reliance placed by the Family Court on the decision of the Supreme Court in the case of **Danial Latifl & Anr. vs. Union of India**, 2001 (7) SCC 740 is completely misplaced.

6. Mr. Shah seeks to place reliance on a Full Bench decision of the Bombay High Court in the case of **Karim Abdul Rehman Shaikh vs. Shehnaz Karim Shaikh & Ors.**, 2000 Cri. L.J., 3560. In the Full Bench decision of the Bombay High Court, referred to above, the Hon'ble Judges addressed themselves on four questions. The same are as under;

"((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 coming into force of the Muslim Women Act?"*

7. The Full Bench answered the aforesaid four questions as under;

"(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 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 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.*

(ii) *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.*

(iii) *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.

(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. “

8. In short, the principal argument of Mr. Shah is that there is no provision in any enactment which empowers the Family Court to award permanent alimony while granting the decree of divorce in favour of the wife.

9. In such circumstances, referred to above, Mr. Shah prays that there being merit in his appeal, the order of grant of permanent alimony be quashed and set aside.

Submissions on behalf of the respondent (original plaintiff/wife)

10. On the other hand, this appeal has been vehemently opposed by Mr. Nishit Gandhi and Mr. Shaswat Shukla, the learned counsel appearing for the wife. Both the learned counsel would submit that no error, not to speak of any error of law, could be said to have been committed by the Family Court in passing the order of permanent alimony in favour of the wife. The learned counsel would submit that the issue in this regard stands sufficiently answered by the Supreme Court in the case of Danial Latifi (*supra*). The learned counsel pointed out that in Danial Latifi (*supra*), the subject matter of challenge was to the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The

Supreme Court, while upholding the validity of the Act, held as under;

- "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 Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.*
- 3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after 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. "*

11. The learned counsel, in the last, submitted that the right of maintenance and the right in the matrimonial property or the consequences of the marriage or its dissolution, are reliefs incidentally to the main relief of the "dissolution of marriage" and, therefore, such reliefs are very much an integral part of the decree of "dissolution of marriage". It is submitted that if need be, the Court may be justified in exercising its inherent powers to protect the interest of the wife. In such circumstances, referred to above, Mr. Gandhi prays that there being no merit in this appeal, the same be dismissed.

ANALYSIS

12. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the Family Court committed any error in passing the order of permanent alimony in favour of the wife while granting decree of divorce to the wife?

Family Courts Act, 1984

13. The preamble of the Family Courts Act, 1984 reads as under;

"An act to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith."

14. The statement of objects and reason of Family Courts Act are necessary to appreciate the scope of the jurisdiction of the Family Courts. The same are quoted herein :

"Several associations of women, other organisations and individuals have urged, from time to time, that Family Courts be set up for the settlement of family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th Report (1974) had also stressed that in dealing with disputes concerning the family Courts ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts at settlement before the commencement of the trial. The

Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the Courts in adopting this conciliatory procedure and the Courts continue to deal with family disputes in the same manner as other civil matters and the same adversary approach prevails. The need was, therefore, felt, in the public interest, to establish Family Courts for speedy settlement of family disputes."

15. The Bill inter alia, seeks to :

- (a) provide for establishment of Family Courts by the State Government;
- (b) make it obligatory on the State Governments to set up a Family Court in every city or town with a population exceeding one million;
- (c) enable the State Governments to set up such Courts in areas other than those specified in (b) above;
- (d) exclusively provide within the jurisdiction of the Family Courts the matters relating to:
 - (i) matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights, or declaration as to the validity of a' marriage or as to the matrimonial status of any person;
 - (ii) the property of the spouses or of either of them;
 - (iii) declaration as to the legitimacy of any person;
 - (iv) guardianship of a person or the custody of any minor;
 - (v) maintenance, including proceedings under Chapter IX of

the Code of Criminal Procedure;

- (e) make it obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or a settlement between the parties to a family dispute. During this stage, the proceedings will be informal and the rigid rules of procedure shall not apply;
- (f) provide for the association of social welfare agencies, counsellors, etc., during conciliation stage and also to secure the services of medical and welfare experts;
- (g) provide that the parties to a dispute before a Family Court shall not be entitled, as of right, to be represented by legal practitioner. However, the Court may, in the interest of justice seek assistance of a legal expert as amicus curiae;
- (h) simplify the rules of evidence and procedure so as to enable a Family Court to deal effectually with a dispute;
- (i) provide for only one right of appeal which shall lie to the High Court.

16. The Bill seeks to achieve the above objects."

17 Clause 2(d) noted above specifically provides for bringing in within the jurisdiction of the Family Courts the matters relating to matrimonial relief, including nullity of marriage, judicial separation, divorce, restitution of conjugal rights etc. matter also relating to the property of spouse or either of them, and also all issues relating to maintenance including proceeding under Chapter IX of Cr.P.C.

18. Few other provisions of the Family Courts Act, 1984 need be noticed;

19. Section 3 provides for the establishment of Family Court. Section 3(1) provides that the State Government in consultation with the High Court shall establish a Family Courts for every area in the state comprising the city or town whose population exceeds one million. The Family Court Act also provides that the State Government may establish Family Courts for such other areas as the State Government deem it necessary. Sub-section (2) of Section 3 provides that the State Government after consultation with the High Court, specify, by notification, the local limits of the area. Section 4 provides that the State Government shall appoint one or more persons to be Judge or Judges of the Family Court with the concurrence of the High Court. Section 4(3) provides the qualification for appointment of the Judge of the Family Court wherein it is stated that a person should have at least seven years' experience of holding a judicial office or should have an experience of seven years as an Advocate in the High Court. Section 4(4) provides that preference shall be given to women in the appointment of Family Court Judge.

20. Section 7 provides for the jurisdiction of the Family Court. Section 7(1) provides that the Family Court shall exercise jurisdiction exercisable by any District Court or by any 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 and also provides that the Family Court shall be deemed 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.

21. Explanation to Section 7 gives details of the proceedings in which the Family Court will have the jurisdiction. Explanations (a), (b), (c) and (f) are relevant which may be taken note of:

- "(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;*
- (b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;*
- (c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;*
- (f) a suit or proceeding for maintenance."*

22. Section 7(2) provides that the jurisdiction exercisable by the Magistrate of the First Class under Chapter IX of the Code of Criminal Procedure, 1973 and any other jurisdiction which may be conferred on the Court by such Act will also be within the jurisdiction of the Family Court.

23. Section 8 excludes the jurisdiction of the other Courts in the matters provided under Section 7 of the Act and also provides that the proceedings covered by Section 7 of the Act shall stand transferred to the Family Court on the establishment of the said Courts in the area.

Muslim Women (Protection of Rights on Divorce) Act, 1986:-

24. The provisions of The Muslim Women (Protection of Rights on Divorce) Act, 1939 (referred to as 'Act') need be scanned.

25. The Act came into force on 19.05.1986. Section 7 of the Act requires that every application by a divorced woman under Section 125 or 127 of the Criminal Procedure Code pending before any Magistrate on the commencement of the Act, shall, notwithstanding anything contained in the Code and subject to the provisions of Section 5 of the Act, be disposed of by such Magistrate in accordance with the provisions of the Act.

26. Section 3 of the Act is reproduced for convenience:

"3. Mahr or other properties of Muslim Women to be given to her at the time of divorce :-

(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to :

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

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

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

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

(2) Where a reasonable and fair provision and maintenance or the amount of Mahr or dower due has

not been made or paid or the properties referred to in Clause (d) of Sub-section (1) have not been delivered to a divorced woman on her divorce, she or any only duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, Mahr or dower or the delivery of properties, as the case may be.

(3) Where an application has been made under Sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that:-

(a) her husband having sufficient means, has failed or neglected to make or pay her within the Iddat period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of Mahr or dower has not been paid or that the properties referred to in Clause (d) of Sub-section (1) have not been delivered to her, make an order, within one month of the date of filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be for the payment of such Mahr or dower or the delivery of such properties referred to in Clause (d) of Sub-section (1) to the divorced woman;

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may for reasons to be recorded by him dispose of the application after the said period.

(4) If any person against whom an order has been made under Sub- section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for having 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."

27. Under Section 3 of the Act it is provided that notwithstanding anything contained in any other law the divorced woman shall be entitled to a reasonable and fair provision and main tenance to be made and paid to her during the Iddat period by her former husband. Clause (b) of Section 3 provides that where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children, Clause (c) of the aforesaid section provides that 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. Clause (d) of the aforesaid section provides that 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-section (3) of the aforesaid section provides procedure for making application wherein it is contemplated that an application is to be made by a divorced woman to the Magistrate and the Magistrate being satisfied that her husband having sufficient means, has failed or neglected to make or pay her within the Iddat period a reasonable and fair provision and maintenance for her and the children or the amount equal to the sum of Mahr or dower has not been paid or that the properties referred to in Clause (d) of Sub- section (1) have not been delivered to her, will make an order directing her former husband to pay maintenance to the divorced wife for the period of Iddat and also may direct for payment of such Mahr or dower or delivery of such properties referred to in Clause (d) of Sub-section (1) to the divorced woman.

28. A bare perusal of Section 3 of the Act demonstrates that the dispute relates to a proceedings between the parties to the marriage for a divorce and for maintenance as well as in respect of the properties of the parties to the marriage. Under Mohammedan Law Mahr and dower are the properties of the wife. Under Section 3 of the Act, the petitioner is to be made claiming maintenance for the period of Iddat after divorce, claiming maintenance for the child born from the former husband and claiming Mahr and dower or a sum equivalent thereto which are admittedly the properties between the parties to the marriage. All the aforesaid claims, which a divorced wife under the Act is supposed to make before a Magistrate are squarely covered by the Explanations of Section 7 of the Family Courts Act.

29. It was realised that the family disputes should either be settled or should be amicably resolved and it was also realised that since the Courts are over- burdened with their arrears, the dispute between the husband and wife, the two important constituents of a family and also many times the plight of the minor children require special and urgent attention and for giving special attention to the disputes of the family and for resolution of the same expeditiously, the Family Court, Act was enacted.

30. Section 20 of the Family Courts Act gives an over-riding effect to the provisions of the Act over all other enactments. The Family Courts Act has in its comprehension all community including the Muslims. All disputes between the Muslim

community within the purview of the Family Courts Act are settled by the Family Courts. It cannot be doubted for a minute that the dispute contemplated by Section 3 of the Act, 1939 is within the purview and four corners of the Family Courts Act, as the dispute under Section 3 of the Act also relates to matrimonial relations between the parties and as a consequence of this matrimonial relations having been broken, entitlement of divorced wife after breaking of the matrimonial relations with her husband begins.

The Dissolution of Muslim Marriages Act, 1939

31. The Act, 1939 came to be enacted to consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriage by women married under Muslim Law and to remove the doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie. Section 2 of the Act, 1939 reads thus;

"2. Grounds for decree for dissolution of marriage. ? A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

(i)that the whereabouts of the husband have not been known for a period of four years; (ii)that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(iii)that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv)that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v)that the husband was impotent at the time of the

marriage and continues to be so;

(vi)that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(vii)that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated;

(viii)that the husband treats her with cruelty, that is to say, ?

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran;

(ix)on any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

Provided that

(a) no decree shall be passed on ground (iii) until the sentence has become final;

(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfied the

Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

(c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground."

32. Section 5 provides that the rights to dower shall not be effected. Section 5 reads thus;

"5. Rights to dower not to be affected-Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage."

33. **What is alimony?**

The term alimony is derived from the Latin word 'Alimonia' which means sustenance. It is also referred to as the spousal support or maintenance. It is a legal obligation of a partner to their spouse to provide financial support after the course of a divorce. This financial support is based on the family laws of the country. This alimony is decided based on the earning power and the person economically dependent on the marriage.

There are mainly two types of alimony-

1. Given at the time of court proceedings- This is usually the maintenance amount.
2. Given at the time of legal separation- This can be given either in a lump sum or as a fixed monthly or quarterly payment or as per the requirements of the spouse.

34. **Alimony Laws in India:**

The personal laws of different religions in India govern the maintenance rights of a woman. These personal laws deal with marriage, divorce, and the maintenance for which there are various provisions for people who can claim maintenance.

Let's look at various different laws for the same:-

1. Alimony under Hindu Law

In Hinduism, it is considered that it is the spiritual duty of the husband to maintain his wife and give her all the comforts.

Under Section 24 of the *Hindu Marriage Act, 1955*, both the wife and the husband are entitled to claim maintenance from their spouse. Thus, this section does not differentiate between a male and a female. This maintenance depends on certain factors like the husband's earnings, assets & liabilities, wife's financial standing, employment, etc.

When the couple decides to get divorced by mutual consent, the decision on the alimony to be paid by either of the party is on the account of their decision and mutual understanding. But in contested matters, the issue of alimony is decided on the merits of each case. It is also possible that no alimony is given at all based on the facts and circumstances. The maintenance amount depends entirely on the discretion of the court.

The wife also has an additional option to claim maintenance under Section 18 of the *Hindu Adoptions and Maintenance Act, 1956*. The entitlement to alimony is based on

the following:-

If the husband abandons her, without any justified reason, without her consent.

If the husband treats her with cruelty.

If the husband has another wife.

If the husband suffers from a virulent form of leprosy.

If the husband has concubine in the same house.

If the husband converted to another religion.

If there is some other reason for the wife to live separately.

This section is read with Section 23 of this Act, which specifies that it shall be the discretion of the court to award maintenance if any and what amount to be awarded.

However, if the couple is married under the *Special Marriage Act, 1954*, only the wife has the entitlement to claim permanent alimony.

2. Alimony under Muslim Law

Here the parties first need to decide which law to file under, for the purpose of claiming the alimony amount. In Muslim law, women are the ones given the right to alimony. According to Sharia, the Muslim women are given the absolute right to maintenance. The right remains unprejudiced even if the wife has a good financial standing and the husband is poor.

For the Muslim women, *The Muslim Women(Protection of Rights on Divorce) Act, 1986* lays down the provisions for the maintenance/alimony. After a divorce she is entitled to:-

A reasonable and fair amount to be paid during the iddat

period.

An amount equal to the dower agreed to be paid during the time of marriage.

A title to the property(or properties) given to her either before or after marriage.

A Muslim woman is also eligible to claim maintenance if:-

She did not remarry and is unable to maintain herself after the iddat period.

She has children and is unable to support them.

If there isn't anyone to maintain her, the magistrate would order the State Wakf Board to pay the maintenance.

3. Alimony under Christian Law

The Christian law deals with the maintenance of wife under Section 36, Section 37 and Section 38 of the *Indian Divorce Act, 1869*. Section 36 deals with the petition for expenses and alimony pending the suit. The main object of this Section is to provide the wife with financial support while the matrimonial suit is pending.

Section 37 of the Indian Divorce Act, deals with the matter of permanent alimony. In every case, the court may order the husband to pay a weekly or monthly sum for her financial support the court may seem reasonable. If in the future, the husband is unable to make such payment, the court may temporarily discharge or suspend the order. There are some factors taken into account under Section 37:-

Conduct of parties before and after marriage.

Nature and source of husband's income.

Wife's own fortune, if any.

Section 38 of the same Act deals with the rules regarding the payment of alimony. It may be given to the wife herself or to any trustee on her behalf. The objective is to ensure the wife is given alimony.

4. Alimony under Parsi Law

The maintenance of the wife is dealt with under the *Parsi Marriage and Divorce Act, 1988*. Section 40, of this Act, deals with the permanent alimony and maintenance. It authorizes any court to order the defendant to pay a periodical sum for a term not exceeding that of the plaintiff's own life. It is important for the court to have regard to the conduct of the parties and the merits of each case.

Apart from the above-mentioned maintenance laws in different religions, there is also the Right to Maintenance under **Section 125**, of the **Criminal Procedure Code, 1973** which was legislated as a tool for social justice. Under this section, a follower of any religion can apply without any restriction. It lays down provision for a husband to maintain his wife, parents, and children if they do not have the adequate means to maintain themselves financially or suffer from any form of mental or physical disability. The spouse can file for maintenance before the court and the court considers the income, assets, and property of the husband and will provide a proper maintenance to the required spouse as per the circumstances and requirement. There is no requirement for a wife to divorce her husband to get maintenance under this section.

35. How is the quantum of alimony decided?

The maintenance amount to be paid is decided by the court on the basis of some specific parameters. These parameters are both spouse's income, net worth and investment as well as their financial needs and liabilities. Their standard of living and financial standing is also taken into account. There is no fixed formula for the decision regarding the alimony amount, generally, it was considered one-third of the spouse's income for paying the alimony. The Supreme Court in the case of Kalyan Dey Chowdhury vs. Rita Dey Chowdhary Nee Nandy, Civil Appeal No.5369 of 2017 dated 19.04.2017 ruled that 25% of the husband's net salary should be taken as a benchmark to constitute a just and proper amount of alimony. The court also observed that the amount must be just enough to live with dignity after the marital separation.

Certain factors are taken into account that influence the alimony amount as well as the duration during which it needs to be paid. They are as follows:-

1. *Duration of marriage- marriages that lasted for more than 10 years are entitled to a lifetime alimony.*
2. *Age of spouse- A young receipt may get it for a shorter duration of time keeping in mind their prospective career excellence and potential to become financially sound.*
3. *To equalize the economic condition of both spouses- The higher earning spouse is entitled to pay heavy amount whereas a lower earning spouse may be asked to pay an able amount for alimony.*
4. *Enjoyment of successful career- Such a spouse may be subject to pay a higher amount of alimony.*
5. *The health of spouse- If the spouse claiming for alimony is in poor health, the other spouse will be subjected to paying high alimony to ensure proper well being and medication for the spouse.*

6. *Child custody– The spouse who maintains child custody will be entitled to receive a greater amount for the expenditure incurred on child's upbringing and education.*
7. *Liabilities of the husband (like taking care of his wholly dependent parents) and flourishing career of the wife (earning sufficient amount comfortably) will also be considered. “*

Status of Muslim Women

36. During the early period of Islam, the Muslim women were held in high esteem and they occupied exalted positions and in the days of Holy Prophet Mohammad, a Muslim woman was given in the society a position of equality with the opposite gender. Equal treatments were meted out to the women. The ladies of the family of the Prophet were noted for their learning, their virtue, courage and their strength of character. (See S.A.Kaders Muslim Law of Marriage and Succession in India, p. 80-81) Even, in the terms of modern concept of giving gender justice, which is essential, integral and inseparable part of human rights, women, who form one half of the human race, have every right to claim equality before law and equal protection of laws as envisaged under [Article 14](#) of the Constitution of India.

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37. Therefore, when women have the right to marry, they have also the right to be maintained by their husbands. This right has been emphasized in [Article 6\(1\)](#) of the Universal Declaration of Human Rights adopted and proclaimed by the General Assembly of the United Nations on 10th December 1948. It declares thus:- Men and women, of full age, without any limitation due to race, nationality or religion, have the

right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

38. The Sura Al-Ahzab, Verse 35 of the Holy Quran, would clearly show that how the women were treated as equals with men. The Verse 35 reads thus-

"For Muslim men and women, For believing men and women, For devout men and women, For true men and women, For men and women who are Patient and constant, for men And women who humble themselves, For men and women who give In charity, for men and women Who fast For men and women who Guard their chastity, and For men and women who Engage much in Allahs remembrance For them has Allah prepared Forgiveness and great reward. However, in post-Islamic period, it is seen that the degradation and degeneration set in, in the status of women. In male-dominated world, Muslim women were pushed to the whims and fancies of the men-folk and this is reflected primarily in the case of dissolution of marriage, i.e., divorce, which is known as Talaq in Arabic meaning. The doctrine of talaq-ul-bidet (triple talaq-one form of talaq) was evolved as a convenient divorce to dissolve the marriage at the will and whims of the Muslim husband."

39. Nonetheless, it is incumbent on the part of a Muslim husband to maintain his wife so long as she is loyal and faithful to him and obeys his reasonable orders. But once she is divorced, she is entitled to maintenance as per law being in force in India, i.e., Muslim Women (Protection of Rights on Divorce) Act, 1986.

The Holy Koran Translation by Abdullah Yusuf Ali at page 96:

*Ayat No. 241—For divorced women
Maintenance (should be provided)*

*On a reasonable (scale)
This is a duty on the righteous.*

*Ayat No. 242—Thus doth God
Make clear His Signs
To you: in order that Ye may understand*

The Quran by Md. Zafrullah Khan (page 38)

For divorced women also there shall be provision according to what is fair. This is an obligation binding on the righteous. Thus does Allah make His Commandments clear to you that you may understand.

(emphasis supplied)

40. The meaning of Quran (Vol. I) published by Board of Islamic Publications, Delhi Ayat 240-241—

Those of you, who shall die and leave wives behind them, should make a will to the effect that they should be provided with a year's maintenance and should not be turned out of their homes. But if they leave their homes of their own accord, you shall not be answerable for whatever they choose for themselves in a fair way; Allah is All-Powerful, All-wise. Like-wise, the divorced women should also be given something in accordance with the known fair standard. This is an obligation upon the God-fearing people

Ayat 242—

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Thus Allah makes clear His Commandments for you: It is expected that you will use your commonsense.

41. Running commentary of the Holy Quran (1964 Edn.) by Dr. Allanadh Khadim Rahmani Nuri

Ayat 241—And for the divorced woman (also) a provision (should be made) with fairness (in addition to her dower);

*(This is) a duty (incumbent) on the reverent.
(emphasis supplied)*

Holy Quran—Translated by Mohammed Ali

Ayat 241—And for the divorced woman, provision (must be made) in kindness. This is incumbent on those who have regard for duty.

(emphasis supplied)

42. Almost all the Translations are unanimous in regard to the content and meaning of Ayat 241, namely, that a fair or reasonable provision should be made for the divorced woman. S. 3 of the Act has incorporated therein the expression "reasonable provision", as distinguished from the expression "maintenance", evidently moving away from the observation of the Supreme Court in Shah Bano's case that the distinction between the two expressions is without difference. The Parliament also appears to have accepted the traditional view that the right to maintenance ceases after the expiration of Iddat after talaq. Parliament dissociated itself from the view expressed by the Supreme Court in Shah Bano's case that "provision" and "maintenance" mean the same thing and, therefore, a divorced woman is entitled, according to the personal law, to maintenance even after the expiration of the Iddat period. The Parliament intended to make it clear that the divorced woman is entitled to maintenance not only for the Iddat period but is entitled to a distinct and reasonable provision for the post-Iddat period. This is the only reasonable construction to be placed on S. 3 of the Act on a consideration of the plain tenor of the provisions of the Act, the mischief sought to be avoided, the object sought to be achieved, the

Shah Bano's case and its aftermath."

43. In Danial Latifi (*supra*), the Supreme Court observed as under;

"20. In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated both economically and socially and women are assigned, invariably, a dependant role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question.

21. Now it is necessary to analyse the provisions of the Act to understand the scope of the same. The Preamble to the Act sets out that it is 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. A divorced woman is defined under Section 2(a) of the Act to mean 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; iddat period is defined under Section 2(b) of the Act to mean, in the case of a divorced woman,-

- (i) three menstrual courses after the date of divorce, if she is subject to menstruation;
- (ii) three lunar months after her divorce, if she is not subject to menstruation; and
- (iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy whichever is earlier.

22. Sections 3 and 4 of the Act are the principal sections, which are under attack before us. Section 3 opens up with a non-obstante 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 by 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.

23. Where such reasonable and fair provision and maintenance or the amount of mahr or dower due has

not been made and paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be. Rest of the provisions of Section 3 of the Act may not be of much relevance, which are procedural in nature.

24. *Section 4 of the Act provides that, with an overriding clause as to what is stated earlier in the Act or in any other law for the time being in force, 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 such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order. If any of the relatives do not have the necessary means to pay the same, the Magistrate may 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. Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them has not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order direct the State Wakf Board, functioning in the area in which the divorced woman resides, to pay such maintenance as determined by him as the case may be. It is, however, significant to note that Section 4 of the 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*

Act.

25. Section 5 of the 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), 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.

26. A reading of the Act will indicate that it codifies and regulates the obligations due to a Muslim woman divorcee by putting them outside the scope of Section 125 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 Act does not apply to a Muslim woman whose marriage is solemnized either under the Indian Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either under Indian Divorce Act, 1969 or the Indian Special Marriage Act, 1954. The Act does not apply to the deserted and separated Muslim wives. 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. Section 3(1) of the Act provides that a divorced woman shall be entitled to have from her husband, a reasonable and fair maintenance which is to be made and paid to her within the iddat period. Under Section 3(2) the Muslim divorcee can file an application before a Magistrate if the former husband has not paid to her a reasonable and fair provision and maintenance or mahr due to her or has not delivered the properties given to her before or at the time of marriage by her relatives, or

friends, or the husband or any of his relatives or friends. Section 3(3) provides for procedure wherein the Magistrate can pass an order directing the former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may think fit and proper having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of her former husband. The judicial enforceability of the Muslim divorced woman's right to provision and maintenance under Section (3)(1)(a) of the Act has been subjected to the condition of husband having sufficient means which, strictly speaking, is contrary to the principles of Muslim law as the liability to pay maintenance during the iddat period is unconditional and cannot be circumscribed by the financial means of the husband. The purpose of the Act appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of iddat.

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

29. The important section in the Act is Section 3 which provides that divorced woman is entitled to obtain from her former husband maintenance, provision and mahr, and to recover from his possession her wedding presents and dowry and authorizes the magistrate to order payment or restoration of these sums or properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations : (1) to make a reasonable and fair provision for his divorced wife; and (2) 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 should be concluded, namely, within the iddat period. If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both reasonable and fair provision and maintenance by paying these amounts in a lump sum to his wife, in addition to having paid his wifes mahr and restored her dowry as per Section 3(1)(c) and 3(1)(d) of the Act. Precisely, the point that arose for consideration in Shah Banos case was that the husband has not made a reasonable and fair provision for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are a reasonable and fair provision and maintenance to be made and paid as provided under Section 3(1)(a) of the Act and these expressions cover different things, firstly, by the use of two different verbs to be made and paid to her within the iddat period, it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4 of the Act, which empowers the magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to provision. Obviously, the right to have a fair and reasonable provision in her favour is a right enforceable only against the womans former

husband, and in addition to what he is obliged to pay as maintenance; thirdly, the words of the Holy Quran, as translated by Yusuf Ali of mata as maintenance though may be incorrect and that other translations employed the word provision, this Court in Shah Banos case dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether mata was rendered maintenance or provision, there could be no pretence that the husband in Shah Banos case had provided anything at all by way of mata to his divorced wife. The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to mata is only a single or one time transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word provision in Section 3(1)(a) of the Act incorporates mata as a right of the divorced Muslim woman distinct from and in addition to mahr and maintenance for the iddat period, also enables a reasonable and fair provision and a reasonable and fair provision as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in Shah Banos case, actually codifies the very rationale contained therein.

30. A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support is satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged

on behalf of the petitioners.

31. Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

32. As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in *Shah Banos* case. In this case to find out the personal law of Muslims with regard to divorced women's rights, the starting point should be *Shah Banos* case and not the original texts or any other material all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering the Holy Quran, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-242 of Chapter II of the Holy Quran and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in *Shah Banos* case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in *Shah Banos* case. The learned Solicitor General contended that what has been stated in the Objects and Reasons in Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in *Shah Banos* case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality.

33. In *Shah Banos* case this Court has clearly explained as to the rationale behind Section 125 CrPC to make provision for maintenance to be paid to a divorced Muslim wife and this is clearly to avoid vagrancy or

destitution on the part of a Muslim woman. The contention put forth on behalf of the Muslims organisations who are interveners before us is that under the Act vagrancy or destitution is sought to be avoided but not by punishing the erring husband, if at all, but by providing for maintenance through others. If for any reason the interpretation placed by us on the language of Sections 3(1)(a) and 4 of the Act is not acceptable, we will have to examine the effect of the provisions as they stand, that is, a Muslim woman will not be entitled to maintenance from her husband after the period of iddat once the Talaq is pronounced and, if at all, thereafter maintenance could only be recovered from the various persons mentioned in Section 4 or from the Wakf Board. This Court in Olga Tellis v. Bombay Municipal Corporation, 1985(3) SCC 545, and Maneka Gandhi v. Union of India, 1978 (1) SCC 248, held that the concept of right to life and personal liberty guaranteed under Article 21 of the Constitution would include the right to live with dignity. Before the Act, a Muslim woman who was divorced by her husband was granted a right to maintenance from her husband under the provisions of Section 125 CrPC until she may re-marry and such a right, if deprived, would not be reasonable, just and fair. Thus the provisions of the Act depriving the divorced Muslim women of such a right to maintenance from her husband and providing for her maintenance to be paid by the former husband only for the period of iddat and thereafter to make her run from pillar to post in search of her relatives one after the other and ultimately to knock at the doors of the Wakf Board does not appear to be reasonable and fair substitute of the provisions of Section 125 CrPC. Such deprivation of the divorced Muslim women of their right to maintenance from their former husbands under the beneficial provisions of the Code of Criminal Procedure which are otherwise available to all other women in India cannot be stated to have been effected by a reasonable, right, just and fair law and, if these provisions are less beneficial than the provisions of Chapter IX of the Code of Criminal Procedure, a divorced Muslim woman has obviously been unreasonably discriminated and got out of the protection of the provisions of the general law as indicated under the Code which are available to Hindu, Buddhist, Jain, Parsi or Christian women or women belonging to any other community. The provisions *prima facie*, therefore, appear

to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and also violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion as the Act would obviously apply to Muslim divorced women only and solely on the ground of their belonging to the Muslim religion. It is well settled that on a rule of construction a given statute will become ultra vires or unconstitutional and, therefore, void, whereas another construction which is permissible, the statute remains effective and operative the court will prefer the latter on the ground that Legislature does not intend to enact unconstitutional laws. We think, the latter interpretation should be accepted and, therefore, the interpretation placed by us results in upholding the validity of the Act. It is well settled that when by appropriate reading of an enactment the validity of the Act can be upheld, such interpretation is accepted by courts and not the other way.

34. The learned counsel appearing for the Muslim organisations contended after referring to various passages from the text books to which we have adverted to earlier to state that the law is very clear that a divorced Muslim woman is entitled to maintenance only upto the stage of iddat and not thereafter. What is to be provided by way of Mata is only a benevolent provision to be made in case of divorced Muslim woman who is unable to maintain herself and that too by way of charity or kindness on the part of her former husband and not as a result of her right flowing to the divorced wife. The effect of various interpretations placed on Suras 241 and 242 of Chapter 2 of Holy Quran has been referred to in Shah Banos case. Shah Banos case clearly enunciated what the present law would be. It made a distinction between the provisions to be made and the maintenance to be paid. It was noticed that the maintenance is payable only upto the stage of iddat and this provision is applicable in case of a normal circumstances, while in case of a divorced Muslim woman who is unable to maintain herself, she is entitled to get Mata. That is the basis on which the Bench of Five Judges of this Court interpreted the various texts and held so. If that is the legal position, we do not think, we can state that any other position is possible nor are we to start on a clean

slate after having forgotten the historical background of the enactment. The enactment though purports to overcome the view expressed in Shah Banos case in relation to a divorced Muslim woman getting something by way of maintenance in the nature of Mata is indeed the statutorily recognised by making provision under the Act for the purpose of the maintenance but also for provision. When these two expressions have been used by the enactment, which obviously means that the Legislature did not intend to obliterate the meaning attributed to these two expressions by this Court in Shah Banos case. Therefore, we are of the view that the contentions advanced on behalf of the parties to the contrary cannot be sustained.

35. In Arab Ahemadnia Abdulla and etc vs. Arab Bail Mohmuna Saiyadbhai & Ors. etc., AIR 1988 (Guj.) 141; Ali vs. Sufaira, (1988) 3 Crimes 147; K. Kunhased Hazi v. Amena, 1995 Crl.L.J. 3371; K. Zunaideen v. Ameena Begum, (1998) II DMC 468; Karim Abdul Shaik v. Shenaz Karim Shaik, 2000 Cr.L.J. 3560 and Jaitunbi Mubarak Shaikh v. Mubarak Fakruddin Shaikh & Anr., 1999 (3) Mh.L.J. 694, while interpreting the provision of Sections 3(1)(a) and 4 of the Act, it is held that a divorced Muslim woman is entitled to a fair and reasonable provision for her future being made by her former husband which must include maintenance for future extending beyond the iddat period. It was held that the liability of the former husband to make a reasonable and fair provision under Section 3(1)(a) of the Act is not restricted only for the period of iddat but that divorced Muslim woman is entitled to a reasonable and fair provision for her future being made by her former husband and also to maintenance being paid to her for the iddat period. A lot of emphasis was laid on the words made and paid and were construed to mean not only to make provision for the iddat period but also to make a reasonable and fair provision for her future. A Full Bench of the Punjab and Haryana High Court in Kaka v. Hassan Bano & Anr., II (1998) DMC 85 (FB), has taken the view that under Section 3(1)(a) of the Act a divorced Muslim woman can claim maintenance which is not restricted to iddat period. To the contrary it has been held that it is not open to the wife to claim fair and reasonable provision for the future in addition to what she had already received at the time of her divorce; that the liability of the husband is limited

for the period of iddat and thereafter if she is unable to maintain herself, she has to approach her relative or Wakf Board, by majority decision in Umar Khan Bahamami v. Fathimnurisa, 1990 Cr.L.J. 1364; Abdul Rashid v. Sultana Begum, 1992 Cr.L.J. 76; Abdul Haq v. Yasima Talat; 1998 Cr.L.J. 3433; Md. Marahim v. Raiza Begum, 1993 (1) DMC 60. Thus preponderance of judicial opinion is in favour of what we have concluded in the interpretation of Section 3 of the Act. The decisions of the High Courts referred to herein that are contrary to our decision stand overruled. "

44. Thus, the Supreme Court, on a creative and meaningful interpretation of the MWPRDA, 1986, upheld its constitutionality. It held that a Muslim husband is liable to make reasonable and fair provision for the future of his divorced wife extending beyond the Iddat period. The Supreme Court based this interpretation on the word "provision" in the Act, 1986 indicating that "at the time of divorce, the Muslim husband is required to contemplate the future needs (of his wife) and make preparatory arrangements in advance for meeting those needs". This case established, for the first time, that a Muslim husband's liability to provide maintenance to his divorced wife extends beyond the Iddat period, and he must realize his obligations within the Iddat period thereby striking a balance between the Muslim personal law and the Criminal Procedure Code, 1973.

45. A Division Bench of the Allahbad High Court in the case of ***Mohd Sayeed vs. Rehana Begum***, 1996 (27) All. L.R., 597 was called upon to consider the question whether an application contemplated under Section 3 of the Act, 1986 could be termed as proceedings in terms of the explanations provided to Section 7 of the Act, 1984. The second question

which arose before the Division Bench for consideration was whether an application to be moved under Section 3 of the Act, 1986 before a Magistrate could be brought within the purview of Section 7(1)(a) of the Act, 1984, i.e, the jurisdiction exercisable by any District Court or by any Subordinate Court under any law for the time being in force in respect of the suits and the proceedings of the nature referred to in the explanations. The Division Bench proceeded to answer the two questions as under;

"The words 'proceedings', 'District Court' or 'any Subordinate Civil Court' are not defined under the Family Courts Act.

Section 2(c) of the Act defines 'Magistrate' which reads as under :

" Magistrate' means a Magistrate of the First Class exercising jurisdiction under the Code of Criminal Procedure, 1973 (2 of 1974) in the area where the divorced woman resides."

General Clauses Act also does not define the words 'proceedings', 'District Court' or' Civil Court'. The word 'proceedings' originates from the word' proceed'. The word 'proceed' is defined in the New Laxicon Websters Dictionary (Delux Encyclopedic Edition). The definition of the words 'proceed' *inter alia* means" to take legal measures". Word 'proceedings' have also been defined in the said Dictionary "as legal measures". Moving an application under Section 3 of the Act is definitely a legal action for the redress of the divorced wife in accordance with the provisions of the Act. The proceedings as contemplated by explanation of Section 7 of the Family Courts Act thus brings in within its purview an application under Section 3 of the 'Act'.

15. The Division Bench decision referred to and relied upon by the learned Counsel for the appellants does not give any reasoning whatsoever for taking a view that an application under Section 3 of the Act cannot be brought in within the meaning of proceedings referred to in explanation of Section 7 of the Family Courts Act.

The other question requires for consideration is whether

an application before the Magistrate contemplated by Section 3 of the Act can be held to be an application under District Court or Civil Court to bring it within the purview of Section 7 of the Family Courts Act.

This needs a reference to the definition of 'Magistrate' referred to in Section 2(c) of the Act. The definition provides that the 'Magistrate' means a Magistrate of the First class exercising jurisdiction under the Code of Criminal procedure, 1973. Since initially an application under Section 125 of Cr.P.C. was moved by the respondent's wife in the aforesaid appeal and the Court was seized of the jurisdiction of the matter, during the pendency of the proceedings the appellant decided to divorce his wife in the aforesaid circumstance the Family Court which was seized of the jurisdiction of 125 Cr.P.C., passed order under Section 3 of the Act. "

46. While answering the question whether the Court has the jurisdiction to pass orders under the Muslim Women (Protection of Rights on Divorce) Act, 1986, the Bench held as under;

"31. Under Section 3 of the Act, the petition is to be made claiming maintenance for the period of Iddat after divorce, claiming maintenance for the child born from the former husband and claiming Mahr and dower or a sum equivalent thereto which are admittedly the properties between the parties to the marriage. All the aforesaid claims, which a divorced wife under the Act is supposed to make before a Magistrate are squarely covered by the Explanations of Section 7 of the Family Courts Act.

33. Section 20 of the Family Courts Act gives an overriding effect to the provisions of the Act over all other enactments. The Family Courts Act has in its comprehension all community including the Muslims. All disputes between the Muslim community within the purview of the Family Courts Act are settled by the Family Courts. It cannot be doubted for a minute that the dispute contemplated by Section 3 of the Act is within the purview and four corners of the Family Courts Act, as the

dispute under Section 3 of the Act also relates to matrimonial relations between the parties and as a consequence of this matrimonial relations having been broken, entitlement of divorced wife after breaking of the matrimonial relations with her husband begins.

46. *The entire purpose of the Act is to provide speedy and expeditious remedy to the destitute lady. The said object of the Act will be defeated if the appellants are permitted to agitate the issue jurisdiction at the appellate stage in the background of the specific provisions of the Act that the application of the destitute lady should be decided within one month from the date of the application. This speedy remedy cannot be permitted to be defeated on the basis of the ground which was never agitated before the Court below. Taking into account the entire circumstances and also taking into account that in case the appellants are permitted to Magistrate the issue of jurisdiction for the first time in the present appeal, the cause of justice will be defeated and considering the entire provision of Family Courts Act we are of the view that the Family Court did not lack inherent jurisdiction to deride an application under Section 3(2) of the Act. "*

47. We may also look into the Full Bench decision of the Bombay High Court in the case of Karim Abdul Rehman Shaikh (supra). We quote the relevant observations;

"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. "*

48. The aforesaid Full Bench decision of the Bombay High

Court is not a good law in view of the aforesaid decisions of the Supreme Court in the case of ***Shabana Bano vs. Imran Khan, AIR 2010 SC 305*** and Danial Latifi (supra).

49. In Shabana Bano (supra), the question that fell for the consideration of the Supreme Court was whether a Muslim divorced wife would be entitled to receive the amount of maintenance from her divorced husband under Section 125 of the Cr.P.C, and if yes, then through which Forum. The Supreme Court answered the aforesaid question as under;

" 14. Section 4 of Muslim Act reads as under:

"4. Order for payment of maintenance: -(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order:

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Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her:

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of

such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order, direct the State Wakf Board established under Section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order."

15. Section 5 thereof deals with the option to be governed by the provisions of Section 125 to 128 of the Cr.P.C. It appears that parties had not given any joint or separate application for being considered by the Court. Section 7 thereof deals with transitional provisions.

16. Family Act, was enacted w.e.f. 14th September, 1984 with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith.

17. The purpose of enactment was essentially to set up family courts for the settlement of family disputes, emphasizing on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. In other words, the purpose was for early settlement of family disputes.

18. The Act, inter alia, seeks to exclusively provide within jurisdiction of the family courts the matters relating to maintenance, including proceedings under Chapter IX of the Cr.P.C.

19. Section 7 appearing in Chapter III of the Family Act deals with Jurisdiction. Relevant provisions thereof read as under:

"7. Jurisdiction-(1) Subject to the other provisions of this Act, a Family Court shall- (a) 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 proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes 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.- The suits and proceedings referred to in this sub- section are suits and proceedings of the following nature, namely:-

- (a)
- (b)
- (c)
- (d)
- (e)
- (f) a suit or proceeding for maintenance;
- (g)"

20. Section 20 of the Family Act appearing in Chapter VI deals with overriding effect of the provisions of the Act. The said section reads as under :

"20. Act to have overriding effect - The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

21. Bare perusal of Section 20 of the Family Act makes it crystal clear that the provisions of this Act shall have overriding effect on all other enactments in force dealing with this issue.

22. Thus, from the above mentioned provisions it is quite

discernible that a Family Court established under the Family Act shall exclusively have jurisdiction to adjudicate upon the applications filed under Section 125 of Cr.P.C.

23. In the light of the aforesaid contentions and in view of the pronouncement of judgments detailing the said issue, learned counsel for the appellant submits that matter stands finally settled but learned Single Judge wholly misconstrued the various provisions of the different Acts as mentioned hereinabove, thus, committed a grave error in rejecting the appellant's prayer.

24. In our opinion, the point stands settled by judgment of this Court reported in (2001) 7 SCC 740 titled Danial Latifi & Anr. Vs. Union of India pronounced by a Constitution Bench of this Court. Paras 30, 31 and 32 thereof fully establish the said right of the appellant. The said paragraphs are reproduced hereinunder :

"30. A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right, loses its significance. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

31. Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

32. As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in Shah Bano's case [(1985) 2 SCC 556 Mohd. Ahmed Khan vs. Shah Bano Begum & Ors.]. In this case to find out the personal law of Muslims with regard to divorced women's rights, the starting point should be Shah Bano's case and not the original texts or any other material - all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering the Holy Quran, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-242 of Chapter II of the Holy Quran and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Bano's case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codifies what was stated in Shah Bano's case. The learned Solicitor General contended that what has been stated in the Objects and Reasons in Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in Shah Bano's case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality."

25. Judgment of this Court reported in (2007) 6 SCC 785 titled Iqbal Bano Vs. State of U.P.& Anr. whereby the provisions contained in Section 125 of the Cr.P.C. have been aptly considered and the relevant portion of the order passed in Iqbal Bano's case reads as under:

"10. Proceedings under Section 125 Cr.P.C. are civil in nature. Even if the Court noticed that there was a divorced woman in the case in question, it was open to it to treat it as a petition under the Act considering the beneficial nature of the legislation. Proceedings under Section 125 Cr.P.C. and claims made under the Act are

tried by the same court. In Vijay Kumar Prasad Vs State of Bihar (2004) 5 SCC 196 it was held that proceedings under Section 125 Cr.P.C. are civil in nature. It was noted as follows: (SCC p.200, Para 14).

14. The basic distinction between Section 488 of the old Code and Section 126 of the Code is that Section 126 has essentially enlarged the venue of proceedings for maintenance so as to move the place where the wife may be residing on the date of application. The change was thought necessary because of certain observations by the Law Commission, taking note of the fact that often deserted wives are compelled to live with their relatives far away from the place where the husband and wife last resided together. As noted by this Court in several cases, proceedings under Section 125 of the Code are of civil nature. Unlike clauses (b) and (c) of Section 126 (1) an application by the father or the mother claiming maintenance has to be filed where the person from whom maintenance is claimed lives."

26. In the light of the findings already recorded in earlier paras, it is not necessary for us to go into the merits. The point stands well settled which we would like to reiterate.

27. The appellant's petition under Section 125 of the Cr.P.C. would be maintainable before the Family Court as long as appellant does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C. cannot be restricted for the iddat period only.

28. Learned Single Judge appeared to be little confused with regard to different provisions of Muslim Act, Family Act and Cr.P.C. and thus was wholly unjustified in rejecting the appellant's Revision.

*29. Cumulative reading of the relevant portions of judgments of this Court in Danial Latifi (*supra*) and Iqbal Bano (*supra*) would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.*

30. In the light of the aforesaid discussion, the

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

50. Thus, in the aforesaid decision of the Supreme Court, it has been held that petition under Section 125 of the Cr.P.C would be maintainable before the Family Court as long as the wife does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C cannot be restricted for the Iddat period only.

51. The main plank of the submission canvassed on behalf of the appellant is that there is no provision in the Dissolution of Muslim Marriage Act, 1939 for maintenance or permanent alimony. Although the suit for dissolution of marriage under the Act, 1939 would be maintainable before the Family Court under the Act, 1984, yet the jurisdiction of the Family Court would not travel beyond granting a decree of divorce. In other words, the argument is that the Family Court has no jurisdiction to pass any order with respect to maintenance or permanent alimony once the suit is allowed and the marriage is dissolved at the instance of the wife.

52. A perusal of the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as "the Muslim Women Act") will leave no manner of doubt that the Act shall operate only when a "divorced woman", as defined in that Act, applies for maintenance against the former husband. The Muslim Women Act is "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". The title therefore makes it abundantly clear that the Muslim Women Act professes to deal with Muslim divorced women and their rights against their former husbands.

53. Where a Family Court has been established, the power and the jurisdiction of the Family Court under section 7(2) of the Family Courts Act, 1984 to entertain an application for maintenance, even by a divorced Muslim wife, under Chapter IX of the Code of Criminal Procedure has not been taken away, either expressly or even by implication by the Muslim Women Act of 1986. And once such an application is made to a Family Court under section 7(2) of the Family Courts Act, and not to a Magistrate, the same has got to be disposed of by the Family Court in accordance with the provisions of Chapter IX of the Code of Criminal Procedure, and the Muslim Women Act of 1986, including its Section 5, would have no manner of application. When the Muslim Women Act was enacted in 1986, it was obviously known to the Parliament that wherever a Family Court is established the Magistrates are divested of their jurisdiction in respect of the applications under Chapter IX of the Code of Criminal Procedure under the provisions of Section 8(b) of the Family Courts Act enacted in 1984 and such jurisdictions are thereafter vested in the Family Courts under section 7(2) of the Act. If, with these provisions staring at the face, the Muslim Women Act of 1986 does not, even remotely, refer to a proceeding under Chapter IX of the Code of Criminal Procedure in or before a Family Court, the conclusion is irresistible that such a proceeding under Chapter IX of the

Code is still available to a Muslim divorced woman in and before a Family Court, while the remedy under the Muslim Women Act, of 1986 is an additional remedy.

54. As we read the relevant provisions of Chapter IX of the Code of Criminal Procedure, of the Family Courts Act, 1984 and the Muslim Women Act, 1986 the position appears to us to be as hereunder. A muslim divorced woman may apply for maintenance before a Magistrate under section 5 of the Muslim Women Act payable to her only during the period of Iddat. She may, thereafter, if still unable to maintain herself, 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 of Criminal Procedure and such application shall be governed and disposed of in accordance with the provisions of Chapter IX only if both the divorced woman and her former husband declare under section 5 of the Muslim Women Act and choose to be so governed. A divorced woman in need for maintenance for the post-Iddat period, may also, if she so chooses, apply to a Magistrate under section 4 of the Muslim Women Act for maintenance to be paid to her from such of her relatives as would be entitled to inherit her property on her death, or, that failing, by the Wakf Board. But where a Family Court has been constituted, such a divorced woman, intending to apply for maintenance under Chapter IX of the Code of Criminal Procedure, 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 that Chapter IX, notwithstanding anything in the Muslim Women Act of 1986. 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 of Criminal Procedure.

55. The right of maintenance and right in the matrimonial property are the consequences of the marriage or its dissolution. Those reliefs are incidental to the main relief of 'dissolution of marriage' and therefore, these reliefs are very much an integral part of the decree of 'dissolution of marriage'. Hence, they are required to be considered in the same proceeding, even if at times such reliefs are not asked for also. It is well recognized that the award of maintenance is the fall out of the decree of 'dissolution of marriage', hence even if at times, the Respondent has not asked for the maintenance, she is awarded that maintenance for herself and her children while passing the decree for 'dissolution of marriage'.

56. The Courts, civil or criminal, are constituted for the purpose of administering justice in accordance with law. The Codes of procedure, civil and criminal, have been enacted to regulate the procedural aspects and to ensure that the enquiries and trial are held in accordance with the principles of fair play. The Provisions of the Codes are designed to further the ends of justice and not to frustrate the ends of justice. The legislature has tried to lay down elaborate rules in respect of all the matters specifically mentioned in the Codes. Yet it has to be appreciated that it is not humanly possible for any legislature to visualise, anticipate and provide for all matters and contingencies that may arise in the courts for all times.

The ever-changing needs and situations may require judicial determination: it cannot be that the courts are powerless to act in the absence of specific provisions in the Codes. The Courts have since olden times evolved the theory of inherent, implied or ancillary powers and applied the same to regulate their proper and effective functioning and in the discharge of their duties to get over the technicalities and to secure the ends of justice. The challenge of administering justice is often met by invocation of inherent powers resting on never changing principles of reason and fair play.

57. It is a well known rule of statutory construction that a tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions for the purpose of doing justice between the parties unless there is any indication to the contrary in the statute. See **Grindlays Bank Ltd. v. Central Govt.** Ind. Tribunal ([1980 Supp SCC 420 : AIR 1981 SC 606](#)). An express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective. (See Sutherland's Statutory Construction, Third edition, articles 5401 and 5402). Where an Act confers jurisdiction, it impliedly also grants the power of doing all such acts or employing such means, as are essentially necessary to its' execution. See Maxwell on Interpretation of Statutes, eleventh edition at page 350. This passage is quoted with approval in [Income Tax Officer, Cannanore. v. M. K. Mohammed Kunhi, \(1969\) 71 ITR 815 and Dharmadas v. S.T.A.T \(1962 KLT 505 \(FB\)\)](#). Every court is deemed to possess such inherent power, in the absence of any provision

either prohibiting or providing for the exercise of such power, in respect of any matter as is really essential for its effective and smooth functioning in accordance with law. Such power is inherent in its very constitution. This power, naturally, has to be exercised sparingly and with due care and caution and only in appropriate cases either to give effect to orders of court or to prevent abuse of process of court or to secure the ends of justice; it has to be exercised judiciously and not arbitrarily or capriciously. The exercise must be based on sound general principles and not in conflict with them or with the intention of the legislature as indicated in the statutory provisions.

58. It was also sought to be argued on behalf of the appellant that in view of Section 4 of the Act, 1986, the former husband has no liability to make any provision for the Post-Iddat period. Section 4 reads thus;

"4. Order for payment of maintenance

(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the Iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and as such periods as he may specify in his order:

Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the

Magistrate shall order the parents of such divorced women to pay maintenance to her.

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such liability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(2) *Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the proviso to sub-section (1) the Magistrate may, by order, direct the State Wakf Board established under **S. 9 of the Wakf Act, 1954 (Act 29 of 1954)** or under any other law for the time being in force in a State, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order." (See Aliyar vs. Pathu, 1988 (2) KLT 446)*

59. The point to be stressed is that the relief of maintenance whether to the wife or the children is incidental to the relief of 'dissolution of marriage'. Merely because '[The Dissolution of Muslim Marriages Act, 1939](#)', does not mention that the Court is also having the jurisdiction or power to grant such relief, it cannot be said that the Court is not having the jurisdiction to grant it, if it is incidental, claimed and the Court finds it necessary to grant the same. Moreover, the right of maintenance given to wife and the minor children under the provisions of the Muslim Women (Protection of Rights on

Divorce) Act, 1986, is in addition to the right, which the minor children are having under Muslim Law to get maintenance from the father. The law expects that the parties should not be driven to approach the different forums but in one forum itself they should be granted whatever reliefs to which they are entitled.

60. A Division Bench of the Bombay High Court in the case of ***Shabbir Ahmed Sheikh vs. Shaikilabano*** has held as follows;

"The preamble of the Dissolution of Muslim Marriages Act, 1939, shows that the Act is of a consolidating and declaratory character and that it was intended to consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriages by women married under Muslim Law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie. It was never intended to abrogate the general Law applicable to Mohammedans. Therefore, this Act is not the sole statute. They are having the rights under other statutes also and those rights can be very well exercised in the Civil Court. Therefore, if any decree is passed by the Civil Court granting those rights, it cannot be said that the Civil Court has acted beyond its jurisdiction." (emphasis supplied)."

61. The Supreme Court in the case of ***K.A. Abdul Jaleel V/s. Shahida***, (2003) 4 SCC 166 was concerned with the provisions of Section 7 of the Family Courts Act, 1984, as to, whether the Family Court had the jurisdiction to adjudicate upon any question relating to the properties of the parties not only of the subsisting marriage but also divorced parties and the Supreme Court was pleased to hold that the reason for enactment of the Family Courts Act, 1984, was to set up a Court to deal with all

the disputes concerning with the Family and it is now well settled principle of law that the jurisdiction of a Court created specifically for the resolution of disputes of certain kinds should be construed liberally. Hence, the restricted meaning if ascribed to explanation "C" appended to Section 7 of the Act would frustrate the object where for the Family Courts were set-up.

62. The relevant observations made by the Supreme Court in Paras-13 and 14 respectively are as under;

"13. The Family Court was set up for settlement of family disputes. The reason for enactment of the said Act was to set up a court which would deal with disputes concerning the family by adopting an approach radically different from that adopted in ordinary civil proceedings. The said Act was enacted despite the fact that Order 32A of the Code of Civil Procedure was inserted by reason of the Code of Civil Procedure (Amendment) Act, 1976, which could not bring about any desired result.

14. It is now a well-settled principle of law that the jurisdiction of a court created specially for resolution of disputes of certain kinds should be construed liberally. The restricted meaning if ascribed to Explanation (c) appended to Section 7 of the Act, in our opinion, would frustrate the object wherefor the Family Courts were set up."

Award of lump sum permanent alimony:-

63. Mr. Shah, the learned senior counsel submitted that his client, i.e, the appellant herein has come to know that the respondent, i.e, his divorcee wife has remarried. According to Mr. Shah if the wife has remarried, then there is no question of any lump sum permanent alimony. In other words, according to Mr. Shah, the order passed by the Family Court, awarding

permanent alimony deserves to be quashed on this ground alone, i.e, remarriage.

64. A divorced Muslim woman is entitled to receive, from her husband, *inter alia*, "maintenance", "reasonable and fair provision", "Mahr" etc. under Section 3 of the Act, 1986. The Supreme Court in the case of *Danial Latifi (supra)* has observed as under;

"28. A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood, after the divorce and, therefore, the word provision indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her cloths, and other articles. The expression within should be read as during or for and this cannot be done because words cannot be construed contrary to their meaning as the word within would mean on or before, not beyond and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but no where the Parliament has provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time."

29. *The important section in the Act is Section 3 which provides that divorced woman is entitled to obtain from her former husband maintenance, provision and mahr, and to recover from his possession her wedding presents and dowry and authorizes the magistrate to order payment or restoration of these sums or properties. The*

crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations : (1) to make a reasonable and fair provision for his divorced wife; and (2) 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 should be concluded, namely, within the iddat period. If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both reasonable and fair provision and maintenance by paying these amounts in a lump sum to his wife, in addition to having paid his wifes mahr and restored her dowry as per Section 3(1)(c) and 3(1)(d) of the Act. Precisely, the point that arose for consideration in Shah Banos case was that the husband has not made a reasonable and fair provision for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are a reasonable and fair provision and maintenance to be made and paid as provided under Section 3(1)(a) of the Act and these expressions cover different things, firstly, by the use of two different verbs to be made and paid to her within the iddat period, it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4 of the Act, which empowers the magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to provision. Obviously, the right to have a fair and reasonable provision in her favour is a right enforceable only against the womans former husband, and in addition to what he is obliged to pay as maintenance; thirdly, the words of the Holy Quran, as translated by Yusuf Ali of mata as maintenance though may be incorrect and that other translations employed the word provision, this Court in Shah Banos case dismissed this aspect by holding that it is a distinction

without a difference. Indeed, whether mata was rendered maintenance or provision, there could be no pretence that the husband in Shah Banos case had provided anything at all by way of mata to his divorced wife. The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to mata is only a single or one time transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word provision in Section 3(1)(a) of the Act incorporates mata as a right of the divorced Muslim woman distinct from and in addition to mahr and maintenance for the iddat period, also enables a reasonable and fair provision and a reasonable and fair provision as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in Shah Banos case, actually codifies the very rationale contained therein.

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 Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.
- 3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after 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. "

65. The law contemplates that the husband has two separate and distinct obligations; (I) to make 'a reasonable and fair provision' for his divorcee wife and (ii) to provide 'maintenance' for her. The Supreme Court has held that the intention of Parliament in enacting the obligation of the husband to make 'a reasonable and fair provision' was to ensure that the divorced woman gets sufficient means of livelihood after the divorce and therefore, the word 'provision' indicates something provided in advance for meeting some needs.

66. It is argued on behalf of the respondent wife that the obligation to make a reasonable and fair provision for the divorced wife is not restricted until the divorced wife remarries. It is submitted that the Family Court was justified in passing an order for a lump sum amount to be paid to the wife in discharge of the obligation of the husband under section 3(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 and such order is not required to be modified upon remarriage of the divorced Muslim wife.

67. Even under the Hindu law, section 25 of the Hindu Marriage Act, 1955 provides for the power of the Court to order permanent alimony and maintenance at the time of passing the decree or at any time subsequent thereto. Sub-section (3) of Section 25 grants a discretion to the Court to vary, modify or rescind the order of permanent alimony and maintenance under certain circumstances including remarriage of the wife.

However, the learned Author viz. Paras Diwan in his book the Law of Marriage and Divorce, 7th Edition at Page No.721, has commented that it is not mandatory for the Court to modify or rescind an order of permanent alimony granted to the wife upon her remarriage. The passage reads as under;

"The statutes clearly specify that orders for permanent maintenance and alimony cannot be made beyond the life of the applicant. There are circumstances where the order may be terminated earlier. Sub Section (3) of section 25 of the Hindu Marriage Act, 1955 and Sub section (3) of Section 25 of the Special Marriage Act, 1954 lay down that such orders would come to end if the Applicant remarries or does not remain chaste (in case the applicant is the husband indulged in extra marital intercourse). The Court may, at the instance of the other party vary, modify or rescind such orders. Before the amendment of 1976 the provision was that in such cases the court "shall rescind the order". Under the Parsi Marriage and Divorce Act, 1936 the order of permanent alimony remains valid only till the applicant remains chaste and unmarried. There is no such provision under the Indian Divorce Act, 1869. The amended provisions of the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 does not obligate the court to rescind the maintenance order in the event of happening of any of the two aforesaid events. The Court may not rescind the order, it may modify or vary it. This has obvious advantage. If a wife having children remarries a poor man, the remarriage does not deprive her of the maintenance. The Court may feel that her ex-husband should still pay the maintenance."

68. The Orissa High Court in the case of **Nanigopal Chakravarty vs. Renubala Chakravarty**, reported in AIR 1965 Ori. 154 has held that an order awarding a gross sum decreed as permanent alimony and maintenance cannot be rescinded under section 25(3) of the Hindu Marriage Act, 1955. The Orissa High Court has observed as under;

"Under Section 25(1), a gross sum can be decreed. In terms, Sub-section (3) does not restrict the powers of the Court to rescind only the payment of monthly and periodical sums. Sub-section (3) has been widely couched and *prima facie* it might be made applicable to rescission of an order awarding a gross sum. Though the matter is not free from difficulty on account of the inartistic language in which the section has been worded and the absence of any authority on the point, on a close scrutiny, the view that a decree awarding gross sum cannot be rescinded appears to be more reasonable. The difference in wording in Sub-sections (2) and (3) is somewhat significant. Under Sub-section (2), if the Court is satisfied that there is a change in the circumstances of either party at any time after the order has been made under Sub-section (1), it may vary, modify or rescind any such order in such manner as it may deem just. To illustrate, if the husband had higher income at the time of the decree, but he becomes indigent later on and is not in a position to pay the sums towards maintenance, the Court may step in to reduce the amount. Similarly if the wife gets an employment and earns a substantial income sufficient to maintain herself, the Court may rescind the order or decree granting maintenance. Thus in case of change in circumstances, the Court has been given ample power either to vary, modify or rescind the order.

Under Sub-section (3), however the Court has been given the power only to rescind. The word 'rescind' means to annul or cancel. If the conditions prescribed under Sub-section (3) exist, that is, if a party in whose favour the order has been made remarries, or, if such a party is the wife and she does not remain chaste, or, if such a party is the husband and he has had sexual intercourse with any woman outside wedlock, the Court shall rescind the order. In case of payment of monthly or periodical sums, the Court can rescind :he order as such payments relate to future payments only. Conferring power on the Court to annul future payments after accrual of cause of action as prescribed in Sub-section (3) appears to be reasonable. The same argument does not, however, apply to rescission of an order granting gross sum, which would amount to annulment of a past liability and not a future one. Such annulment also would lead to an absurdity inasmuch as the past dues accruing in favour

of the wife in between the decree and the remarriage cannot be rescinded under the sub-section as such liability constituted an integral part of the gross sum decreed. The past and future liabilities constituting the gross sum are not severable. Rescission of such an indivisible liability cannot therefore be countenanced. It is for this reason, in Blanche Somerset v. Charles George Bleach, AIR 1915 Bom 50 under the proviso to Section 37 of the Indian Divorce Act, it was held by Hayward J. that where gross sum of money is given to the wife, that is paid absolutely."

69. Blanche Somerset Taylor v. Charles George Bleach, AIR (1915) Bom. 50 was a case which had arisen under the Divorce Act. Section 37 of the Divorce act, 1869 enabled the Court to pass a decree for permanent alimony or for a payment of periodical maintenance to the wife and the proviso to Section 37 enabled it to provide cancellation of decree. A question had arisen in the context of the wife's claim that the order of permanent alimony passed in her favour should carry interest as may be directed by the Court during her life time so that she can be maintained out of that. The contention was founded on the ground that Section 37 envisaged grant of maintenance "for any time".

70. The Division Bench of the Bombay High Court opined that the expression "for any time not exceeding her own life" did not qualify the word permanent alimony but qualified the periodical payments. The Court said;

"The plain meaning of those words would appear to me to be that the gross sum of money should be paid absolutely to the wife and that the annual sum of money only should be limited for the period of her life."

71. Thus, the Court recognized that the order of permanent

alimony is absolute in terms and is not qualified in other periodical payments.

72. In Havelock Charles David Goodall v. Mrs. Beatrice Honor Agatha Goodall, AIR 1938 Bom. 121 after a decree of permanent alimony was passed in favour of the wife, the husband applied for cancelling the decree for permanent alimony on the ground that after passing the decree for permanent alimony, the wife has obtained a decree for maintenance on an application that was made prior to the dissolution of marriage. Rejecting the husband's contention the Court said:-

"Though the High Court has ample jurisdiction under Section 37 proviso to discharge or modify or suspend an order for alimony in so far as it concerns future payment, the High Court has no jurisdiction to declare that a husband should not be liable to make good sums which have already accrued due by way of alimony under a decree."

73. The aforesaid decision clearly indicates that the power to modify, rescind or discharge the order of alimony is restricted to the periodical payment to be made in future and not to apply to one time grant of permanent alimony which in terms is absolute.

74. The concept of "permanent alimony" with reference to Section 25 of the Hindu Marriage Act, 1955 has been very elaborately explained by a Division Bench of this High Court in the case of Patel **Dharamshi Premji vs. Bai Sakar Kanji**, 1967 ILR (Guj.) 866.

75. Though Section 25 does not use the expression "permanent alimony" in any part of the enactment, the marginal note to the section clearly shows that the Section is intended to deal with permanent alimony. The concept of "permanent alimony" is not an indigenous concept grown on our soil as we did not have any law of divorce amongst Hindu in this country. But when the Act was enacted providing inter alia for divorce amongst Hindus, the concept of "permanent alimony" was borrowed by the draftsmen of the Act from England. The history of the development of the law relating to permanent alimony in England may be found in the following passage in the book of Sir Dinshah F. Mulla on Hindu Law, thirteenth Edition at page 735:

"Permanent alimony is the expression used under English law in the context of provision ordered to be made by the Court for a wife on her petition for judicial separation being granted. Behind the relevant statutory enactments in England is a historic development of law. Before the first divorce Act in England a wife could only obtain from the Ecclesiastical Court divorce a monsa at thiro (judicial separation) and the allowance allotted to her was named permanent alimony which was as a general rule one-third of the husband's Income. The operation of the rule was extended and the same principle was applied in cases decided under the successive Divorce acts in England when relief by way of dissolution of marriage by divorce was granted to the wife. At one stage the view was taken that the wife who claimed maintenance after a decree of divorce in her favour would have pecuniary interest in seeking such relief and that would not accord with the policy of law. That view was discountenanced and it was ruled that the principles on which the Ecclesiastical Courts awarded permanent alimony in case of judicial separation should be applicable to cases where relief by way of

divorce or nullity of marriage was granted although in cases under the latter category she ceased to be the wife or was declared not to have been the wife of the other party and relinquished her character as wife and the name of the husband."

76. In England a wife is entitled to a permanent alimony from the husband where a decree is passed granting relief by way of judicial separation, divorce or nullity of marriage. Such a decree may be passed in favour of the husband or the wife. That is not material to the question of permanent alimony, whether the decree be passed in favour of the husband or the wife the wife can ask for permanent alimony from the husband. The reason for awarding permanent alimony to the wife seems to be that if the marriage bond which was at one time regarded as indissoluble is to be allowed to be severed in the larger interests of society, the same considerations of public interest and social welfare also required that the wife should not be thrown on the street but should be provided for in order that she may not be compelled to adopt a disreputable way of life. The provision for permanent alimony is, therefore, really incidental to the granting of a decree or judicial separation, divorce or annulment of marriage and that also appears to be clearly the position if we look at the language of Section 3 of the Act, 1986. It is evident that the provision for permanent alimony is something which follows upon the decree granting substantive relief and is incidental to it. It was also so observed by S. T. Desai C J., (as His Lordship then was) sitting with Bakshi J. in a decision rendered on 28th November 1960 in the First Appeal No. 178 of 1960 (Guj) where it was said:

"We are of the opinion that the rule laid down in Section 25 relates only to ancillary relief which is incidental to substantive relief that may be granted by the Court, though of course the incidental relief may be given to either party".

77. What is significant to note is that the relief of permanent alimony is a relief incidental to the granting of the substantive relief by the Court in the main proceeding. It is an incidental relief claimed in the main proceeding, though an application is necessary for claiming it. The application is an application, in the main proceeding for claiming an incidental relief consequent upon the granting of the substantive relief by the Court. This is abundantly clear not only on principle but there is also an authority in support of it. Dealing with a case under S. 37 of the Divorce Act which contains a provision for making of an order for permanent alimony, Sir John Beaumont observed in J. G. Khambatta v. M.C. Khambatta, AIR 1941 Bombay 17;

"Under Section 37, Divorce Act, the Court can make an order for permanent alimony on making the decree absolute, although usually the order is made after the date. But if the circumstances justify it, the Court can make the order at once on making the decree absolute, and it is quite wrong to suppose that a petition presented afterwards is not a petition in the suit."

78. The Supreme Court had the occasion to consider the question whether a Muslim woman obtaining a divorce under the provisions of the Act, 1939 is entitled to maintenance under Section 125 Cr.P.C., and it has been held in Zohara Khatoon v. Mohd. Ibrahim, AIR 1981 SC 1243 that there are three distinct modes in which a dissolution of marriage can be brought about and Clause(b) of the explanation to Section

125(1) envisages all the three modes, whether a wife is divorced unilaterally by the husband or where she obtains divorce under the other two modes, she continues to be a wife for the purpose of getting maintenance under Section 125 of the Code. The Supreme Court held that divorce resulting from dissolution of marriage under the provision of Dissolution of Muslim Marriage Act, 1939 is also a legal divorce under the Mohammedan law by virtue of the Statute (1939 Act). Applying the law laid down by the Supreme Court in the decision cited above, there is no difficulty to hold that a decree for dissolution of marriage obtained by the wife under the provisions of the Act, 1939 is a legal divorce under the Muslim Law by virtue of the statute. So, the ex wife, who had obtained divorce from her erstwhile husband under the provisions of the Act, 1939 is entitled to reasonable and fair provision under Section 3 of the Act, 1986. The expression "divorced woman" is defined in Section 2 of the Act 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. It is clear from the materials on record that the respondent is a divorced woman coming within the purview of the expression "divorced woman" under Section 2(a) of the Act, i.e., she has obtained divorce from her husband in accordance with the Muslim Law.

79. We may conclude observing that when the Court makes an award of permanent alimony or for one time payment, it is not founded on any stipulation that any part of the sum would be either actually refunded in whole or in part. Such sum is not granted on the condition against remarriage for all times to

come or for any particular period. In fact, it is something different from the obligation of her husband to maintain his divorced wife for his life or until remarried. The permanent alimony in a way is an estimated sum in lump sum to discharge the judgment debtor from his future liabilities unconditionally. On the other hand, the grant of periodical payment by way of maintenance to a divorced wife is in recognition/obligation to the spouse to maintain her so long as she enjoys the continued status of a divorcee. On such remarriage, that status of divorcee comes to an end and she acquires another marital status as someone's spouse. Under the Act, 1986 as well as under Section 125 Cr.P.C, the wife includes a divorcee. Therefore, when the wife remarries, her claim of maintenance primarily comes to stand against her new husband coming into existence in new relationship. The obligation of maintaining the divorced wife is shifted to the husband, whom she subsequently marries. The future obligation to maintain her by her previous husband comes to an end. That makes a case of permanent alimony different from a case of grant of periodical maintenance. The former is to discharge the husband from his obligation for all times in lieu of a settled reason, in the later, he is required to continuously discharge his obligations at interval of every period. This proposition of law laid down by us should be looked into keeping in mind Section 3(1)(a) of the Act, 1986. A divorced woman is entitled to 'a reasonable and fair provision' and "maintenance" to be made and paid to her within and post the Iddat period by her former husband. The Supreme Court in *Danial Latifi* (*supra*) interpreted this as two separate obligations. The Court found "reasonable and fair provision" to mean a provision in advance for the future needs of the ex-

wife including her residence, food, clothes and other necessities. The Supreme Court found that the Act, 1986 requires a Muslim husband to provide maintenance of a reasonable and fair amount needed to maintain his wife for the rest of her life but that he must pay this amount in total during the iddat Period. At the cost of repetition, we state that the provision for permanent alimony is incidental to the granting of a decree or judicial separation, divorce or annulment of marriage. In other words, the relief of permanent alimony is a relief incidental to the granting of the substantive relief by the Court in the main proceeding.

80. From the aforesaid discussion the following conclusions emerge;

(A) Before the enactment of the Act, 1939, a woman, under pure Muslim Law, had no right to get a decree for divorce from the husband if the husband refuse to divorce her. The Act, 1939, for the first time, conferred a legal right to move the Civil Court for a decree for dissolution of marriage on the grounds specified in Section 2 of the Act, 1939. After the Act of 1939, a wife thus had a statutory right to obtain a divorce from her husband through the Court on proof of the grounds mentioned in the Act.

(B) A decree for dissolution of marriage obtained by the wife under the provisions of the Act, 1939 is a legal divorce under the Muslim Law by virtue of the statute. The ex-wife, having obtained divorce from her erstwhile husband under the provisions of the Act, 1939 is entitled to reasonable and fair provision under Section 3 of the Act, 1986.

(C) Section 20 of the Family Courts Act, 1984 gives an overriding effect to the provisions of the Act over all other enactments. The Family Courts Act has in its comprehension all community including the Muslims. All disputes between the Muslim community within the purview of the Family Courts Act are to be settled by the Family Courts.

(D) The dispute contemplated by Section 3 of the Act, 1986 is within the purview and four corners of the Family Courts Act as the dispute under Section 3 of the Act, 1986 also relates to matrimonial relations between the parties.

(E) The right of maintenance and right in the matrimonial property are the consequences of the marriage or its dissolution. Those reliefs are incidental to the main relief of 'dissolution of marriage' and therefore, these reliefs are very much an integral part of the decree of 'dissolution of marriage'. The Law contemplates that the husband has two separate and distinct obligations; (I) to make "reasonable and fair provision" for his divorcee wife and (ii) to provide "maintenance" for her. The obligation to make a reasonable and fair provision for the divorced wife is not restricted until the divorced wife remarries. It is within the jurisdiction of the Family Court to pass an order for a lump sum amount to be paid to the wife in discharge of the obligation of the husband under Section 3(1)(a) of the Act, 1986 and such order cannot be modified upon remarriage of the divorced Muslim wife.

(F) The provision for permanent alimony is incidental to the

granting of a decree or judicial separation, divorce or annulment of marriage.

(G) When the Family Court makes an order of permanent alimony or for one time payment in the proceedings instituted by the wife for divorce, it is not founded on any stipulation that any part of the sum would be refunded either in whole or in part. Such sum is not granted on the condition against remarriage for all times to come or for any particular period. It is something different from the obligation to her husband to maintain his divorced wife for his life or until remarried. The permanent alimony in a way is an estimated sum in lump sum to discharge the husband from her future liabilities unconditionally.

(H) The grant of periodical payment by way of maintenance to a divorced wife is in recognition/obligation of the spouse to maintain her so long as she enjoys the continued the status of divorcee. If the wife gets remarried, her status of divorcee is come to an end and the liability of the husband to pay periodical maintenance would also come to an end.

81. It is brought to our notice by the learned counsel appearing for the respective parties that the appellant herein remarried way back in the year 2014. This is suggestive of the fact that much before the respondent herein instituted the proceedings in the Family Court for divorce, the husband had already remarried and raised a family. The appellant could do so because polygamy is permissible amongst the Muslim Community. It does not constitute an offence of bigamy punishable under 494 of the Penal Code. The materials on record further indicates that the husband hardly paid anything towards maintenance. The respondent had to leave her

matrimonial home soon after the marriage, i.e., sometime in 2010. Ultimately, she was constrained to institute the proceedings of divorce in the Family Court. It appears that even during the pendency of such proceedings before the Family Court, nothing was paid to the wife. The wife, ultimately, succeeded before the Family Court in getting the marriage dissolved and was also successful in getting an order of permanent alimony. The husband now cannot turn around and say that he is not liable to pay the lump sum amount because the respondent is remarried.

82. This litigation reminds us of the observations made by one of us J.B. Pardiwala, J. in the case of ***Jafar Abbas Rasool Mohammad Merchant vs. State of Gujarat***, reported in 2016 (2) GLR 1529. Jafar Abbas (supra) was a case of polygamy and unilateral "Talaq" without the consent of the wife. So far as triple Talaq is concerned, the same has been now taken care of by the Central Legislature by way of a special enactment. However, the following observations are important;

"46. I may usefully quote the observations of late Justice Chagla in the case of State of Bombay v. Naraya [AIR 1952 Bombay page 84] as under:

"5. Now a sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole. A very interesting and instructive case is to be found in the American Reports, viz. Davis v. Beason, (1889) 133 US 637. In that case it was contended that polygamy was part of the creed of the Mormon Church and any

legislation which penalises polygamy to the extent that it affected Mormons was contrary to the First Amendment of the Constitution which provided that Congress shall not make any law respecting the establishment of religion or forbidding the free exercise thereof. This argument was rejected, and Mr. Justice Field delivering the opinion of the Court pointed out that (p. 640):

"The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter." He further pointed out that the First Amendment could not be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. He further pointed out that (p. 640):

"Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilised nations a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which Government is necessarily required to deal." Further on he states (p. 640):

"Laws are made for the Government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." It is only with very considerable hesitation that I would like to speak about Hindu religion but it is rather difficult to accept the proposition that polygamy is an integral part of Hindu religion. It is perfectly true that Hindu religion recognises the necessity of a son for religious efficacy and spiritual salvation. That same religion also recognises the institution of adoption. Therefore, the Hindu religion provides for the continuation of the line of a Hindu male within the frame-work of monogamy.

"9. There can be no doubt that the Muslims have been excluded from the operation of the Act in question. Even Section 494, Penal Code, which makes bigamy an offence applies to Parsis, Christians and others, but not to Muslims because polygamy is recognised as a valid institution when a Muslim male marries more than one

wife. The question that we have to consider is whether there is any reasonable basis for creating the Muslims as a separate class to which the laws prohibiting polygamy should not apply. Now, it is an historic fact that both the Muslims and the Hindus in this country have their own personal laws which are based upon their respective religious texts and which embody their own distinctive evolution and which are coloured by their own distinctive backgrounds. Article 44 itself recognises separate and distinctive personal laws because it lays down as a directive to be achieved that within a measurable time India should enjoy the privilege of a common uniform Civil Code applicable to all its citizens irrespective of race or religion. Therefore, what the Legislature has attempted to do by the Hindu Bigamous Marriages Act is to introduce social reform in respect of a particular community having its own personal law. The institution of marriage is differently looked upon by the Hindus and the Muslims. Whereas to the former it is a sacrament, to the latter it is a matter of contract. That is also the reason why the question of the dissolution of marriage is differently tackled by the two religions. While the Muslim law admits of easy divorce, Hindu marriage is considered indissoluble and it is only recently that the State passed legislation permitting divorce among Hindus. The State was also entitled to consider the educational development of the two communities. One community might be prepared to accept and work social reform; another may not yet be prepared for it; and Article 14 does not lay down that any legislation that the State may embark upon must necessarily be of an all embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community wise. From these considerations it follows that if there is a discrimination against the Hindus in the applicability of the Hindus Bigamous Marriages Act, that discrimination is not based only upon ground of religion. Equally so, if the law with regard to bigamous marriages is not uniform, the difference and distinction is not arbitrary or capricious, but is based upon reasonable grounds."

47. The above noted decision very well explains why the legislature thought fit for treating the Muslim as a separate class to which the laws prohibiting polygamy should not apply, but has not taken care till this date to

prevent the misuse of the theory.

48. *The Indian Constitution does not use the word "Secularism" in any of its provisions; but its material provisions are inspired by the concept of Secularism. When it promised all the citizens of India that the aim of the Constitution is to establish socio-economic justice, it placed before the country as a whole the ideal of a Welfare State; and the concept of welfare is purely secular and not based on any considerations of religion. The essential basis of the Indian Constitution is that all citizens are equal, and this logic equality which is guaranteed by Article 14 obviously proclaims that the religion of a citizen is entirely irrelevant in the matter of his fundamental rights. The State does not owe loyalty to any particular religion as such; it is not irreligious or anti-religious; it gives equal freedom for all religions and holds that the religion of the citizen has nothing to do in the matter of socio-economic problems. That is the essential characteristic of Secularism which is writ large in all the provisions of the Indian Constitution.*

49. *Though the Constitution guarantees freedom to all religions, it recognises that in certain aspects, and under certain conditions, religious practices may impinge upon socio-economic problems and the Constitution has made it clear that whatever socio-economic problems or relations are involved, the State will have a right to interfere in the interests of public good. Let me illustrate my point by taking two provisions of the Constitution. Under Article 15, the Constitution has prohibited discrimination on grounds of religion, race, caste, sex or place of birth; but the Constitution was conscious that the problem of sociality and economically backward communities needed special attention. Article 17 categorically abolished untouchability and provided that the enforcement of any disability arising out of untouchability shall be an offence. Now, untouchability, from a conservative, traditional point of view, was a part of the religious practise prevailing amongst the Hindus; but the Constitution realised that the observance of untouchability impinged upon secular, social rights of all citizens and contravened the basic concept of social equality; and so, Article 17 made a specific provision in that behalf.*

50. *Similarly, when attempts were made by the Indian*

Legislatures to provide special safeguards classes, it was discovered that these provisions conflicted with the prohibition prescribed by Article 15 (1). The Constitution was then amended and clause (4) was added to Article 15 expressly authorising the States to make suitable provisions for the advancement of the said castes and tribes. Now, this provision again emphasises the fact that though the Constitution gives full liberty to the practise of all religions prevailing in India, it will not allow the so-called observance of religion to affect the social and secular rights of its citizens.

51. There is yet another instance which is relevant on this point. Articles 25 and 26 of the Constitution provide for the right to freedom of religion. Article 25 gives freedom of conscience and free profession, practise and propagation of religion, whereas Article 26 guarantees freedom to manage religious affairs. Now, it is well-settled that the freedom to manage religious affairs does not include absolute freedom to manage properties belonging to religious institutions. Questions in regard to management of properties which have no direct relation with religion or its practise, fall within the regulatory power of the State. It will thus be seen that though the Indian Constitution is secular and does not interfere with religious freedom, it does not allow religion to impinge adversely on the secular rights of citizens or the power of the State to regulate socio-economic relations.

52. One characteristic feature of Indian Secularism is its determination to adopt a rational and scientific approach in the discussion and solution of socio-economic problems. Blind adherence to, or reliance on, any sacred text is completely foreign to Indian Secularism, whether the text is that of Hindus, Muslims, Parsis, Sikhs, Buddhist, Christians makes no difference. The tendency of the human mind to lean on textual authority in support of or against a proposition is so powerful that it needs consistent and deliberate effort on the part of intellectuals to promote independent and basic thinking in dealing with problems unhampered by the weight of authority or the printed word. Lawyers know that in Courts of Law, precedents in the form of decided cases sometimes have such an overwhelming influence on judicial approach that Judges show a disinclination to analyse and consider the basic points involved in any

controversy. The value of precedents cannot be denied; but the precedents sometimes tend to hold the judicial mind in bondage and that shows an approach which is not strictly rational and as such, is inconsistent with the philosophy of Secularism.

53. *When the Hindu Code Bill was being debated in Parliament, the conservative Hindus raised a plausible plea that if a Civil Code was intended to be evolved, it should be made applicable to all the communities in India. The main object in raising this plea was not so much to make the Code applicable to the Muslim community as to retard, and if possible, to defeat the Hindu Code itself. The advocates of the Hindu Code wanted to take the first step in the right direction. They realised that to bring the Muslim community within the purview of the Civil Code was impractical at that time having regard to the fact that the public opinion in the Muslim community had not been adequately educated in that behalf. The approach adopted by the reformers in confining the Code to the Hindu community as a first step brings out another feature of Secularism, and that is that Secularism in establishing its philosophy in the social life of the country, adopts a pragmatic approach."*

83. We are quite convinced with the line of reasoning assigned by the Family Court while answering the issue No.7 with regard to maintenance. In our view, the ultimate conclusion drawn by the Family Court is just and proper.

84. In the result, this appeal fails and is hereby dismissed.

85. In view of the order passed in the main matter, the connected civil application does not survive and the same stands disposed of.

(J. B. PARDIWALA, J)

(VIRESHKUMAR B. MAYANI, J)

Vahid