Controller had taken notice of the right of the deceased in the HUF property and a change of opinion would not enable the Assistant Controller to reopen the assessment. The audit-note, as already seen, points out to a mistake apparent from record, which was required to be rectified. Thus the audit note did not constitute 'information' within the meaning of section 59(b) of the Act.

(24) The question of law, referred to this court, is, therefore, answered in the negative, i.e., in favour of the assessee and against the Department.

J.S.T.

Before H.S. Brar, K.S. Kumaran & Swatanter Kumar, JJ.

KAKA—*Petitioner*

versus

HASSAN BANO & ANOTHER,—*Respondents*

Crl. R. No. 45 OF 1992

21st October, 1997

Code of Criminal Procedure, 1973—SS.125 to 128—Muslim Women (Protection of Rights on Divorce) Act, 1986—Ss.5 & 6—The provisions of 1986 Act are not retrospective and cannot invalidate the judgments & orders of Courts of competent jurisdiction passed u/s 125 of the Code—The Act does not take away vested rights.

(Mohd. Yunus v. Bibi Phonkani@ Tasrun Nisa & another, 1987(2) Crimes 241, and, Mahaboob Khan@ Babu v. Parveen Banu & another (II) 1988 divorce and Matrimonial Cases 233)—dissented.

Held, that it will be difficult to interpret the Sections of Muslim Women (Protection of Rights on Divorce) Act, 1986 to hold that the Legislature intended to take away the same benefit which is given to an applicant by Court of competent jurisdiction, by the Act of 1986 which itself intends to provide such a protection to the same section. Thus, we cannot read the provisions of an Act to destroy the very purpose and object of the legislation. It is well settled canon of law of Interpretation of Statutes that the Court should adopt the construction to advance the policy of the legislation and to extend the benefit rather than curtailing such a benefit. There is nothing in the 1986 Act which could persuade the Courts to satisfy its judicial conscience to hold that a party who contests the case over a long period in courts is intended to be deprived of

such benefits accruing from the judgment. Absence of such specific provisions in the Act on the one hand and exclusion of Section 128 of the Code from the operation of provisions of Section 7 of the Act is a sufficient indication of the intention of the legislature not to give retrospective effect to the provisions of this Act to that extent. The scheme of the Act as discussed above leaves no doubt in our mind that the determined rights which culminated into an order or judgment of the Court and has become final even before the commencement of the Act are not taken away by the provisions of the Act of 1986.

(Paras 34 & 37)

Code of Criminal Procedure, 1973—Ss.125 to 128—Muslim Women (Protection of Rights on Divorce) Act, 1986—Ss. 5 & 6—The right of minor muslim child to claim maintenance u/s 125 of the code is not affected by the coming into force of the provisions of 1986 Act.

Held, that the Muslim Women (Protection of Rights on Divorce) Act, 1986 was neither intended nor does it in fact make any provision which would govern the maintenance of children born to a muslim couple. The provisions of Section 125 of the Code of Criminal Procedure, 1973, therefore, continue to be in force in relation to claim of maintenance by the children from their parents and other relations as provided in the provisions of the Code. Even minority of a child is of no consideration for awarding the maintenance under the provisions of the code. The word 'child' appearing in Section 125 of the Code (old Section 488 of the Code) does not mean a minor son or daughter. The real limitation is contained in the expression 'unable to maintain itself'. The provisions of Section 3(1)(b) of this Act gives rights to the Muslim divorced wife to claim such a provision for the children where children are being maintained by her and that too for the limited period of two years. Thereupon the right of the child to claim maintenance is independent of the right of the mother and is not dependent upon the provisions of this Act. Therefore, there would be no justification in saying that the provisions of the code have application only to the children who have not attained majority. The basic purpose is to provide maintenance to a child who satisfies the ingredients of not being able to maintain himself or herself. The consequence is that it no way would render the order already passed by Court of competent jurisdiction in favour of the child as ineffective.

(Paras 38 & 40)

Code of Criminal Procedure, 1973—Ss.125 to 128—Muslim Women (Protection of Rights on Divorce) Act, 1986—Ss.3 & 4—

Claim for maintenance by a divorced muslim wife u/s 3 of the Act is not restricted to the period of 'Iddat'—She will be entitled to a fair and reasonable provision and maintenance for the period subsequent thereto for life or till her re-marriage. There is no inconsistency between S.125 of the Code and Ss. 3 & 4 of the Act.

(All India Muslim Advocates Forum *v.* Osman Khan Brahamani@ Basha & others, 1990(2). All India Hindu Law Reporter 41)—dissented.

Held, that one cannot find any plausible basis to interpret the expression 'within the Iddat period' to be the only period for which the maintenance is to be granted. This expression, whether read in conjunction with other relevant provisions of the Act or alongwith the main scheme of the Act, is not capable of being interpreted in any other manner except to mean and say that provision has to be made and payments indicated under sub-section (1) of Section 3 of the Act to be made or tendered within the Iddat period. Thus, the Magistrate has to satisfy himself, if the payment has been made within the prescribed period of Iddat and not for the Iddat period. There is no reason to substitute and read the word 'within' as 'for' or even 'of'. It is a settled principle of interpretation of statute that Courts normally would not substitute words and would read the provisions as they are enacted. It must and has to be presumed that each word usted by the Legislature is meaningful and is appropriately used in the provision of the Act. The expression 'within' indicates more the period of limitation i.e. Iddat period and specially when the period of Iddat is defined in the Act itself. If the word 'within' is substituted by the word 'for', it will have the effect of changing the entire complextion of this legislation and would probably result in the frustration of the object of this Act, which is to provide protection and security to the divorced muslim woman.

(Para 51)

Further held, that the intention of the Legislature in adding Mehr as one of the ingredients under Section 3 in addition to the amount of maintenance and other amounts payable and properties to be delivered in consonence with that provision, is to grant definite and additional financial and Social security to the divorced women under that Act.

(Para 61)

Further held, that the expression 'within Iddat period' only defines and qualifies the period within which the various liabilities are to be discharged by the husband and does not mean that his liability is limited only to that period. Could it be the intentin of the Legislature where they intended to provide complete protection

by payment of Mehr, maintenance, surrendering of properties and prescription for her maintenance for children on the one hand, inspite of the fact that she might have received Mehr during her married life, they intended to give this benefit for the limited period and thereafter during her entire life or till she gets remarried, she is left to herself to bring up her children and make her both ends meet. This would entirely frustrate the very object of the Act and would in fact be a distorted impression of the legislative intention.

(Para 63)

Further held, that the only conclusion that could be arrived at from the above discussion is that the reasonable and fair provision and maintenance to be made and paid by the husband to the wife within the Iddat period has to be one which would provide her with protection and such standard of living for her life as it postulated under section 3 of the Act failing which to pay such maintenance would be continuing liability of the husband. Fairness in determination and payment of amount of maintenance seems to be the foundation of the provisions of Section 3 of the Act. Fairness in fixing a fair maintenance is also the guiding factor for the Courts which would ensure a fair and proper living to a wife as per expected parameters indicated in Section 3 of the Act till she is alive or she remarries.

(Para 65)

Further held, that we fail to see any such inconsistency or contradiction between these two statutes. Both are legislated with a common intention to protect the right of maintenance of a given class. While the Act gives greater emphasis to the kind of claims which a divorced Muslim woman is entitled to including the right of maintenance, the provisions of the Code as applicable to a large class of persons, but gives only right to claim maintenance. They intend to achieve a common object i.e. the minimum respect and dignity and amount of maintenance payable to a wife or divorced wife in given circumstances. These are the provisions which run parallel to each other. The provisions of the Code of Criminal Procedure, 1973 and the Muslim Women (Protection of Rights on Divorce) Act, 1986 operate in different spheres with a common intended remedy but on some spheres both the statutes have application as is clear from the language of the provisions of the Act. Therefore, the obligation of the husband to pay maintenance is not restricted to the period of Iddat alone, unless, the husband has paid and made provision for fair maintenance within the Iddat period or thereafter which would be a reasonable amount of maintenance keeping in view the mandatory ingredients specified in the provisions of the Act, for rest of her life or till the time she gets re-married or earns any disqualification or guilt which would

disentitle her from receiving such reasonable and fair provision and maintenance, in law.

(Paras 72, 73 & 76)

Code of Criminal Procedure, 1973—Ss.125 to 127—Muslim Women (Protection of Rights on Divorce) Act, 1986—Ss.5 & 7—Cases pending disposal after commencement of the 1986 Act would be governed subject to the provisions of S. 5 of the Act—However, recourse to the Code would be permissible where both the parties submit affidavits to be governed by the provisions of Ss. 125 to 127 of the Code.

Held, that every application pending at the commencement of this Act under Sections 125 or 127 of the Code would hence be disposed of in accordance with the provisions of the Act which obviously means 'subject to the provisions of Section 5'.

(Para 77)

Further held, that :—

Question No. 1 : A final order passed by the Court of competent jurisdiction, under Section 125 of the Code of Criminal Procedure and its execution in accordance with provisions of section 128 of the Code is neither invalidated nor barred by the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986. The provisions of the Act did not divest the party vested with determined rights and benefits under Section 125 of the Code.

Question No. 2 : The right of the child to claim maintenance under Section 125 of the Code is not in any way adversely affected by the provisions of this Act. This, however, is subject to the limitation for initial period of two years from the date of birth of such child, that too only, if the father has provided a reasonable and fair provision and maintenance to such child upon the claim by the mother in that regard.

Question No. 3 : The claim of maintenance by a divorced Muslim wife necessarily need not be restricted only to the Iddat period. Unless the husband shows before the Court of competent jurisdiction that he has, within the Iddat period, provided, made and paid a reasonable and fair provision and maintenance, to the wife, which is an adequate provision, for her life or till she remarries. The husband may show before the Court that the wife by her own act and conduct has become disentitled to receive such amount in accordance with law or has

earned the disqualification disentitling her to the payment of the amount of maintenance.

Question No. 4 : A divorced Muslim woman cannot have recourse to the provisions of Sections 125 to 128 of the Code, after the commencement of this Act. However, recourse to such provisions is also permissible if both the parties submit their required affidavits to be governed by such provision in furtherance to S. 5 of the Act. This answer is obviously subject to the answer provided by us to Question No. 1.

(Paras 80 to 83)

A.K. Chopra, Advocate, Gurpal Singh, Advocate, N.K. Gupta, Advocate and Sandeep Jasuja, Advocate, *for the Petitioner.*

Arun Nehra, Advocate, and Manish Bhardwaj, Advocate *for the Respondent.*

JUDGMENT

Swatanter Kumar, J.

(1) The people of India gave unto themselves a resolution to constitute India into a soverign, socialistic, secular, democratic, republic with a purpose and object to secure to its citizens justice in all spheres, liberty in belief and expression and equality of status and opportunity to promote fraternity assuring the dignity of the individual and the unity and integrity of the nation. This is what the preamble to the Constitution of India says in explicit words. Dignity of an individual irrespective of the status, religion, class and community to which he or she belongs is of paramount consideration to the State and its instrumentalities. An unqualified effort on the part of the State to assure the basic need of an individual is a constitutional obligation. Secularism in a democratic system is an extended principle of assured equality. The Constitution is the apex law and is above all other of its kin. Laws, whether they are enacted by the State or the Centre, within the sphere of their legislative jurisdiction and the customary or personal laws, all must give way to the supreme law of land, the Constitution of India. All other laws must flow in comity to the constitutional law and all laws must be subject to the provisions framed protections provided and limitations imposed under the Constitution. The Constitution in our democratic system is the

veritable precept to all other laws irrespective of their origin and the authority legislating.

(2) The term 'secularism' being one of the basic structures of the Constitution of India has a possible perversive meaning and conotation in the entire social and legal set up of our country. Secularism is the belief that the state, morals education, etc. should be independent of religion says G.J. Holyake's system of social ethics (refer The Chambers 20th Century Dictionary).

(3) Sections 125 to 128 in Chapter IX of the Criminal Procedure Code, 1973, hereinafter referred to as the Code, are a self contained Code in a Code. In other words, a full self-contained procedure has been provided for a wife divorced or not, to claim maintenance from her husband and other relations where the person having sufficient means, neglects or refuses to maintain the wife or his legitimate or illegitimate children married or not who are unable to maintain themselves. The purpose of these provisions is to provide immediate means of subsistence to the applicant before the applicant is withered away by the hard ways of life and realities, for lack of minimum means. These provisions universally apply to all applicants irrespective of the Community, caste or creed they belong to. A divorced wife, too could raise a claim and is entitled to receive maintenance, if she satisfies the basic ingredients of these provisions contained in the Code and her claim falls in line with the settled principles of law.

(4) We have opted for a secular republic. Secularism under the Constitution means that the State does not owe loyality to any particular religion and there is not State religion. The Constitution gives equal freedom to all religions. Every one has the freedom to follow and propagate his own religion. But the religion of the individual or denomination has nothing to do in the matter of socio-economic laws of State. The freedom of religion under the Constitution does not allow religion to impinge adversely on the secular rights of the citizens and/or power of the State to regulate socio-economic relations.

(5) Personal law cannot away the statutory right and it must tilt in favour of the statutory rights when the situation so demands. Propriety of legislative discipline and catena of judgments of the highest Court of the land have consistently settled the proposition that statutory laws take precedence over personal laws and statutory law has to be subject to the constitutional mandate.

(6) No amount of work in customary or statutory law can be permitted to create a dent in the basic staructure of the constitution or the protections, and securities enshrined in the Constitution.

(7) Hon'ble the Supreme Court of India in the case of *Mohd. Ahmed Khan* v. *Shah Bano Begum and others* (1), clearly enunciated this principle that statutory law available to the divorced muslim woman, who would be a wife as long as she does not marry for the purposes of Section 125 of the Code and her right to maintain would not be adversely affected by the provisions of personal law applicable to her. In this pertinent decision of far reaching consequences the Hon'ble Supreme Court held as under:—

> "The statements in the text books viz. Mulla's Mahomedan Law (18th edition); Tyabji's Muslim law (4th edition) are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself. Section 125 deals with cases in which, a person who is possessed to sufficient means neglects or refuses to maintain, amongst others, his wife who is unable to maintain herself. Since the Muslim Personal Law, which limits the husband's liability to provide for the maintenance of the divorced wife to the period of iddat, does not contemplate or countenance the situation envisaged by section 125, it cannot be said that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance, beyond the period of iddat, to his divorced wife who is unable to maintain herself. The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to section 125. Therefore, it cannot be said that there is conflict between the provisions of section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself."

(8) The judgment of the Supreme Court in the case of Shah Bano (supra) resulted in the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986, hereinafter referred to

1. A.I.R. 1985 S.C. 945

as the Act. This Act No. 25 of 1986 came into force on 9th May, 1986 and has been titled as "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". The limited sphere of operation of the provisions of this Act is clear from the very object and the scheme of this Act. It has an application to the rights of the Muslim women who are divorced or who have taken divorce from their husbands. Thus, its area of operation is restricted to the specified class of women and its application is micro-cosm to that class. To a very limited extent it has an application to the children and that too for a limited period of two years from the date of their birth. Shortly, we will proceed to discuss the provisions and the scheme of this Act.

(9) The law was settled by the Supreme Court in the case of Shah Bano (supra) and was enforced without an element of disparity between the citizens of this country. However, the enactment of the Act turned the situation fluid against the controversy in various fields erupted as a result thereof. We are primarily not concerned with the differences of social and political opinions expressed from time to time, but what concern us in this case is the difference of opinion in judicial pronouncements of this Court, supported by the contrary views expressed by various High Courts of the country. Taking advantage of these pronouncements of various courts we are attempting to answer certain questions in regard to the application of the Act vis-a-vis the Code and *Vice versa* and scope of the limitations imposed under these statutory provisions.

(10) Persuaded by the consistent difference of opinion of various judgments of the Court, a Division Bench of this Court considered it proper that questions arising in this criminal revision should be decided by a Full Bench and so directed vide its order dated 12th November, 1992, which reads as under:—

"Present:—

A.K. Chopra, Advocate

Arun Nehra, Addl. A.G. Haryana.

The principal question raised in this revision petition is. Whether order of maintenance passed under section 125 of the Code of Criminal Procedure, 1973, dated 28th February, 1985 in favour of the wife survives after coming into force of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The revision was

admitted to a Division Bench by order dated 22nd January, 1992. On behalf of the respondent-husband, reliance has been placed on *All India Muslim Advocates Forum* v. *Osman Khan Brahmani and others* (2). Full Bench of Andhra Pradesh High Corut. A contrary view has been taken in the following authorities, including three Single Bench decisions of this Court, which are also noted in the impugned order of Judicial Magistrate Ist Class, Malerkotla:—

(1) *Smt. Hazran* v. *Abdul Rehman* (3),

(2) *Maj. Rauf Ahmad* v. *Kanwar Anjam Jamli* (4),

(3) *Faizuddin Khan* v. *The Addl. Sessions Judge* (5),

(4) *Arab Ahemadhia Abdula etc.*v. *Arab Bali Mohmuns Saiyadhai etc.*(6),

(5) *Abdul Khader* v. *Smt. Razia Begum* (7),

(6) *Idris Ali and others* v. *Rameshna Khatun and others*(8),

After hearing the learned counsel for both the parties at some length, we deem it appropriate that the matter should be decided by a Full Bench.

In the facts and circumstances of the present case, a conditional stay order was granted to the husband. The husband having failed to comply with the same, the stay order was vacated with the result that it is open to the wife and the child to execute the order of maintenance in accordance with law.

We, therefore, direct that the papers be placed before the Hon'ble Chief Justice for referring the matter to a Full Bench.

(Sd/-) . . .,

(A.P. Chowdhri)
Judge.

(Sd/-). . .,

November 12, 1992 (Harphul Singh Brar)
Judge.

2. 1990(2) All India Hindu Law Reporter 41
3. 1989(1) R.I.C. CR 113, (Punjab & Haryana)
4. 1991(1) REC CR 602
5. 1990(3) REC CR 534
6. AIR 1988 Gujarat 141
7. 1991(1) REC CR 524
8. AIR 1989 Gauhati 24

(11) We consider it appropriate first to give the basic facts which gave rise to the above order of reference passed by the Division Bench. Hussan Bano (respondent No. 1) was married to Kaka (petitioner herein). They lived together for a considerable period and from the marriage of the parties Mohd. Amran (respondent No. 2 minor) was born. On or about 10th May, 1983 Hussan Bano and the minor child filed a petition under section 125 of the Code which was registered as case No. 6 of 1983. They claimed maintenance from the petitioner Kaka. The learned Magistrate,—*vide* order dated 28th February, 1985 allowed the petition by holding that Hussan Bano was entitled to get maintenance at the rate of Rs. 200 per month and Mohammad Amran minor was granted Rs. 75 per month as maintenance under section 125 of the Code. The order of maintenance between the parties has become final and Kaka filed to pay the maintenance resulting in filing of application for issuing warrant of arrest against Kaka. He was sentenced. Even thereafter he failed to make the payment of the maintenance amount due to the respondents herein. The learned Magistrate, Malerkotla,—*vide* order dated 2nd January, 1987 extended the sentence of Kaka under section 125(3) of the Code for non-payment of arrears of maintenance. This order was assailed by Kaka before this High Court in Criminal Revision No. 193 of 1987. The revision was disposed of by the learned Single Judge,—*vide* order, dated 20th August, 1990. The husband-Kaka was directed to pay the arrears of maintenance in four equal monthly instalments upto the period 18th May, 1986 and the Court further directed the learned trial Court to adjudicate upon the averments of the petitioner-husband that he had divorced his wife in presence of his brother on 2nd January, 1987. For the first time this plea was raised before the High Court. The applicants Hussan Bano and her son during the pendency of the decision filed two applications. Application No. 5 of 1991 was filed for recovering arrears of maintenance for the period 19th November, 1988 to 18th January, 1991 and application No. 42 of 1988 was pending claiming arrears of maintenance payable for the period 19th May, 1986 to 18th November, 1988. Both these applications were disposed of by holding that the applicant were entitled to recover arrears of maintenance from the husband as claimed in both these applications. The important fact which has a bearing on the merits of this case as recorded in paragraphs No. 6 and 7 of the trial Court judgment, needs to be noticed at this stage, which reads as under :—

"6. Now it is to be first determined whether there has been divorce between Hussan Bano applicant and Kaka respondent. On 29th July, 1991, Kaka respondent made statement in this court that he had given divorce to Hussan Bano applicant No. 1 on 2nd January, 1987. On the same date, Hussan Bano applicant also made statement accepting statement of Kaka respondent. *Vide* order of even date i.e. 29th July, 1991, in view of the statements of the parties, it was held that there has been divorce between Hussan Bano applicant and Kaka respondent on 2nd January, 1987. Thus, admittedly Kaka respondent has divorced Hussan Bano applicant on 2nd January, 1987.

7. Now it is to be further determined whether after divorce on 2nd January, 1987, Hussan Bano applicant No. 1 and Mohd. Amran applicant No. 2, are entitled to recover the maintenance amount granted to them under section 125 Cr. P.C."

(12) The relief granted to the wife and the minor child,— *vide* order dated 21st December, 1991 by the trial Court has been assailed before this Court in Criminal Revision No. 45 of 1992, which came up for hearing before the learned Single Judge of this Court, who,— *vide* his order dated 22nd January, 1992 admitted the revision petition for hearing before a Division Bench. When the matter came up before the Division bench they referred the matter to the Full Bench as afore-stated.

(13) In order to appropriately appreciate respective views expressed by the Division Bench we consider it proper to formulate the following questions which squarely arise from the facts and position of law governing the subject, in the present case and then proceed to deal with each one of them with same elucidation:—

(i) Whether the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986, operate retrospectively to the extent that it has the effect of invaliding the order/ judgment of Court of competent jurisdiction passed under Section 125 of the Criminal Procedure Code, render *inter se* parties, i.e. whether these provisions divest parties of vested rights/benefits ?

(ii) Whether the rights of a minor child to claim maintenance under Section 125 of the Code is in any

way affected by coming into force of the provisions of the Act ?

(iii) Whether claim of maintenance by a divorced muslim wife under the provisions of Section 3 of the Act must be restricted only to the period of 'Iddat' or it has to be a fair and reasonable provision and maintenance, even for the period subseqnet thereto ?

(iv) What is the scope and effect of the provisions of Sections 125 to 128 of the Code after commencement of the Act of 1986, in regard to the cases pending disposal or otherwise?

QUESTION NO. 1.

(14) The provisions of Sections 125 to 128 of the Code form part of a general law which uniformly is applicable to the claims of maintenance raised by the wives or even divorced wives in the country. The application of these provisions is dehores the limitation of caste, creed and religion of the applicant. The principles governing the application of these provisions have been elaborately explained by the Apex Court in the case of Shah Bano (supra). The Parliament enacted the Act of 1986 with the principal object of providing protection of rights to the Muslim divorced women. Thus, the provisions of the 1986 Act are applicable to a limited class, that of Muslim divorced women alone.

(15) Under Clause (a) to (d) of sub-section (1) of section 3 of the Act of 1986 a divorced Muslim woman is entitled to the benefits stated therein. Providing or making such a reasonable and fair provision and maintenance, to be made or paid, to the wife during the Iddat period is the obligation of the husband. A statutory obligation is further imposed upon the husband to make similar provision for the children living with the wife at least for a period of two years from the respective dates of the birth of such children, an amount equal to the sum of Mahr or dower agreed to be paid to her at the time of her marriage and all properties given to her at the time of marriage and after marriage by relatives and friends to be returned to her, are the obligation of the husband. In default of discharge of such obligations by the husband, the divorced wife has been given a right to file application for any of all the purposes afore-stated which shall be disposed of by the learned Magistrate while keeping in mind the provisions of sub-section (2), of Section 3 of the Act. If the order so passed by the learned Magistrate is not

obeyed, the Magistrate has the power to issue warrant for levying the amount of maintenance, Mehr or dower due in the manner provided for levying fines under the Code of Criminal Procedure and even to sentence the person defaulting in accordance with the provisions of sub-section (4) of Section 3 of the Act.

(16) Section 4 of the Act provides further safeguards that inspite of the provisions of any other law for the time being in force, and the provisions of the Act itself, if the wife is unable to maintain herself after the Iddat period, an order directing payment of such maintenance could be passed against the relations specified in sub-section (1) of Section 4 of the Act, and if no such relations do exist with enough means to pay maintenance under the provisions of sub-section (1) of Section 4, in that event the State Wakf Board has the liability to pay such maintenance under sub-section(2) of Section 4 of the Act.

(17) Section 5 of the Act gives choice to the parties to be governed under the provisions of Section 125 to 128 of the Code or in accordance with the provisions of the Act, Such choice has to be declared by the parties concerned by filing an affidavit in the prescribed form on the first date of hearing itself.

(18) Section 7 of the Act termed as transitional provision specifically provides that an application by a divorced muslim woman under Section 125 or under Section 127 of the Code pending before the 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 the Magistrate in accordance with the provisions of this Act.

(19) The Act, which contains only seven sections in all has the above material provisions. From the above provisions and the fact that even parties have a choice to have their cases disposed of either under the provisions of the Code or under the provisions of the Act shows the scheme of the act which is not indicative of divesting vested rights. The plain language of the provisions of the Act shows that it is prospective in its application. However, its procedural application to the pending cases is indicated to be restrospective to a very limited extent. This intention of the legislature is clearly spelled out in the above provisions and more particularly in Section 7 of the Act. It must be noticed that while under Section 5 of the Act the Legislature has made a specific reference to the provisions of Section 125 to 128 of the Code but the provisions of Section 7 of the Act have clearly omitted reference

to the provisions of Section 128 of the Code which is conspicuous by its very absence in that provision. If the Legislature intended to govern and place the limitations of Section on the provisions of Section 128 of the Code, it ought to have so spelled out in these provisions.

(20) It is a settled principle of law that the right of the parties which are determined by the orders/judgments of the Courts of competent jurisdiction and have become final are the vested rights in contrast to existing rights. Vested rights of a party cannot be taken away by implecation. The Legislature by a clear language has to spell out such a consequence on the statute itself. Even the Legislature by enactment of law cannot render a judgment ineffective or redundant. The pronouncement of the Hon'ble Supreme Court of India in the case of Shah Bano (supra) might have occasioned the passing of the above legislation, but the judgment of the Supreme Court stands as a judgment of the Court even as on date. Under Article 141 read with Article 142 of the Constitution of India, the law declared by the Supreme Court is to bind all Courts within the Indian territory and is the law of the land.

(21) The judgment in the present case passed by the Court of Competent jurisdiction has become final between the parties. There is nothing in the provisions of the Act, to hold on the principle of necessary implication that it intends to take away the right which was granted by the Court of competent jurisdiction in accordance with the law in force at the relevant time. The provisions of Section 125 to 128 of the Code are a Code in itself. Exclusion of the provisions of Section 128, which is a section primarily dealing with the enforcement of the orders of maintenance, from the ambit of Section 7 of the Act, shows a contrary intention on the part of the legislation, not to affect the vested rights which have culminated from final orders or decrees of the Court of competent jurisdiction.

(22) At the very out-set we would like to refer to the recent judgment of the Supreme Court in the case of *S.R. Bhagwat and others* v. *The State of Mysore* (9), where the Court after detailed discussion clearly held that a binding judicial pronouncement cannot be made ineffective by exercise of such legislative power. The law laid down by the Hon'ble Court is enunciated in the following manner:—

9. JT 1995(6) S.C. 444

"It is now well settled by a catena of decisions of this Court that a binding judicial pronouncement between the parties cannot be made ineffective *with the aid of* any legislative power by enacting a provision which in substance over-rules such judgment and is not in the realm of a legislative enactment which displaces the basis or foundation of the judgment and uniformly applies to a class of persons concerned *with the entire subject sought to be* covered by such an enactment having retrospective effect.

A mere look at sub-section (2) of Section 11 shows that the respondent, State of Karnataka, which was a party to the decision of the Division Bench of the High Court against it had tried to get out of the binding effect of the decision by resorting to its legislative power. The judgments, decrees and orders of any court or the competent authority which had become final against the State were sought to be done away with by enacting the impugned provisions of sub-section (2) of Section 11. Such an attempt cannot be said to be a permissible legislative exercise. Section 11(2) therefore, must be held to be an attempt on the part of the State Legislature to legislatively over-rule binding decisions of competent courts against the State.

xx xx xx

The respondent-State in the present case by enacting sub-section (2) of Section 11 of the impugned Act has clearly sought to nullify or *abroqate the binding decision of the High Court and has encroached upon the judicial power entrusted to the various authorities functioning under the relevant statues and the Constitution. Such an exercise of legislative power cannot be countenanced."*

(emphasis supplied by us)

(23) In the light of this decision we now advert to discuss the scope of retrospectivity of such laws. Every statute is *prima facie* prospective in operation unless it is expressly or by necessary implication made to have restrospective operation. It is only the procedural laws which are normally treated to be retrospective, while the law relating to vested rights is prospective. The cardinal accepted principle of interpretation of statute is that it must be interpreted prospectively unless the language of the statute makes it restrospective. Before a statute can be given restrospective effect on the principle of necessary implication, there has to be some good reasons and attendance circumstances which would justify such

interpretation to the provisions of the Act. The statute should not be so construed as to create new disabilities or obligations or new duties in respect of transactions which were complete at the time of the amending Act coming into force. The effect of the application of this principle is that cases although instituted under the old Act, but still pending are governed by the new procedure under the amended law, but whatever procedures were correctly adopted and concluded under the old law cannot be opened again (Refer *Nani Gopal Mitra* versus *State of Bihar*(10).

(24) The Union Parliament or the State Legislature have plenary powers of legislation within the field of legislation committed to them, and subject to certain constitutional restrictions they can legislate prospectively as well as retrospectively. Where the Legislature intends to apply the law retrospectively it is obligatory on the part of the Legislature to enact specifically in that regard or use such language which in the scheme of the Act would make it imperative for the Courts to draw such conclusion. This requirement is more eminent where the intention is to divest persons drawing benefits under settled and vested rights eminating from the judgments of Courts of competent jurisdiction. None of the provisions of this Act or any such similar statute has been referred or brought to our notice, which could persuade us to hold that this Act is retrospective in its operation and that too to the extent of divesting vested rights.

(25) At this stage it may be appropriate to make a reference to the observations of Lord Blanesburg and Lopes, L.J. as recorded by Justice G.P. Singh in his book 'Principles of Statutory Interpretation' 6th Edition (1996), which reads as follows:—

> "In the words of LORD BLANESBURG, "provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment." "Every statute, it has been said", observed LOPES, L.J., "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect." As a logical corollary of the general rule, that retrospective operation is not taken to be intended unless that intention is

10. AIR 1970 S.C. 1636.

manifested by express words or necessary implication, there is a subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary."

(26) In the present case it is not simplicitor a question of terming the Act retropective or prospective. But the contention of learned counsel for the husband-petitioner is that upon the commencement of Act the natural consequence is that wife is divested of decided rights. Substantive/vested rights must be understood as rights determined and decided finally by the Courts of competent jurisdiction in accordance with the laws in force at the relevant time. These rights cannot be mingled with the rights arising in favour of a party in terms of a procedural law. The effect of the statute amended in regard to procedural laws are based totally on a different footing than the statutes which are to affect vested or substantive rights of the parties.

(27) *In the case of Jose Da Costa and another* v. *Bascora Sadashiva Sinai Narcornin and others* (11), commenting upon the retrospective effect on the sustantive rights, the Supreme Court held as under :—

"While provisions of statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of statute are not to be applied retrospectively, in the absence of express enactment or necessary intendment. The right of appeal being a substantive right, the institution of a suit carries with it the implication that all successive appeals available under the law then in force would be preserved to the parties to the suit throughout the rest of the career of the suit."

(28) In the case of *K.S. Paripoornan* v. *State of Kerala and others* (12), Court while reiterating the above principle held as under :—

"A statute dealing with substantive rights differs from a statute which relates to procedure or evidence or is

11. AIR 1975 S.C. 1843
12. JT 1994(6) S.C. 182

declaratory in nature inasmuch as while a statute dealing with substantive rights is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective effect, a statute concerned mainly with matters of procedure or evidence or which is declaratory in nature has to be construed as retrospective unless there is a clear indication that such was not the intention of the legislature."

Similar view was expressed by the Apex Court in the case of *Anant Gopal Sheorev* v. *The State of Bombay* (13).

(29) In the case of *T.R. Kapur and others* v. *State of Haryana and others* (14) a judgment which was relied upon by the learned counsel appearing for the wife, the Court while observing that the amendment of law by the Legislature must not affect the fundamentals of the Constitution like Articles 14 and 16 of the Constitution of India, held as under :—

"It is well settled that the power to frame rules to regulate the conditions of service under the proviso to Art. 309 of the Constitution carries with it the power to amend or alter the rules with a retrospective effect : B.S. Vadhera *v.* Union of India, (1968) 3 SCR 575 : (AIR 1969 SC 118), *Raj Kumar* v. *Union of India,* (1975) 3 SCR 963 : (AIR 1975 SC 1116), K. Nagaraj *v.* State of A.P. (1985) 1 SCC 523 : (AIR 1985 SC 551) and State of J & K *v.* Triloki Nath Khosla (1974) 1 SCR 771 : (AIR 1974 SC 1).

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This rule is however subject to a well recognised principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Art. 309 which affects or impairs vested rights. Therefore, unless it is specifically provided in the rules, the employees who are already promoted before the amendment of the rules cannot be reverted and their promotions cannot be recalled. In other words, such rules laying down qualifications for promotion made with retrospective effect must necessarily satisfy the test of Arts. 14 and 16 (1) of the Constitution : State of Mysore *v.* M.N. Krishna Murty, (1973) 2

13. AIR 1958 S.C. 915
14. AIR 1987 S.C. 415

SCR 575 :) AIR 1973 SC 1146), B.S. Yadav *v.* State of Punjab, (1981) 1 SCR 1024 : (AIR 1981 SC 561), State of Gujarat *v.* Ramanlal Keshavlal Soni, (1983) 2 SCR 287 : (AIR 1984 SC 161) and K.C. Arora *v.* State of Haryana, (1984) 3 SCR 623 : (1984 Lab. IC 1015)" (emphasis supplied by us)

(30) In the case of *L'Office Cherifien des Phosphates and another* v. *Yamashita Shinninon Steamship Co. Ltd. The Bouchraa* (15), the House of Lords held as under :—

> "Parliament was presumed when enacting legislation not to have intended to alter the law applicable to past events and transactions in a manner which was unfair to those concerned in them unless a contrary intention appeared. Accordingly, the question whether an Act was retrospective was to be determined according to whether in a particular case the consequences of reading the statute with the suggested degree of retrospectivity was, having regard to the degree of retrospectivity involved, the value of the rights affacted, the clarity of the language used and the circumstances in which the legislation was enacted, so unfair that the words used by Parliament could not have been intended to mean that they might appear to say."

(31) The view aforestated has been reiterated with approval by the Apex Court in its subsequent decisions as well. In the case of *Union of India and others* v. *Tushar Ranjan Mohanty and others* (16), the Court held as under :—

> "The retrospective operation of the amended Rule 13 cannot be sustained. The retrospective amendment of Rule 13 takes away the vested right of Respondent 1 and other general category candidates senior to Respondents 2 to 9. Therefore, Rule 13, to the extent it has been made operative retrospectively, is unreasonable, arbitrary and, as such, violative of Articles 14 and 16 of the Constitution of India. The retrospective operation of the rule has to be struck down."

Similar view was expressed in the case of *Uday Partap Singh and others* v. *The State of Bihar and others,* (17).

15. 1994(1) All E.L.R. 20
16. (1994)5 S.C. Cases 450
17. 1995(2) RSJ 28

(32) The consistent view of the Hon'ble Supreme Court of India with regard to restricted and limited scope of a statute being retrospectively effective leaves no doubt in our mind that the basic ingredient which would make the statute operative in retrospect to the extent of affecting decree or vested rights are certainly not satisfied in the present case.

(33) The learned counsel appearing for the husband-petitioner while submitting that the order passed by the Competent Court would be invalidated or rendered ineffective upon the commencement of the provisions of this Act, relied upon the judgements of a learned Single Judge of Patna High Court in the case of *Mohd. Yunus* v. *Bibi Phenkani alias Tasrun Nisa and another* (18), and learned Single Judge of Bombay High Court in *Mahabood Khan alias Babu* v. *Parveen Banu and another* (19), Firstly, the facts of these cases were different and distinguishable, but even on principle of law, with respect, we are not able to agree with the views expressed in these judgements. However, the learned counsel for the wife-respondent has relied upon a judgment of the Karnataka High Court in the case of *Abdul Khader* v. *Razia Begum* (20), A division Bench judgment of the Gauhati High Court in the case of *Idris Ali and etc. etc.* v. *Ramesha Khatun and etc. etc.* (21), and judgment of Allahabad High Court in the case of *Faizuddin Khan* v. *Addl. Sessions Judge, Etath and others* (22). All these judgments, for the reasons stated therein, which are analogous to the reasoning given by us, held that the commencement of the Act of 1986 does not invalidate or render the orders passed under Section 125 of the Code, which have become final, as in-teffective.

(34) At this point it may be appropriate to make reference to the two judgments of this Court in the case of *Major Rauf Ahmed* v. *Kanwar Anjam Jamali* (23), and *Smt. Hazran* v. *Abdul Rehman* (24). It was specifically held in these cases that provisions of Section 128 of the Code would be applicable even after the commencement of the provisions of the Act. In the case of Smt. Hazran (supra) the Court held as under:—

"The result of the above discussions is that the provisions

18. 1987(2) Crimes 241.
19. (II) 1988 Divorce and Matrimonial cases 233.
20. 1991(1) R.C.R. 524.
21. AIR 1989 Gauhati 24.
22. 1990(3) R.C.R. 534.
23. 1991(1) R.C.R. 602.
24. 1989(1) R.C.R. 113.

with regard to encorcement of the order of maintenence under section 128 of the Code has not been affected by coming into force of the Muslim Women Act and the applications made before the Magistrate under section 128 of the Code have to be disposed of in accordance with the provisions of the Code.

In support of the conclusion which I have reached, I may refer to *Mohd. Haji* v. *Rukiya*, 1987 P.A.P. 472 *Kerala and Arab Ahemadhia Abdulla and etc.* v. *Arab Bali Mohmuna Saiyadbhai and others,* AIR 1988 Gujarat, 141 (para 36 at page 158) where a similar view was taken."

In the case of *Arab Ahmadhia Abdulla and etc.,* v. *Arab Bali Mohmuna Saiyadbhai and others etc.* (25), the retrospectivity of the provisions of this Act was answered by the Court in the following words :—

"By the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986, the orders passed by Magistrate under S. 125 of Cr. P.C. ordering Muslim husband to pay maintenance to his divorced wife would not be honest. There is no section in the Act which nulfilies the orders passed by the magistrate under S. 125 of the Cr. P.C. Further, once the order under S. 125 of the Cr. P.C. granting maintenance to the divorced woman is passed, then her rights are crystalized and she gets vested right to recover maintenance from her former husband. That vested right is not taken away by the Parliament by providing any provision in the Act. Under S. 5. an option is given to the parties to be governed by the provisions of Ss. 125 to 128 of the Cr. P.C. This saction also indicates that the Parliament never intended to take away the vested right of Muslim divorced woman which was crystalized before the passing of the Act. There is no inconsistency between the provisions of Act and the provisions of Ss. 125 to 128 of the Cr. P.C. on the contrary the provisions of Muslim Women Act grant more relief to the divorced woman depending upon the financial position of her former husband."

25. AIR 1988 Gujarat 141.

Reverting back to the provisions of the Act, it is not perceived from any of the provisions that the Legislature even remotely intended to divest the vested rights. The Court must proceed on the assumption that the Legislature did not make a mistake and has said clearly what it intended to say. The purpose of this Act is to secure socio-economic protections for a class of persons i.e. the divorced Muslim women. It will be difficult to interpret the Sections of this Act to hold that the legislature intended to take away the same benefit which is given to an applicant by Court of competent jurisdiction, by the Act of 1986 which itself intends to provide such a protection to the same section. Thus, we cannot, read the provisions of an Act to destroy the very purpose and object of the legislation. it is a well settled canon of law of Interpretation of Statutes that the Court should adopt the construction to advance the policy of the legislation and to extend its benefit rather than curtailing such a benefit (Refer *Union of India and another* v. *Pardeep Kumari and others* (26).

(35) We may examine this question from another angle. The provisions of the statutes must be interpreted to give effect to the statutes in conformity with the law of the land and more particularly the constitutional protections. The basic protection to the life and dignity of an individual and with particular regard for welfare of the women guaranteed in the provisions of the Constitution, does not permit us to interpret even on the principle of necessary implication, the provisions of this Act to hold that an order passed by a Court of competent jurisdiction is multified on the commencement of this Act.

(36) There are more reasons that one for forming the opinion which we have formed. There is absence of specific expression in the legislative provisions of this Act, which could persuade a Court of law to render the orders passed ineffective or invalid. The Legislature in the present Act has taken recourse to the definite and unambiguous language. Sections 3 and 4 of the Act contain a non-obstante clause. In other words the Legislature has clearly expressed its intention of providing for exceptions within the statute itself. Thus, it cannot be inferred that absence of the expression 'notwithstanding the judgment, orders or decrees of the Courts" is an incidental slip on the part of the legislature. We find it totally difficult to supply this language or read the same into any of the provisions of this Act. Furthermore, exclusion of the applicability

26. JT 1995(9) S.C. 644.

of these provisions to Section 128 of the Code, as indicated in Section 7 of the act, sufficiently indicates the intention of the Legislature to the contrary. These are no circumstances attendant to this enactment nor any language or scheme of the Act makes it imperative for us to read any intention on the part of the Legislature to invalidate or nullify orders of the Court upon commencement of this Act. The nature of the objections, the scope and effect of the provisions of the Act read in their correct perspective and context does not affect the character of judicial pronouncements. Settled principles of 'Interpretation Jurisprudence' do not admit any interpretation to the contrary in the present case. Another accepted principle of treating judicial pronouncements being final and having culminated into vested rights not subject to variation would also be infringed by any contrary view. It is note worthy that there is no provision in this Act which provides for executing the orders passed by the Court after commencement of this Act. There is also no specific provision in the Act which has the effect of rendering the judgments of the Court ineffective directly or by necessary implication.

(37) Thus there is nothing in this statute which could persuade the Courts to satisfy its judicial conscience to hold that a party who contests the case(s) over a long period in Courts, under the rigours of financial constraints and ultimately succeeds, is intended to be deprived of such benefits accruing from the judgment. Absence of such specific provisions in the Act on the one hand and exclusion of Section 128 of the Code from the operation of provisions of Section 7 of the Act is a sufficient indication of the intention of the legislature not to give retrospective effect to the provisions of this Act to that extent. The scheme of the Act as discussed above leaves no doubt in our mind that the determined rights which culminated into an order or judgment of the Court and has become final even before the amendment of the Act are not taken away by the provisions of the Act of 1986.

Question No. 2 :

(38) The very title of the Act shows that it has no application to the claim or right of maintenance of the children. Section 3(1)(b) provides for maintenance of children if they are living with the wife, that too for a limited period of two years from the date of birth of the children. The Act was neither intended nor does it in fact make any provision which would govern the maintenance of children born to a muslim couple. The provisions of Section 125 of

the Code, therefore, continue to be in force in relation to claim of maintenance by the children from their parents and other relations as provided in the provisions of the Code. Even minority of a child is of no consideration for awarding the maintenance under the provisions of the Code. The word 'child' appearing in Section 125 of the Code (old Section 488 of the Code) does not mean a minor son or daughter. The real limitation is contained in the expression 'unable to maintain itself". The provisions of Section 3(1) (b)of this Act gives rights to the Muslim divorced wife to claim such a provision for the children where children are being maintained by her and that too for the limited period of two years. Thereupon the right of the child to claim maintenance is independent of the right of the mother and is not dependent upon the provisions of this Act. Therefore, there would be no justification in saying that the provisions of the Code have application only to the children who have not attained majority. The basic purpose is to provide maintenance to a child who satisfies the ingredients of not being able to maintain himself or herself (*Nanak Chand* v. *Chandra Kishore Aggarwal and others* (29).

(39) In the case of *Syed Mushtaque Ahmad* v. *Tasneem Kausar* (30), the Bombay High Court held that the right to claim maintenance is vested in the divorced wife under the provisions of the Act and not in the child itself for whose sake the amount of maintenance is claimed.

(40) The distinction appears to be too transparant to be confused for advancing the contention that if the child attains the age of two years (applying the provisions of the Act) it would in any way affect the right of the child less results in extinguishment, to claim maintenance u/s 125 of the Code. The consequence is that it no way would render the order already passed by Court of competent jurisdiction in favour of the child as ineffective. We fully agree with the reasoning and feel that if the father is permitted to argue that upon compliance of the provisions of Section 3(1)(b) of the Act he is absolved of the liability under Section 125 of the Code, it, would amount to decimating not only the intention of the legislature, but the spirit behind the basic moral, legal and social obligations of the father as well. We feel that such an interpretation would not be apt on any basis and in fact would be nadir of human values.

29. AIR 1970 S.C. 446
30. 1991(2) All India Hindu Law Reporter 194

(41) This question requires no further discussion and need not detain us any more as this question is no longer *res-integra* and all controversies arising there from have been finally settled by the Hon'ble Supreme Court of India in the case of *Noor Saba Khatoon* v. *Mohd. Quasim* (31), wherein it was held as under :—

> "Thus, both under the personal law and the statutory law (Sec. 125 Cr. P.C.) the obligation of a muslim father, having sufficient means, to maintain his minor children, unable to maintain themselves, till they attain majority and in case of females till they get married, is asbsolute, notwithstanding the fact that the minor children are living with the divorced wife. Thus our answer to the question posed in the arlier part of the opinion is that the children of muslim parents are entitled to claim maintenance under Section 125 Cr. P.C. for the period till they attain majority or are able to maintain themselves, whichever, is earlier and in case of females, till they get married and this right is not restricted, affected or controlled by divorce wife's right to claim maintenance for maintaining the infant child /children in her custody for a period of two years from the date of birth of the child concerned under Section 3(1) (b) of the 1986 Act. In other words Section 3(1)(b) of the 1986 Act does not in any way affect the rights of the minor children of divorced muslim parents to claim maintenance from their father under Section 125 Cr. P.C. till they a ttain majority or are able to maintain themselves, or in the case of females, till they are married."

(42) In view of the above settled position of law we are of the view that commencement of the Act does not in any way and in any case adversely affect the rights of the children who claim maintenance under Section 125 of the Code. In fact the Act has no application to such right of the child, after completion of two years from the date of his birth. The Act has application only to the divorced Muslim woman and in no way even affects the right of a wife to claim maintenance under Section 125 of the Code, as expression 'wife' in the provisions of the Code includes a wife as well as divorced wife. However, with regard to the right of the divorced wife we would be answering the question in our subseqnet discussion.

31. JT 1997(7) S.C. 104

QUESTION NO. 3 :

(43) The provisions of this Act are exposition of the mind of the Legislature to provide maintenance to a divorced wife and protect her rights under this law. Law always is enacted with a purpose. Such purpose should be extended to its extent but for infringing or jeopardising interests of others, which is supported by law. The provisions of the Act indicate a scheme which is intended as a panacea to all socio-economic problems arising from a divorce of muslim wife. But it is equally true that a Legislature cannot create a magic legislation which would leave no scope for interpretation or would be perfect to all situations. Every social or beneficial legislation is enacted with the basic object of commonweal and benefit of all.

(44) Maintenance of the wife under this Act is a primary duty of the husband. It is stated by many authors that maintenance is incumbent on the husband because this is a precept both in Quoran and the traditions. The right of the wife is absolute and the husband is bound to maintain her even though she has herself good means to maintain and even if the marriage has not consumated. Under the personal law the obligation to maintain the wife is not to be shared (Refer Verma's Muslim Marriage, Maintenance and Dissolution, Second Edition).

(45) Marriage under the Muslim law gives rise to certain definite obligations. Some of such obligations now find mention in the provisions of this Act. There is a clear distinction in the present state of law, between legal and moral obligations. Legal obligations are enforceable in law. The concept of marriage, its obligations, with greater concern to the aspect of maintenance arising from the marriage, have been explained by Shri Asaf A.A. Fyzee in his book "Outlines of Muhammadan Law, Fourth Edition, as under:—

> "Considered juristically, marriage (nikah) in Islam is a contract and not a sacrament. This statement is sometimes so stressed, however, that the real nature of marriage is obscured and it is overlooked that it has other important aspects as well. Before coming to the law proper, we shall consider the three aspects of marriage in Islamic law, which are necessary to understand the institution of marriage as a whole, namely, (i) Legal, (ii) Social, (iii) Religious."

"These authorities leave no doubt as to what constitutes marriage in law, and it follows that, the moment the legal contract is established, consequences flow from it naturally and imperatively as provided by the Muhammadan law."

"Maintenance is called Nafaqa, and it comprehends food, raiment and lodging, though in common parlance, it is limited to the first. There are three causes for which it is incumbent on one person to maintain another- marriage, relationship and property.

The highest obligations arise on marriage, the maintennace of the wife and children is a primary obligation."

In view of the above observations and keeping in mind the social set-up regulated by command of law of land that we have to examine the provisions of this Act.

(46) Section 3 of the Act is really the matter of basic controversy, in this revision petition referred to the Full Bench. Sub-section (1) of Section 3 is virtually the relevant provision which needs to be construed by us for the purposes of setting the basic controversy between the decisions mentioned. Sub-section (1) of the Section 3 of the Act reads as under :—

"(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 priod 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."

(47) Sub-section (2) of section 3 state that the reasonable and fair provision and maintenance or the amount of Mehr due, if not paid and properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman, she has a right to make an application to a Magistrate herself or through her duly authorised agent to make a claim with regard to any or all of the afore-stated claims. Sub-section (3) of section 3 requires the Magistrate concerned to pass an order within one month from the date of the application directing payment or surrender of such properties, subject to the condition that the husband has sufficient means and has failed or neglected to pay the wife 'within the iddat period' the amount of reasonable and fair provision and maintenance for her and her children as required under sub-section (1) of section 3. The order so passed by the Magistrate if not complied, the Magistrate has been given powers under sub-section (4) of section 3 to issue warrant for levying the amount of maintenance or Mehr or dower in the manner provided for levying funds under the Code of Criminal Procedure, 1973 and the Magistrate has the power even to imprison the defaulter as per the period indicated in this section.

(48) Section 4 of this Act which has a non-obstante clause provides for order of maintenance to the divorced wife even from relations and the Wakf Board, in the situations stated under these provisions. The provisions of section 4 are applicable not withstanding anything contained in the provisions of this Act or in any other law for the time being in force.

(49) As already noticed these are the two substantively effective provisions in this Act. In fact these two provisions throw light as to the intention of the Legislatures and the protections sought to be granted to the Muslim divorced wives.

(50) Sub-section (1) of section 3 on its bare leading can be divided into four kinds of claim which the divorced Muslim wife would be entitled to:—

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

(ii) The above claim could include similar claim for the benefit of the children born to the Muslim wife limited for a period of two years from respective dates of births of such children;

(iii) Amount of Mehr or Dower agreed to be paid to the wife *at the time of marriage* or *any time thereafter* according to Muslim Law; and

(iv) All properties given to her before and after her marriage by her relatives or friends or the husband or any relative or friend of the husband.

(51) These claims are not in alternative to each other and are no way inter-dependent. Reasonable and fair provision and maintenance to the wife is not dependent on the payment of the Mehr or Dower. One is a claim which is voluntarily agreed between the parties as a consideration for the marriage which obviously cannot be a consideration for divorce. The claim for the children by the wife is also not dependent either on Mehr or for the claim that she makes in other regards for herself. The reasonable and fair provision and maintenance for the wife cannot be construed or interpreted in its narrower sense. The provisions of section 3(1) of the Act must be read and understood keeping in view the object of the Act which is to provide security and protection to the divorced Muslim woman.

One cannot find any plausible basis to interpret the expression "within the Iddat period" to be the only period for which the maintenance is to be granted. This expression, whether read in conjunction with other relevant provisions of the Act or alongwith the main scheme of the Act, is not capable of being interpreted in any other manner except to mean and say that provision has to be made and payments indicated under sub-section (1) of section 3 of the Act to be made or tendered within the Iddat period.

In this regard reference can also be made to the same expression as used by the Legislature in clause (a) of sub-section (3) of section 3, where the Magistrate has to satisfy himself that the husband has sufficient means and he has failed or neglected to make or pay the wife a reasonable and fair provision and maintenance for her and the children within the Iddat period.

Thus, the Magistrate has to satisfy himself, if the payment has been made within the presecribed period of Iddat and not *for* the Iddat period.

There is no reason for us to substitute and read the word 'within' as 'for' or even 'of'. It is a settled principle of interpretation of statute that Courts normally would not substitute words and would read the provisions as they are enacted. It must and has to

be presumed that each word used by the Legislature is meaningful and is appropriately used in the provision of the act. The expression 'within' indicates more the period of limitation i.e. Iddat period and specially when the period of Iddat is defined in the Act itself. If the word 'within' is substituted by the word 'for', it will have the effect of changing the entire complexion of this legislation and would probably result in the frustration of the object of this Act, which is to provide protection and security to the divorced Muslim women.

(52) Section 3(1) of the Act, therefore, casts a statutory obligation upon the former husband to pay the maintenance without any monetary limit in contrast to the provisions of section 125 of the Code which restrict the liability to pay 'maintenance' to a maximum of Rs. 500. But the present legislation makes it a reasonable and fair provision for maintenance to be paid by the husband having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means by her former husband. Thus, the Court has to be guided by these basic mandatory principles, while exercising jurisdiction under the provisions of this Act. The legislative intention and language of the provisions appears to be more in line with the settled principles adopted by the Courts while granting maintenance to an Hindu woman, on the basis of ingredients specified under section 24 of the Hindu Marriage Act. The Provisions of section 3(1)(a) read with the provisions of section 3(3) the Act show that it is the means and status of the husband looking at the need and standard of life enjoyed by the wife before divorce which shall form basis for adjudication by the Court of competent jurisdiction.

(53) Another ancilliary but pertinent question that now arises for consideration is whether the entitlement of a divorced Muslim woman is limited to the period of Iddat alone under section 3(1)(a) of the Act and any claim for a subsequent period is impermissible under the provisions of the Act. It is true that as per the personal law a divorced Muslim woman is normally entitled to claim maintenance during the period of Iddat and if the divorce is not communicated to her until after the expirty of that period from the date of information of the divorce. But any agreement for future maintenance is neither unknown to this law nor is void in its inception. As agreement for providing suitable maintenance in the event of ill-treatment is not void as being against public policy.

(54) After discussing case law on the subject and making a reference to certain cases following illustrations are given in Mulla's

Principles of Mahomedan Law, Seventeenth Edition, at Page 274:—

(a) An agreement between a Mahomedan and his first wife, made after his marriage with a second wife, providing for a certain maintenance for her if she could not in future get on with the second wife, is not void on the ground of public policy (Mansur *v.* Azizul (1928) 3 Lucknow 603, 109 I.C. 812).

(b) If the marriage is dissolved by divorce, the wife is entitled to maintenance for the period mentioned in section 279 and not for life, unless the agreement provides that it is for life (*Muhammad Muin-ud-din* v. *Jamal* (32), and *Mydeen Beevi* v. *Mydeen Rowther* (33).

(55) The legislative intention to provide protection to the identified class governed by this Act can be gathered from the golden lining indicated by the Legislature by introducing section 4 in the scheme of the Act. The intention to protect the divorced Muslim women by payment of maintenance in the eventuality of provisions contained in section 3 not proving to be fruitful for granting maintenance to the women is manifest when the Legislature provides under section 4(1) of the Act that she is entitled to maintenance from her relations who are entitled to inherit her property under the Muslim Law. Further, in the event of default or non-availability of such relations, the maintenance is to be paid by the Wakf Board in accordance with the provisions of sub-section (2) of section 4 of the Act. The purpose is to ensure payment of fair and reasonable amount of maintenance by providing alternative sources for payment. Thus, these provisions cannot be interpreted in a manner which will be destructive of each other.

(56) It would not be based on any prudent principles of interpretation of law, if, by substituting the word 'within' by 'for' in section 3(1) of the Act, the women is granted maintenance only for a period of three menstrual courses after the date of divorce and leave her to starve for rest of her life or till she re-marries. The personal law, even if it be what is argued from the other side, it must yield and give way for the statutory provisions, which must again be read in consonence with the constitutional law and protections provided there-under.

32. (1921) 43 All 650, 63, I.C. 803
33. 61 A.M. 992

(57) 'Mehr' or 'Dower' is a significant term which finds mention in the provisions of section 3 of the Act. Mehr or Dower is the sum of money or other property or valuables which the wife is entitled to receive from the husband in consideration of marriage. Some authors have expressed the view that Mehr or Dower is not a simple consideration as is understood in the law of contract. In effect Dower is obligation of a husband arising from a contract, or otherwise imposed by law or custom on the husband as a token of receipt for his wife. *Abdul Kadir* v. *Salima* (34) and *Syed Sabir Husain* v. *Farzand Husain* (35).

(58) It may be relevant to refer to the observations recorded from the above judgment in Tyabji's Muslim Law which reads as under:—

> "Dower is not the exchange or consideration given by the man to the woman for entering into the contract; but an effect of the contract, but an effect of the contract, imposed by the law on the husband as a token of respect for its subject, the woman."

The significance of maintenance which a wife is entitled to has also been described by the same author in the following manner:—

> "The wife is entitled to maintenance from her husband through she may have the means to maintain herself, and though her husband may be without means. A wife may refuse to live with her husband and still claim maintenance if there is just ground for doing so: e.g. the husband has contracted a marriage with another or keeps a mistress."

Such a right of maintenance has been described even as a dept against the husband which has priority over the right of all other persons to receive maintenance.

(59) In any event what emerges is that Mehr or Dower is an essential incident of marriage and its payment is a statutory and moral obligation of the husband. The sum so agreed can be founded on a mutual agreement or may be by operation of law. This sum becomes; payable on marriage by the husband to the wife or any time thereafter as agreed. The provisions of the Act do not indicate

34. 1986(8) All 149
35. AIR 1938 P.c. 80

the scheme of prompt or deferred Mehr. It is also settled principle of law that Mehr is never invalid by reason of its being excessive, unless so specifically provided under the law. In other words, the payment of Mehr is a statutory and moral obligation of the husband towards his wife. It has to be paid promptly on the marriage if demanded by the wife, or at any time during continuation of the marriage, or even could be deferred for any subsequent time thereof. The underlying feature of these principles is that payment of Mehr is the duty of the husband and privilege of the wife.

(60) Dower is treated as a debt and its payment in intended to be ensured even on the death of the husband and if the wife is in possession of the property of her husband, she has a right to utilise such property for adjustment of claim of Dower.

(61) That being protection available to Muslim women under their personal law and in terms of amounts payable, Mehr is a liability of the husband which does not get absolved as a result of any other payment or consequence. The intention of the Legislature in adding Mehr as one of the ingredients under Section 3 in addition to the amount of maintenance and other amounts payable and properties to be delivered in consonence with that provision, is to grant definite and additional financial and Social security to the divorced women under that Act. In forming out views afore-stated we rely upon Tyabji's Muslim law Fourth Edition and Principles of Mahomedan Law by Mulla.

(62) Where the Legislature intends to provide additional benefits of protection by specific language used in the Act to limit or circumvent and improvise such limitation, by implication upon such intention would neither be permissible nor proper. The purpose of such payments is to obviate destitution of the divorcee and to provide her with ware-withal to maintain herself. There must and has to be a rational for limiting the application of provisions of Section 3, which we find to be none. In the case of *Bai Taheera* v. *Ali Hussain Fizali* (36) the Court held that payment of illusory amounts by way of customary or personal law may be a consideration for fixation of amount of maintenance, but no construction of such provision leads to frustration of statutory right, as no construction which leads to frustration of statutory project can secure validity, if the Court has to pay true homage to the Constitution.

36. AIR 1979 S.C. 326

(63) The payment of Mehr, thus, being payment as consideration for marriage cannot be a consideration for divorce based on the concept of reasonable and fair provision and maintenance to be made and paid by the husband. It is the cogitated attempt on the part of the legislation to emphasise the need of exigency and expeditiousness for compliance of these provisions. So it cannot be understood to imply limiting the claim to a specified period.

Therefore, the expression 'within Iddat Period' only defines and qualifies the period within which the various liabilities are to be discharged by the husband and does not mean that his liability is limited only to that period. Could it be the intention of the Legislature where they intended to provide complete protection by payment of Mehr, maintenance, surrendering of properties and prescription for her maintenance for children on the one hand, inspite of the fact that she might have received Mehr during her married life, they intended to give this benefit for the limited period and thereafter during her entire life or till she gets remarried, she is left to herself to bring up her children and make her both ends meet. This would entirely frustrate the very object of the Act and would in fact be a distorted impression of the legislative intention.

The legislation is a socio-beneficial legislation and its interpretation must be founded on the principles governing the field of beneficial legislations. A beneficial legislation based on a larger social good, must be interpreted *to favour the ones* who are sought to be benefited from the legislation rather than to interpret its provisions in a manner which will be opposed to the very spirit of the statute. Such an argument indeed would be self-defeating and would be unaccepted norm to be a guide in the search of legal principles.

(64) Another distinction which is apparent on the bare reading of these provisions is that while passing an order under Section 4 of the Act the magistrate is to be guided by the principle that a divorced Muslim woman who has not re-married and is not able to maintain herself after the Iddat period, can get an order for payment of her reasonable and fair maintenance from the relations specified in Section 4. While entertaining an application under Section 3 the Magistrate is not to be guided by the principle of her not being able to maintain herself. Thus, the scope of Section 3 is much wider and it emphasis the need for providing a descent life and standard of living to the wife which she would have enjoyed

while living in her matrimonial home with her husband. It will not be harmonious construction of these provisions if the wife is held to be entitled to a descent standard of living for the limited period of Iddat and threafter is forced to live like a pauper egen if she is unable to maintain herself.

(65) The only conclusion that could be arrived at from the above discussion is that the reasonable and fair provision and maintenance to be made and paid by the husband to the wife within the Iddat period has to be one which would provide her with protection and such standard of living for her life as is postulated under Section 3 of the Act failing which to pay such maintenance would be continuing liability of the husband. Fairness in determination and payment of amount of maintenance seems to be the foundation of the provisions of Section 3 of the Act. Fairness in fixing a fair maintenance is also the guiding factor for the Courts which would ensure a fiari and proper living to a wife as per expected parameters indicated in Section 3 of the Act till she is alive or she remarries.

(66) Coming to the judgments referred before us, firstly we will refer to the case of *Arab Ahemadhia Abdulla* (supra), where the Gujarat High Court held as follows:—

> "It cannot be said that the word "within" used in S.3(1)(a) of the Act should be read as "for" or "during". The words cannot be construed contrary to their meaning as the word "within" would mean "on or before" "not beyond", "not later than". The word "within" which is used by the Parliament under the Act would mean that on or before the expiration of Iddat period, the husband is bound to make and pay a reasonable and fair provision and maintenance to the wife. If he fails to do so, then the wife is entitled to recover it by filing an application before the Magistrate as provided in Sub-section (2) of Section 3 but no where the Parliament has provided that reasonable and fair provision and maintenance is limited only for the Iddat period or that is to be paid only during the iddat period and not beyond it."

> "If different phrases used in Section 3(1)(a), 3(1)(b), 3(3) and section 4 as well as Section 5 of the Act are read together, it would be clear that the Parliament wanted to provide that the divorced woman is fully protected if she does not remarry and she gets adequate provision and

maintenance from her former husband and/or maintenance from her relatives or Wakf board in case of necessity."

Similar view was taken by the Andhra Pradesh High Court in the case of *M. Subhan* v. *Smt. Maqbul Bee and another* (37), where the Court held that a Muslim Woman could apply for enhancement of the maintenance allowance granted to her prior to coming into force of the Act and such an application (under Section 127 of the Code) was not barred on any principle. Still in the case of *Ali* v. *Sufaira* (38), the Kerala High Court took the similar view and after detailed discussion on the subject, held as under:—

"From this, it is clear that the Muslim husband who divorced the lady must be very liberal to the woman and should given her substantially for her future, Ayat 241 states:—

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

Ayat 242 provides:

"Thus doth God
make clear His Signs
To You; in order that
Ye may understand."

From this it is clear that the Muslim who believes in God must give a reasonable amount by way of gift or maintenance to the divorced lady. That gift or maintenance is not limited to the period of Iddat. It is for her future livelihood because—God wishes to see all well. The gift is to depend on the capacity of the husband. The gift, to be paid by the husband at the time of divorce, as commanded by the Quran, is recognised in sub-clause (a) of Clause (1) of S. 3 of the Act. This liability is cast upon the husband on account of the past advantage received by him by reason of the relationship with the divorced woman or on account of the past dis-advantage suffered by her by reason of matrimonial consortim, is in the nature of a compensatory gift or a solatium to sustain the woman for her life after the divorce. In accordance with the

37. 1993(1) R.C. Cases 89
38. 1988(2) Kerala Law Times 94

principles of Islamic equity the said provision or compensation or support from the former husband is wife's right. This right has been given legislative recognition in the above provision. So , I find it difficult to accept the argument that the only liability of the former husband is to pay maintenance to the divorced muslim woman during the period of iddat only.

In contrast to the views expressed above, the Calcutta High Court in the case of *Abdul Rasheed* versus *Sultana Begum*(39), and the Rajasthan High Court in the case of *Abdul Hamid* versus *Mst. Asia*(40), have taken a view that maintenance payable under the provisions of the Act is restricted to the period of Iddat only.

(67) The learned counsel appearing for the husband-petitioner has mainly relied upon the majority view expressed by the Full Bench of Andhra Pradesh High Court in the case of *All India Muslim Advocates Forum* v. *Osman Khan Brahamani* alias *Basha and others(41),* Full Bench has taken the view that the Muslim divorced women cannot claim maintenance under Section 125 of the Code after commencement of the Act. It has also taken the view that the maintenance is payable only for the Iddat period and not any further.

(68) At the out-set we may mention that the view of the Full Bench in the above judgment was not unanimous. We are more inclined to agree and adopt the reasoning given by the minority view in the said judgment. Another feature is that in paragraph 38 of the judgment the majority view has commented upon and attempted to criticise the judgment of the Supreme Court in Shah Bano's case *(supra).* The criticism is founded basically on the ground that the Supreme Court incorrectly assumed the role of an interpreter of Quoran which is not premissible, however, the Hon'ble Judges have endeavoured to discharge the same role. Be that as it may, respectfully but regretfully, while differing with the majority view we feel that judicial discipline and propriety do not permit what has been expressed by the majority view even in this regard, We would only make a reference to the recent judgment of the Supreme Court in the case of *Shri Abani Kanta Raj* v. *State of Orissa*(42), in this regard. The judgment of the highest Court on some principles would continue to govern the field, being law of

39. 1992 Crl. Law Journal 76
40. 1992(2) All India Hindu Law Reporters 475
41. 1990(2) All India Hindu Law Reporters 41
42. JT 1995(7) S.C. 467

the land. In any case the judgment *inter se* parties would even stand today as good law.

(69) In addition to the reasons given by us in this judgment we would prefer to concur with the reasoning given by the learned Single Judge forming the minority view of the judgment of Andhra Pradesh High Court. For the same reasons we are not able to persuade ourselves to concure with the view of the majority. The judgment of the Supreme Court led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife, which resulted in the enactment of this Act and won't necessarily mean that Legislature intended to invalidiate the judgment. We are unable to see such a reasoning in the object and reasons of the Act. Controversy arises only when there are two views about a subject. The provisions of this Act do not indicate that the Legislature intended that a divorced Muslim wife is at the mercy of none for her day-to-day needs and the husband has not obligation to pay the maintenance.

(70) Statement of objects and reasons appended to a bill should not be treated as an aid to the construction of a statute. Objects and reasons of an Act or bill seek only to the extent what reasons induce the mover to introduce the bill in the House and what object he soughts to achieve. It is not necessary that they will always correspond to the objective which the majority of the house had in view while passing the bill into a law. It is also not necessary that the objects and reasons would help in construing the specific or general provisions of the Act. Mr. Justice S.K. Das reiterated these principles in the following expression, "The statement of object and reasons is not admissible. However, for construing the section far less can it control the actual words used" (Refer AIR 1960 SC 12, AIR 1971 SC 1331 and AIR 1973 SC 1293).

(71) The present statute opens with the words, "to provide protection to the rights of Muslim Women who have been divorced or who seek divorce and to provide for matters connected therewith or incidental thereto. The Legislature, therefore, while giving the reasons for enactment, has intentionally expressed its desire by using words of wide magnitude and spectrum. Thus, to give the narrower or limited meaning to these provisions may not be quite appropriate.

(72) Other ground that has been taken into considration by the High Courts, in the Judgments referred by us above, is that

there is apparent conflict between the provisions of the Code and the provisions of this Act. The provisions of the Act being a special law must take precedence over the provisions of the Code, the general law. We fail to see any such inconsistency or contradiction between these two statutes. Both are legislated with a common intention to protect the right of maintenance of a given class. While the Act gives greater emphasis to the kind of claims which a divorced Muslim Woman is entitled to including the right of maintenance, the provisions of the Code and applicable to a large class of persons, but gives only right to claim maintenance. They intend to achieve a common object i.e. the minimum respect and dignity and amount of maintenance payable to a wife or divorced wife in given circumstances. These are the provisions which run parallel to each other. For example, a Muslim married lady, who has not been divorced or has't taken divorce, would still be able to invoke the provisions of Section 125 of the Code, while a divorced woman could also invoke these provisions and opted to be governed by the provisions of Sections 125 to 128 of the Code but only in the event the parties comply with the requirements of Section 5 of the Act. These statutes are easily reconciable. There is no "a head-on clash" between these provisions. They must and have to be harmoniously construed to avoid repugnancy or frustration of any of the provisions.

(73) The principle that a special provision on a matter excludes the application of a general provision on that matter, has not to be applied when the two provisions deal with remedies, for validity of plural remedies cannot be doubted (Refer *Bihar State Co-operative Marketing Union Ltd.,* v. *Uma Shanker Saran* (43). The provisions of the Code and the Act operate in different spheres with a common intended remedy but on some spheres both the statutes have application as is clear from the language of the provisions of the Act.

(74) The filing of an application before the magistrate by the divorced wife under Section 3(2) of the Act is based upon a default. The default being non-payment of dues and delivery of the properties referred to in sub-section (1) of Section 3. The period which gives rise to default being "made and paid to her within the Iddat period by her husband". Thus the cause arises in the event of default. The cause of a cause is the cause of the thing caused. The thing caused from the cause of divorce is the conditions to which the wife would be exposed. The man who divorced her must fulfil

43. AIR 1993 S.C. 1222

his obligation of maintaining the wife. If he fails to discharge this obligation, this becomes a cause for causing the default which given cause of action to the wife.

(75) It is equally true that a right does not arise out of a wrong. The right of the wife is to receive maintenance from her prior husband. This right cannot be defeated, while it is a statutory, moral and religious obligation of the husband, by interpreting the sections in a erroneous manner. As we have already discussed, it is a social and beneficial legislation. It intends to achieve a larger object of providing protection to divorced Muslim women. The maxim *Maqis de bono quam de malo lex intendit* would fairly apply to the present question of interpretation. Law must favour a good rather than a bad. In other words the protection sought to be provided by legislation should not be defeated on a narrower construction of provisions allowing such benefit or protection. The above are also the reasons which should be read as a reasoning for answering questions No. 1 to 4 as framed by us in the beginning of the judgement.

(76) We are of the considered view that the obligation of the husband to pay maintenance is not restricted to the period of Iddat alone, unless, the husband has paid and made provision for fair maintenance within the Iddat period or thereafter which would be a reasonable amount of maintenance keeping in view the mandatory ingredients specified in the provisions of the Act, for rest of her life or till the time she gets remarried or earns any disqualification or guilt which would disentitle her from receiving such reasonable and fair provision and maintenance, in law.

QUESTION NO. 4 :

(77) In order to answer this question we have to keep in mind the provisions of Sections 5 and 7 of the Act on the one hand and non-obstante clauses of Sections 3 and 4 of the Act on the other. The provisions of this Act would operate in preference and in favour of the limited class governed by the provisions of the Act, than the provisions of the Code. Every application pending at the commencement of this Act under Section 125 or 127 of the Code would hence be disposed of in accordance with the provisions of the Act which obviously means "subject to the provisions of Section 5".

Most of the judgments referred by us above have taken the view that the provisions of Section 125 would not be applicable to

this limited class of divorced Muslim Women at the commencement of the Act. We would concur with this view limited to the extent indicated above. (Refer *All India Muslim Advocates Forum's case* (supra) and A. *Abdul Gafoor Kunju* v. *Avva Ummal Pathumma Beevi and another* (44).

(78) While Section 3 clearly states that notwithstanding the provisions of any other law for the time being in force a divorced Muslim woman has a right to raise the claims referred in that Section Section 4 states that notwithstanding anything contained in the foregoing provisions of this Act and any other law for the time being in force, the provisions of Section 4 will prevail. It must be noticed that Section 7 of the Act does not affect the provisions of Section 128 of the Code either specifically or by necessary implication. Even the non-obstante clause in Section 4 would not apply to Section 7 because it restricts its application, to the foregoing provisions of the Act only. Section 7 uses unambiguous language to say that every application by a divorced woman, upon the commencement of this Act, pending before a Magistrate, shall be dealt with under the provisions of the Act. Fresh applications can be instituted under Sections 3 and 4 by the applicant, however, leaving the parties to exercise their option under Section 5 of the Act.

(79) On the proper analysis of these provisions and keeping in mind the aforestated judgments we are of the considered view that provisions of Sections 125 or 127 of the Code in relation to divorced Muslim women would have no application after coming into force the provisions of this Act. The exception to this being that parties to a lis exercise their option in accordance with the provisions of Section 5 of this Act. The above findings given by us are of no consequence if the application is moved under the provisions of the Act by a child or by a Muslim wife not divorced. Therefore, we proceed not to answer the questions raised by us, above, as under:—

QUESTION NO. 1 :

(80). A final order passed by the Court of competent jurisdiction, under Section 125 of the Code of Criminal Procedure Code and its execution in accordance with provisions of Section 128 of the Code is neither invalidated nor barred by the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986. The

44. 1989 Crl. Law Journal 1224

Provisions of the Act do not divest the party vested with determined rights and benefits under Section 125 of the Code.

QUESTION NO. 2 :

(81) The right of the child to claim maintenance under Section 125 of the Code is not in any way adversely affected by the provisions of this Act. This, however, is subject to the limitation for initial period of two years from the date of birth of such child, that too only, if, the father has provided a reasonable and fair provision and maintenance to such child upon the claim by the mother in that regard.

QUESTION NO. 3 :

(82) The claim of maintenance by a divorced Muslim wife necessarily need not be restricted only to the Iddat period. Unless the husband shows before the Court of competent jurisdiction that he has, within the Iddat period, provided, made and paid a reasonable and fair provision and maintenance, to the wife, which is an adequate provision, for her life or till she remarries. The husband may show before the Court that the wife by her own act and conduct has become disentitled to receive such amount in accordance with law or has earned the disqualification disentitling her to the payment of the amount of maintenance.

QUESTION NO. 4 :

(83) A divorced Muslim woman cannot have recourse to the provisions of Sections 125 of the Code, after the commencement of this Act. However, recourse to such provisions is also permissible if both the parties submit their required affidavits to be governed by such provision in furtherance to Section 5 of the Act. This answer is obviously subject to the answer provided by us to Question No. 1.

(84) It had become necessary for us to deal with all these questions as the contentions raised on behalf of the petitioner were founded on these basic and pertinent questions. The learned counsel for the petitioner has contended that in view of Section 3(1) of the Act, the petitioner has no obligation to pay any maintenance to the child and the wife beyond the Iddat period as he had divorced his wife with effect from 1987. He has further argued that as on the commencement of the Act the orders of the Magistrate under the provisions of Sections 125 to 128 of the Code had become in-effective and any order passed by the learned Magistrate directing extension

of the period of his arrest or directing him to pay the arrears of maintenance were invalid in law.

(85) The learned counsel for the respondent-wife and child has countered all these arguments on the basis of some of the judgements referred by us above. The cumulative effect of the contentions raised before us and keeping in mind the facts and circumstances of the case and the fact that the revision pettition itself was directed to be heard by a Full Bench it had become imparative for us to formulate the questions and to answer them, with some elaboration.

(86) The objection on behalf of the respondent was obviously raised for the first time in the year 1990. The petitioner is a person who has all through defaulted to make the payment of the amount ordered to be paid on account of maintenance to the respondents. No Court had granted an absolujte stay in favour of the petitioner at any point of time. *Vide* order dated the 20th August, 1990 the High Court had granted permission to the petitioner to make the payment in monthly instalments which admittedly the petitioner failed to comply with. Further the Division Bench vide order dated the 7th February, 1992 had directed the petitioner-husband to pay amounts towards the arrears of maintenance even to the minor child. The husband defaulted even in that behalf. The interim stay granted stood automatically vacated pursuant to the order of the Court dated the 1st October, 1992. This was so recorded by the Division Bench in its order dated the 4th October, 1992.

(87) In the present case it is admitted by the husband that neither he has made any provision nor paid such amount on account of maintenance during the Iddat period or even thereafter, which could be termed as a reasonable and fair amount for the wife to maintain herself and the child for rest of her life. She has admittedly not remarried as yet.

(88) We have already held that the order passed by the learned Magistrate dated the 28th February, 1985 is not invalidated nor is rendered ineffective. The order is executable in accordance with law. The plea of the learned counsel for the petitioner that his liability ceases immediately upon expiry of the Iddat period irrespective of any other consequence is equally untenable for the reasons recorded above. The liability of the father to maintain his minor children in any case stands finally settled by the judgement of the Hon'ble Apex Court, in the case of *Noor Saba Khatoon (supra).*

(89) It is an accepted principle that law is mutable. It must advance by the lapse of time in consonance with the statutory provisions and keeping the need of the society in mind. Equality, uniformity and avoidance of unintelligible differentia even in regard to interpretation of provisions more particularly social and beneficial provisions are the basic guilding factors. The interpretation given by the Courts has to be in conformity with the statutory provisions and legislative intent, but at the same time, must not appear to be a view which at the face of its is an utopian one.

(90) The constructive and harmonious approach for evolution of law which takes in its cover the personal or the customary law as well must lead to improvisation for difficult and need oriented situations.

(91) For the reasons afore-stated we dismiss the revision petition preferred by the husband against the order dated 21st December, 1991. We further direct the petitioner to pay the arrears of maintenance to his divorced wife and child, up-to-date within a period of three months from today. Keeping in view the peculiar facts and circumstances of the case, the respondents shall be entitled to the costs, which are assessed at Rs. 2,500/-.

R.N.R.

Before Ashok Bhan & K.S. Kumaran, JJ.

MANMOHAN LAL GUPTA,—*Petitioner*

versus

STATE OF PUNJAB & ANOTHER,—*Respondents*

CWP No. 12283 of 1996

22nd January, 1997

Constitution of India, 1950—Arts. 226/227—Land Acquisition Act, 1894—S. 11—A—Award—Proceedings initiated to quash notifications under sections 4 & 6 of the Act on the ground that award given was beyond statutory period of two years from publication of declaration—Last date of publication in locality is to be taken into account for computing period of limitation u/s 11-A.

Held, that S. 11 mandates the Collector to make the award under Section 11 within the period of two years from the date of