

(1990) 03 AP CK 0020

In the Andhra Pradesh High Court

Case No : Criminal M.P. No's. 146, 147, 1916, 2396, 2466, 3167 and 3915 of 1989, Criminal Petns. No's. 1134, 1151, 1173 and 1972 of 1989 and Cri. Revision Case No. 308 of 1989 & Criminal.M.P. No's. 146, 147, 2466, 2396, 3915, 1916 and 3167 of 1989 and Criminal Petns. No's. 1151, 1134, 1972 and 1173 of 1989 and Cri. Revision Case No. 308 of 1989

Usman Khan Bahamani

APPELLANT

Vs

Fathimunnisa Begum and Others

RESPONDENT

Date of Decision : 19-03-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 126, 127, 128
Muslim Women (Protection of Rights on Divorce) Act, 1986 — Section 3(1), 4, 5, 6, 7
Muslim Women (Protection of Rights on Divorce) Rules, 1986 — Rule 8

Citation : AIR 1990 AP 225 : (1990) CriLJ 1364

Hon'ble Judges : Sardar Ali Khan, J;Ramanujulu Naidu, J;Bhaskara Rao, J

Bench : Full Bench

Advocate : H. Prahalad Reddy, for the Appellant; V. Bhaskar Reddy, Public Prosecutor, Mohd. Ghiyasuddin and Syed Sadatullah Hussaini, for the Respondent

Judgement

Sardar Ali Khan, J.—Division Bench of this Court while dealing with the question of the right of a divorced woman to claim maintenance under the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as "the Act"), has referred the matter for the Full Bench on certain questions arising about the right of such Muslim Divorced Women to claim maintenance under S. 125 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") from her former husband even after the enforcement of the aforesaid Act. The Division Bench felt that the matter involves substantial questions of law of general importance having a far-reaching effect and therefore it should be placed before a Full Bench for an authoritative pronouncement on the matter. The questions to be considered by the Full Bench are as follows :

(1) Whether a divorced Muslim woman can claim maintenance under S. 125 of

the Code from her former husband even after passing of the Act of 1986 ?

(2) Whether the maintenance contemplated under S. 3 of the Act of 1986 is restricted only for the period of "Iddat" or whether a fair and reasonable provision has to be made for future also within the period of Iddat ?

(3) How far Sections 125 to 128 of the Code can be held to be applicable after coming into force of the Act of 1986 and what should be the mode of disposal of the cases pending before the Courts under these sections ?

2. The above three questions will therefore have to be considered by this Full Bench in the light of the provisions of the Act of 1986, the principles of Mahommeden Law and the provisions of Sections 125 to 128 of the Code.

3. The main question with regard to the right of a divorced Muslim woman for maintenance under S. 125 of the Code from her former husband after passing of the Act of 1986 and deserves to be taken up first for consideration (sic) hinges around S. 3 of the Act. Before going to the intricacies of S. 3 of the Act of 1986, it would be necessary to consider the aims and objects for which the Act of 1986 has been passed.

4. The decision of the Supreme Court in Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, (for short, Shah Bano case) created a furore among the Muslim community of India who agitated strongly against the decision on the ground that it sought to abrogate the principles of Muslim law with regard to maintenance payable to a divorced Muslim wife. In the wake of the protests made against the said decision, the Parliament passed the Act of 1986. It would be in the fitness of things to make a reference to the objects and reasons of the said Act which clearly brings out the circumstances under which the Act was passed and indicates the objects which it seeks to achieve. A perusal of the statement of objects and reasons shows that in the very first sentence it is stated that the Supreme Court in Shah Bano case has held that although the Muslim Law limits the husband's liability to provide for maintenance of the divorced wife to the period of Iddat, it does not contemplate or countenance the situation envisaged by S. 125 of the Code. The Court held that it would be incorrect and unjust to extend the above principle of Muslim Law to cases in which divorced wife is unable to maintain herself. The Court, therefore, came to the conclusion that if the divorced wife is able to maintain herself, the husband's liability ceases with the expiration of the period of Iddat, but if she is unable to maintain herself after the period of Iddat, she is entitled to have recourse to S. 125 of the Code. The above statement is almost taken verbatim from the statement of objects and reasons and it clearly highlights two points which must be kept in mind for the purpose of a decision in the instant case. The first principle which has been recognised in the statement of objects and reasons of the Act of 1986 is that the Muslim Law limits the husband's liability to provide maintenance to the divorced wife to the period of Iddat only. However, the Supreme Court held that if the divorced wife is unable to maintain herself after

the period of Iddat, she is entitled to have recourse to S. 125 of the Code. This in effect, means that the decision in Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, overrides the well established principle of Muslim law that the husband of a divorced Muslim wife is not liable to pay maintenance under any circumstances beyond the period of Iddat. The statement of objects and reasons further states that the decision in Shah Bano case had created some controversy and it has become necessary to specify the rights to which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. Thereafter, the statement of objects and reasons proceeds to give the glaring features of the Bill which was introduced in the Parliament and was subsequently passed as the Act of 1986.

5. The main object of delving at length on the statement of objects and reasons of the Act of 1986 is to highlight the point that the Act has been passed in the wake of the decision of the Supreme Court in Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, and seeks to remove the difficulties that have arisen as a result of that decision in regard to the liability of the husband to pay maintenance to his divorced Muslim wife. We would, therefore, like to approach the provisions of the Act which call for consideration in this case in the backdrop of events which led to passing of the Act of 1986.

6. It is an accepted principle of the interpretation of statutes that the historical setting of the enactment of a legislation is a relevant factor to be taken into consideration for finding out the precise aim and object for which the legislation has been enacted. In the case of *Holme v. Guy* (1877) 5 Ch D 901 at p. 905.

Sir George Jessel M.R. laid down the principle that :

"The Court is not to be oblivious of the history of law and legislation, and I have cited from the authorities to which I have referred to show that such is the case of history of law and legislation. Although the Court is not at liberty to construe an Act of Parliament by the motives which influenced the Legislature, yet when the history of law and legislation tells the Court and prior judgments tell this present Court what the object of the Legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view of finding out what it means, and not with a view to extending it to something that was not intended."

It is also relevant to note that in the famous case - *Re Mayfair Property Co.* (1898) 2 Ch 28 at p. 35, Lindley M.R. said :

"In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon's* case to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."

7. It may not be necessary to multiply the well established authorities of great antiquity and reputation to emphasise the point that a piece of legislation like the

Act of 1986 is therefore to be viewed in its proper historical perspective to ascertain the precise intention of the Parliament in promulgating the Act.

8. It is necessary to reproduce some of the provisions of the Act which are relevant for the purpose of this case. S. 2(a) defines "divorced woman" in the following terms :

"Divorced woman" means a Muslim woman who was married according to Muslim law, and has been divorced by, or has obtained divorce from, her husband in accordance with Muslim law."

"Iddat period" has been defined in S. 2(b) thus :

"Iddat period" means, in the case of a divorced woman, -

(i) three menstrual courses after the date of divorce, if she is subject to menstruation;

(ii) three lunar months after her divorce, if she is subject to menstruation; and

(iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy, whichever is earlier."

Section 3 postulates thus :

"Mahr or other properties of Muslim woman to be given to her at the time of divorce :

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

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

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

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

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

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in Clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order of payment of such provision and

maintenance, mahr or dower or the delivery of properties, as the case may be.

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

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

(b) the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in Clause (d) of sub-section (1) have not been delivered to her,

make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such mahr or dower or the delivery of such properties referred to in Clause (d) of sub-section (1) to the divorced woman;

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

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1984) and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code."

The heading of S. 3 itself reads that it seeks to achieve the object of ensuring the payment of Mahr or making available other properties of Muslim which belongs to her, at the time of divorce. S. 3 starts with a non obstante clause reading "notwithstanding anything contained in any other law for the time being in force", a divorced woman shall be entitled to lay a claim for all those things enumerated in Cls. (a) to (d) of sub-section (1) thereof. The effect of a non obstante clause in a piece of legislation is well known and need not detain us any further except stating that a true and well purported meaning will have to be given to the non obstante clause which states that "notwithstanding anything contained in any other law for the time being in force" a divorced woman shall be entitled to the benefits accruing to her under the provisions of Cls. (a) to (d) of sub-section (1) of S. 3 of the Act of 1986. A close perusal of S. 3(1)(a) shows that a divorced Muslim woman is entitled to a reasonable and fair provision and

maintenance to be made and paid to her within the iddat period by former husband. This Full Bench has to address itself to the meaning and purport of Clause (a) of sub-section (1) of S. 3 to find out what is the exact meaning to be attributed to this section. It is clearly stated that a divorced Muslim woman shall be entitled to a reasonable and fair provision and maintenance within the Iddat period to be made and paid by her former husband. It is also equally clear that the reasonable and fair provision and maintenance has to be made and paid by the husband within the "period of Iddat" which has been defined under S. 2(b) of the Act. There is nothing in the section which can be read to mean that the husband is liable to make reasonable and fair provision and maintenance beyond the period of Iddat. The word "within" indicates two things - that the liability of the husband to make a reasonable and fair provision and maintenance is limited to the period of Iddat only and it is already seen in the statement of objects and reasons that the principle of Muslim law limits the husband's liability to provide maintenance to the divorced wife for the period of Iddat only. Even in the case of Shah Bano, it is recognised that a Muslim woman is entitled to maintenance under the Muslim law only during the period of Iddat. However, it is held that if she is unable to maintain herself then the liability of the husband to pay maintenance arises under S. 125 of the Code. Therefore, inherent in the decision of the Supreme Court is the recognition of the principle that while maintenance during the period of Iddat is to be paid under the Muslim law, maintenance beyond the period of Iddat is envisaged only under S. 125 of the Code. Therefore, the word "within" occurring in S. 3(1)(a) clearly means that there is an obligation on the part of the husband to provide fair and reasonable maintenance to his divorced wife within the period of Iddat and for the period of Iddat only. It is also clear that the liability of the husband cannot be extended beyond the period of Iddat to make any reasonable and fair provision or to pay maintenance beyond the period of Iddat of his divorced wife. Much has been said to which reference is to be made later about the use of the word "within" rather than "for" which has been employed in S. 3(1)(a). We are clearly of the opinion that the use of the word "within" does not permit an interpretation to be put to the section that the liability of the husband to make a reasonable and fair provision and maintenance to his divorced wife extends beyond the period of Iddat. The intention of the legislature is manifestly clear that it envisages the making of reasonable and fair provision and payment of maintenance to the divorced wife commensurate with the period of Iddat to be paid within the period of Iddat. To take a contrary view would result in complete negation of the principles envisaged under S. 3(1)(a) of the Act of 1986 and defeat the very purpose for which the Act of 1986 has been enacted.

Under sub-section (2) of S. 3, it is provided that where a reasonable and fair provision and maintenance or the amount of Mahr or Dower due has not been made or paid or the properties referred to in Clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one on her behalf may make an application to a Magistrate for an order for payment of such

provision and maintenance, Mahr or Dower, or the delivery of properties, as the case may be. In our opinion, sub-section (2) of S. 3 confers immense benefit on a divorced woman under the Act of 1986. She can claim all the advantages mentioned in Cls. (a), (b), (c) and (d) of sub-section (1) of S. 3 without going through the procedure of filing a suit in a Civil Court as she is given the right to file an application under sub-section (2) of S. 3 to claim all that is due to her under Cls. (a) to (d) of sub-section (1) of S. 3 of the Act of 1986. The Magistrate shall make an order under sub-section (3) of S. 3 within one month from the date of filing of the application directing the former husband to pay such reasonable and fair provision and maintenance to the divorced woman, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such mahr or dower or the delivery of such properties referred to in Clause (d) of sub-section (1) of S. 3 to the divorced woman.

9. The Act has been promulgated 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. In so far as it provides the speedy remedies to the wife as laid down in sub-secs. (2) and (3) of S. 3, it can safely be said that the Act of 1986 is a self-contained Act enumerating the rights and obligations of the parties and providing remedies for the same.

10. The next step in this regard is to examine the provisions of S. 4. S. 4 of the Act deals with the question of order for payment of maintenance and it is in the following terms :

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

In the proviso to S. 4, it is stated that if the divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her. If the parents are unable to pay their share of maintenance on the ground of their not having the means to pay the same, the Magistrate may, on proof of such inability, order other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate thinks fit to order. Under sub-section (2) of S. 4, it is stated that if the divorced woman is

unable to maintain herself and she has no relatives as stated above, the Magistrate may, by order, direct the State Wakf Board established under S. 9 of the Wakf Act, to pay such maintenance as determined by him under sub-section (1).

11. The primary question arising out of S. 4 for consideration is that the liability of the relatives or the Wakf Board, as the case may be, to pay maintenance to the divorced woman arises only if the divorced woman is not remarried or is unable to maintain herself after the Iddat period. This clearly shows that the husband is not liable to pay any maintenance beyond the period of Iddat. If the divorced woman is unable to maintain herself even after the period of Iddat then the liability devolves on her relatives who would inherit her property, as stated in S. 4. Under S. 5 it is provided that if, on the date of the first hearing of the application under sub-section (2) of S. 3, a divorced woman and her former husband declare by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 of the Code of Criminal Procedure and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly. The form in which the affidavit has to be filed in pursuance of S. 5 is given in Form "B" under R. 8 of the Muslim Women (Protection of Rights on Divorce) Rules, 1986. It is clear from a reading of S. 5, that it is only if a declaration is made by a divorced woman and her former husband exercising their option to be governed by the provisions of Sections 125 to 128 of the Code, then their case will be governed by the provisions of Sections 125 to 128 of the Code and not otherwise. But in case no such option is exercised and the affidavit is not filed as required under R. 8 referred to supra, Sections 125 to 128 of the Code will have no application to the case of maintenance claimed by the divorced woman. Under S. 7, transitional provisions are made to the effect that every application by a divorced woman under S. 125 or under S. 127 of the Code, pending before a Magistrate on the commencement of this Act, shall, notwithstanding anything contained in that Code and subject to the provisions of S. 5 of the Act of 1986, be disposed of by the Magistrate in accordance with the provisions of Act of 1986.

12. It is thus clear that even if an application is pending under S. 125 or under S. 127 of the Code, on the commencement of the Act (of 1986), notwithstanding anything contained in that Code and subject to the provisions of S. 5 of the Act, the application has to be disposed of in accordance with the provisions of Act of 1986. This indicates that the operation of the provisions of S. 125 or S. 127 of the Code are excluded on the commencement of the Act of 1986 and such applications (filed under S. 125 or under S. 127 of the Code) pending before the Magistrate, shall have to be disposed of in accordance with the provisions of Act of 1986.

13. It is also significant to note that there is no saving clause in the Act of 1986 under which it may be said that the provisions of Ss. 125 to 128 of the Code of

Criminal Procedure are not applicable to the case of the divorced Muslim woman claiming maintenance from her former husband, after passing of the Act of 1986. In the absence of a saving clause, the intention of the Parliament is clear that the claim of maintenance by the divorced Muslim woman is to be governed by the provisions of the Act of 1986 unless option is exercised by the parties as provided under S. 5 of the Act.

14. Let us now analyse the situation arising out of the provisions of the Act itself to answer the question whether S. 125 of the Code would be applicable to the case of a divorced Muslim wife claiming maintenance from her former husband. It is seen that S. 3 starts with a non obstante clause as it provides that "notwithstanding anything contained in any other law for the time being in force," a divorced woman shall be entitled to the rights which are enumerated therein. Under S. 4 of the Act, the liability to pay maintenance to a divorced woman, if she is unable to maintain herself after the period of Iddat, is devolved upon the relatives and if the relatives are not available, on the Wakf Board. The very concept of liability of the husband is limited for and during the period of Iddat. The liability, if any, arising for payment of maintenance after the Iddat period to the divorced woman if she is unable to maintain herself is cast upon the relatives or the Wakf Board, under S. 4 of the Act. Under S. 5 it is provided that the husband and wife would be governed by Sections 125 to 128 of the Code, if they exercise their option in the manner stated therein. If the option is not exercised, then it is clear that they will not be governed by the provisions of Sections 125 to 128 of the Code. It would be too much to say that the claim of maintenance by the divorced Muslim would still be governed by the provisions of S. 125 of the Code when such an application is expressly dependent upon the provisions of S. 5 of the Act and on the exercise of the option by the parties concerned. Further more, under S. 7 of the Act, the intention of the Legislature is clear when it provides that every application by a divorced woman under S. 125 or under S. 127 of the Code pending before the Magistrate on the commencement of the Act of 1986, shall, notwithstanding anything contained in that Code and subject to the provision of S. 5 of the Act, be disposed of in accordance with the provisions of Act of 1986.

15. A combined and harmonious reading of the provisions of Sections 3 to 7 of the Act of 1986 would clearly demonstrate that the general object of the legislation is to bring the law of maintenance payable to the wife in consonance with the principles of Muslim law. Therefore, the provisions of Sections 125 to 128 of the Code will have no application to the Act of 1986 except in case of option exercised by the parties under S. 5 of the Act to any such claim of maintenance made by the wife under S. 125 of the Code.

16. One of the reasons for referring this matter to the Full Bench is that there are conflicting decisions of various High Courts on the question of applicability of S. 125 of the Code to the claim of maintenance made by a divorced Muslim wife. It is therefore necessary to discuss the point involved in the various decisions to

arrive at a fair and just conclusion in this case.

17. In *Md. Yunus v. Bibi Phenkani Alias Tasrun Nisa* (1987) 2 Crimes 241, a learned single Judge of the Patna High Court considered the question of applicability of Sections 125 and 127 of the Code in the case of Muslim woman claiming maintenance after the passing of the Act of 1986. The precise question before the learned Judge was whether the right under S. 125 of the Code to claim maintenance subsists even after the passing of the Act of 1986. After referring to several authorities the learned Judge held that S. 3(1)(a) of the Act of 1986 curtailed the right of a divorced Muslim woman to get maintenance for the period of Iddat only. It is also held that the right to get maintenance from her husband given to a wife under S. 125 of the Code until she remarries has been impliedly repealed in case of a divorced Muslim wife governed by the provisions of S. 3(1)(a) of the Act of 1986. In effect, it is also held in that case that a divorced Muslim woman is no longer entitled to get maintenance from her husband after the period of Iddat as there is no saving clause in the Act of 1986. Having lost her right to get maintenance from her former husband after the period of Iddat, she has also lost her remedy as provided under S. 125 of the Code to enforce her right in case her former husband fails without sufficient cause to comply with the order of maintenance. Thus, an application under S. 125(3) of the Code which in effect is a penal provision will not be applicable to such a wife. The repeal without saving such rights means that such woman had never such right and in this view of the matter the said right was held not to be enforceable under S. 125(3) of the Code. "Any view to the contrary", said the learned Judge, "will amount to frustration of the very object of the Act for which it has been passed."

18. A similar view as taken by a Division Bench of Rajasthan High Court in *Abid Ali v. Mst. Raisa Begum* (1988) 1 Raj LR 104. The question for consideration before the Division Bench was the effect of the provisions of Act of 1986 on orders of maintenance passed under the Code of Criminal Procedure and whether the orders passed under S. 125 of the Code remain effective even after coming into force of the Act of 1986. The answer given by the Division Bench to the said question is clearly in the negative. It is held that the Act of 1986 does not contain any saving clause for the right created on orders passed in favour of a divorced Muslim woman. The Act has completely obliterated the right of such woman to get maintenance. The repeal without saving such right means that such woman had never acquired such right and that right now cannot be enforced under S. 25(3) of the Code. Therefore, if a Muslim woman divorced prior to coming into force of the Act of 1986 in whose favour order of maintenance has been passed and has become final or is pending in revision or in other Court is being challenged by the husband and if such an order is held to be executable then it will amount to contravention of the intention of the Legislature and will amount to frustrate the very object of the Act of 1986 for which it has been enacted.

19. A brief reference may also be made to the decision in *A. Abdul Gafoor Kunju Vs. Avva Ummal Pathumma Beevi and Another*, . It is held that a divorced Muslim is not entitled to invoke S. 127 of the Code for seeking enhancement of maintenance after 19th May, 1986, the date on which the Act of 1986 came into force. The Court further held that even though Sections 125 to 127 of the Code have not been repealed by title Act of 1986, it cannot be said that the Act of 1986 supplemented, widened or enriched the contents of rights ensuring to the wife under the Code. The Act of 1986 being in the nature of a special law which applies to the Muslim community, it excludes the operation of Sections 125 to 128 of the Code in so far as that community is concerned. Therefore, when a Special Law - Act of 1986 has been enacted to govern maintenance payable to Muslim wives, application of general law under the Code is excluded or restricted. We find ourselves in agreement with the ratio of these three decisions referred to supra. We are also in agreement with yet another decision in *Rizwana Begum v. Motiullah* 1989 Cri LJ 155 (Orissa), which also affirms the principle that S. 125 of the Code will have no application to the case of a divorced Muslim woman who is governed by the provisions of the Act of 1986.

20. As against the above tenor of cases in favour of the proposition that Sections 125 to 128 of the Code are not applicable, there are some cases which have taken a contrary view and which may be considered in the light of the provisions of Act of 1986.

21. In *Arab Ahemadhia Abdulla and etc. Vs. Arab Bail Mohmuna Saiyadbhai and Others etc.*, a learned single Judge took the view that a divorced Muslim woman is entitled to maintenance after contemplating her future needs and the maintenance is not limited only up to Iddat period. The phrase used in S. 3(1)(a) of the Act of 1986 is "reasonable and fair provision and maintenance to be made and paid to her" indicates that the Parliament intended to see that the divorced woman gets sufficient means of livelihood after the divorce and that she does not become destitute or is not thrown on the streets without a roof over her head and without any means of sustaining herself and her children. The learned Judge observed that the word "provision" itself indicates that some thing is provided in advance for meeting some needs. This means that at the time of giving divorce the Muslim husband is required to visualise or contemplate the extent of the future needs and make preparatory arrangement in advance for meeting the same. It is also held that the word "within" under S. 3(1)(a) cannot be read as "for" or "during". Therefore, the husband was held to be liable for making reasonable and fair provision and maintenance to the wife even after the period of Iddat. The learned Judge also held that it cannot be held that S. 3 of the Act of 1986 in any way adversely flecks the personal rights of a Muslim divorced woman. Nowhere in the Act it is provided that the rights which are conferred upon a Muslim divorced woman under Personal Law are abrogated, restricted or repealed. In that view of the matter, it was held in the above case that the order passed by the Magistrate under S. 125 of the Code ordering the Muslim husband to pay maintenance to his divorced wife would not be non est as there is no

section in the Act which nullifies the order passed by the Magistrate under S. 125 of the Code. We are unable to agree with the reasoning given in the above judgment for several reasons. Firstly it has to be seen that S. 3 of the Act of 1986 has been promulgated in the wake of the furore created after the decision in Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, in which the principle of Mahomaden Law with regard to maintenance was given a new interpretation. In fact, the main object of the Act of 1986 is to bring the law in consonance with the principles of Mahomaden Law. S. 3 affirms the principle which has been laid down by various authorities about the right of a divorced Muslim wife to claim maintenance from her former husband only for the period of Iddat. Therefore, it cannot be said that S. 3 is something different from what the principle of Mahomaden Law provided in regard to payment of maintenance to a divorced Muslim woman. It is rather surprising to note that the learned single Judge in the above case thought that - "taking into consideration the objects and reasons for enacting the Act of 1986 as well as the preamble and the plain language of S. 3, it cannot be said that the Act in any way adversely affects the personal rights of a Muslim divorced woman, as laid down by the Supreme Court in Shah Bano case." In that view of the matter he came to the conclusion that the liability of the husband to provide for maintenance to his divorced wife under the principles of Mahomaden Law is not limited to the period of Iddat only. It is obvious that this is an erroneous impression carried by the learned single Judge. The very object of promulgation of the Act of 1986 as stated in the aims and objects of the Act itself is to nullify the effect of Shah Bano case and not to strengthen it. Moreover, it is a wrong presumption on the part of the learned single judge that under the Muslim Personal Law liability of a husband to pay maintenance to his divorced wife extends beyond the period of Iddat. There is an inherent contradiction in the judgment where it provides that there is no section in the Act of 1986 which nullifies the order passed by the Magistrate under S. 125 of the Code. It is stated that once the order under S. 125 of the Code granting maintenance to a divorced Muslim wife is passed, then her rights are crystallised and she gets vested rights to get maintenance from her former husband. That vested right is not taken away by the Parliament by providing any provision in the Act. Then the learned Judge deals with the question of option to be exercised by the parties under S. 5 of the Act to be governed by Sections 125 to 128 of the Code and holds that that also indicates that the Parliament never intended to take away the vested right of a Muslim divorced woman which were crystallised before passing of the Act of 1986. As stated above, there are several inherent contradictions and inconsistencies in the above statement of law which do not stand to reason or scrutiny. It is clear that the liability of the husband for payment of maintenance is limited i.e., only during and for the period of Iddat. The liability cannot be extended by provisions of S. 125 of the Code unless the parties exercise their option under S. 5 of the Act of 1986. Therefore, it is difficult to visualise how it can be held that the right of the divorced wife get crystallised under S. 125 of the Code and cannot be taken away by the provisions of the Act of 1986.

22. In Smt. Hazran Vs. Abdul Rehman, a similar view has been taken as that of the Gujarat High Court referred to above, where it was held that the order of maintenance under S. 125, Cr.P.C. is not affected by coming into force of the Act of 1986. This is held primarily on the basis that there is no provision in the Act of 1986 to the effect that - "notwithstanding anything contained in Ss. 125 to 128 of the Code, maintenance of Muslim woman shall be governed by the provisions of the Act of 1986". It is further stated that - "it follows that the provisions of Sections 125 to 128 have been superseded only to the extent that there is a provision in the Act of 1986 on matters covered under Chapter IX of the Code. If no contrary provision has been made either expressly or by necessary implication in the Act of 1986, the provisions of the Code in Chapter IX shall hold the field." In our opinion, this decision completely ignores the non obstante clause in S. 3 of the Act of 1986 - "notwithstanding anything contained in any other law for the time being in force" Moreover, read with S. 4, the intention of the Legislature is patently clear that the operation of Sections 125 to 128 of the Code have been impliedly repealed by the Act of 1986.

23. Therefore, in view of the foregoing, it is held that a divorced Muslim woman cannot claim maintenance u/s 125 of the Code from her former husband after passing of the Act of 1986.

24. The second question which requires consideration is what is meant by "reasonable and fair provision and maintenance" mentioned in Section 3(1)(a) of the Act ? Does it mean that the husband should provide a reasonable and fair provision and maintenance as a compendious whole or is to be taken that a reasonable and fair provision is something distant and separate from maintenance. This aspect of the matter is of considerable importance because the learned Advocate General appearing for the State has contended that the concept of "reasonable and fair provision" must be read as distinct and separate from that of "maintenance". While he concedes that there is no liability on the part of a Muslim husband, within the meaning of Section 3(1)(a) of the Act of 1986 to pay maintenance to the divorced wife beyond the period of Iddat, he insists that there is a liability on the husband to make a reasonable and fair provision for the wife even after the period of Iddet. This argument is advanced on the premise that while there is an absolute injunction in the Muslim Law that the wife is not entitled to any maintenance beyond the period of Iddat, there is nothing which limits the rights of the divorced wife to claim a reasonable and fair maintenance beyond the period of Iddat. The first and the foremost point to be considered in this regard is that if the concept of reasonable and fair provision is to be read as one meaning that it is payable even for the period beyond the Iddat, then it would be defeating the very purpose for which the Act of 1986 has been enacted. The primary object of the Act is to bring the state of law in regard to payment of a reasonable and fair provision and maintenance to a divorced Muslim woman in consonance with the principle of Muslim law. The language of Section 3(1)(a) is clear and it is provided that a reasonable and fair provision and maintenance should be made and paid "within" the period of Iddat. If it is

recognised that the liability of the husband to pay maintenance is limited to the period of Iddat, then there is no justification to hold that the liability of making a reasonable provision extends beyond the period of Iddat u/s 3(1)(a) of the Act of 1986. What has been recognised on one hand in regard to maintenance cannot be taken away by the other for providing reasonable and fair maintenance. There is another difficulty which clearly demonstrates the fallacy inherent in such a submission. If a reasonable and fair provision is to be made by the husband for a period beyond the Iddat of the divorced woman then it is clear that such a provision will have to be made within the period of Iddat which is normally a period of approximately three months. The essential fact to realise is that the making of a reasonable and fair provision and payment of entire maintenance is to be made in lump sum within the period of Iddat because the section clearly stipulates that the provision and maintenance must be made and paid in full within the period of Iddat. The question is, is it possible to make such a payment within the stipulated period of Iddat which may be deemed to be a reasonable and fair provision to cover up the necessities of life of the divorced woman for the entire period of her remaining life or until she gets remarried. In other words, how an assessment can be made that a provision is reasonable and fair provision payable within the period of Iddat forecasting the future needs that may arise fifty to sixty years hence. Let us test the strength of this argument from another angle. Suppose a fair and reasonable provision is made by the husband on the assumption that the wife is not going to get remarried. But if after a year or two, the wife remarries again, what will happen to the reasonable and fair provision made and paid by the husband during the period of Iddat ? Would an actionable claim lie on behalf of the husband to recover the sum paid as a fair and reasonable provision ? The obvious result of such discussion seems to be that the term "fair and reasonable provision and maintenance" will have to be read in a compendious form. Even if there is a concept of a reasonable and fair provision separate from the payment of maintenance, such a reasonable and fair provision is to be made for the upkeep of the divorced wife during the period of Iddat only. No liability can be cast on the husband to make any reasonable and fair provision for the divorced wife beyond the period of Iddat.

25. The cardinal principle which Section 3 seeks to lay down is that the liability of the husband to make a fair and reasonable provision and pay maintenance is confined to the duration of Iddat only.

26. Under the Mahomedan Law, the position is clear. In Aiyat 241 of Chapter II of the Holy Quran it is stated thus :

Arabic version English version Ayat No. 241 WA LIL MOTAL- For divorced women LA QATAY Maintenance (should MATA UN .. be provided) BIL MAARO- On a reasonable OFAY .. (Scale) HAQQAN .. This is a duty ALAL MUTTA On the righteous. QEENA

It is stated that for a divorced woman maintenance should be provided on a reasonable scale. This is a duty on the righteous. There is no dispute about the

translation of the above Aiyat by Abdullah Yusuf Ali. The concept of a reasonable and fair provision and maintenance arises out of the Quranic verse 241 in which the word "MATA" has been used. In order to avoid any confusion, the Legislature has provided that a fair and reasonable provision and maintenance shall be paid to the wife within the period of Iddat.

27. In Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, the Supreme Court has also recognised the principle that there is no difference between the words "provision" and "maintenance" as are used in Section 3. While dealing with the word "MATA" in Aiyat No. 241 of the Holy Quran, the Supreme Court has observed that the contention of the appellant that the word "Mata" in Aiyat No. 241 means "provision" and not "maintenance" is a distinction without difference. In other words the provision and maintenance convey the same sense of providing maintenance the wife during the period of Iddat. Therefore, viewed from any angle, it cannot be said that there is a difference between "provision" and "maintenance" and that while maintenance may be payable only for the period of Iddat, the liability to make fair and reasonable provision for the wife may extend beyond the period of Iddat as well. The above interpretation is clearly not sustainable in the light of the principles of Mohamedan law and under the provisions of Section 3 of the Act of 1986.

28. A reference to the classical authorities on the subject of "maintenance to a divorced Muslim wife" reveal beyond any doubt that the maintenance to the divorced wife is payable only during the period of Iddat.

29. In "The Hedaya" which is the classical work of Muslim law applicable to the predominant Sunni sect of Muslims, in Section 3 (Book IV, page 406), it is stated that where a man divorces his wife; her subsistence and lodging are, incumbent upon him during the term of her Iddat, whether the divorce be of the reversible or irreversible kind. The concept of the term "subsistence and lodging" is wide enough to include the reasonable and fair provision and maintenance. Under the Shafei law, no maintenance is due to a woman repudiated by irreversible divorce unless she be pregnant. The Holy Quran in Verse 228 says :

"Divorced women shall wait concerning themselves for three monthly periods. This is the period of iddat." In Mulla Principles of Mahomedan Law, u/s 279, it is stated that after divorce, the wife is entitled to maintenance during the period of Iddat. If the divorce is not communicated to her, until after the expiry of that period, she is entitled to maintenance until she is informed of the divorce. There is a consensus of opinion among all the eminent authors on Muslim law, such as Tyabji, Ameer Ali, Fyzee and others, that a divorced woman is entitled to maintenance only during the period of Iddat. Apart from HEDAYA, which is the classical work of Sunni law, the classical work of Immamia which is a treatise on Shia Law and Baillie which deals both with Shia and Sunni aspects of law are all uniform that a divorced woman is entitled to maintenance for the period of Iddat only.

30. Therefore, it is patently clear that under the principles of Muslim Law, the divorced wife is entitled to a provision or maintenance only for and during the period of Iddat. It is this principle of Muslim Personal Law which has been promulgated u/s 3 of the Act of 1986.

Ameer Ali in his classical work on Mohomedan Law (Volume II) has stated at page 459 as follows :

"The husband's liability to support the wife continues during the whole period of probation, if separation has been caused by any conduct of his, or has taken place in exercise of a right possessed by her. The husband would not, however, be liable to support his wife during the Iddat if the separation is caused by her misconduct."

Tyabji has expounded the law lucidly in his book on Muslim law. It is stated that under Hanafi law, on divorce a wife is entitled to maintenance during her Iddat, whether the divorce is revocable or irrevocable, whether single or triple, and whether she is pregnant or not, unless the marriage has been dissolved for some cause of a criminal nature originating from the woman. Under Shiite and Shafii law, the wife is entitled to maintenance during her Iddat if revocably divorced but not if irrevocably divorced, unless an irrevocable divorce is pronounced during the wife's pregnancy, in which case she is entitled to maintenance until delivery. In any case, on the expiry of the Iddat after Talaq, the wife's right to maintenance ceases.

31. The celebrated work of Asaf A. A. Fyzee - "Outlines of Muhammadan Law" (Fourth Edition) explains the principle for the payment of maintenance in the following words :

"The wife's right to maintenance commences on divorce, or when she comes to know of the divorce, and ceases on the death of her husband, for her right of inheritance supervenes. The widow is therefore not entitled to maintenance during the iddat of death. It is otherwise in the case of divorce where she is entitled to maintenance during Iddat."

The principle has been followed in Mohd. Shamsuddin Vs. Noor Jahan Begum, and Chandbi Ex Vs. Bandesha, .

32. It is also to be noted that in the ancient authority of Fatawai Alamgiri, it is stated that a woman undergoing Iddat on account of Talak (divorce) is entitled to maintenance and lodging, whether the Talak be revocable or irrevocable, and whether she be pregnant or not. The principle of this is that when separation is induced by any cause proceeding from the husband, or by any cause proceeding from the wife in exercise of a right, or by any cause proceeding from a third party, the wife is entitled to maintenance during her Iddat.

33. The sum and substance of the above I discussion is that there is no difference of opinion among the authorities - Sunnis or Shias, that a divorced Muslim woman is entitled to maintenance from her husband only during the

period of Iddat. Section 3 of the Act of 1986 therefore, reaffirms the same principle in so far as it provides that "notwithstanding anything contained in any other law for the time being in force, a divorced wife is entitled to a reasonable and fair provision and maintenance to be made and paid to her within the Iddat period by her former husband." We have already discussed in detail the concept of a reasonable and fair provision and maintenance and we have come to the conclusion that even if it is taken for granted that a reasonable and fair provision is to be made apart from maintenance, that also will have to be for the period of Iddat only and shall be made and paid to the wife within the period of Iddat. The liability of the husband in any case cannot transgress the duration of Iddat.

34. It has been further argued that the payment of reasonable and fair provision for future has been made to ensure that the divorced woman is not left in the lurch after the pronouncement of Talak. A fair reading of the provisions of Clauses (a) to (d) of sub-section (1) of Section 3 clearly shows that there is no strength in the argument that a Muslim woman is left in the lurch when she is divorced by her husband. We want to test this argument in the light of Clauses (a) to (d) of sub-section (1) of Section 3. It is mentioned under clause (a) that she is entitled to maintenance during the period of Iddat; under clause (b) she is entitled to claim maintenance for the children born to her before or after her divorce from her former husband for a period of two years from the respective dates of birth of the children; under Clause (c) she can claim 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. This is based upon the concept that marriage under Muslim law is a civil contract giving rise to certain rights and obligations between the husband and the wife who are parties to such a contract. Therefore, under Clause. (c), when the marriage is dissolved, she is entitled to claim her entire Mahr or Dower amount from her husband. Under Clause (d), she can claim all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends. The words used in this clause are all the properties which include moveable as well as Immovable properties. The divorced woman will therefore, be entitled to lay claim for return of all the moveable and Immovable properties given to her before or at the time of marriage or thereafter, by her relatives or by her husband or by the relatives of her husband or friends. All this clearly shows that u/s 3 of the Act of 1986, the divorced woman is looked after well even after the dissolution of the marital tie. In so far as the financial aspect of the matter is concerned, it cannot be said that a woman is left without any consideration for her future well being because, as stated above, she is entitled to claim all the benefits which have been mentioned above.

35. The only decision relied upon in this regard is in *Ali v. Sufaira* (1988) 3 Crimes 147 wherein a learned single Judge of the Kerala High Court held that u/s 3(1)(a) of the Act of 1986, a divorced Muslim woman is not only entitled to maintenance for the period of Iddat from her former husband but also to a reasonable and fair provision for her future. The purport of this decision seems to

be that the liability of the former husband does not cease by paying maintenance for the period of Iddat only. He is liable to make a reasonable and fair provision for her future also. In other words, a distinction is sought to be drawn between what is a reasonable and fair provision and maintenance which is payable to the divorced woman. After discussing the various Aiyats of the Holy Quran - 236, 237, 241 and 242, the learned Judge concluded that -

"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."

In the final conclusion, the learned Judge held that u/s 3(1)(a), a divorced Muslim woman is not only entitled to maintenance for the period of Iddat from her former husband but also to reasonable and fair provisions for her future, and directed the Magistrate to pass orders giving effect to this intention of the Legislature. We have already discussed in our judgment that the concept of "reasonable and fair provision and maintenance" cannot be read as meaning two different things. The word "Mata" used in Aiyat 241 indicates that the words "fair and reasonable provision and maintenance" convey the same meaning. Even in Shah Bano case, it is recognised that the words - "provision" and "maintenance" convey the same meaning and no distinction can be made between the two.

36. In this connection it may be mentioned that one of the main criticisms against the decision in Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, by the Supreme Court has been that the Supreme Court has assumed the role of an interpreter of Quran which is not permissible under the Mahomaden Law and therefore the verses of the Holy Texts cannot be a subject matter of interpretation by the Courts of law. As far back as in 1897, in Aga Mahomed Jaffer Bindaneem v. Kool Som Bee Bee (1897) 24 Ind App 196 the Privy Council laid down the law on this aspect of the matter in the following words :

"But it could be wrong for the Court on a point of this kind to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority."

The same view was reaffirmed by the Privy Council in Baker Ali Khan v. Anjuman Ara Begum, (1903) 30 Ind App 94 wherein it was observed thus :

"Their Lordships think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions."

In K. Veerankutty Vs. Pathummakutty Umma and Others, and Ibrahim Fathima Vs. Mohamed Saleem and Others, it has been recognised that the Court must administer the personal law for Muslims on the basis of the ancient textual

authorities whose validity as of law can hardly be questioned.

37. Dr. Tahir Mahmood in an article published in Islamic and Comparative Law Quarterly (Vol. 5 No. 1) March 1985, has commented upon Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, in the following terms :

"The Shah Bano Judgment has caused great resentment in many circles of the Muslim community of India. Though we may not agree with the other opponents of the judgment on many points that they have raised, we do strongly feel that the assumption by the Supreme Court of the function to interpret the Holy Quran was absolutely uncalled for."

He further goes to observe that there was no need nor justification for the Supreme Court to assume the role of an interpreter of the Quran. The Quran, like the Holy Vedas and the Bible, is a revealed book. Would any modern court anywhere in the world attempt to interpret the Rigveda or the Old Testament ?" asked Dr. Tahir Mahmood. Further more, he observed :

"Laws derived from the Quran in the distant part are found in the books of laws, and the Court could definitely have interpreted those books. Re-interpreting the Quran itself straightway was, however, not a task that the Supreme Court of India or any of its Judges should have performed."

We are quoting the above opinion along with the various authorities referred to above only to indicate the inherent danger in attempting to direct interpretation of the holy verses of Quran. The interpretation which has been put to such verses of the Quran by the established authorities are to be taken as an authoritative pronouncement which cannot be deviated from.

38. Therefore, to hold that while maintenance may be payable for and during the period of Iddat, a fair and reasonable provision shall be made by her husband forecasting her future needs, would amount to negation of the very object for which Act of 1986 has been promulgated. It would give rise to a new concept of liability on the part of the husband which would be difficult to be translated in concrete terms as it would be almost impossible to visualize the future needs of a divorced Muslim woman which would be depending upon several factors like her remarriage, change in the circumstances or in the life style, etc. We have already discussed this concept earlier in our judgment and have categorically come to the conclusion that the provision or maintenance whatever it may be is liable to be paid only for the period of Iddat and within the period of Iddat only. In any case, the liability of the husband to provide a reasonable and fair provision and maintenance is limited for the period of Iddat only. Therefore, in regard to the second question as to whether the maintenance contemplated u/s 3(1)(a) of the Act of 1986 is restricted only for the period of Iddat or a fair and reasonable provision has to be made for future also within the period of Iddat, we are of the opinion that the liability to pay reasonable and fair provision and maintenance on the part of the former husband is confined only for and during the period of Iddat. Even if it is taken for granted for a reasonable and fair provision is to be

made separately from that I of maintenance to be given to the wife, such I reasonable and fair provision is confined only for the period of Iddat, as defined in Section 2 of the Act. We do not find ourselves in agreement with the decision of the Kerala High Court in Ali case (1988 (3) Crimes 147) supra, for the reasons which we have already explained above.

39. Regarding the third question, how far Sections 125 to 128 of the Code can be held to be applicable after coming into force of the Act of 1986, we hold that u/s 7 of the Act of 1986, it is specifically stated that every application by a divorced woman u/s 125 or u/s 127 of the Code pending before a Magistrate on the commencement of the Act shall be disposed of by the Magistrate in accordance with the provisions of the Act of 1986, having due regard to Section 5 of the Act and the rules framed thereunder with regard to the option to be exercised by the parties. Any order of maintenance which is sought to be enforced u/s 128 of the Code imposing a liability on the husband which is not warranted by the provisions of the Act of 1986, cannot be executed against the husband. This is based on the principle that when a Muslim husband is not liable to make any provision or pay maintenance after the period of Iddat, then there is no question of any order being enforced against such a husband u/s 128 of the Code after passing of the Act of 1986. A similar view by a learned single Judge in Crl. Petition 849/87 dated 28-11-87.

40. In the light of the foregoing discussion, in answer to the first question, we are of the opinion that the divorced woman cannot the claim maintenance u/s 125 of the Code after passing of the Act of 1986.

41. In regard to second question, we hold that the fair and reasonable provision and maintenance contemplated u/s 3(1)(a) payable by the husband is restricted only for the period of Iddat and the liability of husband to provide any provision or maintenance after the period of Iddat does not arise.

42. In regard to third question, we hold that Sections 125 to 128 of the Code are not applicable after coming into force of the Act of 1986, save in so far as the parties exercise their option u/s 5 of the Act, to be governed by the provisions of Sections 125 to 128 of the Code.

43. The questions under reference are answered accordingly.

Ramanujulu Naidu, J.

44. I am entirely in agreement with the conclusions reached by my learned brother Sardar Ali Khan, J. and the reasoning adopted by him.

Bhaskar Rao, J.

45. I have had the benefit of going through the judgment of my learned brother, Sardar Ali Khan, J., as agreed to by Justice Ramanujulu Naidu. With great respect to my learned brothers, I should express my inability that I am not able to toe myself in line with the view expressed by them on the question.

"(2) Whether the maintenance contemplated u/s 3(1)(a) of the Act 1986 is restricted only for the period of "Iddat" or whether a fair and reasonable provision has to be made for future also within the period of Iddat ?"

I may make it clear that though I held a contra view in Crl. Revision Case No. 577/87 D/- 31-3-89 (reported in 1989 (2) ALT 275) : (1989 Cri LJ 2285) that the maintenance contemplated by section 3(1)(a) of the Muslim Women's (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as "the Act") is not confined to the Iddat period only, I am now convinced on further enlightenment that the Legislature intended payment of maintenance only for the Iddat period and not beyond that. However, on the latter limb of the question, whether a fair and reasonable provision has to be made for future also within the period of Iddat, I am clearly of the opinion that the answer should be in the positive and positive only.

46. On the other two questions, namely, whether a divorced Muslim woman can claim maintenance u/s 125 of the Code from her former husband even after passing of the Act of 1986-and-how far Sections 125 to 128 of the Code can be held to be applicable after coming into force of the Act of 1986 and what should be the mode of disposal of the cases pending before the Courts under these Sections, I have absolutely no divergence of opinion with my learned brothers. I, with great respect, agree with my learned brothers that a divorced Muslim woman cannot claim maintenance under S. 125, Cr.P.C., after passing of the Act and that Sections 125 to 128, Cr.P.C., are not applicable after coming into force of the Act save in so far as the parties opt for their applicability under S. 5 of the Act.

47. It is the decision of the Supreme Court in Mohd. Ahmed Khan Vs. Shah Bano Begum and Others, that gave rise to the present legislation of enacting the Muslim Women's (Protection of Rights on Divorce) Act, 1986. The Supreme Court, held that although the Muslim law limits the husband's liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by S. 125 of the Code of Criminal Procedure, 1973. The Court, therefore, held that it would be incorrect and unjust to extend the above principle of Muslim law to cases in which the divorced wife is unable to maintain herself. Accordingly, the Court concluded that if the divorced wife is able to maintain herself, the husband's liability ceases with the expiration of the period of iddat, but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to S. 125, Cr.P.C.

48. The statement of objects and reasons in bringing out the Act reads :

"2. This (Supreme Court's) decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests"

The main object of the legislation, thus, is to protect the rights of the Muslim women on divorce. Title of the enactment also refers to the "Protection of Rights on Divorce". In so far as husband's obligation to pay maintenance is concerned, the Muslim law as also the decision of the Supreme Court confines it to the period of iddat only. The only right, apart from the one under Muslim Law to which a divorced Muslim woman is entitled to, as was held by the Supreme Court in the above Shah Bano's case, is to have a recourse to S. 125 of the Code of Criminal Procedure for maintenance even after expiration of the period of iddat if the woman is not able to maintain herself. In so far as payment of maintenance during the iddat period is concerned, the personal law stood settled and there was absolutely no controversy on the issue. The right to maintenance held to be available even after the expiration of the period of iddat under S. 125, Cr.P.C., is only if the woman is unable to maintain herself, and this right is crystallised after the pronouncement by the Supreme Court. No doubt, as stated in the statement of objects and reasons, this decision vesting the right to maintenance under S. 125, Cr.P.C., gave rise to some controversy. This controversial state of affairs did not relate to the liability of the husband to pay maintenance for the iddat period and therefore the corresponding right of the muslim woman did not call for any protection since it was never under erosion. What was sought to be controverted or eroded by means of some furore was with reference to the newly accrued right on its crystallisation that the muslim women, if unable to maintain herself, is entitled to have recourse to S. 125, Cr.P.C., even after the iddat period. This much of crystallisation, though not exactly in the same form and under the same provision, but in substance something over and above the liability to pay maintenance during the iddat period, was under the need and warrant of protection which the legislation intended to do by embedding in Section 3(1)(a) of the Act it is liability of the husband to make a reasonable and fair provision apart from maintenance.

49. Before analysing the term "a reasonable and fair provision" occurring in Section 3(1)(a) of the Act, it is very much necessary to extract Section 3 to the extent relevant, It reads :

"Mehr or other properties of Muslim woman to be given to her at the time of divorce :

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

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

Now, the question is as regards the meaning of "a reasonable and fair provision and maintenance to be made and paid ..." as it occurs in the above section. The contention on one hand is that "provision and maintenance" have to be read together in a compendious form. This submission is sought to be fortified by referring to Quranic verse 241 wherein the word "MATA" occurs, the meaning of

which is "Maintenance (should be provided)". Since "MATA" as interpreted by the Supreme Court takes in both "maintenance" and "provision" the Legislature - it is submitted - to avoid any confusion couched the language in Section 3(1)(a) by clubbing the words "provision" and "maintenance" together without meaning them to be distinct and separate items. The argument, ex-facie, sounds too far fetched and is incapable of being reconciled with (i) the preamble of the Act, (ii) the following Section 4 of the Act wherein the term used is only "reasonable and fair maintenance" (the word "provision" is omitted) and (iii) Section 5 of the Act which provides an option to the parties for being governed by Sections 125 to 128 of the Code of Criminal Procedure.

50. It is basically the intention of the legislature that provides the lever for purposes of interpretation of any statute. No doubt, there are several sources to find out the a intention. They can as well broadly be divided into (i) external aids and (ii) internal aids External aids consist of statement of objects and reasons, earlier reports of commissions, if appointed, reports of Parliamentary Committees, etc. A referrers is already made to the statement of objects and reasons. The internal-aids have got to be gathered from the preamble of the statute and on an harmonious construction of different provisions in the statute. The preamble of the Act reads :

"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."

Thus, this Indian Act intended to protect the rights of the Muslim women on their divorce. Question of protecting a right arises only on its recent acquisition and that too when it is under a threat of erosion. In so far as the question of payment of maintenance for the iddat period is concerned, there was never any dispute as regards it, that was not a recent acquisition nor it was under a threat of erosion at any time earlier to the making of the present legislation. The furore among the Muslim community, in other words the controversy, was with regard to the liability of the husband to pay maintenance beyond the iddat period u/s 125, Cr.P.C., if she is unable to maintain herself. This was the newly crystallised right as per the Supreme Court's pronouncement and in regard to which there was much controversy. Thus, this newly crystallised right was the subject matter of controversy and resultantly under a threat of erosion, and accordingly needed or warranted protection, may be in the same form or in a balancing different form. The option, however, as regards the form is left out to the parties themselves by Section 5 of the Act. In this background of protection, the resultant provisions are Section 3(1)(a) and Section 5 of the Act, the former casting a liability on the husband to make a reasonable and fair provision apart from the payment of maintenance within the iddat period and the latter leaving the option to the parties to be governed by Sections 125 to 128 of the Code of Criminal Procedure. If it is simply a question of payment of maintenance for the iddat period that is truely intended by Section 3(1)(a) and nothing more, neither

the Legislature would have wasted its breath by incorporating the liability of making a provision reasonable and fair, apart from paying maintenance, in Section 3(1)(a), nor would it have allowed Section 5 to remain otiose on the statute since no Muslim former husband with minimum commonsense would opt for governance by the provisions of Sections 125 to 128 of the Code of Criminal Procedure in the absence of any corresponding or balancing liability cast on him by one or other provision in the statute. It is equally important to note that Section 4 of the Act which reads :

"Section 4. Order for payment of maintenance :

(1) Notwithstanding anything contained in the foregoing provisions of the Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not remarried and is riot able to maintain herself after the Iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as may be determined

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate the Magistrate may, by order direct the State Wakf Board functioning in the area in which the woman resides to pay such maintenance as determined by him under sub-section (1)"

Significantly omits the word "provision" from the term "a reasonable and fair provision and maintenance". The liability u/s 4 either of the relatives or of the Wakf Board is just to pay reasonable and fair maintenance. Section 4 does not contemplate making of fair and reasonable provision in contradistinction from Section 3. Therefore, the argument that provision and maintenance mean one and the same and they should be read in a compendious form is not worthy of appreciation. These two or (are) distinct and different items as submitted by the learned Advocate General. Further the reasonable and fair provision contemplated by this section to be made within the iddat period is for a period much beyond the iddat whereas the maintenance to be paid within the iddat period is for the iddat only.

51. I am not able to concede to the argument that the liability of the husband, even if making of provision is different and distinct from paying of maintenance, is confined to the period of iddat only and that in no case either of the two could run beyond the iddat period. The words in Section 3(1)(a) "within the iddat period" lay stress on the urgency in making or paying and they cannot be read as confining the liability to the limited period of iddat, save in so far as maintenance is concerned since the Muslim Law is settled on that aspect. Interpreting the distinct liability of making a reasonable and fair provision as having been confined to the period of iddat would not only render the very Section 5 on the statute otiose but also defeats the specific purpose of casting

that liability on the former husband by Section 3(1)(a) in contra-distinction from Section. Whereunder the liability of either the relatives or the Wakf Board is only to pay maintenance and there is absolutely no liability to make any provision, u/s 4 of the Act. Incidentally, no doubt, there advanced a submission whether it would be possible to make or fix-up such a provision apart from paying maintenance within the iddat period so as to cover-up the necessities of life if the divorcee for the entire period of her remaining life or until she gets remarried. No doubt, there does appear to be some inconvenience but the question is whether such an inconvenience is a dominant factor to render a contra-interpretation, which otherwise is a total absurdity. Means of remedy would surely follow the event. For an apprehended event, being not able to presently comprehend a means of remedy, is it proper to relieve of a benefit available otherwise to the divorcee under a statute that too a beneficial legislation. The Supreme Court in *The Mysore State Electricity Board Vs. Bangalore Woollen, Cotton and Silk Mills Ltd. and Others*, , clearly laid down that inconvenience is not a decisive factor in interpreting a statute.

52. It is also crucial to notice that the Legislature cannot be said to be not apprehensive of this inconvenient situation not only in arriving at but also in making a reasonable and fair provision. Having been apprehensive only, it introduced Section 5 in the statute to enable the parties to choose governance by Sections 125 to 128 of the Code of Criminal Procedure.

53. The learned Advocate General brought to our notice a decision of the Kerala High Court in *Ali v. Sufaira* (1988) 3 Crimes 147. The question raised before the Kerala High Court is exactly the same as discussed herein. After a threadbare discussion of several points involved the Kerala High Court held that u/s 3(1)(a) of the Act a divorced woman is not only entitled to maintenance for the iddat period from her former husband but also to a reasonable and fair provision for her future. I am in absolute agreement with the reasoning given therein and the conclusions arrived at. As a matter of fact, all said decision covers substantially and fully the issue under discussion in my judgment,

54. Before parting with this, it is equally important to notice the meaning of the words "provision" and "maintenance". According to Webster's Third New International Dictionary, the word "provision" means :

"a gift by will or deed to one as heir who would not be heir otherwise."

Our Supreme Court had also the occasion in *Metal Box Company of India Ltd. Vs. Their Workmen*, , to interpret the word "provision". It is stated :

"an amount set aside out of profits and other surpluses, not designed to meet a liability, contingency, commitment or diminution in value of assets to exist at the date of the balance sheet is reserve but an amount set aside out of profits and other surpluses to provide for any known liability to which the amount cannot be determined with substantial accuracy is a provision."

The word "provision", thus, means an amount set apart to meet a known liability, the amount of which cannot be decided with accuracy. The known liability u/s 3(1)(a) of a husband is to provide for the future of the divorced muslim woman. The amount is not capable of being decided with substantial accuracy. This provision, thus, is surely different and distinct from maintenance due to the Muslim divorced woman for the iddat period.

55. The word "maintenance" as per Webster's Third New International Dictionary means :

"the act of providing means of support for someone; means of subsistence; designed or adequate to maintain a living body in a stable condition without providing reserves for growth, functional change, or healing effect."

56. As seen the meaning of the words "provision" and "maintenance" is distinct and different from one another and therefore the contention that they both mean one and the same is not tenable.

57. Questions do arise as to the period to which and the amount for which the husband is liable to make a provision. In so far as the period is concerned surely it is much more beyond the iddat period and for the future of the divorced wife. As to the amount or extent of making the provision, the factors are almost similar as those that govern the fixation of maintenance. The state of condition as to the health or education of the divorced wife is a dominant factor in arriving at the extent or amount of the provision as also the period for which it is to be assessed. For instance, the divorced wife may be a simply different examples. In such and similar cases it would be doing harm to the beneficial legislation if the provision is confined to the iddat period on the ground that maintenance has got to be so. The amount or extent to which and the period for which the husband is liable to make a provision depends on the facts and circumstances of each case and there cannot be a general or common ruling on these aspects. Accordingly I am of the firm view that the maintenance contemplated by S. 3(1)(a) of the Act is limited to the iddat period while the fair and reasonable provision to be made in terms of the same section runs for the future much beyond the iddat period. mentioned in the opening paragraph, except to this extent as regards the effect and import of the term "reasonable and fair provision" in Section 3(1)(a) of the Act, I express my absolute concurrence with regard to the rest of the conclusions and the reasoning issued therefore in the judgment of my learned brother, Sardar Ali Khan, J.

"Final Order dt. 19-3-1990 by N. D. Patnaik, J.

"Following the decision of the Full Bench the petition is allowed and the order in M.C. No. 13/88 on the file of the Munsif Magistrate, Nellore is quashed.

58. Order accordingly.