Commentary on

THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986

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THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986

by

MOHD. OSMAN SHAHEED

ADVOCATE, A.P. High Court

With Foreword by

Justice SYED SHAH MOHAMMED QUADRI

FORMER JUDGE SUPREME COURT OF INDIA

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Former Judge Supreme Court
Former Chairman Authority for Advance Rulings (Income-Tax),
(Customs, Central Excise & Service Tax) and
Central Sales Tax Appellate Authority, Government of India

Dated 1st September, 2012

Foreword

"Commentary on The Muslim Women (Protection of Rights on Divorce) Act, 1986", is a recent contribution of Mr. Mohammed Osman Shaheed, Advocate, to legal libraries. He needs no introduction in the legal circles as also in political circles. He is a good Orator, a Politician and a Senior Advocate. For a long time he was Additional Public Prosecutor of the High Court of Andhra Pradesh. It is praise worthy that inspite of being so busy he has contributed many books on various topics. This recent addition reaffirms his academic interest.

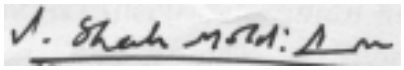
The Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short the Act) is the product of the controversial judgment of a Constitution Bench of the Hon'ble Supreme Court in Ahmed Khan v. Shah Bano, AIR 1985 SC 945 (commonly known as Shah Bano case). To give a quietus to the uproar and agitation against the said judgment by the Muslim minority, the Parliament enacted the Act to reverse that judgment inspite of fierce opposition by some members of the Parliament. Sections 3 and 4 of the Act are the key provisions. Section 3(1)(a) of the Act commences with a non-obstante clause and gives it an overriding effect over any other law for the time being in force to provide to a divorced women (defined in Section 2(a) of the Act) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The Constitutional validity of the Act fell for consideration of the Hon'ble Supreme Court in Danial Latifi and another v. Union of India, AIR 2001 SC 3958 (for short Danial Latifi case). The Constitution Bench which decided Danial Latifi's case observed, "The emphasis of the section is not on the nature of duration of any such 'provision' or 'maintenance' but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, within the iddat period". Having so observed the bench referred to the reasoning of the Shah Bano's case and concluded, "there is no reason why such provision could not take the form of the regular payment of alimony to the divorce women, though it may look ironical that the enactment intended to reverse the decision in Shah Bano's case (supra) actually codifies the very rational contained therein." While concluding it was held, "All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as

declared by this Court in Shah Bano's case (supra) without mutilating its underlying ratio. We have carefully analysed the same and came to the conclusion that the Act actually and in reality codifies what was stated in Shah Banu's case (supra)." Thus observing the Constitution Bench in Danial Latifi's case revived and reaffirmed the ratio in Shah Bano case and though the constitutional validity of the Act was upheld, in effect the Act itself was effaced.

It is submitted, with great respect, that the emphasis of Section 3(1)(a) is not on the time by which an arrangement for payment of provision and maintenance should be concluded because that was not the controversy in Shah Bano case; the real emphasis is on the duration of the liability, namely, within the iddat period in other words ending with the iddat period. The above quoted and other observations and conclusions in Danial Latifi case would lead to the inference that the Parliament either failed to give effect to its avowed object of restoring the position relating to the rights and obligations of a former Muslim husband and a divorced Muslim wife, an existing before the judgment of Supreme Court in Shah Bano case and thus had under taken a futile exercises or under the purported exercise of reversing the judgment of Supreme Court in Shah Bano case and restoring the personal law of Muslims, had indeed given legislative recognition to the ratio of the said judgment in the Shah Bano case contrary to its declared object. It is submitted that the settled proposition of the principles of interpretation of statutes is that such an intention cannot be imputed to the Parliament.

The said judgments apparently reflect the position of one of the schools of personal law, namely, "ghair muqallid" (non followers of schools of fiqh) whether they would also apply to other schools of personal law, that is, muqallid (followers of anyone of the schools of "fiqh"), because principles of none of the schools of "fiqh" were referred to much less discussed in those cases. This is a moot question and it is not an appropriate occasion to delve into such a debatable vexed question.

The author has dealt with the subject in detail. His treatment of subject would have been complete had he referred to authorities of various schools of law like Hanafi, Shafai, Maliki, Hanbali and Athna-e-Ashari etc., on the subject of maintenance and mataa payable to a divorced Muslim woman and brought out the distinction between them. I must record here that I have not gone through the various aspects this book has dealt with but having regard to the fact that the author of the book is an experienced writer on the topics of Muslim Law, I wish and hope that this book would be a welcome addition for the legal fraternity and would be of interest to the Bench and the Bar alike.



(Justice Syed Shah Mohammed Quadri)

Preface

The First divine message, which was received by the Prophet Mohammed (MPBUH) was "Iqra" (read). "Thou Creator has taught the man with His pen what the man did not know."

The literary meaning of Al-Quran is reading. So reading is the foundation of religion, a civilized society and a key to the hidden treasure of knowledge. An advocate has to read various books to get himself enlightened on various aspects of law and to put it into practice to advance the cause of justice. I hope this humble endeavour of mine would be a great help to the members of the Bar and Bench to understand the provisions of the law discussed. This book would reveal several aspects of Muslim Women (Protection of Rights on Divorce) Act 1986.

My profound thank is due to His Lordship Justice Janab Syed Shah Mohammed Quadri, former Judge of Supreme Court of India, who has spared his most valuable time to write the foreword.

While writing this book my wife Mrs. Masarrath Jahan, my son Sri Mohd. Adnan Shaheed, advocate, his wife Mrs. Nilofer Afshan advocate and my dearest colleague Mr. Alauddin Ansari advocate have rendered their valuable services for which I am thankful to them. I am also thankful to the publishers M/s. Hasin Ahmed and Waseem Ahmed.

Md. Osman Shaheed

Author

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INTRODUCTORY

Of all the creatures, we are the most eminent of all Created Beings.

Allah the Almighty bestowed upon us wisdom, sense of judgment and ability to understand good and bad, a conscience to prick us, while we step on wrong path, a power to investigate the secrets of nature, an ability to lean, a brain to memorize the events and to reproduce the same as and when required, and a power to speak.

He treats us like His children and guides us through His messengers and through his Holy books, to follow the right path as indicated by Him.

In order to understand the truth, veracity, godliness and righteousness of Islam and its teaching, one has to study the life of Prophet Mohammad (MPBUH) and His sayings (Hadiths) and follow His Sunnah, as major Islamic laws flow from these sources. One of such laws is the law relating to Marriage and Divorce. Undisputedly, we all want a civilized society. A civilized family is a foundation stone of a civilized society. A civilized family comes into existence with the union of two mankind of opposite sex. Union of two opposite sex must be acceptable to the civilized society and the relation based on such union should be respected by one and all and it should not be a sin in the eye of religion nor an offence in the parlance of criminal laws.

When two opposite sex join hands and agree to live together for the rest of their lives and to procure children with the responsibility to look after their well being and welfare and to make them as an asset of a civilized society they have to enter into a contract, an agreement or into a social binding what is commonly termed as marriage and Nikah under Islamic Law.

Nikah or marriage is not a fun. It is not a device to kill one's sexual appetite or sexual lust. It does not create a right only to own other's body. Nikah creates rights and duties both. That is the reason why Prophet Mohammad (MPBUH) said, (whose Hadith was quoted by Hazrath Abdullah Bin Masood) "Oh young men those who could fulfill the responsibilities of Nikah must perform it as it controls passion and prevents you from hankering and make you pious and one who could not fulfill the responsibilities due to lack of means should observe fasting since fasting would control the passions.

Basing on this Hadit it was further explained that "Marriage is obligatory on a Muslim whose passions cannot otherwise be restrained from committing wrongs and from hankerings after what has been prohibited and who can provide dower and maintenance. But it is not sinful for one who is continent and has no means to abstain from it, as stated in "Badaya".

The Muslim jurists have in one voice interpreted the meaning of responsibilities which arise out of the contract of Nikah, are responsibilities to provide food, clothings, shelter, dower and maintenance to wife.

At the same time the prophet (MPBUH) has informed his followers saying that,

> "No one is allowed to remain a bachelor in Islam or abstain himself from performing marriage".

So when one is ready to enter into a contract of marriage having understood his rights and obligations and one who has means to fulfill his obligations as husband, he must not be reluctant in performing this sacred duty.

Marriage doesn't cloth the husband alone with several duties or responsibilities. It simultaneously imposes several duties upon a wife too. However it is not the duty of wife to maintain her husband. On the other hand it is the duty of the husband to provide maintenance

to his wife and children, since he is made responsible to take care of his family and dependants as mention in the Quran.

> "Men are the protector & maintainers of women, because Allah has given one more (Strength) than the other & because they support them from their means". *Ref.* Ayat No.24, Surah Al-Nisa.

The word "Qawwam" as used in surah Al Nisa means one who takes care of, one who looks after the welfare (of his family) and one who is a watch dog. (Text, translate, comments by Abdullah Yousuf Ali Published by Jamiath IQWAAN_UL-QURAAN).

According to the above said injunction of Quran when a man is made responsible to look after his family and to take care of his spouse, it is his sacred and bounden duty to provide all amenities of life to his wife and children which are within his reach and could be possibly provided as per his means and social status.

It is this duty of a husband which is the subject of matter of our discussion in this book in the light of injunctions of Quran, Hadits, Sunnah and Principles of Islamic Fiqhs and more particularly in the light of the case law decided by Indian Courts of all hierarchy and with special reference to the provisions of The Muslim Women (Protection of Rights on Divorce) Act, 1986 and Rules of 1986.

MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986

[ACT No.25 of 1986]

[New Delhi, dated the 19th May, 1986]

The following Act of Parliament received the assent of the President on 19th May, 1986 and is hereby published for general information.

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.

Be it enacted by Parliament in the Thirty-seventh Year of the Republic of India as follows:

1. Short title and extent:—(1) This Act may be called the Muslim Women (Protection of Rights on Divorce) Act, 1986.

(2) It extends to the whole of Indian except of State of Jammu and Kashmir.

2. Definitions:— In this Act, unless the context otherwise requires:

(a) "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.

(b) "iddat period" means, of a divorced woman.

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

(ii) Three lunar months after her divorce, if she is not subject to menstruation and

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

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

(d) "Prescribed" means prescribed by rules made under this Act.

3. Mahar 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 to such children.

(c) An amount equal to the sum of mahar 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 or mahar or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) has not been delivered to a divorced woman on her divorce, she or any one duly authorized by her may, on her behalf, make an application to a Magistrate for an order for payments of such provision and maintenance, mahar 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 the mahar 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 filling of 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 mahar 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 the reasons 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) falls without sufficient cause to comply with the order the Magistrate may issue a warrant for levying the amount of maintenance or, mahar or dower due in the manner provided for levying fines under the Code of Criminal Procedure 1973 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 defense and the said sentence being imposed according to the provisions of the said Code.

4. Order for payment of maintenance:—(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorced woman has not 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.

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

order the parents of such divorced woman to pay maintenance to her;

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

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

5. Option to be governed by the provisions of Sections 125 to 128 of Act 2 of 1974:—If, on the date of the first hearing of the application under sub-section (2) of Section 3, a divorced 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 1973 and the file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.

Explanations :—For the purpose of this Section "date of the first hearing of the application" means the date fixed in the summons for the attendance of the respondent to the application.

6. Power to make rules :—(1) The Central Government may by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In the particular and without prejudice to the foregoing power, such rules may provide for—

(a) the form of the affidavit or other declaration in writing to be filed under Section 5.

(b) the procedure to be followed by the Magistrate in disposing of applications under this Act, including the serving of notices to the parties to such applications, dates of hearing of such applications and other matters.

(c) any other matter which is required to be or may be prescribed.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so, however, that may such modification or annulment shall be without prejudice to the validity of anything previously done under that Rule.

7. Transitional Provisions:—Every application by a divorced woman under Section 125 or under Section 127 of the Code of Criminal Procedure, 1973 pending before a Magistrate on the commencement of this Act, shall, notwithstanding anything contained in the Code and subject to the provisions of Section 5 of this Act be disposed of by such Magistrate in accordance with the provisions of this Act.

CHAPTER I

APPLICABILITY, SCOPE AND CONSTITUTIONAL VALIDITY OF THIS ENACTMENT

Synopsis

1. Applicability of the Act

The Act only applies to divorced Muslim woman and newly born children after divorce for a period of two years.[1]

2. Scope of the Act

Now it is necessary to analyse the provisions of the Act to understand the scope of the same. The preamble to the Act set out that it is an Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto. A "divorced woman who was married according to Muslim law, and has been divorced by, or has obtained divorce from her husband in accordance with Muslim law, "iddat period" is defined under Sec.2(b) of the Act to mean, in the case of a divorced woman,—

1. 2007 (6) SCC 785

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

(ii) three lunar months after her divorce, if she is not subject to menstruation; and

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

Sections 3 and 4 of the Act are the principal sections. Section 3 opens up with a *non-obstante* clause overriding all other laws and provides that a divorced woman shall be entitled to—

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

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

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

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

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

Section 4 of the Act provides that, with an overriding clause as to what is stated earlier in the Act or in any other law for the time being in force, where the Magistrate is satisfied that a divorced woman

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

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

A reading of the Act will indicate that it codifies and regulates the obligations due to a Muslim divorcee woman by putting them outside the scope of Section 125 Cr.P.C as the "divorced woman" has been defined as "Muslim woman who was married according to Muslim law and has been divorced by or has obtained divorce form her husband in accordance with the Muslim law". But the Act does not

apply to a Muslim woman whose marriage is solemnized either under the Indian Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either under the Indian Divorce Act, 1869 or the Indian Special Marriage Act, 1954. The Act does apply to the deserted and separated Muslim wives. The maintenance under the Act is to be paid by the husband for the duration of the iddat period and this obligation does not extend beyond the period of iddat. Once the relationship with the husband has come to an end with expiry of the iddat period, the responsibility devolves upon the relatives of the divorcee. The Act follows Muslim personal law in determining which relatives are responsible under which circumstances. If there are no relatives, or no relatives are able to support the divorcee, then the court can order the State Wakf Board to pay the maintenance.

Section 3(1) of the Act provides that a divorced woman shall be entitled to have from her husband, a reasonable and fair provision which is to be made and paid to her within the iddat period. Under Section 3(2) the Muslim divorcee can file an application before a Magistrate if the former husband has not paid to her a reasonable and fair provision and maintenance or mahar due to her or has not delivered the properties given to her before or at the time of marriage by her relatives, or friends, or the husband or any of his relatives of friends. Section 3(3) provides for procedure wherein the Magistrate can pass an order directing the former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may think fit and proper having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of her former husband. The judicial enforceability of the Muslim divorced woman's right to provision and maintenance under Section 3(1)(a) of the Act has been subjected to the condition of the husband having sufficient means which, strictly speaking, is contrary to the principles of Muslim law as the liability to pay maintenance during the iddat period is unconditional and cannot be circumscribed by the financial means of the husband.

A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provisions for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood after the divorce and, therefore, the word "provision" indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for

meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles. The expression "within" should be read as "during" or "for" and this cannot be done because words cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Sec.3(3) but nowhere has Parliament provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

3. Constitutional Validity of the Act

This Act was challenged in the Apex Court on various grounds *inter alia* that it is constitutionally invalid. The constitutional validity of this Act was at length considered in the case of *Daniel Latif vs. Union of India*,[1] which is a landmark judgment. The same is reproduced below:

JUDGEMENT

The Constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as "the Act") is in challenge before us in these cases.

In the case of *Ahmed Khan vs. Shah Bano*, AIR 1985 SC 945, the principal question for consideration before this Court was the interpretation of Sec.127(3)(b) Cr.P.C that where a Muslim woman had been divorced by her husband and paid her mahar, would it indemnify the husband from his obligation under the provisions of Sec.125 Cr.P.C. A five-Judge Bench of this court reiterated that the Code of Criminal Procedure controls the proceedings in such matters and overrides the personal law of the parties. If there was conflict between the terms of the Code and the rights and obligations of the individuals, the former would prevail. This Court pointed out that mahar is more closely connected with marriage than with divorce through mahar or a significant portion of it, is usually

1. AIR 2001 SC 3958

payable at the time the marriage is dissolved, whether by death or divorce. This fact is relevant in the context of Sec.127(3)(b) Cr.P.C. Therefore, this Court held that it is a sum payable on divorce within the meaning of Section 127(3)(b) Cr.P.C and held that mahar is such a sum which cannot ipso facto absolve the husband's liability under the Act.

It was next considered whether the amount of mahar constitutes a reasonable alternative to the maintenance order. If mahar is not such a sum, it cannot absolve the husband from the rigour of Sec.127(3)(b) Cr.P.C but even in that case, mahar is part of the resources available to the woman and will be taken into account in considering her eligibility for a maintenance order and the quantum of maintenance. Thus this court concluded that the divorced women were entitled to apply for maintenance orders against their former husbands U/s.125 Cr.P.C and such applications were not barred U/s.127(3)(b) Cr.P.C. The husband had based his entire case on the claim to be excluded from the operation of Sec.125 Cr.P.C on the ground that Muslim law exempted him from any responsibility for his divorced wife beyond payment of any mahar due to her and an amount to cover maintenance during the iddat period and Sec.127(3)(b) Cr.P.C conferred statutory recognition on this principle. Several Muslim organizations, which intervened in the matter, also addressed arguments. Some of the Muslim social workers who appeared as interveners in the case supported the wife, brought in question the issue of "mata" contending that Muslim law entitled a Muslim divorced woman to claim provision for maintenance from her husband after the iddat period. Thus, the issue before this court was: the husband was claiming exemption on the basis of Sec.127(3)(b) Cr.P.C on the ground that he had given to his wife the whole of the sum which, under the Muslim law applicable to the parties, was payable on such divorce while the woman contended that he had not paid the whole of the sum, he had paid only the mahar and iddat maintenance and had not provided the mata i.e., provision or maintenance referred to in *The Holy Quran*, Chapter II, Sura 241. This Court, after referring to the various textbooks on Muslim law, held that the divorced wife's right to maintenance ceased on expiration of iddat period but this court proceeded to observe that the general propositions reflected in those statements did not deal with the special situation where the

divorced wife was unable to maintain herself. In such cases, it was stated that it would be not only incorrect but unjust to extend the scope of the statements referred to in those textbooks in which a divorced wife is unable to maintain herself and opined that the application of those statements of law must be restricted to that class of cases in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. This Court concluded that these Aiyats (*The Holy Quran*, Chapter II, Suras 241-42) leave no doubt that *The Holy Quran* imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teaching of *The Holy Quran*. On this note, this Court concluded its judgment.

There was a big uproar thereafter and Parliament enacted the Act perhaps, with the intention of making the decision in *Shah Bano Case*, AIR 1985 SC 945 in effective.

The Statement of Objects and reasons to the Bill, which resulted in the Act, reads as follows:

"The Supreme Court, *Mohd. Ahmed Khan vs. Shah Bano Begum & others*, AIR 1985 SC 945, has held that although the Muslim law limits the husband's liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance the situation envisaged by Sec.125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect and unjust to extend the above principle to Muslim law to cases in which the divorced wife is unable to maintain herself. "The Court, therefore, came to the conclusion that if the divorced wife is able to maintain herself, the husband's liability ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse of Sec.125 of Code of Criminal Procedure."

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

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

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

The object of enacting the Act, as stated in the Statement of Objects and Reasons to the Act, is that this court, in *Shah Bano* Case (supra) held that Muslim law limits the husband's liability to provide the maintenance of the divorced wife to the period of iddat, but it does not contemplate or countenance the situation envisaged by Sec.125 of the Code of Criminal Procedure, 1973 and, therefore, 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.

As held in *Shah Bano Case*, (supra), 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 but if she is unable to maintain herself after the period of iddat, she is entitled to have recourse to Sec.125 Cr.P.C. Thus it was held that there is no conflict between the provisions of Sec.125 Cr.P.C and those of the Muslim personal law on the question of the Muslim husband's obligation to provide maintenance to his divorced wife, who is unable to maintain herself. This view is a reiteration of what is stated in two other decisions earlier rendered by this Court in *Bai Tahira vs. Ali Hussain Fidaalli Chothia*, (1979) 2 SCC 316: 1979 SCC (Cri) 473 and *Fuzlunbi vs. K.Khader Vali*, (1980) 4 SCC 125: 1980 SCC (Cri) 916.

Smt. *Kapila Hingorani* and Smt. *Indira Jaising* raised the following contentions in support of the petitioners and they are summarized as follows:

1. Muslim marriage is a contract and an element of consideration is necessary by way of mahar or dower and absence of consideration will discharge the marriage. On the other hand, Sec.125 Cr.P.C has been enacted as a matter of public policy.

2. To enable a divorced wife, who is unable to maintain herself, to seek from her husband, who is having sufficient means and neglects or refuses to maintain her, payment of maintenance at a monthly rate not exceeding Rs.500. The expression 'wife" includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. The religion professed by a spouse or the spouses has no relevance in the scheme of these provisions whether they are Hindus, Muslims, Christians or Parsis, pagans or heathens. It is submitted that Sec.125 Cr.P.C is part of the Code of Criminal Procedure and not a civil law, which defines and governs right and obligations of the parties belonging to a particular religion like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Sec.125 Cr.P.C, it is submitted, was enacted in order to provide a quick and summary remedy. The basis there being, neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves, these provisions have been

made and the moral edict of the law and morality cannot be clubbed with religion.

3. The argument is that the rationale of Sec.125 Cr.P.C is to offset or to meet a situation where a divorced wife is likely to be led into destitution or vagrancy. Sec.125 Cr.P.C is enacted to prevent the same in furtherance of the concept of social justice embodied in Article 21 of the Constitution.

4. It is therefore, submitted that this Court will have to examine the questions raised before us not on the basis of personal law but on the basis that Sec.125 Cr.P.C is a provision made in respect of women belonging to all religions and exclusion of Muslim women from the same results in discrimination between women and women. Apart from the gender injustice caused in the contrary, this discrimination further leads to a monstrous proposition of nullifying a law declared by this Court in *Shah Bano Case* (supra). Thus there is a violation of not only equality before law but also equal protection of laws and inherent infringement of Article 21 as well as basic human values. If the object of Sec.125 Cr.P.C to avoid vagrancy, the remedy there under cannot be denied to Muslim women.

5. The Act is un-Islamic, unconstitutional and it has the potential of suffocating the Muslim woman and it undermines the secular character, which is the basic feature of the Constitution; that there is no rhyme or reason to deprive the Muslim women from the applicability of the provisions of Sec.125 Cr.P.C and consequently, the present Act must be held to be discriminatory and violative of Article 14 of the Constitution; that excluding the application of Sec.125 Cr.P.C is violative of Articles 14 & 21 of the Constitution; that the conferment of power on the Magistrate under sub-section (2) of Section 3 & 4 of the Act is different from the right of a Muslim woman-like any other woman in the country to avail of the remedies U/s.125 Cr.P.C and such deprivement would make the Act unconstitutional, as there is no nexus to deprive a Muslim woman from availing of the remedies available U/s.125 Cr.P.C, notwithstanding the fact that the conditions precedent for availing of the said remedies are satisfied.

The learned Solicitor-General, who appeared for the Union of India submitted that when a question of maintenance arises

which forms part of the personal law of a community, what is fair and reasonable is a question of fact in that context. U/s.3 of the Act, it is provided that a reasonable and fair provision and maintenance to be made and paid by her former husband within the iddat period would make it clear and it cannot be for life but would only be for the period of iddat and when the fact has clearly been stated in the provision, the question of interpretation as to whether it is for life or for the period of iddat would not arise. Challenge raised in this petition is de hors the personal law. Personal law is a legitimate basis for discrimination, if at all, and, therefore, does not offend Article 14 of the Constitution. If the legislature, as a matter of policy, wants to apply Sec.125 Cr.P.C to Muslims, it could also be stated that the same legislature can, by implication, withdraw such application and make some other provision in that regard. Parliament can amend Sec.125 Cr.P.C so as to exclude them and apply personal law and the policy of Sec.125 Cr.P.C is not to create a right of maintenance de hors the personal law. He further submitted that in *Shah Bano Case* (supra) it has been held that a divorced woman is entitled to maintenance even after the iddat period from the husband and that is how Parliament also understood the ratio of that decision. To overcome the ratio of the said decision, the present Act has been enacted and Sec.3(1)(a) is not in discord with the personal law.

Shri *Y.H. Muchhala*, learned Senior Advocate appearing for the All India Muslim Personal Law Board submitted that the main object of the Act is to undo *Shah Bano Case* (supra). He submitted that this Court has hazarded the interpretation of an unfamiliar language in relation to religious tenets and such a course is not safe as has been made clear by *Aga Mahomed Jaffer Bindaneem vs. Koolsom Bee Bee*, (1896-97) 24 IA 196: ILR 25 Cal 9 (PC). He submitted that in interpreting Sec.3(1)(a) of the Act, the expressions "provision" and "maintenance" are clearly the same and not different as has been held by some of the High Courts. He contended that the aim of the Act is not to penalize the husband but to avoid vagrancy and in this context Sec.4 of the Act is good enough to take care of such a situation and he, after making reference to several works on interpretation and religious thoughts as applicable to Muslims, submitted that the social ethos of Muslim society spreads a wider net to take care of Muslim divorced

wife and not at all dependent on the husband. He adverted to the works of religious thoughts by Sir Syed Ahmad Khan and Bashir Ahmad, published from Lahore in 1975 at p. 735. He also referred to the English translation of *The Holy Quran* to explain the meaning of "gift" in Sura 241. In conclusion, he submitted that the interpretation to be placed on the enactment should be in consonance with Muslim personal law and also meet a situation of vagrancy of Muslim divorced wife even when there is a denial of the remedy provided under Section 125 Cr.P.C and such a course would not lead to vagrancy since provisions have been made in the Act. This Court will have to bear in mind the social ethos of Muslims, which is different and the enactment is consistent with the law and justice.

It was further contended on behalf of the respondents that Parliament enacted the impugned Act, respecting the personal law of Muslims and that itself is a legitimate basis for making a differentiation; that a separate law for a community on the basis of personal law applicable to such community, cannot be held to be discriminatory; that the personal law is now being continued by a legislative enactment and the entire policy behind the Act is not to confer a right of maintenance, unrelated to the personal law; that the object of the Act itself was to preserve the personal law and prevent inroad into the same; that the Act aims to prevent the vagaries and not to make a Muslim woman destitute and at the same time, not to penalize the husband; that the impugned Act resolves all issues, bearing in mind the personal law of the Muslim community and the fact the benefits of Sec.125 Cr.P.C have not been extended to Muslim women, would not necessarily lead to a conclusion that there is no provision to protect the Muslim women from vagaries (sic vagrancy) and from being a destitute; that therefore, the Act is not invalid or unconstitutional.

On behalf of the All-India Muslim Persona Law Board, certain other contentions have also been advanced identical to those advanced by the other authorities and their submission is that the interpretation placed on the Arabic word "mata" by this Court in *Shah Bano Case* (supra) is incorrect and submitted that the maintenance which includes the provision for residence during the iddat period is the obligation of the

husband but such provision should be construed synonymously with the religious tenets and, so construed, the expression would only include the right of residence of a Muslim divorced wife during the iddat period and also during the extended period U/s.3(1)(a) of the Act and thus reiterated various other contentions advanced on behalf of others and they have also referred to several opinions expressed in various textbooks, such as—

1. The Turjuman al-Quran by Maulana Abdul Kalam Azad, translated into English by Dr Syed Abdul Latif;

2. Persian translation of *The Quran* by Shah Waliullah Dahlavi;

3. Al-Manar Commentary on The Quran (Arabic);

4. Al-Isaba by Ibne Hajar Asqualani (Part 2); *Siyar Alam-in—Nubla* by Shamsuddin Mohd. Bin Ahmed Bin Usman Az-Zahabi;

5. Al-Maratu Bayn Al-Fiqha Wa Al *Qanun* by Dr Mustafa-as-Sabayi;

6. Al-Jamil ahkam-il Al-Quran by Abu Abdullah Mohammad Bin Ahmed Al Ansari Al-Qurtubi;

7. Commentary on The Quran by Baidavi (Arabic);

8. Rooh-ul-Bayan (Arabic) by Ismail Haqqui Affendi;

9. Al Muhalla by Ibne Hazm (Arabic);

10. Al-Ahwalus Shakhsiah (the personal law) by Mohammad Abu Zuhra Darul Fikrul Arabi.

On the basis of the aforementioned textbooks, it is contended that the view taken in *Shah Bano Case* (supra) on the expression "mata" is not correct and the whole object of the enactment has been to nullify the effect of *Shah Bano Case* (supra) so as to exclude the application of the provision of Sec.125 Cr.P.C, however, giving recognition to the personal law as stated in Sec's.3 & 4 of the Act. As stated earlier, the interpretation of the provisions will have to be made bearing in mind the social ethos of the Muslims and there should not be erosion of the personal law.

On behalf of the Islamic Shariat Board, it is submitted that except for Mr. M.Asad and Dr Mustafa-as-Sabayi no author subscribed to the view that Verse 241 of Chapter II of *The Holy Quran* casts on obligation on a former husband to pay maintenance to the Muslim divorced wife beyond the iddat period. It is submitted that Mr. M.Asad's translation and commentary has been held to be unauthentic and unreliable and has been subscribed by the Islamic World League only. It is submitted that Dr Mustafa-as-Sabayi is a well-known author in Arabic but his field was history and literature and not the Muslim law. It was submitted that neither they are theologists nor jurists in terms of Muslim law. It is contended that this Court wrongly relied upon Verse 241 of Chapter II of *The Holy Quran* and the decree in this regard is to be referred to verse 236 of Chapter II which makes paying "mata" as obligatory for such divorcees who were not touched before divorce and whose mahar was not stipulated. It is submitted that such divorcees do not have to observe the iddat period and hence not entitled to any maintenance. Thus the obligation for "mata" has been imposed which is a one-time transaction related to the capacity of the former husband. The impugned Act has no application to this type of case. On the basis of certain texts, it is contended that the expression "mata" which according to different schools of Muslim law, is obligatory only in a typical case of a divorce before consummation to the woman whose mahar was not stipulated and deals with obligatory rights of maintenance of observing the iddat period or for breast-feeding the child. Thereafter, various other contentions were raised on behalf of the Islamic Shariat Board as to why the views expressed by different authors should not be accepted.

Dr *A.M. Singhvi*, learned Senior Advocate who appeared for the National Commission for Women submitted that the interpretation placed by the decisions of the Gujarat, Bombay, Kerala and the minority view of the Andhra Pradesh High Courts should be accepted by us. As regards the constitutional validity of the Act, he submitted that if the interpretation of Sec.3 of the Act as stated later in the course of this judgment is not acceptable then the consequence would be that a Muslim divorced wife is permanently rendered without remedy in so far as her former husband is concerned for the purpose of her survival after the iddat period. Such relief is neither

available U/s.125 Cr.P.C nor is it properly compensated by the provision made in Sec.4 of the Act. He contended that the remedy provided U/s.4 of he Act is illusory inasmuch as – firstly, she cannot get sustenance from the parties who were not only strangers to the marital relationship which led to divorce; secondly, Wakf Boards would usually not have the means to support such destitute women since they are themselves perennially starved of funds and thirdly, the potential legatees of a destitute woman would either be too young or too old as to be able to extend requisite support. Therefore, realistic appreciation of the matter will have to be taken and this provision will have to be decided on the touch stone of Articles 14, 15 and also Article 21 of the Constitution and thus the denial of right to life and liberty is exasperated by the fact that it operates oppressively, unequally and unreasonably only against one class of women. While Sec.5 of the Act makes the availability and applicability of the remedy as provided as Sec.125 Cr.P.C dependent upon the whim, caprice, choice and option of the husband of the Muslim divorcee who in the first place is sought to be excluded from the ambit of Sec.3 of the post-iddat period and, therefore, submitted that this provision will have to be held unconstitutional.

This Court in *Shah Bano Case* (supra) held that although Muslim personal law limits the husband's liability to provide maintenance for his divorced wife to the period of iddat, it does not contemplate a situation envisaged by Sec.125 Cr.P.C of 1973. The Court held that it would not be incorrect or unjustified to extend the above principle of Muslim law to cases in which a divorced wife is unable to maintain herself and, therefore, the Court 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 recourse to Sec.125 Cr.P.C. This decision having imposed obligations as to the liability of the Muslim husband to pay maintenance to his divorcee wife, Parliament endorsed by the Act the right of the Muslim woman to be paid maintenance after the divorce and to protect her rights.

The learned Counsel have also raised certain incidental questions arising in these matters to the following effect:

(1) Whether the husbands who had not complied with the orders passed prior to enactments and were in arrears of payments could escape from their obligation on the basis of the Act, or in other words, whether the Act is retrospective in effect ?

(2) Whether Family Courts have jurisdiction to deicide the issues under the Act ?

(3) What is the extent to which the Wakf Board is liable under the Act ?

The learned counsel for the parties have elaborately argued on a very wide canvas. Since we are only concerned in this Bench with the constitutional validity of the provisions of the Act, we will consider only such questions as are germane to this aspect. We will decide only the question of constitutional validity of the Act and relegate the matters when other issues arise to be dealt with the respective Benches of this Court either in appeal or special leave petitions or writ petitions.

In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated, both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life – a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognized by persons belonging to all religions and it is difficult to

perceive the Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the Wakf Boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question.

The important section in the Act is Sec.3 which provides a divorced woman is entitled to obtain from her former husband "maintenance", "provision" and "mahar", and to recover from his possession her wedding presents and dowry and authorizes the Magistrate to order payment or restoration of these sums or properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wording of Sec.3 of the Act appear to indicate that the husband has two separate and distinct obligations: (1) to make a "reasonable and fair provision" for his divorced wife; and (2) to provide "maintenance" for her. The emphasis of the section is not on the nature or duration of any such "provision" or "maintenance", but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, "within the iddat period". If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both "reasonable and fair provision" and "maintenance" by paying these amounts in a lump sum to his wife, in addition to having paid his wife's mahar and restored her dowry as per Sec's.3(1)(c) & 3(1)(d) of the Act. Precisely, the point that arose for consideration is *Shah Bano Case* (supra) was that the husband had not made a "reasonable and fair provision" for his divorced wife even if he had paid the amount agreed as mahar half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her U/s.125 Cr.P.C. This

position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are : a reasonable and fair provision and maintenance to be made and paid" as provided U/s.3(1)(a) of the Act and these expressions cover different things, firstly, by the use of two different verbs – "to be made and paid to her within the iddat period" it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Sec.4 of the Act, which empowers the Magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to "provision". Obviously, the right to have "a fair and reasonable provision" in her favour is a right enforceable only against the woman's former husband, and in addition to what he is obliged to pay as "maintenance"; thirdly, the words of *The Holy Quran*, as translated by Yusuf Ali of "mata" as "maintenance" though may be incorrect and that other translations employed the word "provision", this Court in *Shah Bano Case* (supra) dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether "mata" was rendered "maintenance" or "provision", there could no pretence that the husband in *Shah Bano Case* had provided anything at all by way of "mata" to his divorced wife. The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to "mata" is only a single or onetime transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word "provision" in Sec.3(1)(a) of the Act incorporates "mata" as a right of the divorced Muslim woman distinct from and in addition to mahar and maintenance for the iddat period, also enables " a reasonable and fair provision" and " a reasonable and fair provision" as provided U/s.3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and the Court further observed that there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in *Shah Bano Case* (supra), actually codifies the very rationale contained therein.

A comparison of these provisions with Sec.125 Cr.P.C will make it clear that requirements provided in Sec.125 and the

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

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

As on date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in *Shah Bano Case* (supra). In this case to find out the personal law of Muslims with regard to divorced women's rights, the starting point should be *Shah Bano Case* (supra) and not the original texts or any other material – all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering *The Holy Quran*, and other commentaries or other texts. When a constitution Bench of this Court analyzed Suras 241-42 of Chapter II of *The Holy Quran* and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in *Shah Bano Case* (supra) without mutilating its underlying ratio. We have carefully analyzed the same and come to the conclusion that the Act actually and in reality codifies what was stated in *Shah Bano Case* (supra). The learned

Solicitor-General contended that what has been stated in the objects and reasons in the Bill leading to the Act is a fact and what we should presume to be correct. We have analyzed the facts and law in *Shah Bano Case*[1] and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the legislature took note of certain facts in enacting the law will not be of much materiality.

In *Shah Bano Case* (supra) this Court has clearly explained as to the rationale behind Sec.125 Cr.P.C to make provision for maintenance to be paid to a divorced Muslim wife and this is clearly to avoid vagrancy or destitution on the part of a Muslim woman. The contention put forth on behalf of the Muslim organizations who are interveners before us is that under the Act, vagrancy or destitution is sought to be avoided but not by punishing the erring husband, if at all, but by providing for maintenance through others. If for any reason the interpretation placed by us on the language of Sec's.3(1)(a) & 4 of the Act is not acceptable, we will have to examine the effect of the provisions as they stand, that is, a Muslim woman will not be entitled to maintenance from her husband after the period of iddat once the talaq is pronounced and, if at all, thereafter maintenance could only be recovered from the various persons mentioned in Section 4 of the Wakf Act. This Court in *Olga Tellis vs. Bombay Municipal Corporation*, (1985) 3 SCC 545 and *Maneka Gandhi (v) Union of India*, (1978) 1 SCC 248 held that the concept of "right to life and personal liberty" guaranteed under Article 21 of the Constitution would include the "right to live with dignity". Before the Act, a Muslim woman who was divorced by her husband was granted a right to maintenance from her husband under the provisions of Sec.125 Cr.P.C until she remarry and such a right, if deprived, would not be reasonable, just and fair. Thus the provisions of the Act depriving the divorced Muslim women of such a right to maintenance from her husband and providing for her maintenance to be paid by the former husband only for the period of iddat and thereafter to make her run from pillar to post in search of her relatives one after the other and ultimately to knock at the doors of the Wakf Board does not appear to be reasonable and fair substitute of the provisions of Sec.125 Cr.P.C. Such deprivation of the divorced Muslim women of their right to maintenance

from their former husbands under the beneficial provisions of the Code of Criminal Procedure which are otherwise available to all other women in India cannot be stated to have been effected by a reasonable, right, just and fair law and, if these provisions are less beneficial than the provisions of Chapter IX of the Code of Criminal Procedure, a divorced Muslim woman has obviously been unreasonably discriminated and got out of the protection of the provisions of the general law as indicated under the Code which are available to Hindu, Buddhist, Jain, Parsi or Christian women or women belonging to any other community. The provisions prima facie, therefore, appear to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and also violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion as the Act would obviously apply to Muslim divorced women only and solely on the ground of their belonging to the Muslim religion. It is well settled that on a rule of construction, a given statute will become "ultra vires" or "unconstitutional" and, therefore, void, whereas on another construction which is permissible, the statute remains effective and operative the court will prefer the latter on the ground that the legislature does not intend to enact unconstitutional laws. We think, the latter interpretation should be accepted and, therefore, the interpretation placed by us results in upholding the validity of the Act. It is well settled that when by appropriate reading of an enactment the validity of the Act can be upheld, such interpretation is accepted by courts and not the other way round.

The learned Counsel appearing for the Muslim organizations contended after referring to various passages from the text books which we have adverted to earlier to state that the law is very clear that a divorced Muslim woman is entitled to maintenance only up to the stage of iddat and not thereafter. What is to be provided by way of mata is only a benevolent provision to be made in case of a divorced Muslim woman who is unable to maintain herself and too by way of charity or kindness on the part of her husband and not as a result of her right flowing to the divorced wife. The effect of various interpretations placed on Suras 241 & 242 of Chapter II of *The Holy Quran* has been referred to in *Shah Bano Case* (supra). *Shah Bano Case* (supra), clearly enunciated what the

present law would be. It made a distinction between the provisions to be made and the maintenance to be paid. It was noticed that the maintenance is payable only up to the stage of iddat and this provision is applicable in case of normal circumstances. While in case of a divorced Muslim woman who is unable to maintain herself, she is entitled to get mata. That is the basis on which the Bench of five judges of this court interpreted the various texts and held so. If that is the legal position, we do not think, we can state any other position is possible nor are we to start on a clean slate after having forgotten the historical background of the enactment. The enactment though purports to overcome the view expressed in *Shah Bano Case* (supra) in relation to a divorced Muslim woman getting something by way of maintenance in the nature of mata is indeed statutorily recognized by making provision under the Act for the purpose of the "maintenance" but also for "provision". When these two expressions have been used by the enactment, which obviously means that the legislature did not intend to obliterate the meaning attributed to these two expressions by this Court in *Shah Bano Case* (supra). Therefore, we are of the view that the contentions advanced on behalf of the parties to the contrary cannot be sustained.

In *Arab Ahemadhia Abdulla vs. Arab Bail Mohumuna Saiyadbhai*, (1979) 2 SCC 316: 1979 SCC (Cri) 916, *Ali vs. Sufaira*, AIR 1988 Guj 141: (1998) 1 Guj LH 294, *K. Kunhammed Haji vs. K. Amina*, (1988) 3 Crimes 147 (Ker), *K. Zunaideen vs. Ameena Begum*, 1995 Cri LJ 3371 (Ker), *Karim Abdul Rehman Shaikh vs. Shehnaz Karim Shaikh*, 2000 Cri LJ 3560 (Bom) (FB) and *Jaitunbi Mubarak Shaikh vs. MubarakFakruddin Shaikh*, (1999) 3 Mah LJ 694, while interpreting the provision of Sec's.3(1)(a) & 4 of the Act, it is held that a divorced Muslim woman is entitled to a fair and reasonable provision for her future being made by her former husband which must include maintenance for the future extending beyond the iddat period. It was held that the liability of the former husband to make a reasonable and fair provision U/s.3(1)(a) of the Act is not restricted only for the period of iddat but that divorced Muslim woman is entitled to a reasonable and fair provision for her future being made by her former husband and also to maintenance being paid to her for the iddat period. A lot of emphasis was laid on the

words "made" and 'paid" and were construed to mean not only to make provision for the iddat period but also to make a reasonable and fair provision for her future. A Full Bench of the Punjab and Haryana High Court in *Kaka vs. Hassan Bano*, (1998) 2 DMC 85 (P&H) (FB), has taken the view that U/s.3(1)(a) of the Act a divorced Muslim woman can claim maintenance which is not restricted to the iddat period. To the contrary, it has been held that it is not open to the wife to claim fair and reasonable provision for the future in addition to what she had already received at the time of her divorce; that the liability of the husband is limited for the period of iddat and thereafter if she is unable to maintain herself, she has to approach her relatives or the Wakf Board, by majority decisions in *Usman Khan Bahamani vs. Fathimunnisa Begum*, 1990 Cri LJ 1364: AIR 1990 AP 225 (FB), *Abdul Rashid vs. Sultana Begum*, 1992 Cri LJ 76 (Cal), *Abdul Haq vs. Yasmin Talat*, 1998 Cri LJ 3433 (MP) and *Mohd. Marahim vs. Raiza Begum*, (1993) 1 DMC 60. Thus preponderance of judicial opinion is in favour of what we have concluded in the interpretation of Sec.3 of the Act. The decisions of the High Courts refereed to herein that are contrary to our decision stand overruled.

While upholding the validity of the Act, we may sum up our conclusions:

(1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Sec.3(1)(a) of the Act.

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

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

Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.

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

The validity of this Act was also challenged by one *Nayeem Khan*[1] contending that it is unconstitutional. The Division Bench of A.P. High Court in its elaborate and well considered judgment reported in 2001 (4) ALT 666, held that, "it is not therefore correct to content that the provisions of the Act of 1986 Act are unconstitutional".

4. Whether the Act is Prospective or Retrospective

The question regarding prospective effect of the Act fell to the consideration of the High Court of Bombay and while answering the question in the case of *Mahaboobkhan vs. Praveen Banu* the said court delivered a decision for far reading fact, which runs as follows:

JUDGEMENT

Is the Muslim Women (Protection of Rights on Divorce) Act, 1986 (the Act) retrospective in operation is the point that arises in this application. Following is the factual back-ground:

Factual Matrix of the case.

The applicant *Mahaboobkhan* married the non-applicant Praveenbanu on 25th April, 1984. Both are Muslims and were married according to Muslim law. There was a divorce between the two on 8th January, 1985. *Praveenbanu* applied for maintenance U/s.125 Cr.P.C. On 25th January, 1985 in the Court of Judicial Magistrate First Class, Luxettipet (A.P.), where the marriage was solemnized. By order dated 31st January, 1985 she was granted maintenance at the rate of Rs.250/- P.M. from the date of the application till the circumstances vary. She filed an application in the Court of Judicial Magistrate, First Class, Wani (M.S) (where *Mahaboob Khan* resides) under sub-section (3) of Sec.125 r/w Sec.120 Cr.P.C. for issuance of a distress warrant for recovery of maintenance for the period 25th January, 1985 till 21st April,

1. 2001 (4) ALT 666

1986 along with costs amounting to Rs.100/-. The said application was resisted by *Mahaboobkhan* vide reply dated 16th July, 1986 on the ground that the Act which brought into force w.e.f. 19th May, 1986 has obliterated the proceedings U/s.125 Cr.P.C. and the only permissible relief for maintenance to a Muslim divorced woman thereafter was in terms of the provisions of the Act. The learned Judicial Magistrate, Wani overruled the objection on the ground that the order of maintenance U/s.125 Cr.P.C was passed prior to the commencement of the Act, which does not have retrospective effect and, therefore, the husband *Mahaboobkhan* was obliged to comply with the order of maintenance dated 31st January, 1986. The said order overruling the objection was challenged before the Additional Sessions Judge, Yavatmal, who was pleased to maintain the order impugned. The present application challenges the maintainability of the application U/s.125(3) Cr.P.C dated 14th May, 1986 on the ground that its continuation is an abuse of the process of the Court.

In deciding the question of retrospectively and the applicability of the Act to pending proceedings U/s.125(3) Cr.P.C., on the date of the commencement of the Act, it will be necessary to examine not only the general scheme and the intent but also the legislative back-ground. I will first deal with the back-ground. In two decisions, (*Bai Tahira vs. Ali Hussain Fissali Chothia and another*) A.I.R. 1979 S.C. 362: 1 M.C. 402 (S.C.) and (*Fuzlunbi vs. Khader Vali and another*) A.I.R. 1980, S.C. 1730: 1 M.C. 523 (S.C) the Supreme Court held that Sec.125 Cr.P.C applied to every divorcee-woman and no exception could be carved out for a divorced Muslim wife, despite provisions of Sec's.127(3)(b), Cr.P.C and Muslim Personal Law. Soundness of this view was doubted by a Division Bench when the famous matter of (*Mohd. Ahmed Khan vs. Shah Bano Begum and others*) A.I.R. 1985 S.C. 945 came up for hearing before the said Bench. The matter was referred to a larger Bench by making the following order: as this case involves substantial questions of law of far-reaching consequences, we feel that the decisions of this Court in (*Bai Tahira vs. Ali Hussian Fidaali Chothia and Fuzlunbi vs. V.K. Khader Vali*) require consideration because, in our opinion, they are not only in direct contravention of the plain and unamniguous languages of Sec.127(3)(b) of the Code of Criminal Procedure,

1973 which far from overriding the Muslim law on the subject protects and applies the same in case where a wife has been divorced by the husband and the dower specified has been paid and the periods of iddat has been observed. The decision also appears to us to be against the fundamental concept of divorce by the husband and its consequences under the Muslim law which has been expressly protected by Sec.2 of the Muslim Personal Law (Shariat) Application Act, 1937 an Act which was not noticed by the aforesaid decisions. We, therefore, direct the matter may be placed before the Hon'ble Chief Justice for being heard by a larger Bench consisting of more than three Judges. In view of the public importance of the point raised, a Bench of five learned Judges heard the matter and held that (i) even according to his personal law, a Muslim husband is under an obligation to provide a maintenance beyond the period of iddat to his divorced wife who is unable to maintain herself and that there was no conflict between the two laws on the subject and (ii) even if there is any conflict U/s.125 Cr.P.C will have overriding effect.

This decision generated great controversy as to the obligation of a Muslim husband to maintain his divorced wife who is unable to maintain herself beyond iddat period. A section of Muslim population strongly felt that the Supreme Court has not correctly interpreted the Muslim Personal Law. The Act has been made to specify the rights to which the Muslim divorced woman is entitled to at the time of divorce and to protect her interests. Here are the subjects and reasons attached to the relevant bill introduced in the Parliament. The Supreme Court, in *Mohd. Ahmed Khan vs. Shah Bano* Begum and others has held that although the Muslim law limits the husbands liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance in the situation envisaged by Sec.125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim law to cases in which the divorced wife is unable to maintain herself. The Court, therefore, came to the conclusion that if the divorced wife is able to maintain herself the husbands liability ceases with the expiration of the period of iddat, but she is unable to maintain herself after the period of iddat, she is entitled to

have resource to Sec.125 of Code of Criminal Procedure. The decision has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interests. The Bill accordingly provides for the following among other things, namely :- (a) a Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period of iddat, by her former husband and in case, she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extended to a period of two years from the dates of birth of the children. She will also be entitled to mahar or dower and all the properties given to her by her relative, friends husband and the husbands relatives. If the above benefits are not given to her at the time of divorce, she is entitled to apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of mahar or dower or the delivery of the properties; (b) where a Muslim divorced woman is unable to maintain herself after the period of iddat, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death accordingly to Muslim law in the proportions in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where a divorced woman has no relatives or such relatives any one of them has not enough means to pay the maintenance of the other relatives who have been asked to pay the shares of the defaulting relatives also do not have the means to pay the shares of the defaulting relatives the Magistrate would order the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay.

The Act has barely 7 Sections. Sec.2 defines *inter alia* the terms divorced woman iddat period Magistrate. Sec.3(1), which is substantive in character states that notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to (a) reasonable

and fair provision and maintenance to be made and paid to her within the iddat period by her former husband; (b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made or paid by her former husband for a period of two years from the respective dates of birth of such children; (c) an amount equal to the sum or mahar or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and (d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends. Sub-sections (2) & (3) of Sec.3 are procedural. An application can be made to a Magistrate for an order of payment of dues under sub-section (1) of Sec (3). Sub-section (4) deals with the subject of execution of the order of payment. It is pari materia with Sec.125(3) Cr.P.C and reads as under: 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 mahar or dower due in the manner provided for levying fine under the Code of the Criminal Procedure, 1973, (2 of 1974) and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code. Sec.4(1) deals with the order for payment of maintenance to a divorced woman who has not remarried and who is not able to maintain herself after the iddat period, against her relatives who would be entitled to inherit her property on her death according to Muslim law. Similar provision is made also for maintenance allowance for the children of such divorced woman. Sub-section (2) of Sec.4 provides that if a divorced woman has no relatives as mentioned in sub-section (1) or such relatives do not have sufficient means to pay the maintenance, the Magistrate may by order direct the State Wakf Board established U/s.9 of the Wakf Act, 1954 to pay such maintenance as determined by him or to pay. Sec.5 deals with the option to a former husband to be Governed by the provisions of Sec.125 to Sec.128 of Cr.P.C. Sec.6 is rule making power. Sec.7 which contains

transitional provisions reads thus: Every application by a divorced woman U/s.125 or U/s.127 of Code of Criminal Procedure, 1973 (2 of 1974), pending before a Magistrate on the commencement of this Act, shall notwithstanding anything contained in that Code and subject to the provisions of Sec.5 of this Act, be disposed of by such Magistrate in accordance with the provisions of this Act, it will be seen that the Act does not fix outer limit of Rs.500/- as contained in Sec.125 Cr.P.C. A divorced Muslim woman who has not remarried is entitled to maintenance from the husband only upto the iddat period – the maximum being the amount of mehr.

Now, from the Legislative history and the back-ground, it seems that in a sense, the Act is declaratory in character. When is the Act declaratory ? According to Blackstone where the old custom of the realm is almost fallen into disuse or become disputable, in which case Parliament has thought proper, in perpetuum rei testimonium, and for avoiding all doubts and difficulties, to declare what the law is, and every hath been. Carries on Statute Law, Seventh Edition at page 58 states the usual reason for passing a declaratory Act is to set aside what parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. It is well settled that where the Act has declaratory character, the usual presumption against retrospectivity does not arise. Indeed such Acts are generally retrospective. No doubt the word declared is not mentioned in the Act but the presence or the absence of the said word is not conclusive of the matter.

That on coming into force of the Act provisions of Sec's.125 of 127 of the Cr.P.C stand repealed is clear from the language of Sec.7. No longer the right of getting maintenance from the husband after the iddat period is available to a Muslim divorced woman. It is pertinent to notice that no exception about sub-section (3) of Sec.125 Cr.P.C. has been made is Sec.7 of the Act, which means that even such applications were intended to be brought into the net of Sec.7. Under the circumstances, to make exception about sub-section (3) and to restrict the operation only to sub-section (1) of Sec.125 would be doing violence to the plain language of Sec.7. The Legislative intention seems to be quite clear. It is of extreme relevance to note that neither

order passed U/s.125 Cr.P.C nor liability already incurred earlier to the Act has been saved. The inevitable consequence is that not only right U/s.125(1) but also remedy u/s.125(3) are lost. Sec.7 thus envisages complete enforcement of the right and remedy U/s.125 Cr.P.C and therefore, there can be no question of enforcing the same under sub-section (3) of Sec.125 Cr.P.C.

Presence of non-obstante clause in Sec.7 of the Act is also a pointer. Sec.3 & Sec.7 of the Act (which is latter to the Criminal Procedure Code) operate upon the same field in which the Cr.P.C operates. The only way by which the conflict between the two provisions can be resolved is to hold in favour of whole repeal in the absence of a saving clause. In this connection, useful reference may be made to the following observations in the case of (*Gopi Chand vs. Delhi Administration*) A.I.R. 1959 S.C 609: Since the impugned Act does not contain an appropriate saving section the appellant would be entitled to contend that after the expiration of the Act, the procedure laid down in it could be no longer be invoked in the cases then pending. What applies to remedy also applies to the right."

While considering the prospective effect of the Act in the case of *Idris Ali vs. Ramesha Khatun,*[1] the Court held like this:

"We feel that legislature was very much concerned not to write off the maintenance of Muslim divorced wives, who had already been granted maintenance earlier by a competent Court U/s.125 and 127 of the Cr.P.C and therefore it expresses that the new Act of 1986 and the provisions thereof would cover only the cases filed after the new Act came into force and those cases U/s's.125 & 127 which were pending. If any retrospective effect would be given to the Act of 1986, it would result in serious complications. The Legislature in its wisdom never contemplated a situation where divorced Muslim women would not be given benefit which they had already acquired under the law which was in force earlier and which had been implemented U/s's.125 & 127 Cr.P.C and became final. It must be noticed that in Sec.7 of the new Act of 1986 word 'Magistrate' has been used twice and as such the Magistrate should act in accordance with the provisions of this Act which means that even the High Court in revision, if it is

1. AIR 1989 Gauhati 24

pending on the date of commencement of Act cannot deprive Muslim women of their rights of maintenance U/s's.125 and 127 which had been allowed by the Magistrate earlier and which had become final to that extent.

Consequently there is no hesitation to hold that answer to the question referred to by the learned single Judge is that if a divorced Muslim woman approaches the Court of a Magistrate for execution of final order already passed U/s's.125 & 127 Cr.P.C earlier to the new Act of 1986 then she will have a right to get the order executed U/s.128 Cr.P.C which section has been excluded from Sec.7 of the Act of 1986, and Sec.7 of the new Act of 1986 would not take away that right.

In other words Sec.7 would apply only to those cases which are not finalized by the Magistrate U/s.125 & 127 Cr.P.C on the date the new Act of 1986 came into force and are still pending and such application had been moved by a divorced woman. We want to make it clear that a Muslim divorced woman or her husband cannot move before a Magistrate for cancellation of the order of maintenance already granted simply on the ground that the new Act of 1986 has come into force. We are trying to set all the controversies at rest and we further make it clear that U/s.127 Cr.P.C there are various provisions where in case of divorce the husband or the wife may approach the Magistrate for cancellation of order of maintenance already passed on proving of certain conditions which are laid down therein."

To the same effect the Andhra Pradesh High Court in the case of *Tajuddin vs. Kamarunnisa,*[1] has ruled that:

"After the Act came into force when the husband pleaded as defence that the maintenance order is no longer valid by virtue of the Act 25 of 1986, the court came to the conclusion that Act 25 of 1986 is prospective in operation and it does not have the effect to invalidate the orders of maintenance which have been granted prior to the enforcement of the Act 25 of 1986 and have become final. "

The same question was also answered by Andhra Pradesh High

1. 1989 Crl.J 2285

Court once again in the case of *Shamsunnisa Begum vs. G. Subhan Basha*[1] and held that the Act has got prospective effect.

A similar case was posted to Madhya Pradesh High Court and the Madhya Pradesh High Court in the case of *Peer Mohd vs. Hasinabee*[2] has ruled that the Act has got prospective effect.

The same question was also considered in the case of *Munni Begum vs. Abdul Sattar*[3], where it was held that:

> "As such, the question remains to be decided is as to whether in this particular case when the maintenance was already granted at the rate of Rs.100/- per month U/s.125 of Code and that order had become final even in revision and the same was not challenged before the lower Court, then the same could be recovered by way of execution U/s.128 of the Code. On this point, there are two conflicting decisions, one of the Division Bench of Gauhati High Court in *Idris Ali and Others* (supra) holding that even after the commencement of the Act, application U/s.128 of the Code is maintainable for its recovery, whereas the other one is of the Full Bench of Andhra Pradesh High Court in *Usman Khan Bahamani* (supra) holding that after the commencement of the Act, even application U/s.128 of the Code for recovery of maintenance which had already become final before the commencement of the Act could not be entertained under the Code. The learned Revisional Court has also referred the cases *Mohd. Umar Khan vs. Gulshan Begum* and *Bashir Khan vs. Jamila Bee.* In those two cases, this point was not considerd and even till date, no decision of any Court has been brought to the notice of this Court regarding the maintainability of application U/s.128 of the Code for recovery of the maintenance already granted earlier which had become final before the commencement of the Act".

Bombay High Court has also ruled in the case of *Sirazuddin Ahmed Bagwan vs. Khateeja Sirazuddin Bagwan*[4], that the Act is prospective in operation. In the case of *A.A. Abdullah vs. A.B. Mohmuna, Saiyad Bhai*[5], it has been held that new Act does not take away the earlier order or decree passed by a court under Section 125 Cr.P.C.

1. 1995 (1) ALD 377.
2. 1995 (1) Crimes 84.
3. 1995 (1) Crimes 575
4. 1996 TLS 1304796 = 1996 BCR (3) 756
5. AIR 1988 Guj 141

Similar view is also taken in the case of *Idris Ali vs. Reshma Khatoon*,[1] wherein it was ruled that any order obtained under Section 125 Cr.P.C. prior to the Act coming into effect is not taken away by the new Act.

Similar view were also contributed by Karnataka High Court in the case of *Abdul Qader vs. Razia Begum*[2].

Andhra Pradesh High Court in the case of *A. Hameed vs. Arif Jaan*,[3] and Punjab High Court in the case of *Smt. Hazran vs. Abdul Rahman*,[4] and A.P. High Court in the case of *Sheikh Raj Mohamed vs. Sheikh Amena Bee*[5] and Bombay High Court in the case of *Hafeeza Bee vs. Suleman Mohammed*,[6] took the same view.

In the case of *Moin vs. Amena Khatoon*,[7] it was held that:

> "it has been further laid down that the liability of the Muslim husband to pay reasonable and fair provision and maintenance only for and during Iddat period."

The Bombay High Court speaking through a Division Bench in the case of *Fareeda Bano vs. Shahabuddin*,[8] held that the Act has got prospective effect.

SECTION 2.—DEFINITIONS

(a) Divorced Woman

In this Act, unless the context and otherwise requires:

"divorced woman" means a Muslim woman who was married according to Muslim Law and has been divorced by,

1. AIR1989 Guj pg 24.
2. 1991 Cr.LJ 24
3. 1990 Cr.LJ 96
4. 1989 Cr.LJ 1519
5. 1993 Cr.LJ 3690
6. 1996 BCR (3) 281
7. 1996 DMC (1) 494
8. 1993 (1) MLJ 252

or has obtained divorce from her husband in accordance with Muslim law.

In the light of the definition of a divorced woman as defined in this Act every Muslim woman is not entitled to claim benefits under this Act unless she is married and divorced in accordance with the tenets of Islam relating to Muslim law of marriage and divorce.

The first limb of the definition of Muslim woman under this Act is that she should be married under Muslim Law which means that her marriage should be a valid marriage. This limb requires a detail study of Muslim Law of marriage for proper interpretation of the definition.

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CHAPTER II

MUSLIM LAW OF MARRIAGE

The Quran mandates, "Believers deny not to yourself the pleasures of which God has declared lawful" (The Quran S.V)

The Prophet Mohammed (MPBU) described 'Nikah" as his "Sunnat"

From the object arise the importance of "Nikah" regarding which the Prophet himself says, "The man who does not marry is not one of my followers".[1]

Thus the Islamic Law describes Marriage as an act of devotion to Allah, for it preserves mankind from pollution and guards human beings for foulness.

Nikah (Marriage) is recognized in Islam as basis of a civilized society. Nikah is defined in Durrul Mukhtar, (selected pearl) which is a commentary or a work of great authority known as Tanvir-ul-Abbsar written by Sk.Abdullah Taramsrtashi it was translated in Hijri year 1070, by the great scholar Shiek. Md. Alaudin, S/o. Shiek Ali Hastafi who had been a Mufti at Damasuss for a longtime, as under:

1. Sahih Al Bukhari, Book of Nikah, Hadith No.886.

> "Nikah according to jurists is a contract which is productive of an exclusive right of enjoyment *i.e.*, which validates the enjoyment by a man, of a woman, with when marriage is not prohibited by means of any legal impediment."

Nikah literally means sexual connection and by implication, the contract of marriage. In Hidaya Vol.I Chapter marriage, the Nikah or marriage under Islamic law is defined as:

> "Nikah, in its primitive sense, means carnal conjunction. In the language of the law it implies a particular contract used for this purpose of legalizing generation."
>
> Marriage is contract that is to say is effected and legally confirmed by means of declaration and consent.
>
> In chapter-III of Hidaya it is stated that a marriage is valid, although no mention be made on the dower by the contracting parties because the term Nikah in its literal sense signifies a contract of union, which is fully accomplished by the function of a man and woman, moreover the payment of dower is enjoined by the law merely as a token of respect for its object (the woman).
>
> *Amir Ali*, in his celebrated work, "commentaries on Mohammedan Law quotes the definition of Marriage as given by Ashbah "is an intimation ordained for the protection of society and in order that human being may guard themselves for foulness and unchastely".
>
> No sacrament but marriage has maintained its sanctity, since the earliest time (lit, the days of Adam). It is an act of "ibadat" of piety for it preserves mankind from pollution. It is instituted by the divine command among members of the human species."

Marriage is a contract which has for its object the procreation of children "And the kifaya (volume-III P.577) lays down that it is one of the original necessities of man instituted for the good ordering life. It is therefore lawful for an old man, or who has no hope of offspring, and even in the last or death illness.

According to Mr. Baillie marriage is constituted by Ijab-wa-Kabul, or offer and acceptance, but it confers no right on either party or over the property of the other.

In the case of *Anis Begum and Mohd. Istafa*,[1] *Sulaiman*, CJ., observed that "it may not be out of place to mention here in the marriage is not regarded as a mere civil contract, but as a religious sacrament".

But in the case of *Abdul Khader vs Saleema*,[2] *Mahmood*, J., observed that marriage under Mohammedan Law is not a sacrament, but purely a civil contract and Mohammedan Law does not prescribe any service peculiar to the occasion.

Dr. Nishi Prohit is his book on "Principles of Mohammedan Law" published by Orient Publishing Company, II edition gives the definition of marriage under Mohammedan law as " a civil contract made between two persons of opposite sexes with the object of legalizing sexual intercourse, the procreation legitimating of children and preservation of the human race. The marriage confers the status of husband and wife on the parties to the marriage.

Faizee is his celebrated work "Out lines of Mohammedan Law" described marriage under Muslim law as, " a contract for the legalization of intercourse and procreation of children". He further writes that the objects therefore are "the promotion of a normal life and the legalization of children".

In Fatawa Alamgiri and Baillie's digest 1,4 it is mentioned that "marriage was instituted for the source of life and one of the prime or original necessities of man. It is therefore lawful in extreme old age, after hope of off spring has ceased, and in the last or death illness."

An African author Dr.A.D.AJIJOLA (Bar-AT-Law) in his book "Introduction to Islamic Law" defines Marriage under Islamic Law as a form of Civil Contract being formed by declaration and acceptance expressed in a manner of demonstrating an intentional without any sort of ambiguity.

Mulla is his most widely acknowledged commentary, "principles of Mohammedan Law" reproduces the definition of marriage as was defined in Hidaya 25 by Baillie 4, 17.

In *Abdul Khader's* case (supra) the court has held that the moment a legal contract is established, consequences flow from it naturally and imperatively as provided by the Mohammedan Law.

1. (1933) 55 Allahabad
2. (ILR 8 ALL149) (1886) 8 ALL 149

In the case of *Sulumaneessa vs. Saidon Shiek,*[1] the court has delivered a word just by defining the marriage as " a civil contract of sale. Sale is transfer of property for a price in contract of marriage, the wife is property and the "dower is price".

Author does not agree with such concept of marriage as was considered by the Calcutta High Court in the case of Sulumaneessa (supra) Marriage is no doubt a civil contract, but the wife is not the property of husband. Husband does not own his wife but they belong to each other. Muslim does not purchase a woman for consideration of Dower. This opinion of the learned Judge would reflect his perverse and misconceived approach to Muslim Law of marriage and dower. In Baillie's digest Vol.1.P 91 it is stated that the word consideration is not used in the sense in which the word used in the contract Act. See also *Abdul Khader's* case (supra).

REQUIREMENTS OF A CONTRACT OF MARRIAGE

Synopsis

1. Marriage contract must take effect immediately:

It is necessary that a contract of marriage must come into immediate effect. If a marriage is referred to a future time it would

1. AIR 1934 Cal 639

not be valid. Thus, if a person says to another, " I have married her to thee tomorrow", the marriage would be void".

2. Marriage contract must be permanent:

It is necessary that a contract of marriage should be a permanent one. It cannot be restricted as regards the duration. Thus, a contract of usufructuary marriage (*nikah muta*) (*e.g.* where a man says to a woman, "I will take the use of you for such a time for so much") would be illegal.

So also a contract of temporary marriage for specified time for fixed term (*nikah muwakkat*) would also be void. According to Imam Jafar, such marriage will take effect as a permanent marriage and the condition about its being temporary would be void. The Hedaya gives reasons for the view of "our doctors". Ameer Ali says that the view of Jafar should be preferred. Temporary marriages are however permitted by Shia *Isna-Asharia*.

3. Marriage contract should not be conditional:

A contract of marriage should not be made contingent or conditional. The Prophet Mohammed (MPBUH) has said "conditions are not lawful in the marriage contract.[1] Conditions in a marriage contract may be of two kinds. Some are such as would invalidate the contract of marriage itself (*e.g.*, a temporary marriage) while there may be some other conditions which would themselves become void and the marriage would remain valid. If an illegal condition is stipulated marriage would be valid but the conditions would be void as held in the case of *Hafizan vs. Saidno*[2].

(1) Unlike a contract of sale options of inspection defect or stipulation are unknown to a contact of marriage. Any such stipulation attached to marriage would be void but the marriage would be valid except in the case of a defect where the husband is an eunuch or is impotent in which case according to Abu Hanifa, the wife has the option (Ballie 1, 21, 22).

Shia Law :

Under the Shia law some are of the opinion that the marriage

1. Sahih UL Bukhari, Book of Nikah, Hadith No.1852.
2. AIR 1925 Sindh 22

itself is annulled by the option while others are of the opinion that marriage is valid option is void.[1] According to Sircar II 364, if a Shia husband failed to pay the dower at stipulated time the contract would be void.

As stated in Hedaya 47 and Ballie 1, 94 "Nikah-ush-shiya" reciprocal marriage is valid but according to shia law it is void."[2]

According to Ameer Ali, Suni marriage would be void only when consummated.

Shafei Law :

Under Shafei law such marriage is valid . Conditions regarding foregoing maintenance, right to inherence are all void.

4. Conditions to restrain another marriage :

If an agreement is made there by restraining the husband for performing second marriage, such agreement is enforceable according to *Ameer Ali* (Ameer Ali II 321).

If the conditions is violated or in case of breach of this agreement the marriage would not be void but under Shia law such condition is void.[3]

It is stated in Baille I, 251 and ruled in the cases of *Bedramunisa vs. Mafiatullah*,[4] that as to the right of wife with whom such agreement is made, the wife may pronounce Talaq in case of breach of contract apart from providing maintenance. See also *Paroo Bibi vs. Fyez Baksh*.[5]

In the case of *Khaliul Rahman* it was held by a Larger Bench that such an agreement is not immoral not opposed to public policy.[6]

Tayabji has cited a decision rendered in the case of *Hurron vs. Khyroollah*,[7] to the effect that if no provision is made in such agreement, the aggrieved wife may claim damages in breach of term of agreement.

1. Ballie II 5, 77.
2. Baillie II, 37.
3. Ballie II, 76
4. 7 BANG LR 442, 15 WR 555
5. 15 Bang LR 5
6. 59 K 804 (LB).
7. 1838 Fullton 361

But the shia law does not recognize any such agreement.[1]

5. Marriage should not be contingent:

A contract of marriage contingent on the happening of an uncertain future event is not valid.

Illustrations

A man says to a woman, "I have married thee for so much if my father permits' and she should answer "I have accepted". Witnesses are present. There is no valid contract. Ameer Ali says that in such case the marriage would be only invalid and copula will effectuate a marriage".

But if the dependence is on an event already passed, then the contract is valid for its date may be ascertained. Thus, if it is suspended to a condition which has already happened and exists without doubt and marriage is a certainty, it is valid.

A falsely says to B, "If I had not married my daughter to such an one, I would have married her to thy son. B thereupon accepts in the presence of witnesses. If the daughter of A was not already married, the contract would be valid.

6. Competency for contracting marriage :

Every Muslim who has attained puberty and who possesses sound mind may enter into a contract of marriage.

Shia Law:

A female who has attained puberty is entitled to contract herself in marriage, without a guardian and her consent is necessary.[2]

Shafei Law:

A woman is utterly incompetent to enter into a contract of marriage either for herself or for another even though her guardian should authorize her to do so. A father can contract the marriage of

1. Baillie II 76.
2. Bail II.9.

his virgin daughter without asking for her consent whatever her age. The consent of the father is necessary of a virgin even though adult as guardian (Jubar) continues till a virgin is married.[1]

A person of unsound mind or a person who has not attained puberty may be contracted into marriage by a person who is a guardian under the Muslim Law.

7. Puberty :

According to Muslim Law, the age of majority is the same as the attainment of puberty.

An adult male who is of sound mind can contract a marriage according to all schools. But with respect to a woman who is adult and of sound mind there is a difference of opinions. According to Abu Hanifa and Abu Yusuf, she may be married by virtue of her own consent whether she is a virgin or Saibba, Mohammed holds that the marriage would be suspended upon the guardian's consent. The view of Abu Hanifa has received recognition.

The conditions thus required for contracting a marriage are understanding, puberty, freedom and equality in the contracting parties. Once a person attains puberty, no person has got absolute authority of guardianship over him or her unlike the case of minors over whom others have got authority as guardians. All acts with respect to marriage become good and valid. A marriage contracted by a woman after attaining puberty is valid without interference, of the guardian, though the match be unequal. No guardian can force an adult woman whether a virgin or not into marriage. A girl who arrives at puberty can select a husband for herself without reference to the wishes of the father or guardian. A female whether a virgin or saibba (i.e, a woman who already had sexual intercourse) can enter into a contract of marriage.

We shall further study the Guardianship of bride and bridegroom under the Muslim Law in the forthcoming Chapter. Before that we shall take up the form of Muslim Marriage.

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1. Bail I, 54 (fn); Minhaj 284.

CHAPTER III

FORM OF MARRIAGE AND ITS INGREDIENTS

Muslim Law does not recognize any ceremonial solemnization nor makes any ceremony as mandatory to make a marriage valid. In the case of *Maung Kyi vs. Mashawa,*[1] it was held that no formalities by way of religious ceremony or writing are at all necessary.[2]

In the case of *Mst. Zahinaba vs. Abdul Rahman,*[3] the court did not recognize betrothal as a condition or a requirement for a valid Muslim marriage by holding that betrothal is not known to the system of marriage in Mohammedan Law.

To the same effect, the Nagpur Bench of High Court of Bombay in the case of *Abdul Nabi vs. Syed Azmad Hussain,*[4] held that only one ceremony called the Nikah is known to Mohammedan Law for uniting a husband and Wife.

1. AIR 1929 Rangoon 341
2. (63 Cal 415) (31 Cal 849).
3. AIR 1945 Peshawar Page 51
4. AIR 1935 Nagpur 23

The Peshawar High Court in the case of *Mst. Gulam Kubra vs. Mohd Shafi*,[1] also delivered a judgment to the same effect holding that some formalities are however usually performed in Marriage under Mohammedan Law, but those are not mandatory. See also *Razia Bano vs. Nawab Ara Begum*[2]. No writing is necessary evidencing the marriage as held in the case of *Jogu Bibi vs. Mesal Shaik*[2a]. Absence of religious ceremonies is immaterial and in no way affects the validity of marriage as held in the case of *Nafeezunnisa vs. Mirza Mumtaz*[3]. Even the presence of Khazi can be dispensed with as ruled in the case of *Abdul Nabi vs. Azmath Hussain*[4]. A valid marriage can be contracted even though no ceremony may be proved to have been gone through, as held in the case of *Habib-ur-Rahman vs. Althaf Ali*[5].

The ordinary procedure adopted at a marriage by custom is that a vakil would be appointed for the bride and a vakil would be appointed for the bridegroom. The bride's vakil would approach the lady who would be behind a curtain and would ask her whether she has given her consent to the marriage and tell her about the dower fixed. Having obtained this information from her he would approach the bridegroom's vakil who has to extract similar information from the bridegroom and if both were agree as to the amount of dower, the two vakils would then, one after another, pronounce the Arabic words signifying the union and stating that the dower was agreed upon as held in the cases of *Mst Jadoo Begum vs. Nawab Sharaf Jahan*[6]; *Mst Ghulam Kubra vs. Mohd. Shafi*[7]; See also *Abdul Aziz vs. Ameer Begum*[8].

It is usual practice in India for a mulla or kazi to be present to officiate at the time of the marriage contract and to recite benediction, etc. But any such custom has not altered the law. (See *Badal Aurat vs. Queen Empress*[9]; *Almuddin vs. R*[10]). The khazi generally keeps a register in which he makes a record of marriages mainly for purposes of evidence. A marriage feast is also given by the bridegroom and has

1. AIR 1940 Peshawar page 2.
2. 1955 NUC 3602
2a. AIR 1963 Cal 415
3. AIR 1922 All 363
4. AIR 1935 Nagpur 123
5. AIR 1922 PC 159
6. AIR 1927 Oudh 194 at page 145: 102 IC 838: 4 OWN 450
7. AIR 1940 Pesh. 2
8. 66 IC 104
9. AIR 19 Cal at page 81
10. 10 CWN 982 at pa 934

become a sort of a religious duty. It is considered to be an institution of the sunna and is raised by some to the rank of dogma, (Minhaj 314).

Ceremonies under Shia Law:

Ceremonies observed by Shias and Sunnis are very much similar but while the Sunnis simply recommend the use of the Khutba before the contract is finally executed and of the Surat-ul-Fatiha (the opening chapter of Koran) at the conclusion of the marriage, the Shias consider their use to some extent obligatory. Among them the ceremony commences and concludes with a prayer. The Khutba and Surat Al-fathiha are read by the priest after the "sighah" is pronounced.[1]

If no ceremony is essential to perform a valid marriage then what are the essential ingredients of a valid marriage as per Muslim Law, let's discuss the same.

ESSENTIAL INGREDIENTS OF A VALID MARRIAGE

Synopsis

1. Ameer Ali, II, 290.

The validity of a marriage under Islamic Law depends upon the proposal on one side and acceptance on other. The Islamic Law does not require any particular ceremony of ritual or even any particular form to be affected nor any particular condition to be fulfilled to validate a marriage. There is a Quranic verse, "*Plight not your torth with women except by uttering a recognized form of words*" (Quran II, 235).

Mere acknowledgment as distinguished from proposal and acceptance would not by itself be sufficient to constitute a contract of marriage.

Dr. *Taher Mahmood* in his book "the Muslim Law of India" has laid down the following requirements for a valid marriage.

(i) IJAB (Proposal).—The marriage should be proposed by or on behalf of either party thereto – this is called ijab.

(ii) Qubul (Acceptance).—The proposal should be accepted by or on behalf of the other party – called qubul.

(iii) Form of ijab and qubul.—Both ijab and qubul must be in definite words so as to result into a complete and not an inchoate transaction and must not convey a mere intention or promise to marry.

(iv) Wilayat (guardianship).—Where legally the consent of a wali is essential, the ijab or qubul as the case may be should be made by the guardian. In all other cases a wali may do so on behalf and with the consent of the party concerned.

(v) Vakalat (representation).—Adults can make the ijab or qubul either personally or through an adult who may act as his vakil or representative. Guardians of minor have the option of naming representatives.

(vi) Shahadat (witness).—Except if the parties are Isna Ashrai, their Ijab and qubul should be made in presence and hearing

of at least two adult Muslim witnesses. One of these may be replaced by two women.

(vii) Majlis-e-wahid (single sitting).— The Ijab and qubul should be made in the same sitting signifying the continuity of transaction.

Amir Ali in his celebrated work, commentaries on Mohammadan Law stated about the form of Muslim Marriage thus. There are several other conditions laid down in the Mussulman law for the contractual performance of marriage, all of which when properly considered resolve themselves to a mere question of form. For example, it is required (a) that the parties to the contract " should hear each other's words," that is, the contract should be understood by both: (b) that, if sui juris, they should actually consent to the contract; and (c) that the husband and wife should be distinctly specified, so that there should be no doubt as to their identity {Fatawai Alamgiri, PP: 377, 378 and 381; Sharaya P.263}. Regarding these formal conditions the Sunni and the Shiahs are agreed, but whilst the former insist that the declaration and acceptance " should take place at one and the same meeting", and that the acceptance should not be discrepant from the declaration" the latter hold that " it is not condition that the acceptance should verbally agree with the document of declaration.

It is a settled law that no contract of the marriage can be said to be complete unless the contracting parties understand its nature and mutually consent to it. A consent can be express or implied. Promise of marriage or entering into an agreement is not sufficient. Where such promise is made or an agreement is entered into each party may retract even after acceptance by the woman or by the guardian if she is a minor and even after the would be husband has made a presentation with a view to marriage or has paid a part of the dower. In case of a dumb person proposal and acceptance may be expressed by intelligible signs.[1] According to Shia law mere writing is not enough to validate a contract of marriage.[2]

The first speech from whichever side it may proceed is the declaration and the other the acceptance.[3] The legal essentials for a marriage are that there should be proposal made by or on behalf of one of the parties and an acceptance.

1. Balliee I, 14, Balliee II 3, Sircar II, 326
2. Sircar II, 323
3. Jamma-ush Shittat, Mafatih Sharayaih P.62

The terms may be either plain (Sarih) or ambiguous (Kinaya). The sarih words are only "Nikah" and Tazwij". All other terms are ambiguous. Some of the ambiguous forms by which marriage may be validly effected are such as indicate a completeness of transfer. Thus, marriage may be contracted by the use of such words hiba (gift) tumleek (transfer) sadaqa. Marriage cannot however be contracted by use of such expressions that indicate an incomplete or limited transfer. It cannot be contracted by use of such words as ijara (hiring), ariat (lending) and ibahut (permitting).[1]

The declaration and acceptance need not however be in any particular form. Form must be distinguished from substance.[2] It is however necessary that the woman to be married must be distinguished from others by being distinctly pointed out by name or description to leave no doubt or ambiguity.[3] It is stated in Fatawai-Alamgiri Vol.I P.382 that the declaration and acceptance may be expressed in any language known to the parties and it is not necessary that the words should be Arabic. It is mentioned in Hawi-Ul-Khadgi that it is not necessary that the proposal should always precede assent/consent or the proposal should be from one side particularly.

The proposal and acceptance must be expressed in the past tense as stated in Hedaya 25-26. The present and future are both expressed in one form in Arabic and contract expressed in the present would be equivocal. The past tense is therefore adopted in law.[4] This is also the case with the Shia Law. The use of the imperative is, according to the more approved opinion, valid.[5] It is not necessary that declaration should precede the acceptance.[6]

1. Who can make declaration and acceptance :

Such declaration and acceptance may be made by the parties themselves or in the case of parties who have not attained puberty or of unsound mind, by the guardian of such party are parties of the guardian or by any of the parties or of both the parties of the guardian or guardians.

1. Bail 1, 15-16; Hed 26: Durr 7-8; Bail II, 3.
2. *Kazi Siddique Hasan vs. Salima*, 61 CWN 18, *Mst Bashiran vs. Mohd Hussaih*, 1941 Oudh 284; 16 LUCK 615.
3. Bail I 5; Sircar II, 329 Bail II, 5.
4. 1 Hed 25-26.
5. Bail II, 1-2
6. Bail II 3.

Shia and Shafei Laws :

Under the Shia Law the declaration and acceptance for the constitution of marriage must both be expressed by the use of the word "tazwij" or "Nikah" or grammatical variations of these words, "Zawwajatu-ka" and "Ankaanthi-ka" both meaning, "I have married thee". Any deviation from the two words is unlawful though it were by translating them into some language other than Arabic. The use of translated words in the own language of the parties is permitted only in case of positive inability to make use of Arabic.[1]

In Shia Law according to better opinion the words muta or "Muttatu-ka" (I have taken thee to enjoy) may also be sufficient for contracting a permanent marriage although these words are generally used for muta.[2]

2. Acceptance must be unconditional :

The acceptance must entirely conform to the proposal or declaration. It should not vary from it".[3] It should not be conditional.

3. Consent of the Parties :

As narrated by Abu Huraira, "the prophet (MPBUH) said a matron should not be given in marriage except after consulting her and a virgin should not be given in marriage except after her permission, the people asked, O Allah's messenger how can we know her permission?, He said, her silence (indicates her permission) (Sahih Ul Bukhari, Book of Nikah, Hadith number 1848).

The prophet Mohammed (MPBUH) further said if a man gives his daughter in marriage while she is averse to it, then the said marriage is invalid, (Sahih Ul Bukhari, Book of Nikah, Hadith 1850)

Shia Law

As per Shia law, the father or guardian cannot give a virgin or matron in marriage without her consent. Basing on these principles of shariath and in consonance with the above stated Hadiths, various

1. Bail II, 3 Ged 26.
2. Sircar II, 324; *Shazada Qanum vs. Fakher Jung*, AIR 1953 Hyd 6; ILR 1953 Hyd. 359.
3. Bail I, 11-12.

courts of India delivered judgments in many cases explaining as to how and why consent of parties to the marriage is necessary for a valid marriage since a marriage without consent is invalid. Some of the decisions are quoted below.

For a valid marriage it is necessary that the parties who are above puberty must give their own consent.[1]

A marriage brought about without consent of the bride would be invalid.[2]

According to shafei law an adult virgin stands on the same footing as an infant with respect to marriage and the father is empowered to make seizing of her dower without her consent Hed 34. But see bail, I, 54-55. Thus, where a Shafei girl was clandestinely married to a Hanafi without the consent of the girl's father and the mullah was made to believe that the girl had become a convert to the Shaafi sect. It was held that the usual presumption as to the validity of a marriage could not be made and the marriage was invalid for want of the consent of the girl's father.[3]

The formal consent of an adult woman is necessary even if she has lost her virginity (*i.e.*, is saibba). It is however commendable to consult a virgin also (Minhaj 284). In some cases however it has been held that even a Shafei father or grand father cannot contract a marriage for an adult virgin without her own consent and against her wishes it would not be valid (*Sayad Mohiuddin vs. Khatijbai*[4]), (marriage held to have taken place under compulsion).

It has been held that although the view expressed in Minhaj-et-Talibin is to the contrary, the consent of an adult woman is necessary for marriage both for Hanafis and Shafeis. The only difference between the Hanafi and Shafei Laws on this point is under Shafei Law consent must be expressed through a wali and not direct.[5]

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1. *Hasan Kutte vs. Jainabh*, 1928 Mad 1285: 52 Mad 39; *Bindu vs. Bogli*, 1 IC 814; *Begum vs. Faiz Baksh*, 60 IC 743).
2. *Asghar Ali vs. Muhabbat Ali*, 22 WR 403; *Mst Aktia Begum vs. Mohd Ibrahim*, 1916 PC 250; *Sibt Ahmed vs. Amina Khatun*, AIR 1929 All 18; 50 All 733; *Hafizan vs. Saidno*, 1925 Sind 22; 86 IC 301; *Mst Ahmad-un-unnisa vs. Ali Akbar*, 1942 Pesh 19.
3. *Rahim Bi vs. Mohammed Saleh*, 29, IC 866 at P.868).
4. AIR 1939 Bom 489
5. *Hassan Kutti vs. Jainabha*, 1928 Mad 1285; 52 Mad 39; See also *Muhammad Haji vs. Ethiyamma*, 1967 Ker LT 913; 1968 Ker LJ 43.

If an adult Shafei woman renounces the Shafei doctrines and adopts the tenets of the Hanafis or Shias, she will be governed by the laws of the sect adopted by her and if she marries a person with her own consent even though against the wishes of her father, the marriage would be valid and binding.[1] A woman is utterly incompetent to enter into a contract of marriage either for herself or for another even though her guardian should authorize her to do so. A father can contract the marriage of his virgin daughter without asking for her consent whatever her age. The consent of the father is necessary in the case of a virgin even though adult as guardianship (jubar) continues till a virgin is married. According to shia law a woman who has attained puberty has got a right to contract herself to marriage with a guardian. (Bailie II, 9)

4. Who can give consent:

In case of *Subrati*[2] it was held that "the consent must be given by the parties themselves or an agent who can lawfully give consent or of a minor by a guardian who is competent to bind the minor. A woman who is adult and is of sound mind may be married by virtue of her own consent although the contract may not have been made or acceded to by her guardian. No one, not even the father or the mother, can contract an adult or sane woman in marriage without her permission, whether she be a virgin or saibba.[3] The consent of the father of an adult woman cannot take the place of her own consent.

In the cases of *Sibt Ahmad vs. Amina Khatun*[4], (Shia Case); *Asghar Ali vs. Muhabbat Ali*[5]; *Ahmad Ali vs. Raisunessa*[6], it was held that if the consent of the bride is not formally asked for before the ceremony giving away in marriage is not sufficient. It must be proved that the woman herself consented to the marriage and there was performance of the ceremony.[7]

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1. *Mohd Ibrahim vs. Gulam Ahmad*, (1864) 1 BHCR (OCJ) 236; Ameer Ali, II, 239.
2. *Sobrati vs. Jungli*, 2 CWN 245.
3. Bail I, 54-55, HED 34; Bail II, 7.
4. 50 All 733: 1929 All 18
5. 22 WR 403
6. 17 CWN 429
7. *Mst. Atkia Begum vs. Mohd. Ibrahim*, AIR 1916 PC 250.

5. Consent by Fraud:

If consent of either parties to marriage is obtained by fraud the marriage is irregular but not void.[1] In the case of *Haji Ahmed Yar vs. Abdul Ghanik*,[2] it was held that a contract of marriage may be rescinded if the consent was obtained without disclosing the defects or fraudulently and any expenses incurred may be recovered by the party defrauded but in such case damages will not be recoverable under Section 75 of the Contract Act. In the case of *Kulsumbi vs. Abdul Khader*,[3] it was held that if the consent of a party to a marriage is obtained by fraud such marriage is irregular not void and may be ratified by consummation or otherwise and the wife could not in that case lose her prompt dower.

In the case of *Abdul Kaseem vs. Jamila*,[4] the court gave a ruling that where a consent to the marriage has not been obtained, consummation against the will of the women would not validate the marriage.

6. Consent under compulsion:

A contract of marriage made under compulsion without any intention of making it is valid.[5] This view is sought to be based on a hadis: "The apostle of God said, there are three things which whether done in joke or earnest shall be considered as serious and effectual, one marriage; the second divorce, and the third taking back."[6] According to Fatawai-I-Alamgiri and Radd-ul-Muhtar such marriages are valid.[7] Ameer Ali has criticized the view of Radd-ul-Muthar as "rather casuistal" in its interpretation of a statement in Kaffi for the conclusion that a marriage concluded by compulsion on either party is valid. He also observes that the passages in Fatawai-I-Alamgari which "in their bare from are no less astounding than contrary to the generally equitable principles of the Mussulman Law" refer only to cases of compulsion by strangers or on a woman by her guardian.[8]

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1. *Mohammed Sharif vs. Khuda Baksh*, AIR 36 Lahore page 683
2. AIR 1937 Nagpur page 270
3. AIR 1921 Bom. 205
4. AIR 1940 Cal. 251
5. Bail, I, 72-73.
6. Tyabji, ML at p 105.
7. Bail I, 72-73; Ameer Ali, II, 360.
8. Ameer Ali, II, 360-361.

He cites the authority of Jama-ur-Ramuz for the view that such marriages are invalid. He thinks that the Indian courts which are governed by principles of equity, justice and good conscience would follow the rule laid down in Jama-ur-Ramuz.[1] It has been observed that consent obtained by fraud or coercion is invalid unless ratified.[2]

Shia Law:

Such marriages are not valid. Clear intention must be proved.[3]

7. Consent of minor below puberty :

Among the several conditions of requisites of a contract of marriage are understanding, puberty and freedom in the contracting parties with the difference between the conditions that the first of them is essential, for marriage cannot be contracted by an insane person or a boy without understanding but the other two are required only to give operation to the contract for the marriage contracted by a boy of understanding is valid, though dependent for its operation on the consent of his guardian.[4]

8. Proposal and acceptance how expressed :

Where both parties are present, a declaration and acceptance must be expressed at one meeting (majlis), If either of the parties rises from the meeting before acceptance there would be no valid contract.[5] (usual ceremonies in marriages described); *Sklemannessa vs. Mohd.*[6] A proposal made at one meeting and acceptance made at another would not constitute a valid marriage.[7]

A contract of marriage may be made only by speech uttered by the parties or their agents in the presence of each other and also of the witnesses.[8] It cannot be expressed through any act, for instance,

1. Ammer Ali, II, 362.
2. *Abdul Latif vs. Niaz Ahmad*, I IC 538: 31 All 343.
3. Bail, II, 1.
4. Bail 1, 4-5.
5. Bail I, 10-11; Sircar I, 294: *Mohd Zaman vs. Naima Sultan*, PLD 1952 Pesh 47; *Mst Ghulan Kubra vs. Mohd Shafi*, 1940 Pesh 2
6. 31 Cal 849
7. *Jogu Bibi vs. Mesal Sheikh*, AIR 1963 Cal 415: 164 IC 957: 37 Cr.LJ 1072
8. *Sahabi, Bibi vs. Karmuddin*, 15 CWN 99 d1.

by taking possession of dower or by mutual surrender as stated in Durrul Mukhtar.

If, however one of the parties is not present a proposal of marriage may be made by a letter provided that there are witnesses to the receipt of the letter and to the consent of the person to whom it is addressed.[1] The contents of the letter must be made known to the witnesses and the proposal should not be expressed in the imperative mood" as stated in Durul Mukthar. Thereafter the following may be implied.

9. How consent should be expressed :

A consent to a marriage may be given either in express words or may be expressed by conduct. In certain cases, it is necessary that consent must be expressed in express words but in other cases it can be inferred from conduct also.

Thus, in the case of a woman married for the second time it was held that the unequivocal recognition of the subsistence of the marriage would not imply consent, particularly in view of the fact that consent was not given freely.[2]

10. Consent of Saibba :

In the case of a Saibba a girl who has already been married or who had knowledge of carnal connection, it is necessary that the consent must be given in express terms.[3]

The express consent of saibba is necessary according to all schools. In her case it must be expressed by words such as "I consent to it" because the Prophet had said, "the saibbas are to be consulted" and also because she has not the same pretence to silence or shyness as a virgin.[4]

As to whether a woman whose virginity has been lost by fornication or adultery is to be treated as a virgin for the purposes of

1. (Sircar I.296)
2. *Bindu vs. Bugli*, 1 IC 814.
3. Bailee, I, 160, Hidaya 35, Bailee II, page 9.
4. Hed 35.

validity of implied consent, there is a difference of opinions. Abu Hanifa is of opinion that she must be treated as a virgin while Muhammad and Abu Yusuf treat her as a saibba.[1] But if virginity is lost by menstrual discharge or by jumping or hurt, she would be treated as virgin.[2] A woman who has been separated from her husband by reason of impotency or by talaq or death before consummation is to be treated as virgin.[3]

Shafei Law :

Loss of virginity whether by fornication or by legitimate intercourse would make her saibba but virginity is not lost without carnal connections or a fall on the ground.[4]

11. Consent by virgin:

It is not necessary that consent should be given in express terms. Consent may be inferred from conduct in various ways:

(i) **Silence:** Where the consent of an adult virgin is obtained by the father, brother or uncle of the bride or an agent appointed by him,[5] the consent may not be given in express words. If the guardian, being the person empowered to engage in the contract, asks for the consent of an adult virgin to a marriage and she remains silent, this is compliance; because the Prophet has said, " a virgin must be silent in everything as regards herself and if she is silent it signifies assent", and also because her assent is rather to be supposed as she is ashamed to testify her wish.[6] Silence and laughing will in such cases to appointment of such person who should have been a guardian if she had been a minor an agent and would amount to permission by her. But this would be so only if there is one guardian, otherwise it would not amount to consent.[7]

1. Hed 35.
2. Hed 35; Durr 37.
3. Abdur Rahman, Art 55; *Jaiman vs. Rulia*, 25 I C 43.
4. Minhaj, 284-85; Hed 35.
5. Durr 35.
6. Bail I, 9; Hed 35; Durr 33.
7. Durr 33-34.

In the case of an adult virgin when consent is obtained by any person other than the father, brother or uncle it must be given in express words as is the case with a saibba,[1] unless the person is acting as a messenger from her parent or their immediate guardian.[2] Thus, express consent is needed where a paternal cousin contracts a woman in marriage and silence would amount to repudiation.[3]

If the guardian of an adult woman marries her to himself, her silence after the contract would amount to repudiation but not if she remains silent before the contract.[4] Even in the case of a father if the father does not mention the dower or the name of the proposed husband, silence of the woman would not amount to consent and she may repudiate the marriage.[5] If, however, the name of the husband is mentioned without any mention of dower, the marriage would be operative and consent would be deemed to be for proper dower. If the contract is made for specified dower, it would not be operative.[6]

(ii) **Laughing :** If a woman smiles, it signifies assent. Laughter is still more certain token of assent than silence unless the laugh be in jest or sneeringly.

(iii) **Weeping :** If weeping is with effusion of tears and unaccompanied by any audible sounds, it indicates consent but if it is accompanied by cries and sounds, it is not consent.[7]

(iv) **Other acts showing consent :** Any other conduct may also amount to consent if it is such from which clear consent may be inferred. Thus, her consent may also be established by her asking for her dower or maintenance of facilitating consummation or accepting congratulations. But accepting presents, after the marriage or partaking of husband's food or serving him as before would not amount to consent.[8]

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1. Hed 35, 37-38; Durr 36 : 25 I C 43 supra.
2. Hed 35.
3. Ameer Ali, II, 305.
4. Durr 34.
5. Bail I, 56-57.
6. Bail I, 57; Hed 35.
7. Bail I, 55; Hed 35.
8. Bail I, 60; Durr 36-37

So also if a person were to call a woman in the presence of witnesses, "my wife" and she answered, "yes my husband", it will amount to a valid marriage.[1]

In the case of *Hafizan*, it was held that "it is however necessary that consent should be clearly inferable from the conduct or the words used. If the words used are vague and ambiguous they would not amount to consent. Thus, where the vakil for the marriage went to the bride and inquired, "who is your waris" and thereupon she replied, "my father", it was held that this did not amount to consent for marriage with any particular person. "It is necessary that before such words could be a proper authorization of marriage, the authorization should have given to the father in the following manner: " I appoint you waris to enter into the contract of marriage on my behalf".[2]

12. Intention not necessary :

In a contract of marriage earnestness and joke are equal. It is not a condition that the contracting parties should know the meaning of the words in which the proposal or acceptance have been made because there is need for intention.[3]

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1. Ameer Ali, II, 307.
2. *Hafizan vs. Saidno*, 1925 Sind 22 at p 25.
3. Durr 7.

CHAPTER IV

GUARDIANSHIP AND AGENCY IN MUSLIM MARRIAGES

Synopsis

We have so far mentioned the form of marriage and its essential ingredients. Now we have to examine as to who can act as guardian or an agent on the occasion of her/his marriage and what is the age of majority in Islam.

1. Guardianship and agency in Muslim Marriages :

Almost all the systems of law have rules with respect to the power of guardians to enter into contracts of marriage. In fact, early child marriages was the trend in most of the countries in early days. The Roman gave strict powers of "*patria potestas*" over their children not only in the case of marriages but also for other purposes. Among the Jews also the father had the right of contracting a minor daughter in marriage.

Muslim law has made elaborate rules in respect of rights and duties of guardianship for marriage. These rules relate to—

(1) the contracting of the marriages of minors and lunatics (with the incidental rights in respect of dower and matrimonial conditions);

(2) bringing about dissolution of marriages.

2. Indian Majority Act and Muslim Law :

Age to attain majority in India is governed by the provisions of Sections 2 and 3 of the Indian Majority Act. According to Section 3 of the Act, the normal age for majority is 18 years (except in cases where a guardian is appointed or declared by the Court or where the property of the minor has been or shall be assumed by any Court of Wards, in which case the age of majority is 21 years).

In certain matters, however, the question of majority is not affected by the Indian Majority Act. Thus, according to the provisions of Sec.2 of the Act, nothing shall affect "the capacity of any person to act in the following matters, namely marriage, dower, divorce and adoption".

In all theses matters the age of majority will be determined according to the provisions of Muslim Law.[1] The conversion of Hindu girl who has not attained the age of 18 years embracing Islam with understanding would be valid and she can enter into a contract of marriage with a Mohammedan but the husband may not be appointed her guardian under the Guardians and Wards Act, if he is not fit for the purpose in the interest of the welfare of the girl.[2] A person who has attained puberty and who is entitled to enter into a contract of marriage is also major for the purpose of fixing dower.[3]

As to whether majority for the remission of dower is governed by Sec.3 of the Majority Act or by Muslim Law by the effect of Sec.2 of the Act, there is a difference of opinions. It has been held by Patna[4] and Madras[5] High Courts that the question would be governed by Sec.3 of the Act. On the other hand, it has been held by Allahabad[6] and Calcutta High Courts[7] that the provision of Muslim Law would apply and majority would be attained on puberty. It is submitted that this question would necessarily be an act in the matter of dower and the capacity of a person to act in such matters will be covered by Sec.2. The latter view is therefore more sound.

It has been held in case of *Maugtun*[8] that in the matter of a pre-nuptial agreement for contracting a marriage in future, the majority would be determined by Sec.3 of the Act of 1936.[8] But this view is doubtful. The matter essentially relates to the capacity for contracting a marriage. There is no reason why majority should be determined by Section 3 of the Act.

For the purpose of procedure for suits, it appears that the majority for filing a suit would be governed by Section 3 of the Act. It has however been held by Bombay[9] and Calcutta High Courts,[10] that a

1. *Qasim Husain vs. Bibi Kaniz Sakina*, 1932 All 649: 54 All 806: 139 IC 371: *Begam Bibi vs. Rahmat Khan*, 1924 Lah 673: 75 IC 892.
2. *In re Muhammad Alam*, 1939 Sind 311.
3. *Mozharul Islam vs. Abdul Gani*, 1925 Cal 322.
4. *Najmunnisa vs. Serajuddin*, 1939 Pat 133: 17 Pat 303.
5. *Abidhunnisa vs. Mohd Fathiuddin*, 41 Mad 1026: 44 IC 293.
6. *Qasim Husain vs. Bibi Kaniz Sakina*, 1932 All 649.
7. *Mozharul Islam vs. Abdul Gani*, 1925 Cal 322.
8. *Maung Tun vs. Ma E Kyi*, 1936 Rang 212: 14 Rang 215: 162 IC 560 overruling *Maung Gale vs. Ma Hla Yin*, 65 IC 411 (Burmese marriage).
9. *Ahmed vs. Bai Fatima*, 1931 Bom 76: 55 Bom 160.
10. *Naksetan vs. Habibur Rahman*, 1948 Cal 66 : 50 CWN 689; *Haneefa vs. Mokshed Ali*, 1961 Cal 59.

wife whose age is below 18 but who has attained puberty may sue for divorce without a guardian. On the other hand, it has been held in Oudh,[1] that the provisions of Order 32, Rule 1, C.P.C. would apply and a suit for dower must be instituted through a next friend unless majority has been attained according to Sec.3 of the Act. The latter view, it is submitted is sound.

3. Minimum and Maximum age of Puberty :

Under the Muslim law, majority is attained on puberty. Puberty and majority are one and the same.[2] A person who has attained puberty can enter into a contract of marriage.

The minimum age of puberty in the case of a boy is 12 years and in the case of a girl it is 9 years so that majority cannot be held to have been attained before the age even though the party should claim to be adult or even if natural signs are present.[3] It has been held that in the case of a girl, the age of puberty is 9 years, evidently referring to the minimum age.[4]

After the age of 12 years in the case of a boy and 9 years in the case of a girl, puberty would be established if there are natural signs at any time before the age of 15. Thus, puberty is attained either on the completion of her fifteenth year or on her attainment of the state of puberty at an earlier period. The onus of providing that the girl has attained puberty in either of these ways rests upon those who allege and rely upon it.[5]

The maximum age when puberty would be deemed to have been attained is 15 years according to Abu Yusuf and Muhammad. As to the view of Abu Hanifa there are conflicting reports, according to one in which he agrees with Muhammad and Abu Yusuf. It has been held in many cases that puberty may in the absence of evidence

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1. *Usman Ali vs. Khatoon Banu*, 1942 Oudh 243.
2. Hed 529 (F N); *In the matter of Lovejoy Patel*, 1944 Cal 433.
3. Bail II, 96 (F N).
4. *Sadiq Ali vs. Jai Kishori*, 1928 PC 152: 109 IC 387; *Maleka Jehan vs. Mohd Uskuree*, 26 WR 26.
5. *Atkia Began vs. Mohd. Ibrahim*, 1916 PC 250: 36 IC 20. But see Macnaughten, 62 Prin. 1, males and females both minors till the age of sixteen.

to the contrary be presumed to have been attained at the age of 15 years.[1]

Shafei Law :

It agrees with the views of Muhammad and Abu Yusuf.[2]

Shia Law :

Puberty is established by natural sings or by age which is 15 years in the case of males and 9 years in the case of females.[3] Puberty begins with menstruation which is presumed to commence between the age of 9 and 10.[4] Ameer Ali has however stated that puberty is to be presumed at the age of 15 both in the case of males and females according to both Hanafis and Shias.[5] This has been accepted in *In re Lovejoy Patel*.[6]

4. Guardians for Marriage

4.1. Who can act as Guardians for marriage[7] :

The persons who are entitled to act as guardians for marriage of a minor are the following:

(1) **Paternal relations :** All male paternal relations are residuaries in the same order in which they are entitled to inheritance. They are in the following order of preference:

(a) **Descendants :** The son or son's son.

(b) **Ascendants :** The father or true grandfather.

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1. *Yusuf vs. Mst. Zainab*, 1923 Lah 102; *Khair Din vs. Hakim Bibi*, 28 IC 421; *Nawab Bini vs. Allah Dina*, 1924 Lah 183: 73 IC 896; *Mst. Ghulam Kubra vs. Mohd, Shafi*, 1940 Pesh 2; *Behram Khan vs. Akhtar Begum*, 1952 PLD (Lah) 548: (1951) Lah 656; *Allah Diwaa vs. Kammon Mai*, 1957 PLD (Lah) 651: (1957) 2 WP 1013; *Mushtaq Ahmad vs. Mohd. Amin*, 1962 PLD (Kar) 442.
2. Hed 524.
3. Bail II, 6 (FN).
4. *Sibt Ahmad vs. Amina Khatoon*, 1929 All 18 : 50 All 733.
5. Ameer Ali II, 235, 275, 535. No authority cited.
6. 1944 Cal 433 : (1943) 2 Cal 554.
7. Bail I, 45-46.

(c) **Descendants of fathers :** The descendants of fathers are in the following orders – full brother and then consanguine brother and their descendants alternately in the like order.

(d) **Descendants of the true grandfather :** that is, full and failing them consanguine paternal uncle or their male descendants alternately in like order.

In each of these classes nearer will exclude the more remote.

The priority of agnates is based on the Prohpet that guardianship belongs to the agnates in the order of inheritance, the more remote being excluded by the nearer.[1]

(2) **Maternal relations :** There is a difference of opinions with respect to right of guardianship of any relations other than the father and true grandfather. According to Muhammad and also the more generally received report of the opinion of Abu Yusuf, no authority is vested in any relation except the paternal kindred. But Abu Hanifa is of opinion that the right of guardianship is vested in the mother or maternal uncle or aunt and all others within the prohibited degrees.[2]

According to Abu Hanifa the other relations after the mother entitled to be guardians are in the following order:

(a) **Descendants :** Daughter, son's daughter, daughter's daughter, daughter of the son's son, then daughter of daghter's daughter.

(b) **Ascendants :** The nearest maternal or false grandfather.

(c) **Collaterals :** Full sister, consanguine sister, uterine brother, uterine sister and brother then their children.

(d) **Descendants of grandfather :** Paternal aunts, maternal uncle, maternal aunts, then daughters of maternal uncles and then the daughters of maternal aunts.[3]

The view of Abu Hanifa in respect of the right of guardianship of mother or other maternal relations seems to have been accepted. A

1. Bail I, 45.
2. Bail I, 46; Hed 38-39 giving reasons for views of each.
3. Bail I, 46; Sircar I, 331.

marriage contracted by the mother in the absence of the father is not void. Where the marriage was contracted by the mother in the absence of the nearer guardian who was in jail it was held to be lawful.[1]

The right of the mother to guardianship would however be forfeited if she marries another husband but otherwise her right would continue (even if she is divorced by the husband) till the child attains puberty.[2]

(3) The Judge-in default of relations is the guardian.

Shia Law :

The father and grandfather are the only relations who are guardians for marriage.[3] The mother has no power of giving a minor child in marriage even if she is an executrix of the father.[4]

Shafei Law :

The father and the grandfather are the only guardians for marriage of a virgin minor girl. The collateral agnates (such as full or consanguine brother or uncle) cannot contract a minor girl into marriage. But in the case of saibba minor girl, guardianship does not belong to any person whatever, not even to the father or grandfather.[5]

Ameer Ali however states that the guardianship is in the following order:

> father, father's father son, son (by previous marriage), full brother, consanguine brother, nephew, uncle, cousin, tutor and lastly the kazee.[6]

5. Qualifications for guardianship :

Two necessary qualifications for guardianship are that the guardian has attained puberty and is of sound mind. Majority for this purpose,

1. *Kaloo vs. Goriboollah*, 10 WR 12 : 13 Beng LR 163; see also *Mohd Sharif vs. Khuda Baksh*, 1936 Lah 683.
2. *Abdul Jabbar vs. Khatija Begam*, 1964 MPLJ (Notes) 119.
3. Bail II, 6-7.
4. Ameer Ali II, 246.
5. Hed 36; Minhaj 285.
6. Ameer Ali II, 301. But see Minhaj 285, slightly different order of persons who can assist as guardians.

would be governed by the Personal Law and shall be deemed to have been attained puberty. A boy of 15 years can give his sister in marriage as her guardian.[1]

If a guardian becomes permanently insane he would cease to be a guardian but if he has lucid intervals, his guardianship would not cease and his acts during the lucid intervals will have legal operation. The continuance of insanity for a month may be criterion for determining the character of the insanity.[2]

Profligacy, blindness or dumbness are however not disqualifications for guardianship.[3] But if the father is profligate, the judge may contract a woman into an equal marriage.[4]

Shafei Law :

Notorious misconduct is a disqualification for guardianship.[5]

6. Apostacy of the guardian :

It is one of the conditions of the Muslim Law that the guardian must profess the religion of Islam. An apostate cannot be a guardian for any person even of a non-muslim or an apostate.[6] Thus, according to Muslim law, the rights of guardianship terminate on the apostacy of a guardian.

The question is as to whether this right is affected by the provisions of the Caste Disabilities Removal Act (XXI of 1850). It provides as follows:

> "So much of any law or usage now in force within the territories subject to the Government of the East India Company that inflicts on any persons forfeiture of rights or property or may be held to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of any religion or being

1. *Yusuf vs. Zainab*, 1923 Lah 102: 68 IC 727.
2. Bail I, 47-48; Hed 38.
3. Bail I, 47-48; Sircar II, 371.
4. Bail I, 50.
5. Minhaj 286.
6. Bail I, 48; *Moni Jan vs. District Judge*, 42 Cal 351 : 25 IC 229 : 20 CLJ 91.

deprived of caste shall cease to be enforced as law in the courts of the East India Company and in the courts established by Royal Charter within the said territories."

There is no direct decision on the point. The question was raised with respect to the effect of apostacy on the right of a guardian to the custody of his children. It was held that the right to the custody of the children was not lost by apostacy.[1] In another case it was held that a Hindu father does not lose his capacity to give his son in adoption merely by reason of his conversion to Islam.[2] In one case however it was held that a father who has apostatized from Islam cannot object to the marriage of his minor daughter by the Muslim mother on the ground that his consent was not obtained.[3]

If the principle of the cases,[4] is applied, the right to guardianship would also not be lost by the reason of apostacy.

Ameer Ali is however of opinion that the Caste Disabilities Removal Act is confined in its application to rights of inheritance.[5] The provisions of the Act do not however seem to be so confined.

7. Powers and Duties of Guardians

7.1. Powers of contracting marriages of minors :

A contract of marriage by a person who has not attained puberty or is not of sound mind without a guardian is not valid.[6] It is necessary that the marriage of a minor should be contracted through a guardian. A ceremony performed without the previous consent of the guardian of a minor would be ineffectual for creating a valid marriage.[7] The existence of a guardian is a condition for the validity of the marriage of a minor or a lunatic.[8] A marriage by a boy or a girl who has attained age of discretion but has not attained the age of

1. *Muchoo vs. Arzoon*, 5 WR 235 (Hindu case, conversion to Christianity); *Gul Mohd vs. Mst. Wai*, (1901) 36 PR. 191.
2. *Sham Singh vs. Santabai*, 25 Bom 551.
3. *In the matter of Mohin bibi*, (1874) 13 Beng LR 162.
4. *Muchoo vs. Arzoon*, 5 WR 235 and *Sham Singh vs. Santabai*, 25 Bom 551.
5. Ameer Ali II, 259-260.
6. Bail I, 5; Bail II, 14; *Subrati vs. Jungli*, 2 CWN 245; *Shafiullah vs. Emperor*, 1934 All 589; 150 IC 139.
7. *Mst Atkia Begum vs. Mohd Ibrahim*, 1916 PC 250: 3 IC 20.
8. Durr 30-31.

puberty is not valid unless the legal guardian has consented to it.[1] Such marriages are only irregular (and not void) and can be validated by the guardian's consent.

A guardian can contract a minor into marriage whether the girl is virgin or not even against the will of the minor.[2]

The guardian may marry the minor girl to himself, thus the son of a paternal uncle may marry his uncle's daughter to himself.[3]

But while a contract of marriage by a guardian would be binding a mere acknowledgment of the fact of the marriage having been contracted would not be binding and the fact of the marriage must be proved by evidence.[4]

7.2. Equal guardians :

The power to contract a minor into a marriage can be exercised by the nearest guardian. If there are more guardians than one in the same degree, a contract made by either of them would be void, even though it is not allowed by or is cancelled by the others.[5] In such case the first marriage contracted by any of the equal guardians will be valid. If however it is not known as to which of them was first contracted or if both marriages are performed simultaneously, they will both be void.[6]

7.3. Remoter guardians[7] :

Where there are guardians who are not equal in degree, the nearest guardian would preclude the remoter guardian and would be first entitled to contract a minor into marriage. If a marriage is contracted by a remoter guardian even though the nearer guardian is in existence, it would be dependent on the consent of the latter. This would be so even if the guardianship devolves on the other remoter guardian subsequently and the contract would not be valid except by

1. *Mst Khatji vs. Rehman Wani*, 1952 J and K 43.
2. Bail I, 50; Sircar 321; Durr 38; *Mst Ghulam Kubra vs. Mohd Shafi*, 1940 Pesh 2.
3. Bail I, 47.
4. Durr 47.
5. Bail I, 49; Durr 45.
6. Durr 45; Minhaj 287.
7. Bail I, 49-50.

the consent given after the devolution.[1] Thus, where the mother and the brothers of a minor girl were alive and a marriage was contracted by the uncle it was held that the marriage would not be void.[2]

Where a minor is contracted into marriage by a remoter guardian while the nearest is present, the marriage would depend upon distinct ratification by the nearest guardian. Mere silence or mere presence would not be sufficient, an express consent must be proved.[3]

If the nearer guardian is made incompetent by reason of insanity or minority, the remoter guardian would become the nearest guardian and marriage contracted by him will be valid.

The nearest guardian may delegate his authority to a remoter guardian. Where the father of a minor girl had divorced his wife and has relinquished his claim to his daughter in lieu of dower and the mother married the minor to one person but subsequently the father married her to another person, it was held that the marriage contracted by the mother was valid as the father had delegated his power of guardianship in marriage to the mother.[4]

There are however circumstances in which a remoter guardian may contract a minor into marriage. If the nearest guardian is absent and is at such distance that there is risk of missing a good offer, a remoter guardian may enter into a contract of marriage.[5]

If a nearer guardian refuses a suitable match, the remoter cannot even in that case contract the marriage but if a complaint is made to the judge even where the refusal has been made by the father, the judge may contract the marriage.[6]

Shia Law :

No person has any authority to contract a minor in marriage except the father and paternal grandfather. A contract made by either the father or grandfather would be valid.[7] The Shafei law is also the same.[8]

1. Durr 45; Hed 38.
2. *Ghulam Fatima vs. Khaira*, 1923 Lah 674; *Mohd Sharif vs. Khuda Baksh*, 1936 Lah 683.
3. *Abdul Kasim vs. Jamila Khatun*, 1940 Cal 251: 44 CWN 352; *Ayub Hasan vs. Akhtari*, 1963 All 525; *Chirag Bibi vs. Ghulam Sarwar*, 60 IC 453 (Lah).
4. *Bakhsha vs. Mirbaz*, 51 PR 1888.
5. Durr 45; Bail I, 49; Hed 39.
6. Abdur Rahman, Art 41.
7. Bail II, 6-7.
8. Hed 36; Minhaj 285.

If the father selects one husband and the paternal grandfather another, the contract prior in date be valid and the other one void. The grandfather has however precedence over the authority of the father, so that if two contracts of marriage should take place simultaneously, then that which was entered into by the grandfather would be preferred to that entered by the father.[1]

7.4. Powers of guardians to contract a lunatic into marriage :

The guardians for lunatics are the same as for the minors. Several of the guardians would naturally not be guardians of minor. Thus, any of the descendants cannot be a guardian for a minor. The list of guardians is however common and the guardians of lunatic would be in the order indicated.

An insane persons even though adult may be contracted into marriage by the guardians.[2] The son has got a priority of the right to contract a father or mother who has become a confirmed lunatic into marriage in preference to the father of the lunatic.[3]

The guardian of a lunatic may contract more marriages than one for the lunatic.[4] A lunatic woman contracted into marriage has no option of canceling the marriage on regaining sanity if it was contracted by father or grandfather or the son but if it is contracted by any guardian other than these, she has the right to rescind the marriage on regaining sanity.[5]

Shia Law :

The lunatic has no option of canceling the marriage on regaining sanity. The father or grandfather alone can be the guardian for a lunatic.[6]

Shafei Law :

A guardian should seek a husband for an adult girl who is lunatic but should not seek a wife for adult male unless there is manifest

1. Sircar II, 371.
2. Bail I, 46; Sircar I, 330.
3. Bail I, 49; Sircar I, 330-333; Hed 39; Durr 43.
4. Durr 47.
5. Bail I, 43.
6. Bail II, 7-8.

need for it. No contract of marriage should be made for a minor person of either sex.[1]

7.5. Power of executor to contract marriage :

The executor is not entitled to act as a guardian for contracting a minor boy or girl in marriage. This would be so even if he has been authorized in the will to contract the marriage. If however the executor happens to be a near relative and is otherwise a natural guardian he may exercise his right in such capacity but not as an executor, this would not deprive him of his rights as a guardian.[2] The right may, however, be vested in the executor by the judge if no other person exists having preference over him.[3]

Shia Law :

According to better opinion the executor has no authority for contracting the marriage of a minor even if it was expressly given to him by his testator but executor may contract a marriage for a person who, though has attained puberty, is deficient in understanding or he is a lunatic when there is any necessity for contracting the marriage and the marriage is for the benefit of such person.[4]

7.6. Power of the judge to contract marriage of minors :

According to the Muslim the guardian after the relations is the Sultan or the Ruler and then the judge. The judge has the power of contracting a person in marriage when it is within his commission and authority but not if it is not so. If however the nearest guardian fails to contract a minor into marriage the judge may contract it when there is apprehension of losing an equal husband. The Judge cannot however marry a minor girl to himself or to his son.[5] The Judge of a Muslim State is a Qazi.

Shia Law :

The Judge has no power of contracting a minor into marriage. But the Judge has authority to contract a marriage for a person who

1. Minhaj, 286, 289.
2. Bail I, 47; Durr 30 (FN), 44.
3. Abdur Rahman, Art 38.
4. Bail II, 9; Sircar II, 367, 368.
5. Bail I, 47; Durr 46.

has attained puberty without discretion or is insane when the marriage is for his benefit.[1]

7.7. Limits of the guardians's power – Control by court :

The Muslim Law has a great regard for the interests of a minor. The power is not to be exercised by the guardian in such manner as to cause any prejudice to the interests of the minor. In fact, the right of contracting a marriage is the right of the minor resting upon the guardian and if a minor girl requires the guardian to contract her in marriage to a particular person who is her equal and for him whom she has a liking the guardian must comply with her wishes.[2] If, therefore, a guardian enters into a contract of marriage in a state of intoxication with a profligate or a wicked person or of a very low position, there would be misuse of power and such marriage may become invalid.[3] So also, if the father indefinitely abuses authority by systematically refusing his consent to the marriage of his daughter to suitors for the girl, the judge may interfere.[4] An unequal marriage cannot be contracted by a guardian except with the woman's own consent.[5]

The provisions of Muslim law have been modified and superseded by the Guardians and Wards Act in respect of the guardianship of the person and the property of a minor. The Act however does not deal with the power of contracting a minor into marriage. So far as the guardianship of marriage is concerned, it is governed by the Personal Law. A guardian appointed by the court under the Guardians and Wards Act has no power of contracting a minor in marriage. The right of a guardian for marriage under the Personal Law to contract a minor into marriage is not affected by the Act.[6]

But even under the Muslim law the Judge has got the power of control over the acts of the guardian. The civil court would, if there is sufficient and reasonable cause to injury or warrant interference, restrain a guardian who abuses his power by refusing to marry the minor to an eligible suitor,[7] or may, at the instance of the mother or

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1. Bail II, 8; Sircar II, 367, 368.
2. Hed 699.
3. Durr 39.
4. Ameer Ali II, 239.
5. Minhaj 288.
6. *Hadish vs. Bogamulla*, 38 IC 787.
7. Ammer Ali II, 237-238.

maternal relations, grant an injunction restraining the guardian from entering into an improper contract.[1] If the mother contracts a minor daughter into marriage, the court may grant an injunction restraining the husband and the mother from the consummation of the marriage till the minor has an opportunity to exercise the right of regularisation of marriage on attainment of puberty.[2]

The court is empowered to appoint a guardian of person and the property of all persons including Muslims. Such guardian would be under the control of the court and must obtain the sanction of the court for the marriage of a ward of the court. The court has got the power to prevent an obviously unsuitable marriage of the minor.[3]

The court may in appointing the mother as a guardian direct that before contracting a marriage she must obtain the permission of the court and should comply with some conditions.[4]

8. About Contracting dower

8.1. Guardian's power for contracting dower :

A guardian has the power of settling dower. The dower settled by a guardian other than the father or the grandfather will not be binding if the dower fixed is excessive for the boy or deficient for the girl.[5]

As to dower settled by the father or grandfather there is a difference of opinions. According to Abu Hanifa the contract of dower would be valid and binding even if the guardian contracts his daughter into marriage on very inadequate dower or if he contracts his son for extravagant dower. According to Muhmmad and Abu Yusuf the contract would be binding only if the deficiency or excess is not very disproportionate but it would not otherwise be binding.[6]

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1. Ameer Ali II, 241-242.
2. *Mohammad Sharif vs. Khuda Baksh,* 1936 Lah 683: 164 IC 713.
3. *Moni Jan vs. District Judge*, 42 Cal 351: 25 IC 229: 20 CLJ 91 dissenting from *Bai Diwali vs. Moti Carson,* 22 Bom 509.
4. *Aftab Begam vs. Saiyad-ul-zafar*, 20 IC 873. See also *Premji Kanj vs. Jeewi Bai,* 1528 Sind 129 (Hindu case).
5. Hed 41.
6. Bail I, 73-74; Hed 41, giving reasons for the opinions of both.

The difference however is limited only to those cases in which the father or grandfather is not known to have acted carelessly or wickedly. But if this is known, or if he was dumb at the time of contracting the dower the marriage would be void.[1]

In the case of a woman who is a minor and of unsound mind, the payment to a legal guardian would be sufficient discharge to the husband and would exonerate effectively from the liability to pay dower.[2]

Shia Law :

A contract by a guardian for a much smaller sum than the proper dower is, according to the most approved doctrine, valid and binding.[3]

Shafei Law :

The guardian of a minor boy cannot contract a higher dower than proper dower nor can the guardian of a minor girl contract a dower smaller than the proper dower without her consent. The wife would be entitled to proper dower in such case.[4]

8.2. Liability of guardian for payment of dower :

The guardian does not become personally liable to pay the dower of minor merely because he has entered into a contract of marriage of a minor son or has consented to it.[5] But a guardian (whether of the husband or the wife or of both) may while in health stand as surety for dower although the wife may be a minor provided that the wife or someone else accepts the suretyship in the same meeting. Thus, if the father makes a contract for dower on behalf of a minor son and becomes surety for it, he would become liable for payment of the dower. In such case, if the father pays the dower he has no right to reimbursement from the son, unless there is a condition in the original security that he would be entitled to reimbursement. The wife can claim the dower from the guardian (*i.e.*, the father) but she would not be entitled to demand it from the husband till he attains puberty.[6]

1. Bail I, 73, 74.
2. Bail I, 129-130.
3. Bail II, 80. But see Sircar II, 369 also citing Sharaya-ul-Islam in such a case, the woman is, according to the most authentic doctrine, competent to object.
4. Minhaj 308.
5. *Mohd Siddiq vs. Shabuddin*, 1927 All 364: 49 All 557.
6. Bail I, 140-141; Hed 54; Durr 79-80; *Mst Fatima Bibi vs. Lal Din*, 1937 Lah 845.

If the father enters into a contract of marriage of a minor son he would become liable to pay the dower to the wife if the son dies without leaving any property.[1]

If a father becomes a surety for his adult son without his authority and then dies, the dower will be payable from his estate without being recoverable, by the other heirs, from the son.[2]

Shia Law :

If a father contracted a minor son in marriage and the son has no independent means of his own, he is liable for the dower, even if the son becomes wealthy after attaining puberty.[3] In the event of his death, it must be discharged out of his whole estate.[4]

If the father gratuitously pays the dower on account of an adult son who divorces his wife before consummation, the son and not the father has a right to re-claim one-half of the dower, the payment by the father being considered to be a gift to the son.[5]

8.3. No power of relinquishing dower :

The power of relinquishing the whole or part of her dower rests with the wife. The father or any other guardian cannot make any abatement of dower.[6]

Shia Law :

The father or grandfather of the wife who alone can be guardian under the shia law can forgive a part of the dower and this would be valid if it is not fraudulent. Thus, the guardian of the wife can give up one-half of the dower to which a wife would be entitled if a talaq is pronounced before consummation. The guardian cannot however give up the whole dower. The guardian of the husband

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1. Ameer Ali II, 468.
2. Bail I, 141.
3. Bail II, 80; *Sabir Husain vs. Farzand Khan*, 1938 PC 80 reversing 1934 All 52.
4. Sircar II, 365.
5. Bail II, 81; Sircar II, 365.
6. Bail I, 117.

cannot give up the right of the husband to the return of one-half of the dower in the case of divorce before consummation.[1]

8.4. Guardian's power to make matrimonial conditions :

The parties who are adults can agree to certain conditions in a marriage contract. The guardians may also make conditions which would be binding. A condition as to talaq-e-tafweez contracted by the guardian of a minor girl would be binding.[2] An agreement for kharch-I-pandan made between the guardians of minor parties to a marriage is valid. The mere fact that the wife is herself not a party to the agreement will not prevent her from making a claim. She would be entitled to enforce it as a beneficiary.[3]

9. About dissolving marriages

9.1. Powers of guardians to dissolve marriages :

Where a marriage is contracted by the nearest guardian, it is valid and binding. The guardian himself cannot dissolve it.[4] A person whether a boy or girl who has attained puberty is entitled to enter into marriage without the advice or consent of any persons who should have been guardians before puberty. Such persons have no right to interfere with a marriage contracted by any person after attainment of puberty.

There are however two cases in which the persons who should have been guardians before attainment of puberty would be entitled to interfere with a contract of marriage made even by adult persons :

(1) where an unequal marriage has been contracted ; or

(2) where inadequate dower has been settled at the marriage.

Shafaee Law:

Under Shafi law a marriage can be dissolved on the ground of any party suffering from any disease by the guardian before anyone of the party to the marriage attains puberty.

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1. Bail II, 77-78; Sircar II, 362.
2. *Marfat Ali vs. Jabedunnisa,* 1941 Cal 657.
3. *Khwaja Mohd vs. Husaini Begam,* 32 All 410 (PC); 7 IC 237.
4. *Ata Muhammad vs. Saiqal Bibi,* 7 IC 820: 8 ALJ 953.

9.2. Guardians who can object to marriage :

The right to raise any objections to the marriage either on the ground of inequality or of unequal dower is confined only to agnates and does not belong to any maternal relations.[1] The right is, however, according to better opinion, available not only to those agnates who are within the prohibited degrees but to all other agnates.[2] The woman cannot object to marriage contracted by herself even though it is unequal. The right belongs to the guardian.[3] The guardian who has himself consented to the marriage would not be entitled to object and the consent would be binding on himself and other guardians equal or more remote to him, unless there was express stipulation for equality or the husband represented himself to be equal of the wife.[4]

Shafei Law :

If an unequal marriage is contracted by the nearest guardian with the consent of the woman, no remoter guardian can object to it.[5]

9.3. Validity of unequal marriage :

In marriage regard is to be given to equality. This is on the basis of a saying of the Prophet (MPBUH), " take ye care that none contract women in marriage but their proper guardians and that they be not so contracted but with their equals."[6]

As to the validity of an unequal marriage contracted by an adult woman, there are conflicting reports about the views of Abu Hanifa, Abu Yusuf and Muhammad on this point, according to some, such marriage being legal and according to others illegal.[7] But it appears that preference was given both in "Fatawai-I-Alamgiri" and "Hedaya" to the view that such marriage is valid.[8]

Shafei Law :

The nearest guardian may, according to better opinion, contract a

1. Bail I, 68; Durr 31, 53.
2. Bail I, 68.
3. Durr 48-49.
4. Bail I, 69, 70.
5. Minhaj 288.
6. Hed 40.
7. See Bail I, 67; Hed 34.
8. Bail I, 67 (FN).

woman into an unequal marriage only with the consent of the woman. But if such contract is made by only one of the equal guardians without the consent of the others, it would not be valid even with the consent of the woman.[1]

9.4. What is equality :

Regard for equality is to be had with respect to the husband. The husband must be equal of the wife but it is not necessary that the wife be the equal of the husband since men are not degraded by cohabitation with women who are their inferiors. The wife may be lower as against the husband.[2]

For purposes of equality, the following facts have to be considered :

(1) Lineage : Preferences have been indicated in the Muslim texts mostly about Arab tribes.[3] It is doubtful if this can be considered now.

(2) Religion : They should have been Muslims for two generations up to paternal grandfather as in the case of a husband is considered to be equal, irrespective of the lineage of the wife.

(3) Wealth : There is a difference of opinions. According to Abu Yusuf it is sufficient if the man is able to support his wife. It is not necessary that he should be able to pay the dower.[4] According to some it is necessary that the husband should be possessed of sufficient means to enable him to pay at least the prompt dower. Abu Hanifa and Muhammad held that the fortune of the man is to be considered without regard to any particular ability and a person who is able to pay dower as also to provide subsistence may yet not be equal of a woman who is possessed of a large property.[5]

(4) Social Position : Preferences have been suggested in the texts. Persons in certain professions are not equal in position to those carrying on other professions.[6]

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1. Minhaj 288.
2. Hed 40.
3. Bail I, 62, 63; Hed 40.
4. Hed 41; but see Bail I, 65, the husband should also be able to pay dower.
5. Hed 40-41.
6. Bail I, 60; Hed 41.

It appears that in the present day the view of Abu Yusuf as stated in "Hedaya" will be accepted.

Shia Law :

Equality is a condition in respect of Islam or the general profession of Islam. According to better opinion, equality in eeman (true belief, i.e., being Shia) is not necessary. According to more generally received opinion, husband's ability to maintain is not a condition of the contract and the wife is not entitled to cancel the marriage by supervenient disability to maintain the wife. Equality is not required in the matter of tribe or country or possession of property or nasab (ancestry).[1]

Shafei Law :

Physical defects, profession and character are to be considered for determining whether the marriage is unequal. A man of notorious misconduct is not a suitable match for an honest woman.[2]

9.5. Cancellation of unequal marriage :

If an adult woman enters into a contract of marriage with an unequal husband without the consent of the guardian, the nearest guardian is entitled to get the marriage cancelled through the judge.[3] An order by the judge separating the parties would operate as a cancellation of the marriage and would not take effect as talaq, so that in the case the marriage has not been consummated or valid retirement has not taken place, now dower would be payable. In the case of a consummated marriage the whole dower will become payable and maintenance will also be payable during iddat. The woman will have to observe iddat.[4] Mere disparity of ages would not be a ground for setting aside a marriage contracted by a woman of mature age.[5]

9.6. Cancellation of marriage for inadequate dower :

There is a difference of opinions as to whether the guardians can raise objections in the case of inadequate dower. According to Abu Hanifa, if the woman contracts herself in marriage consenting to receive

1. Bail II, 34, 35.
2. Minhaj 288, 289.
3. *Mohamdee Begam vs. Bairam Khan*, 1 Ag HCR 130.
4. Bail I, 67-68.
5. *Shahzad Begum vs. Abdul Hamid*, 1950 PLD (Lah) 504.

a dower of much smaller value than her proper dower, the guardian has a right to oppose it until the husband agrees either to give complete and proper dower or to separate from him. Such separation would be cancellation of the marriage.[1]

According to Muhammad and Abu Yusuf the guardians are not possessed of any such authority.[2]

10. Matrimonial Agency : (Wikalat-ba-nikah)[3]

The appointment of agents for entering into contracts of all kinds including marriage is recognized as lawful by the Muslim Law. Marriages are often contracted by the parties through agents appointed for that purpose. There is also a precedent of the Prophet (MPBUH) in appointing an agent for his own marriage.[4] The system of agency was becoming a trend in Arabia and marriages were frequently effected through agents for both sides and almost invariably so on the part of the woman.[5] Both by the way of custom and owing to natural modesty, the practice of appointing agents, mainly in the case of women, is most common in India also. Elaborate provisions for agency in the case of marriages have been made in the Muslim Law. Important points about matrimonial agency may be noted.

10.1. Appointment and qualifications of agent :

The parties to a marriage may appoint any person/s as agent/s to enter into the contract on their behalf. In case the parties to the marriage are minors or of unsound mind, agents may be appointed by the guardians of such persons. A minor cannot appoint an agent. The appointment of her vakil by a minor bride would invalidate the marriage.[6] An agent may be appointed for contracting a marriage which has already been agreed upon between the parties.[7]

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1. Durr 41.
2. Hed 41, giving reasons for conflicting views; Durr 53, giving the view only of Abu Hanifa.
3. Hed 42.
4. Hed 376.
5. Bail I, 75.
6. *Shafi Ullah vs. Emperor*, 1934 All 589: 32 ALJ 38: 150 IC 139: 35 Cr LJ 1053.
7. Bail I, 75.

The appointment of an agent may be made either verbally or in writing and no witnesses are necessary for its validity.[1] The appointment of a vakil (agent) would not become invalid merely because such appointment has not been made in the presence of two witnesses.[2] The appointment of an agent by a minor is not valid.

Puberty and sound mind are required as qualifications for an agent.[3] Contracts by minor either for themselves or for others cannot be taken into account.[4] It has however been held that the majority of an agent (vakil) for marriage does not affect the validity of the marriage as Sec.184, Indian Contract Act permits a minor to act as an agent between the principal and third parties.[5]

Female as an agent :

Sex is not a disqualification either according to the Shia or Sunni Law and females can act as agents for either party to express both declaration and acceptance.[6]

Shafei Law :

No female is competent to act as an agent in a contract of marriage. A competent agent cannot be appointed to contract a valid marriage while either of the parties is in a state of ihram even though the agent is appointed previous to the state of ihram.[7]

10.2. Position of an agent for marriage :

The position of an agent for sale is somewhat different from that of an agent for marriage. The former does not act merely as a negotiator but also as a principal and is consequently affected by the obligations.

The position of latter is one in which he is no more than a negotiator and the principal himself or herself must be referred to as

1. Bail I, 76.
2. *Kazi Siddique Hussain vs. Salima*, 61 CWN 187.
3. Tyabji, ML, Sec 54; But see Hed 378, infant with understanding can be agent.
4. Sircar II, 32.
5. *Erafanuddin vs. Badan Sheikh*, 51 IC 583.
6. Bail, II 9.
7. Minhaj, 284: 286

the contracting party who alone is entitled to the rights and is liable to the obligations of the contract. In ordinary contracts, such as those for sale and hiring, an agent is regarded primarily contracting in his own name. But in the case of marriage contracts, his position is more or less that of a negotiating intermediary.[1]

The position of an agent contracting a marriage is fairly protected.[2] Thus, even if an agent contracts a man into marriage with a prohibited woman, whether knowingly or in ignorance he cannot be proceeded against for recovery of dower which may be due for marriage. So also the marriage agent of a woman is not entitled to receive dower nor is he bound to make delivery of her person.[3]

10.3. Kinds of agents :

Muslim Law deals with agencies for marriage in considerable details. The kinds of agents dealt with under that law may be of the following kinds:

(1) Agents generally authorized to contract any marriage.

(2) Specially authorized agents.

(3) Agents with restricted terms of authority.

(4) Joints agents.

(5) Separate agents.

(6) Common agents of both parties.

(7) Unauthorized agents.

10.4. Agents for marriage in general :

An agent may be appointed generally or specially.[4] In a sense, the authority for marriage is special authority for the purpose of a particular marriage. There are however certain restrictions on the powers of an agent authorized generally for contracting the marriage. A male agent for marriage is not authorized to marry the principal

1. Bail 75; Hed 42.
2. Bail I, 78.
3. Bail I, 75.
4. Bail I, 75.

into marriage with himself even if he is generally authorized to marry her to anyone he likes.[1] There is also some restriction on an agent marrying the principal to certain relations of his own. The marriage of a principal to a person who is under the guardianship of the agent would not be within the power of the agent. Thus, if an agent marries the principal to his own minor daughter or son, the marriage would not be valid. The marriage of the principal to the grown up daughter or son of the agent would however be valid according to Muhammad and Abu Yusuf but not according to Abu Hanifa unless it is ratified by the principal.[2]

But in the case of other relations, it is within the power of the agent to enter into a contract of their marriage with the principal according to all.[3]

It is lawful for a nephew to contract the daughter of his uncle in marriage with himself.[4]

If an agent contracts his wife whom he has divorced by talaq, the marriage would be lawful, if the talaq had been made before he was appointed as an agent but if the talaq had been made after the appointment the marriage would be unlawful.[5]

If an agent contracts the principal into a marriage with a prohibited relation (*e.g.*, if the woman is the wife of the another person or she is observing iddat on account of another person) the consequences would be the same as in the case of an irregular marriage. The parties must be separated and the woman would be entitled to her dower if the marriage has been consummated.[6]

10.5. Specially authorized agent :

In order that an agent may contract the principal into marriage with himself, it is necessary that he must be specifically authorized to do so. If such authority is expressly given, the agent may marry the principal to himself and the marriage, if performed in the presence of

1. Hed 42; Bail I, 76; Durr 57; Sircar II, 369.
2. Durr 54; Bail I, 77.
3. Bail I, 77.
4. Hed 42.
5. Bail I, 78.
6. Bail I, 78.

witnesses, would be lawful.[1] This would of course be subject to there being no legal prohibitions.[2]

Shia Law :

The Shia Law also is, according to better opinion, the same.[3]

Shafei Law :

An agent cannot marry himself to a woman who has appointed him her agent even though she has given him an authority to do so. But a guardian may in such case lawfully contract his ward into marriage with himself on the plea of necessity.[4]

10.6. Agent with restricted authority :

It is open to the principal to place any restrictions on the power of an agent to enter into a contract of marriage. Just as restrictions can be placed on the powers of an agent under the contractual law of India, the powers of the agent for marriage under the Muslim Law can also be restricted by the principal. He must act within the scope of his authority.[5] Such restrictions may be placed with respect to a marriage with some specified persons or answering any particular description or with respect to the number of women to be married or the dower to be paid.

Where an agent extends the powers conferred to him or act contrary to the directions given to him, the contract of marriage would not bind the principal. Thus, marriage in the following cases would not be lawful as being against the directions given to the agent:

(1) *As to choice of the husband:* No particular person named, and the agent marrying the woman to an unequal husband.[6]

(2) *As to choice of woman:* Direction for marriage with a black woman but agent marrying the principal with a white

1. Hed 42.
2. Hed 42 (f.n.)
3. Bail II, 9.
4. Hed 42.
5. For interpretation of terms of authority, see Bail I, 76-83; Hed 43.
6. Durr 54.

woman, or vice versa; or for marriage in the family of the principal but agent contracting marriage in another family; or for marriage with a particular woman but the agent marrying another.[1]

(3) *As to the number of woman:* Direction for marriage with one woman and agent marrying with two.[2]

(4) *As to dower:* Direction for marriage to a particular woman without reference to dower but the agent marrying on dower which is much in excess of proper dower; or direction for marrying on 20 dirhems as prompt and 80 dirhems as deferred dower but the agent making 30 as prompt.[3]

A contract of marriage would not however be unlawful in every case, where the terms of the agency are not strictly complied with. If the terms of the authority can be construed as justifying the making of the contract of marriage would be lawful. Thus, a marriage would be valid if an agent is directed to marry the principal to a blind woman but marries him to one having sight,[4] or if he contracts a woman in marriage for more than her proper dower [5]; or if he is directed to marry the principal to two women or to two particular women but married him to only one, in the absence of an express direction to marry to not less than two;[6] or if he is directed to select a match of particular qualifications with the advice of some other person but selects a person of the same qualifications without such advice.[7]

10.7. Joint agents :

Where more agents than one are appointed to act in any matter in which thought and judgment is required one of them cannot act without concurrence of others since the principal may have confidence in the joint judgment of all and not one of them. Thought and

1. Bail I, 78-79; Hed 43.
2. Bail I, 797; Hed 43.
3. Bail I, 81.
4. Bail I, 78; Hed 43.
5. Hed 388.
6. Bail I, 79.
7. Bail I, 82.

judgment is required in the matter of marriage and divorce etc. It is therefore unlawful for any of the joint agents to contract a marriage independently of others.[1]

10.8. Separate agents :

Where some persons, *i.e.*, more than one are appointed separately as agents for entering into a contract of marriage each one of them is entitled independently to enter into a contract. In the case of an agency for the marriage of a man, all contracts made by separate agents would be valid unless the contracting of such marriages involves a prohibition. A man can thus be contracted into marriage by independent agents with different women not bringing the number to more than four.

In some cases however a conflict as to the validity of marriages contracted by separate agents may arise. There may be an infringement of some prohibition. This conflict will necessarily arise where a woman is married by two or more separate agents to different men. The question in such cases would be as to which of the marriages contracted by separate agents would be valid. In such case marriages which are not prohibited would be valid in the order of priority of date. Thus, if two agents acting independently of each other marry a man to two sisters, the one prior in date would be valid and the other one would be nullified without formal judgment by the court or regular divorce. If however it is not possible to discover as to which of the marriages contracted by different agents was first entered into, all the marriages would be nullified.

Thus, if the two marriages are simultaneously contracted with two sisters they will both be nullified.[2] The result is that all marriages contracted by independent agents would in all cases be valid unless otherwise prohibited. If however any of them offends against the rules of prohibition the first of those marriages which do not offend these rules would be valid.

Shia Law :

Where a woman is contracted into marriage by two separate agents to two different men and the marriages are not simultaneous,

1. Bail I, 83; Hed 391.
2. Ameer Ali II, 352.

the first one would be valid but if the second has been consummated, and the woman becomes pregnant, the paternity of the child has to be ascribed to the man whose marriage has been consummated and he would be liable for her dower. The woman must however be returned to the first man.[1]

10.9. Common agent :

The parties may both authorize one and same person to act as an agent on behalf of both parties and he can contract them to one another by a single form of words. Thus, a single declaration by the agent, "I have contracted" comprehends both the declaration and the acceptance and consequently there is no occasion for two separate sentences.[2]

10.10. Unauthorized agent (Fuzuli) :

A person who purports to act as an agent for contracting another person into marriage without obtaining any authority from such person, he is called a fuzuli (an unauthorized meddler). Any contracts made by fuzulis depend for their validity on the ratification of the contracts by the persons who have been contracted into marriage.

If an agent generally authorized contracts a marriage with a person on whose behalf the contract is made by a fuzuli, he can cancel the contract either expressly or impliedly.

The position of a fuzuli is however different. While there can be a common guardian or agent for marriage, a fuzuli cannot act either on behalf of both sides or as a fuzuli on one side and a principal on the other even though he is a guardian for one side. Such a contract would not become valid even by subsequent ratification according to Abu Hanifa and Muhammad. Abu Yusuf holds a contrary opinion.[3]

If however two fuzulis enter into a contract of marriage one acting for each side, such contract would on ratification be valid according to all.[4]

1. Bail II, 12.
2. Hed 42; Bail I, 84.
3. Bail I, 84-85; Hed 43.
4. Hed 43.

But, unlike the case of a fuzuli in contracts of sale who have power to retract, a fuzuli in a contract of marriage is not entitled to retract either expressly or impliedly.[1] Thus, if a fuzuli contracts a man into marriage with a woman and after he marries the man to the sister of the same woman, the second marriage would remain in suspense and there would be no cancellation of the first marriage.[2]

10.11. Acknowledgment of agent whether sufficient :

According to Abu Hanifa an acknowledgment by an agent that he had contracted the principal (whether male or female) into marriage would not be binding and the fact of the contract having been made must be proved by evidence or must be corroborated by the principal. According to Muhammad and Abu Yusuf such acknowledgment is sufficient without corroboration.[3]

10.12. Agents not authorized to delegate power :

An agent cannot delegate his power. Unless authorized specifically a power to contract a marriage would not include the right of delegation.[4] Such delegation would be valid if the principal either expressly or impliedly his consent.[5]

10.13. Termination of agency :

An agency for marriage may be terminated in a number of ways:

(1) *Formal discharge :* An agent may be formally discharged from his agency and his functions do not cease till he becomes acquainted with the fact. If he should exercise the right in the meantime by contracting the principal into marriage, the contract would be lawful.[6]

(2) *Necessity ceasing to exist :* The agency would terminate if there is no necessity left for agency.

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1. Bail I, 76.
2. Bail I, 88.
3. Durr 47.
4. Bail I, 83; Durr 35.
5. Hed 391.
6. Bail I, 84.

Illustration

A woman appoints another person an agent to contract her in marriage. After that she makes a contract for herself. The agent is discharged.

(3) *Performance becoming illegal or impossible :* In such a case the agent stands discharged.

Illustration

A man appoints an agent to marry him to a particular woman. Then he himself marries the mother or daughter of the woman. The agent is discharged.

But the mere fact that there is a temporary bar to a marriage would not operate to discharge the agent.

Illustration

A man has four wives. He appoints an agent to marry him to a woman. Then he divorcés one of them. The authority to contract continues in the agent and will have reference to the time when it can be lawfully exercised.[1]

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1. Bail I, 84.

CHAPTER V

WITNESSES

Presence of witnesses in Suni Law should be along with Proposal and Acceptance. It is also necessary under Suni Law that there should be witnesses present to attest the conclusion of the contract. Two witnesses at least should be present to testify that the contract was properly entered into, and in accordance with the conditions laid down above. When the wife is non-muslim the witnesses may be the same faith as herself or any other faith. But a marriage contracted without witnesses is not illegal.

In the case *Sahabi Bibi vs. Kamraddin,*[1] it was held that the presence of witnesses is essentially required for a valid marriage.

Shia Law :

In the Shariya page 262 the Shia Doctrine regarding witnesses was described as under. "The presence of witnesses is not necessary

1. 15 CalwN 991

in any matter regarding marriage and even if there was an injunction to secrecy that would not invalidate it.

If two persons hear the words of the contracting parties, but do not understand their meaning it has been said that the contract is valid. In Fatawai Alamgiri page 379 it is stated that a person marries his daughter to a man in a house, and there are several persons in another house who hear the transaction but are not called upon to bear witnesses to it, yet if there be an opening between the houses through which the persons can see the father, there testimony will be accepted.

In Fatawai Alamgiri 377 volume (1) it was also stated that there are four condition requisite to the competency of witnesses, *viz*., freedom, sanity, majority and Islam.

Lord *Coke* declared that an "An infidel is not a competent witness".

The Hanafi law admits the testimony of a blind witness.[1]

In Tanvir-ul-absar it is stated that the names of the bride and her fathers and grand fathers must be mentioned in the presence of witnesses for the purpose of identification. Baharul-ur-Raik also supports this view.

The purpose of this Fatwa is that the parties to the contract of marriage must be known to the witnesses.

The Durr-ul-mukhtar also the same condition is laid down.

But it is not necessary that all the witnesses presents at a marriage ceremony should know the bride. It is sufficient when her name is mentioned that two of them should know her. And it is not necessary that they should see her face.

Among the Shafies and Hanafis the testimony of two men or of one men and two women is considered sufficient but no marriage can be celebrated in the presence of females alone.[2]

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1. Fatawai Alamgiri Volume I page 377, Fatawai Khaji Khan Volume 1 page 330, Raddul Muhutar volume 2 page 448.
2. Hedaya, Fathawai Kazikhan Volume 1 page 380) Fathawai Alamgiri Volume 1 page 378.

Presence of Khazi and Mulla are not at all required at the time of contract of marriage. A valid marriage can be contracted in their absence also, as held in the case of *Kyi B Ma Shawe*[1].

Sex not a disqualification :

Sex is not a disqualification.[2] It is not necessary that all the witnesses should be males for a marriage. It may be contracted in presence of one man and two women witnesses but not in presence of women only without a man.[3]

Whether the witness should be invoked :

It is sufficient that witnesses are present at the time of the marriage but it is not necessary that they should be specifically asked to act as the witnesses for the marriage.[4]

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1. AIR 1929 Raj 341
2. Hed 26.
3. Bail I, 7.
4. *Mst Shamul vs. Dost Mohd*, AIR 1933 Sind 317.

CHAPTER VI

VALID, VOID & IRREGULAR AND UNLAWFUL MARRIAGES

Synopsis

In the preceding Chapters we have studied as to how a marriage is performed and what are its essential requirements. Whether such a marriage even after fulfillment of all necessary and legal requirements is a valid marriage, this question is answered in this chapter. We will also discuss in this Chapter as to with whom a muslim male can perform marriage validly and what relations are forbidden in Islam.

1. Void Marriage :

Allah ordains in Surah Al Nisa (The woman) Ayath number 23, "prohibited to you (for marriages) are:- Your mothers, daughters, grand daughters, sisters, father's sisters, mother's sisters, brother's daughters, sisters' daughters, foster mothers (who gave you suck), foster sisters, your wives mother, your step daughter, under your guardianship born of your wives to whom you have gone in_____no prohibition if you have not gone in (those who have been, wives of your sons proceeding from your loins, and two sisters in wedlock at one and the same time and also (prohibited are) women already married".

In the same surah in ayath number 22, it is ordained, "do not marry unbelieving woman (idolators) until they believe nor marry your girls to unbelievers until they believe.

Explaining the above ordains various authors and authorities on Islamic Laws have further laid down the relations which are forbidden in Islam for the purpose of marriage.

A marriage contracted in accordance with the Shia rules of Muslim Law is a valid marriage and if it is performed in violation of any of these rules it is an unlawful marriage.

All unlawful marriages are not void unless the same is determined by the law applicable.

The Hanafi Law says that a marriage which is unlawful but not void abinitio is regarded as irregular. All the schools of Muslims law regard a void marriage as a nullity. The off springs of such marriage are illegitimate children. They acquire no right in the property or against each other.

According to Hidaya Book II Chap I Vol. I marriage with the following relations are invalid as forbidden:

It is unlawful to marry a mother or grandmother. A man may not marry his mother, his paternal or maternal grandmother because the word of God in the Quran says "Your Ams (mothers) your daughter is forbidden to you".

Neither may a man marry his sister, nor his sister's daughter, nor his brother's daughter nor his paternal aunt nor his maternal aunt; the prohibition of such a marriage is based on the Injunction of Quran.

All the degrees of aunts are included in this Prohibition.

It is not lawful for a man to marry his mother-in-law as per the commands of Almighty nor he can marry a step daughter of his wife.

It is also unlawful to marry step mother or a step grandmother. God having so commanded, saying "Marry not the wives of your pregerritors.

Neither it is lawful for a man to marry his daughter-in-law, grand daughter-in-law. Almighty having said, "Wed not the wives of your sons, or your daughters who proceed for your Lions".

It is not lawful for a man to marry his foster mother or his foster sister, the Almighty having commanded, "Marry not your mothers who have suckled you or your sisters by forte rage, and the Prophet has also declared," Every thing is prohibited by lease of forte rage which is so by reason of kindred.

It is unlawful to marry and cohabit with two woman being sisters, because the Almighty has declared that such cohabitation is unlawful (as stated supra).

A man may not marry two women within such degree of affinity as would render a marriage between them illegal if one of them were a man and for the same reason because this would occasions a confusion of kindred. AND in "Khulasa" it is held that sexual connection with his wife's sister will not render his wife prohibited to him.[1]

AND if a man marries two sisters or those who are like their sisters by two contracts simultaneously and forgets which was the first Nikah the Qazi would separate him from bother by pronouncing divorce.[2]

AND Prohibition to a man are the wives of his ascendants and descendants absolutely however remote they may be, whether they may have been cohabited with or not by their respective husbands.

AND all these whose belongs prohibited on account of consanguinity or affinity has been mentioned above, are forbidden if such relationship is created, by fosterage, exempted.

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1. Durral Mukhtar 92 Edition Babun-nikah P.17.
2. Durral Mukhtar referred supra.

AND forbidden to a man on account of affinity are also the ascendants of a woman with whom he had adulterous intercourse, and the ascendants of a woman touched by him with sexual desire.

2. Marrying two real sisters

A man shall not marry the real sisters as it is forbidden in Islam.

The marriages which are clearly void under all the schools of Muslim law are those which were performed in violation of the rules of prohibited degrees and the second marriage of a woman whose 1st husband is still alive, as explained above.

3. Marriage during Iddat Period:

A marriage of a woman undergoing iddat is irregular and consummation of an irregular marriage gives rise to nearly all the effects of a lawful marriage except the mutual right to inheritance between the spouse.

Shia Law

In the shia law, a marriage woman between a Muslim male and a non muslim female is unlawful and void, and so also a marriage between a muslim female and a non muslim male. But a Muslim male may contract a valid Mutta marriage with a Kitabia. The Shias reckoned fire-worshipers among kitabias.[1]

The sharaius Islam (on which bailee's digest is based) condemns such marriages.

4. Minor's Marriage :

When a minor marries without the consent of his/her guardian and when he or she repudiates such contract after attaining majority or rectify the same, and in case of ratification no fresh contract is necessary.

5. Khairul-Bulugh

If a minor's marriage is performed by her/his guardian the marriage is voidable at the option of the minor which is called Khairul-

1. Bailee 29, 40.

bulugh (Option of Puberty). Such can be exercised by the minor on attaining majority. Since under Muslim law a minor cannot be regarded as consenting party to a marriage so the option of puberty is not destroyed even where a minor's consent is obtained.

In the case of *Aziz Bano vs. Ibrahim,*[1] it was held that if father or grandfather while acting as guardian of a minor to his/her disadvantage is by acting fraudulently or negligently or by agreeing to an improper dower such choice can be upturned. The option of puberty is lost by consummation or payment or acceptance of Dower. Such right is also lost if the option is delayed.

In India exercise of option of puberty is also a ground for dissolution of marriage made under Dissolution of Muslim Marriage Act of 1939,[2] and under Sunni Shafei laws it is valid.

All the texts are uniform and all the scholars and commentators on Muslim law agree that in case of apostasy of the wife the marriage shall stand dissolved. No exception to this view has been stated whether she re-embraces her original religion/faith or embraces new religion it is nonetheless an apostasy which means acceptance of any other religion by a Muslim.

Dr. Tahir Mahmood in his Book the Muslim law of India (Third Edition P.60) has stated that, Muslim wife who renounces Islam and believing that her marriage has been ipsofacto dissolved cannot marry again otherwise is liable for prosecution U/s.494 of IPC unless by renouncing Islam she has reverted to her original religion. This will be the result of the Provisions of Sec.4 of Dissolution of Muslim Marriage Act of 1939.

In the case of *Sarla Mudgal,*[3] the apex court expressed its view and rules that every bigamous marriage of a Hindu convert to Islam would void and penal. The ration laid down *Saia Mudgal's* case was confirmed in the case of *Lily Thomas,*[4] having held that :

> "Even under the Muslim law right to plurality of marriages is not unconditionally conferred upon the husband. It would

1. AIR 1925 ALL 720
2. *Mufi Zudiri vs. Rahima*, AIR 1934 Cal. 104, *Batloon vs. Zahoor*, AIR 1952 MB 30, *Shaib Ali & Jannantan*, AIR 1960 Calcutta 717, *PIR Mohammed vs. State of Madhya Pradesh*, AIR 1960 MP 24, *Nizamuddin vs. Hussaini*, AIR 1960 MP 212
3. AIR 1995 SC 1531.
4. 2000 (6) SCC 224

be therefore doing injustice to Islamic law to urge that the convert is entitled to practice bigamy not withstanding the continuance of his marriage under the law to which he belonged before conversion."

6. Religion of parties :

A Muslim has to marry a Muslim woman except in the following cases:

A marriage between a Muslim male and Christian female is not invalid as she is KITABIA which means she is Christian or a Jew follower of a scriptural religion. Kitab means a book *i.e.*, Book of Revealed religion. "Kitabi" means a man who believes in Christianity or Judaism "Kitabia" means a female who believes in either of these religions. This principle of Mohammedan Law was upheld in the case of *Kaneez Fatima vs. Siraj Sullaina*[1].

But a Muslim women cannot contract a valid marriage with a "Kitabi" *i.e.*, a Christian or a Jew. She too cannot enter into a valid contract of marriage with a fire worshipper or an idolater or infidel (Katir). According to Indian Christian Marriage Act, 1872 marriage between Muslim male and a Christian female has to be solemnized U/s.5(4) of the Act by or in the presence of a Registrar Deputy who laid in this Act in Section 88 but a marriage between a Muslim woman and a Christian male cannot be solemnized.

7. Marriage between different sects of Islam :

Two Muslims who belong to different schools of law of Islam can lawfully marry. Thus a marriage between Sunni-Shia is a valid marriage.

Whether a Muslim wife was a Christian or Hindu prior to her marriage has no bearing on the question as to the consequences of the apostasy on one of the parties to the marriage. All the texts are uniform and all the scholars and commentators on Muslim law agree that in the case of apostasy of the wife, the marriage shall stand dissolved. No exception to this view has been stated. Whether she re-embraces her original faith or embraces a new faith, is none of the

1. 1978 (2) APLT 337 (DB)

less an apostacy. Apostacy being acceptance of any other faith by a Muslim, the consequences of apostacy must be the same on the continuance of the marital relations of a Muslim.

In the instant case, admittedly the third defendant embraced the Christian faith in the year 1972 *i.e.* prior to the extension of the Muslim Dissolution of Marriages Act, 1939. The marriage, therefore stood dissolved in that year and is not saved by that enactment. Consequently the third defendants right to recover the dower due to her commenced in 1952. The suit instituted in 1968 was therefore barred by time, though infact, she was entitled to it.

CHAPTER VII

MUTA MARRIAGE

Synopsis

1. Definition of Muta :

An Isna-Ashari Shia may contract a valid marriage for a temporary but specified period after specifying the dower. Such marriage is called Muta.

2. Validity of Muta Marriage :

A contract of marriage must be a permanent one according to all the schools of Muslim Law except the school of Isna Ashari Shias. Temporary marriage would be void according to Sunni Law.[1] The other schools of Shia Law also do not recognize a temporary marriage. The Ismaili Shias, including Khojas and Bohras of Bombay do not recognize them.[2]

According to all these schools Muta marriages which were prevailing in Pre-Islamic era were later on prohibited by the Prophet. The Sunnis rely on a tradition said to be reported by Ali himself: "Verily the Prophet prohibited, on the day of the battle of Khaiber, a Muta marriage which is for a fixed time". There is another tradition, according to which Muta was once permitted for 3 days after which it was forbidden by the Prophet (MPBUH).[3] These traditions are denied by the Shias. According to them, it is permitted by law and there is nothing to show that this law was abrogated.[4]

3. Essentials of Muta :

There are four pillars of the contract of Muta - the form, the subject, the period and the dower.[5]

4. Form of Muta :

A contract of Muta may be made by a declaration and acceptance. The proper words by which they may be expressed are tazwij, nikah,[6] or muta and their grammatical variations. It cannot be contracted by

1. Bail I, 18; Hed 33.
2. See 3 Bom LR (Jour, 30).
3. My Khan I, 101.
4. Sircar II, 373.
5. Bail II, 39.
6. *Shobrat Singh vs. Jafri Bibi*, 24 IC 499 (PC): 13 ALJ 113

use of other words such as tamlik (transfer), hiba (gift) or ijara (lease). Both the declaration and acceptance must be expressed in the past tense.[1] No witnesses are necessary.[2] An adult and discreet woman whether virgin or not may contract herself in Muta and no guardian can object to it.[3] A minor may contract a Muta with the consent of the guardian but not without it.[4]

5. Subject of Muta :

A Muslim female cannot contract a Muta with a non-Muslim. A male Muslim may however contract a Muta with a Muslim woman and also with a kitabia, (*i.e.*, a Jew or a christain and also with majoosia (a fire worshipper) but Muta with an idolatress is prohibited. Muta with the niece of one's wife without the consent of the wife would be void.[5]

6. Dower in Muta :

It is an essential condition of Muta that some dower should be specified.[6] If no dower is specified, the contract would be void. It may be noted that Muta essentially differs from a contract of a permanent marriage. A permanent marriage would not be void even if no dower is fixed while in the case of Muta, the contract would itself become void.[7] As stated in Bailee's digest II, 41, 42, the following points may be noted in respect of dower in Muta[8] :

(1) The dower must be something which is actually owned and possessed and is known by measure, weight, inspection or description. The quantity is however immaterial and is left to be determined by mutual agreement.

(2) As to exigibility of dower, the wife would be entitled to the entire dower after consummation of the marriage. This would be so even if the husband gives up the unexpired term but

1. Bail II, 39.
2. Sircar II, 377; *Shazada Qanum vs. Fakher Jung*, AIR 1953 Hyd 6: ILR 1953 Hyd 359.
3. Bail II, 43.
4. Sircar II, 380.
5. Ball II, 40.
6. *Official Assignee vs. Ma Hla*, 1929 Rang 35; *Akbar Hussain vs. Shunkha Begum*, 31 IC 657.
7. Bail II, 41-42; *Suraiya vs. Qudsia Begam*, 24 IC 643 (Oudh).
8. Bail II, 41-42.

if there has been no consummation she would be entitled to one half of the dower.

(3) If the wife herself leaves the husband before expiry of the term, the husband may deduct a proportionate part of the dower.

(4) If any defect is found in the contract (for instance, if it is found that she was the wife of another person or a prohibited relation) no dower would be due if the marriage has not been consummated. After consummation she would be entitled to retain what has been actually received by her provided that she did not know of the defect. If she was cognizant of it then she is bound to refund it.

(5) The dower is to be paid upto the contract being entered into.[1]

7. Period of Muta[2] :

In bailee's digest I, 18 and in Hidaya 33, it is stated that another conditions for Muta is that the period should be specified. The extent of the period is left entirely to the parties. It may be long or short. It may be a year, month or a day. A contract even for a part of a day would be lawful.

If however no mention of the period is made at the time of the contract, it becomes a permanent marriage. The contract would not become void in such case as would be the case if no dower is specified. There is no difference between Muta for unspecified period and Muta for life.[3]

8. Incidents of Muta :

The incidents of Muta are as follows:

8.1. Inheritance:

There are no mutual rights of inheritance in the absence of an express condition to that effect. There is however a difference of opinions as to whether such rights would be available to the parties, if

1. Sircar II, 376 citing Tahrir-ul-Ahkam.
2. Bail II, 42-43.
3. *Shazada Qanum vs. Fakher Jung*, 1953 Hyd 6.

there is an express condition for mutual rights of inheritance. The better opinion is that such rights would be available.[1].

8.2. Legitimacy of Children :

Children born of a Muta union are legitimate and are entitled to inherit from both the parents to the same extent as the offspring of a nikahi marriage.[2] The practice of izl (contraception) is permitted in Muta and is not dependent on the permission of the wife.[3]

8.3. Limitation of wives under Muta Marriage:

The number of wives contracted in permanent marriage is limited to four. There is no limit to the number of wives in Muta. It is lawful for a person to marry as many temporary wives as he pleases even though he may have four wives by permanent marriages.[4]

8.4. Iddat after the Muta marriage terminates:

The wife is bound to observe iddat as follows

(a) If the marriage is terminated by death, iddat is 4 months and 10 days and in the case of a pregnant wife 4 months and 10 days or the delivery whichever is longer.

(b) If it is terminated otherwise, iddat is two menstrual course for a menstruating wife and 45 days for a non-menstruating wife.

This is so only in the case of a consummated marriage otherwise no iddat is due.[5]

8.5. Prohibitions :

The relations by affinity who are unlawful in permanent marriage are also unlawful in temporary marriage.[6] But the sister of the wife can be married during the wife's iddat of muta wife.[7]

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1. Bail II, 44, 344-345: *Shorat Singh vs. Jafri Bibi*, 24 IC 499 (PC): 13 ALJ 113.
2. *Sadiq Husain vs. Hashim Ali*, 38 All 627: 1916 PC 27: 36 IC 104.
3. Bail II, 43.
4. Bail II, 28, 345.
5. Bail, II, 44.
6. Sircar II, 375 citing Tahrir-ul-Ahkam.
7. Sircar II, 382.

CHAPTER VIII

PROOF OF MARRIAGE

Synopsis

Muslim law permits an oral marriage. Neither official nor unofficial registration of any marriage is obligatory to prove the subsistence of a Muslim marriage. A Muslim marriage can be proved other than written record. In this respect following points are notable:

a. Registration of Muslim marriage under any statutory law is conclusive proof of the marriage though not necessary for its validity.

b. Nikah namas are admissible in evidence as written record of marriage but it is not mandatory.

c. Qazi who performed the Nikas can give satisfactory evidence of marriage.

d. Where the person who performed the Nikah is dead, the evidence of a witness can prove the Nikah.

1. Presumption of Marriage

In the following cases a valid marriage is presumed unless a legal bar against the alliance at issue:

a. Whether the parties have lived as husband and wife for a long time and have been treated as married couple.

b. Whether either party has acknowledged a marriage and the acknowledgment has been confirmed by the other party and where the men has acknowledged the paternity of the women's child.

1.1. Evidence of Marriage :

Muslim Law has made some provisions for evidence for proving marriage. Those rules of evidence are no longer in force in India. Evidence about marriage may not be given in any form permitted by the Indian Evidence Act[1]. Marriage may be proved either by direct or indirect evidence. It must be proved like any other fact. It must be proved that the woman was the man's wife and not his mistress[2].

1.2. Direct Evidence :

There may be direct proof of the actual marriage in fact, for instance, by direct evidence of eye-witnesses and most certainly one should include in this category the evidence of the husband or wife as to his or her part in the ceremony of marriage or of the register of marriages kept under the law[3].

Indirect proof by way of the acknowledgement of legitimacy of children is allowed when direct proof of marriage is not available. Where direct proof is available to establish that the marriage was impossible or that the marriage would be invalid, no question of presumption of marriage on account of any alleged acknowledgement would arise[4]. When a marriage took place a long time ago and the kazi is dead some evidence that nikah was performed and that the kazi wrote down on paper the contract of marriage, would be sufficient[5]. After the lapse of a long time formalities required should be presumed to have been complied with[6]. A marriage may be established by direct evidence such as the evidence of persons present at that time of the marriage[7].

1. *Zamin Ali vs. Aziz-unnissa*, 1933 All 329: 55 All 139.
2. *Secretary of State vs. Mst Mariam*,1937 Sind 126.
3. 1937 Sind 126 126, supra.
4. *Shafiqullah vs. Nuhullah*, 1926 All 48: 88 IC 954: 23 ALJ 917.
5. *Alamgir vs. State*, 1957 Pat 285: 35 pat 93.
6. *Mst Bashiran vs. Mohd Husain*, 1941 Oudh 284: 16 Luck 615.
7. *Razia Banu vs. Nawab Ara Begum*, 1955 NUC 3602 (All).

But it is absolutely necessary that the parties either themselves or through their agents agreed to the marriage at one meeting in the presence of two adult witnesses. It must be proved that the whole procedure had been gone through. Where the mulla denied that anyone was sent to enquire from the girl whether she had agreed to the marriage, the vague allegation that there were two witnesses of the nikah, was held to be valueless[1].

1.3. Indirect evidence :

Indirect proof will suffice where direct proof is not available[2]. It is not expected that direct evidence of marriage should be produced in respect of a marriage which took place at a distant date[3].

Indirect evidence for proving the fact of marriage or legitimacy may be of the following forms:

(1) Conduct of the parties:

(a) in cohabitation as husband and wife; or

(b) in treating the children of the union as legitimate children;

(2) acknowledgment by the man—

(a) that the woman is his wife; or

(b) that the children are his legitimate children;

(3) acknowledgement by the woman that the man is her husband;

(4) evidence admissible U/s.32 of the Indian Evidence Act;

(5) evidence admissible U/s.50 of the Indian Evidence Act;

(6) other circumstantial evidence.

2. Long Cohabitation :

The mere cohabitation of man and woman or their behavior in other respects as husband and wife always affords an inference of

1. *Mst Ahmad-un-unnisa vs. Ali Akbar*, 1942 Pesh 19: *Mst Ghulam Kubra vs. Mohd. Shafi*, 1940 Pesh 2.
2. *Habibur Rahman vs. Altaf Ali*, 1922 PC 159: 48 Cal 856: 60 IC 837; *Bibi Anu vs. Asiat*, 1958 PLD Kar 420: 1937 Sind 126, supra.
3. *Zamin Ali vs. Aziz-un-nissa*, 1933 All 329.

greater or lesser strength that a marriage has been solemnized between them. Their conduct being susceptible of two opposite explanations, the court giving effect to the presumption of innocence is bound to assume it to be moral rather than immoral[1]. The law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for a number of years[2]. *See* also, Section 112 of Evidence Act.

The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive[3]. The presumption is one which not only might, but ought to be drawn from cohabitation with habit and repute although cohabitation commenced with a ceremony which was known to be invalid[4]. Persons living as man and wife and the children being recognized by family would be good evidence of marriage and legitimacy of the children even though there is no strict proof of marriage *de facto*[5].

These presumptions are equally applicable under the Indian Evidence Act also in the case of Mohammedans. Where there is not mere casual concubinage but a more permanent connection and there is no insurmountable obstacle to marriage, a presumption of marriage may be made. If it is proved that a man and woman have lived together as husband and wife and have cohabited as such and have been treated as such by neighbours, a presumption of valid marriage may be made[6].

Where a child was born to a person who had resided during a period of 7 years in the female residence anterior to the birth of the child taking place and whiles she so resided, she was recognized, to a certain extent, as wife and child was born under his roof and continued to be maintained in his house without any steps being taken on the father's part or anyone else to repudiate his title to legitimacy as his

1. Lawason : Presumptive Evidence 93, 95, 104.
2. *Mohabbat Ali vs. Mohd Ibrahim*, 1929 PC 135: 117 IC 17: 10 Lah 725: 1929 Oudh 126; *Ashruf-un-nissa vs. Aziman*, 1 WR 17; *Shumsoonnisa vs. Rai jan Khanum*, 6 WR 52 (PC): *Amir Ahmad vs. Vakil Ahmad*, 1952 SC 358; *Ma Khatoon vs. Ma Mya*, 1906 Rang 448; *Sulakhan Singh vs. Santa Singh*, 60 IC 375.
3. *Morris vs. Davies*, 5 Clark and Fin 163, followed in Piers (v) Piers, 2 HLC 331; *Sastry Velaider vs. Sembecutty*, 6 App Cas 364 at p 372.
4. *Campbell vs. Campbell (Breadalbane Case)*, LR 2 HL p 269.
5. *Re Shephard, George vs. Thyer*, (1904) 1 Ch 456.
6. *Abdul Halim vs. Saadat Ali*, 1929 Oudh 126: 112 IC 956; *Mi Me vs. Mi Shwe Ma*, 39 Cal 492 (PC).

offspring, it was held that this was sufficient evidence of marriage and legitimacy according to Muslim Law even if it is not proved that the ceremony of marriage had been gone through[1]. A marriage may be presumed when it is proved that the parties have cohabited for years and a child is acknowledged and treated by the man as his son, although there may be no evidence of the actual fact of marriage[2]. The mere fact that the woman was not living behind the purdah like other admitted wives of the man is not sufficient to rebut the presumption[3]. A presumption would be made from prolonged and continued cohabitation unless there is some insurmountable obstacle to such a marriage (*e.g.*, the woman being the undivorced wife of the husband who was alive)[4]. The burden would in such case be on the person who denies the marriage to prove that it did not take place[5].

3. Where cohabitation not sufficient to raise presumption of marriage :

Mere continued cohabitation is however not sufficient in all cases. It is necessary that there should be cohabitation from which it could be reasonably inferred that it was a cohabitation as between man and wife and that there was treatment tantamount to acknowledgment of the fact of the marriage and of the legitimacy of the children. The presumption in favour of marriage must rest on sufficient grounds and cannot be permitted to override over-balancing proof whether direct or presumptive[6]. Thus proof of cohabitation would not be sufficient to establish marriage in the following cases :

(1) *If the woman was a prostitute :* Presumptions which might have been raised in a case where the woman was not found to be a prostitute before the alleged marriage and where connection with her was not found to be adulterous in its inception can have no bearing on a case where these facts have been found to be established[7]. It was held that in the absence of any evidence of marriage, the

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1. *Khajah Hidayutoollah vs. Rai Jan*, 3 MIA 295 at p321; *Ashrafunnissa vs. Aziman*, 1 WR 17.
2. *Secretary of State vs. Mst Mariam*, 1937 Sind 126; *Mahtala vs. Ahmad*, 10 CLR 293.
3. *Mohabbat Ali vs. Mohd. Ibrahim*, 1929 PC 135: 10 Lah 725: 117 IC 17.
4. *Mohd Amin vs. Vakil Ahmad*, 1952 SC 358: 1953 SCA 245: ILR 1953 All 481.
5. *Maung Kyi vs. Ma Shwe Baw*, 1929 Rang 341: 7 Rang 777 (marriage presumed).
6. *Ashrufood Dowlah vs. Hyder Hossein*, (1866) 11 MIA 94; *Masitannisa vs. Pathani*, (1904) 26 All 295; *Mohd Baukar vs. Sharfoonissa*, (1860) 8 MIA 136 at p159; *Mohd Ali vs. Shujat Ali*, 46 IC 913 (Nag); *Ismail Khan vs. Fidayat-un-unnisa*, 3 All 723.
7. *Rahmat Ali vs. Harbhajan Singh*, 1946 Lah 450: 223 IC 505: 48 PLR 187.

presumption of marriage which might have otherwise arisen from long cohabitation did not apply, because the woman was admittedly a prostitute before she was admitted to the father's house. Instances of acknowledgment by the father or the mother as his wife and the fact that two of her daughters were married to respectable men with due formalities would not be sufficient[1].

But such marriage may be proved by other evidence[2] or by a proper acknowledgment, as a marriage with a prostitute is not prohibited[3].

(2) *When marriage is unlawful :* In the case of *Razia Begum vs. Nawab Ara Begum*,[4] it was held that, "No presumption can be made if there is any impediment existing in respect of a valid marriage between the parties[4]. So also in the case of Munawar Khan it was ruled that, "there would be no presumption from continued cohabitation between a Muslim and a Hindu woman"[5]. So also, if the husband of the woman is alive, his continued existence would be an insurmountable impediment to the marriage and thus of legitimacy of the child[6]. There can be no presumption as to form of marriage gone through when a former valid subsisting marriage has been proved. In such case, the burden of proof is entirely upon those who set up a second marriage to show that the earlier marriage has been dissolved[7].

4. Presumption under illicit relations:

In the case of *Habeeb UL Rahma vs. Altaf Ali*,[8] it was held while answering the question as to whether illicit connection between a man and a woman would result into a presumption of a valid marriage, that, "where a woman first lived with one person and then migrated to another person's place and cohabited with him and even though a

1. *Ghazanfar Ali vs Kaniz Fatima*, 31 All 345: 6 IC 674; *Dhan Bibi vs. lalon Bibi*, 27 Cal 801.
2. *Ashad Ali vs. Mst Kariman*, 1917 PC 169: 46 IC 217.
3. *Imambandi vs. Mutsaddi*, (1918) 45 Cal 878: 47 IC 513.
4. *Razia Begum vs. Nawab Ara Begum*, 1955 NUC 3602 (All); *Fazal Din vs. Aziz*, 134 IC 785: 32 PLR 617.
5. *Monowar Khan vs. Abdoolah Khan*, 3 NWP (HCR) 178.
6. *Inder Singh vs. Thakur Singh*, 1921 Lah 20: 63 IC 387: 2 Lah 207; *Karam Ali vs. Husain Ali*, 1932 Sind 137: 140 IC 724.
7. *In re Millard*, 16 Mad at p221.
8. *Habibur Rahman vs. Altaf Ali*, 1922 PC 159: 48 Cal 856; *Shaban Bibi vs. Khalis Shah*, 16 ALJ 754: 51 IC 624.

child was born after cohabitation but the woman was never recognized as a wife, it was held the marriage could not be presumed[1].

5. Treatment of children as legitimate :

The treatment of children as legitimate may also be a proof of the validity of the marriage with the mother. Thus, where a son was always treated on the same footing as other legitimate son even though he was not recognized on any particular occasion, it would raise some presumption that his mother was his father's wife[2].

6. Acknowledgment of marriage :

The Muslim law recognizes acknowledgment as proof of marriage as also of the legitimacy of the children not merely as piece of evidence but as matter of substantive law. An acknowledgment that a woman is his wife would raise a presumption of marriage with the person who makes the acknowledgment[3]. Such acknowledgment would be sufficient to establish marriage if no prohibition against the marriage is established[4]. Where there is recorded evidence between a man and woman which asserts that their marriage ceremony has in fact taken such statement shall be accepted[5].

The acknowledgment must however be distinct and unmistakable[6]. A presumption would nor arise from acknowledgment if the conduct and treatment of the parties is inconsistent with martial relationship. Thus, if the marriage is not permissible by reason of the difference of religion[7], or if the marriage is disproved[8], or if the woman was admittedly a prostitute before cohabitation commenced[9].

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1. *Fateh Mohd vs. Abdul Rahman*, 1931 Lah 223: 12 Lah 396.
2. *Khajooroonissa vs. Roshan Jehan*, 2 Cal 184 at p 199.
3. *Mst Bashiran vs. Mohd Husain*, 1941 Oudh 284: 16 Luck 615; *Mst Khatoon vs. Mst Bhondi*; 1955 NUC 1131 (Raj).
4. *Wise vs. Sanduloonisa*, 11 MIA 177; *Nathu vs. Bhag Singh*, 6 IC 661; *Sadakat Hossein vs. Mohd Yusuf*, 10 Cal 663: 11 IA 31; *Suriya vs. Qudsia*, 24 IC 643 at p645: 1OLJ 281; *Sadik Hussain vs. Hashim Ali*, 36 IC 104 (PC): 38 All 627: 14 ALJ 1248.
5. *Irshad Ali vs. Mst Kariman*, 1917 PC 169: 20 Bom LR 153: 46 IC 217.
6. *Kedar Nath vs. Benjamin*, 22 WR 352.
7. *Keolapati vs. Raja Hamir Singh*, 1936 Oudh 908; *Man Mohan vs. Mohd Husain*, 1924 Pat 191: 72 IC 152.
8. *Malik Jiad Khan vs. Province of Sind*, 1948 Sind 130.
9. *Ghazanfar Ali vs. Kaniz Fatima*, 32 All 345 at p 350 (PC): 6 IC 674.

If a man refuses a acknowledge a woman as his wife or the children as his children, the martial relationship is negatived and the presumption is rebutted[1].

7. Acknowledgment of marriage by a woman :

If a woman whether in health or in sickness acknowledges a man to be her husband and the man assents while she is living, the marriage would be established even if the wife then denies it. He will be entitled to inherit. But if he assents after her death the marriage would be established and there would be right of inheritance in that case also according to Muhammad and Abu Yusuf but not according to Abu Hanifa[2].

Shia Law :

If the man makes a declaration and the woman assents to it or if the woman makes a declaration and the husband acquiesces in it, the marriage would be established. But if only one of them males the declaration, it would have all effects against that party only to the exclusion of the other[3].

8. Acknowledgment of legitimacy of children :

Muslim law is scrupulous is bastardizing the issue of any connection in which it can be shown by presumption that there has been cohabitation and acknowledgment of paternity[4]. A presumption as to the legitimacy of children whether sons or daughters[5], would be established by acknowledgment of marriage. So also a presumption of marriage may be made by acknowledgment of the legitimacy of children. An acknowledgment is one way of indirect proof[6]. Even though evidence with respect to marriage is led and disbelieved, the effect of presumption arising from acknowledgment is not lost if there is an acknowledgment of the legitimacy of a son[7]. An acknowledgment (or

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1. *Fateh Mohd vs. Abdul Rahman*, 1931 Lah 223: 12 Lah 396.
2. Bail I, 412.
3. Bail II, 5.
4. *Roshan Jehan vs. Enaet Husain*, 5 WR 4.
5. *Oomada Beebee vs. Syed Shah*, 5 WR 132; *Fuzeelan Beebee vs. Omdah Beebee*, 10 WR 469. See also *Dhan Bibi vs. Lalon Bibi*, 27 Cal 801.
6. *Agha Mohd vs. Zohra Begum*, 1927 Oudh 562: 3 Luck 199.
7. *Ahsanullah vs. Nejabat Ali*, 1929 Cal 682 at pp 683-84.

ikrar) which involves the assertion that the father was married to the acknowledgee's mother raises a presumption in favour of the marriage and legitimacy[1]. The term ikrar (iqrar) literally means to confirm or establish. In law it is defined to be the giving of information respecting a right in favour of another against oneself[2]. The basis of ikrar or acknowledgment in respect of paternity is to be found in the words of the Quran: "call them after their fathers"[3].

Muslim law recognizes acknowledgment as a method whereby a marriage and legitimate descent can be established[4]. A presumption of legitimacy will be made as a matter of substantive law and not as a matter of mere evidence if the acknowledgment satisfies some conditions[5].

An acknowledgment of the legitimacy of a child would give rise to the rights of inheritance to the child[6], and also to the mother by establishing a valid marriage with her[7]. It is wrong doctrine regarding proof of marriage to require that an estimate is to be formed whether the various relatives prefer the tie of concubinage to that of marriage. The presumption cannot be made by reason of the conduct and mode of life and predilection of other persons[8].

Acknowledgment of a child would be valid even though made in death-illness[9].

9. Conditions of a valid acknowledgment :

An acknowledgment only raises a presumption of marriage which

1. *Mohabbat Ali vs. Mohd Ibrahim*, 1929 PC 135: 10 Lah 725.
2. Bail I, 407; Hed 427.
3. *Mohd Allahabad vs. Mohd Ismail Khan*, 10 All 289 at p 327.
4. *Ihsan vs. Panna Lal*, 1928 Pat 19: 7 Pat 6; *Mohd Safiqullah vs. Nuhullah*, 1926 All 48 at p49: 48 All 58, confirmed in 1929 PC 212; *Mohd Bauker Hossain vs. Sharfoonissa*, 8 MIA 136; *Mohd Ali vs. Ghazanfar Ali*, 60 IC 147: 7 OLJ 474, confirming 49 IC 545.
5. *M. Allahabad vs. Ismail*, 10 All 289, at pp 317, 330, 334-335; *Mst Bibee Fazilatunnessa vs. Kamarunessa*, (1906) 9 CWN 352; *Usmaniya vs. Valli Mohd*, (1916) 40 Bom 28: 30 IC 904.
6. *Habibur Rahman vs. Altaf Ali*, 1922 PC 159; *Mohd Azmat vs. Lalli Begum*, (1881) 8 Cal 422 (PC); *Sadakat Hossain vs. Mohd Yusuf*, (1882) 10 Cal 663 (PC).
7. *Khajah Hidayat vs. Rai jan Khanum*, (1844) 3 MIA 295 at p318; *Wise vs. Sunduloonissa*, (1866) 11 MIA 178 at p193; *Khajooroonissa vs. Roshan Jehan*, (1876) 2 Cal 184 at p 199 (PC); *Imambandi vs. Mutsaddi*, 45 Cal 878 (PC); *Zahid Ali vs. Shahr Banu*, 1925 Oudh 284: 48 IC 101.
8. *Mohabbat Alt vs. Mohd Ibrahim*,1929 PC 135.
9. Bail I, 409; Durr 329.

however is a presumption of fact and not juris et de jure. It is like any other presumption of marriage which however is a presumption of fact capable of being set aside by contrary proof[1].

The presumption of legitimacy from marriage follows the bed and whilst the marriage lasts the child of the woman is taken to be the husband's child. But this presumption follows the bed and is not ante-dated by relation. An ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate. If a child really illegitimate by birth becomes legitimate, it is by force of an acknowledgment, express or implied, directly proved or presumed. These presumptions are inferences of facts. They are built on the foundation of the law and do not widen the grounds of legitimacy by confounding concubinage and marriage[2].

The difference between legitimacy and legitimation is that legitimacy is the status which results from certain facts, while legitimation is a proceeding which creates status of legitimacy which did not exist before and in the proper sense of the term, there is no legitimation in Mohammedan Law[3].

Before an acknowledgment can be held to be valid for establishing the marriage and following conditions must be satisfied :

9.1. It must be of the legitimacy of the child :

It is necessary that the acknowledgment must be of the child being a legitimate child[4]. The father must acknowledge the child to be the child of his body. An acknowledgment that the son was brought up by him would not be sufficient to establish acknowledgment of legitimate sonship. For effective acknowledgment of paternity, there must be an admission of physical relationship between the father and the son[5].

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1. *Habibur Rahman vs. Altaf Ali*, 1902 (PC) 159: 48 Cal 856 at p 864: 60 IC 137: 1929 PC 135, supra.
2. *Ashrufood Dowlah vs. Hyder Hossain*, 11 MIA 94.
3. *Habibur Rahman vs. Altaf Ali*, 1922 PC 159; *Zakir Ali vs. Sograbi*, 43 IC 883.
4. *Habibur Rahman vs. Altaf Ali*, 1922 PC 159; *Zahid Ali vs. Shahr Banu*, 1925 Oudh 384: 86 IC 101; *Husain Baksh vs. Jhanda Singh*, 1922 Lah 460: 68 IC 749; *Mahbubunnisa Begum vs. Mohd. Yusuf*, 1950 Hyd 41; *Fatima Binti vs. Administrator-General*, 1949 PC 254.
5. *Abdul Rahiman vs. Abdul Hafiz*, 1929 Nag 313: 121 IC 35.

A mere casual acknowledgment of paternity without intending to confer the status of legitimacy would not be sufficient[1]. There must be something deliberate in acts from which intention may be probed[2]. The question in each case is one of fact and it must be ascertained whether the person making the acknowledgment intended to confer upon the person acknowledged the status of legitimacy[3].

9.2. Child should not be acknowledged to be born of zina :

If a woman becomes pregnant by zina, then marries the person who had committed zina, the acknowledgment of a child would not establish paternity if it is born within six months. But if the child is born beyond six months and the husband does not say that the child is of zina, the acknowledgment would establish paternity[4].

A child of mulai'nah (a woman whose marriage has been dissolved by li'an) can never be established in any person other than the husband. The husband may however contradict himself and acknowledge the child to be his own[5].

Shia Law :

The paternity of the child of Ii'an would be established if the husband makes an acknowledgment but he would not be entitled to inherit from the child[6].

9.3. Marriage should not be unlawful :

The marriage of a woman or the legitimacy of her child cannot be established if the marriage is unlawful by reason of any prohibition[7]. Thus, the presumption by acknowledgment would not arise if there is prohibition by fosterage,[8] or a triple divorce[9]. A presumption as to

1. *Ashrufood Dowlah vs. Hyder Hossein*, 11 MIA 94; *Abdool Razack vs. Aga Mohd Jaffar*, 21 Cal 666 at p 679 (PC).
2. *Zahida Bibi vs. Wali Mohd*, 37 IC 926 at p 932 (Oudh).
3. *Kasim Hasan vs. Batul Bibi*, 7 IC 1019.
4. Bail I, 393, 414.
5. Bail I, 412.
6. Bail II, 14, 269.
7. Bail I, 400-401; *Fazaldin vs. Azia*, 134 IC 785 (Lah); *Abdul Razack vs. Aga Mohd. Jaffar*, 21 Cal 666 (PC).
8. *Suriya vs. Qudisa*, 24 IC 643: I OLJ 281, prohibition not proved.
9. *Rashid Ahmad vs. Anisa Khatun*, 1932 PC 25: 54 All 46 at pp 53-54: 1922 PC 159, supra.

an intermediate marriage cannot be made by the mere fact of marriage[1].

An acknowledgment will also not be valid if the woman was the married wife of another at the time of the conception of the child.

9.4. The marriage should not be disposed :

Evidence has to be examined in each case. The doctrine of acknowledgment applies only to the cases of uncertainty, i.e., where marriage is only unproved and is neither proved nor disproved. It proceeds entirely upon an assumption of legitimacy and the establishment of legitimacy by force of such acknowledgment. That effect always proceeds upon the assumption of a lawful union between the parents[2]. If therefore on the evidence recorded by the court it comes to the conclusion that no marriage at all took place, the presumption of legitimacy by acknowledgment cannot be raised[3].

9.5. The child not be probed to be illegitimate :

An acknowledgment would not be sufficient if the child is probed to be illegitimate[4]. The son to be legitimate must be offspring of a man and his wife. Any other offspring is the offspring of zina (*i.e.*, illicit connection) and cannot be legitimated[5]. Where it is known that the child is that of some other person an acknowledgment will not prove paternity[6]. The paternity must not have been established in any

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1. *Akhtaroonnissa vs. Shariatoollah*, (1887) 7 WR 263.
2. *Allahabad Khan vs. Mohd Ismail Khan*, (1888) 10 All 289 at pp 334-335 cited with approval in 49 IC 545 confirmed on appeal in *Habibur Rahman vs. Altaf Ali*, AIR 1922 PC 159: 48 Cal 856: 60 IC 837; *Husain BAksh vs. Jhanda Singh*, 1922 lah 460: 68 IC 749 at p750; *Usmaniya vs. Vali Mohd.*, 40 Bom 28: 30 IC 904 at p905; *Sadiq Husain vs. Hasham Ali*, (1916) 38 All 627 (PC): 36 IC 104; *Rafiqa Begam vs. Aisha Begam*, 1945 All 363; *Roshanbai vs. Suleman Ahmad*, 1944 Bom 213.
3. *Ghazanfar Ali vs. Kaniz Fatima*, 32 All 345 (PC): 6 IC 674: 1922 PC 159, supra; *Firoz Din vs. Nawab Khan*, 1928 Lah 432: 9 Lah 224; *Razia Begum vs. Anwari Begum*, 1958 AP 195: 1958 Andh LT 844; *Man Mohan Saw vs. Mohd Husain*, 1924 Pat 191 at p192; *Mohd. Shafiqullah vs. Nuhullah*, 1926 All 48: 48 All 58 (confirmed in *Nuhullah vs. Shafiqullah*, 1929 PC 212: 117 IC 6 (woman a kept Hindu mistress); *Hakima vs. Jiandi*, 1927 Sind 209: 103 IC 870; *Fateh din vs. Umrao*, 1923 All 440: 82 IC 592; *Mohd. vs. Shujoonnessa*, 8 MIA 136 at p159.
4. 40 Bom 128, supra; Mst Bibi Fatima (v) Abdul Karim, 1928 pat 539 at p 541 (Proposition conceded).
5. (1888) 10 All 289, supra.
6. Bail I, 408; Hed 439.

other person[1]. A child which must have been conceived or born before the marriage of his mother with the acknowledger cannot become legitimate by acknowledgment[2].

9.6. Relationship should not be impossible :

It is an essential condition of the validity of the acknowledgment that the physical relationship of father and son should not be a matter of impossibility. One of the conditions which would make the relationship impossible is a proximity of ages which would prevent such relationship. The acknowledger and the acknowledged must therefore be of such respective ages as would admit of the possibility of their standing in the relation of parent and child to each other[3].

The minimum difference must be of 12½ years between the persons acknowledged and the one making acknowledgment[4]. If the physical relationship is a matter of impossibility, the presumption of paternity arising from the acknowledgment may be rebutted by proving the impossibility of physical relationship[5].

9.7. The person acknowledged should not repudiate the acknowledgment if a major :

If the acknowledgment is made in respect of a minor or insane person assent of the person acknowledged is not necessary if his interests are not adversely affected[6]. Even if a minor repudiates the acknowledgment after attaining majority the denial will not have any effect[7]. A person who can give account of himself (*i.e.,* a person of discretion and of unsound mind) may repudiate the acknowledgment. It is necessary that he must confirm the acknowledger[8].

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1. *Najeebunnissa vs. Zumeerun*, 11 WR 426: 4 Beng LR (AC) 55, affirmed in *Jaibun vs. Najeebunnissa*, 12 WR 497.
2. *Zahida Bibi vs. Wali Mohd*, 37 IC 926 at p 932 (Oudh); *Mohd Hanif vs. Badrunnessa*, (1938) 42 CWN 272.
3. Bail I, 408.
4. Bail I, 411.
5. *Zakir Ali vs. Sograbi*, 43 IC 883 at p892; *Naymooddeen vs. Zahooran*, 10 WR 45 at p 47; *Oomda Bibi vs. Syed Shah Jenab Ali*, 5 WR 132; *Agha Mohd vs. Zohra Begum*, 1927 Oudh 562 at p 565: 3 Luck 549; *Feroze Din vs. Nawab Khan*, 1928 Lah 432: 9 Lah 224: 112 IC 89.
6. Bail I, 408; Durr 331; Bail II, 289.
7. Ameer Ali II, 226.
8. Bail I, 408; Durr 331; *Bibi Fatima vs. Abdul Karim*, 1928 Pat 539; *Govindram vs. Pali*, 43 IC 883; *Agha Mohs vs. Zohra Begum*, 1927 Oudh 562.

9.8. The acknowledger must be a major and of sound mind :

The acknowledgment can be valid only when it is made by a person possessing legal capacity entering into a valid contract. An acknowledgment by a person who has not attained the age of puberty or by the person who is under duress or who is non compos mentis is absolutely invalid[1]. A dumb person may make a valid acknowledgment if his meaning can be ascertained by approved signs[2].

10. Burden of proving acknowledgment :

The preliminary burden of proving a valid acknowledgment is on the person setting up the acknowledgment. The burden of proving the marriage is also on the person who sets up the marriage until an acknowledgment is established[3]. A person who has in his favour a good acknowledgment of legitimacy is in this position: the marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgment, the onus is on him to prove the marriage. Once he establishes the acknowledgment the onus is on those who deny a marriage to negative it in fact[4]. Once he establishes an acknowledgement, it can be rebutted only by disclaimer on the part of the person acknowledged or such proximity of ages as would render the alleged relationship physically impossible or proof that the acknowledgee is in fact the child of some other person[5]. If direct proof of marriage is wanting, an acknowledgment would be sufficient to make the child legitimate[6]. In the absence of positive evidence that the marriage did not take place, the marriage will be held to be proved,[7] and the law will refuse to declare a son a bastard[8]. There must be extremely cogent evidence to displace the presumption of legitimacy[9]. The onus is on those who deny the marriage to negative it in fact[10].

1. Bail I, 406.
2. Bail II, 155.
3. *Agha Mohd vs. Zohra Begum*, 3 Luck 549: 105 IC 400: 1927 Oudh 562.
4. *Mohabbat Ali vs. Mohd. Ibrahim*, 1929 PC 135: 10 Lah 725.
5. *Bibi Fatima vs. Abdul Karim*, 1928 Pat 539; *Ibrahim Ali vs. Mst. Mubarak Begum*, 1 Lah 229: 56 IC 923: 20 PWR 1920; *Husain Baksh vs. Jhunda Singh*, 1922 Lah 468: 68 IC 719; *Mohd Sadiq vs. Mohd Hassan*, 1943 Lah 225.
6. *Ihsan Hassan vs. Panna Lal*, 1928 Pat 19: 7 Pat 6; *Bibi Waheedan vs. Wasee Husain*, 14 WR 403.
7. *Feroze Din vs. Nawab Khan*, 1928 Lah 432: 9 Lah 224: 112 IC 89; *Zahid Ali vs. Shahar Banu*, 1925 Oudh 384: 86 IC 101: 1927 Oudh 562 at p 565.
8. *Mst. Jaibun vs. Mst Najeebunnissa*, 12 WR 497 confirming 11 WR 426.
9. *Zakir Ali vs. Sograbi*, 43 IC 883 (Nag).
10. *Habibur Rahman vs. Altaf Ali*, AIR 1922 PC 159: 48 Cal 856.

The question is on whom in case the making of acknowledgment is proved, the burden would lie to prove that the acknowledgment was one of legitimacy. It has been held that where a person acknowledged a woman to be his daughter it must be taken to mean that he had acknowledged her to be his legitimate daughter unless the contrary is proved[1]. Similarly, the acknowledgment of another person as a son would be *prima facie* acknowledgement that the person was his son[2].

In case of *Mst. Mariam*,[3] it was held that the burden is on the persons setting up the acknowledgment to prove that the expression "son" was used as meaning legitimate son[3]. The acknowledgement would only be an admission of sonship but it could be regarded as an acknowledgment of legitimate sonship if there are circumstances to justify it[4].

It appears, however, the burden would depend on the facts of each case. Evidence may establish that the acknowledgment was of legitimate sonship[5]. But an acknowledgment of paternity would not be sufficient to confer the status of legitimacy if it was not intended to have a serious effect[6].

11. Acknowledgment irrevocable :

If paternity is once established by an acknowledgment which satisfied the conditions of its validity, the status once conferred cannot be destroyed by any subsequent act of the acknowledger or of any son claiming through him[7]. The denial of a son after an acknowledgment is established is untenable[8].

12. Evidence U/s.32 of Indian Evidence Act :

The statement of a deceased person that he had married a woman is admissible U/s.32(5) for the purpose of providing a marriage. The

1. *Fuzeelan Bebee vs. Omdah Beebee*, 10 WR 469, at p 474.
2. *Sadik Hussain vs. Hashim Ali*, 36 IC 104 at p 116: 38 All 627 at p 659.
3. *Secretary of State vs. Mst. Mariam*, 1927 Sind 209 at p 213.
4. *Usmaniya vs. Valli Mohd*, 40 Bom 28: 30 IC 904.
5. *Ahsanullah vs. Nejabat Ali*, 1929 Cal 682.
6. *Abdool Razack vs. Aga Mohd Jaffar*, 21 Cal 666 at p 679.
7. *Mohd Allahabad vs. Mohd Ismail*, 10 All 289 at p317 (FB); *Habibur Rahman vs. Altaf Ali*, AIR 1922 PC 159.
8. Bail I, 342, 411; *Ashrufood Dowlah vs. Hyder Hossein*, 11 MIA 94.

doctrine of Muslim Law relating to acknowledgment do not exclude evidence of this nature. Evidence Act does not apply to such cases[1]. A woman has special means of knowledge about her marriage and a statement by her describing herself to be the wife of her husband is admissible in evidence and can be proved if the statement was made before her marriage was disputed[2].

Declaration admissible U/s.32 would be treated as admissible evidence on the question of legitimacy[3]. Statement as to relationship in a final order in mutation proceedings would be admissible[4]. The word "marriage" in Sec.32 (5) & (6) would include a marriage by mula also[5].

Such evidence would be admissible U/s.32 (5) only if the declaration is made by a person having special knowledge of the relationship[6]. On a question of relationship, the special knowledge should be presumed in the case of the members of the family[7]. The evidence of a mirasi who is hereditary family bard would not be valueless[8].

13. Evidence :

There is no express provision in the Indian Evidence Act making evidence of general reputation admissible as proof of relationship[9].

The evidence of general reputation is not admissible. It must be expressed by conduct[10]. Evidence of opinion expressed by relations or members of the family or other persons specially qualified to speak is admissible under the section. But mere statements of such persons are

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1. *Zamin Ali vs. Aziznunnissa*, 1933 All 329.
2. *Bashiran vs. Mohd Hussain*, 1941 Oudh 284: 16 Luck 615.
3. *Baqar Ali vs. Anjuman Ara*, 25 All 236.
4. *Fazal haq vs. Said Nur*, 1948 Lah 113.
5. *Anjuman Ara vs. Sadik Ali*, 2 OC 115 (overruled on another point in *Baqar Ali Khan vs. Anjuman Ara Begum*, 25 All 236).
6. *Mohd Zaim Khan vs. Mohd Saada Ali*, 1931 Oudh 177: 8 OWN 349.
7. *Latafat Hussain vs. Onkarmal*, 1935, Oudh 41: 10 Luck 423: 152 IC 1042.
8. *Abdul Ghafur vs. Hussain Bibi*, 1931 PC 45: 58 IA 188: 12 Lah 336: 130 IC 612: 1931 MWN 373.
9. *Laxmi Reddi vs. Venkata Reddi*, 1937 PC 201 at p 202: 168 IC 881: 39 Bom LR 1005: 1937 MWN 1271.
10. *Chandu Lal vs. Khatem-un-nissa*, 1943 Cal 76: (1942)2 Cal 299.

not admissible. The opinion must be expressed in the conduct of some such person[1].

14. Other circumstantial evidence :

Indirect evidence may also be led about the circumstances from which a valid marriage may be inferred[2]. Marriage contracts are often reduced to writing in the form of a nikhanama. The failure to prove nikhanama does not however disprove marriage. Even where direct evidence of marriage with a woman is disbelieved, the fact that her daughter obtains the same dower as in the case of an admittedly legitimate daughter immensely adds to the presumption of marriage arising from acknowledgment of legitimacy of a son[3]. To remain behind the purdah is no necessary part of a legal marriage for a conclusive evidential fact. But the fact may be considered[4].

Where there is a very strong feeling between the parties and direct evidence is of a partisan character, it is safe to deicide the case upon the circumstances and probabilities[5]. In the absence of evidence to the contrary it may be presumed that the marriage was duly solemnized and the words of acceptance were uttered by the husband. The presumption is fortified if there was consummation[6].

15. Presumption as to continuance of marriage :

If a marriage is proved, it may be held to be subsisting at a later date unless it is disproved[7]. If a second marriage is set up the burden lies on the party who sets it up to show that the earlier marriage was dissolved[8].

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1. *Secretary of State vs. Mst. Mariam*, 1937 Sind 126.
2. *Karamali vs. Husainali*, 1932 Sind 137: 140 IC 274.
3. *Ahasanulla vs. Nejabatali*, 1929 Cal 682.
4. *Mohabbat Ali vs. Mohd Ibrahim*, 1929 PC 135: 10 Lah 725: 117 IC 17.
5. *Sibt Ahmad vs. Amina Khatoon*, 1929 All 18.
6. *Qazi Siddique Hossein vs. Salima*, 61 CWN 187.
7. *Ismail Ahmad vs. Momin Bibi*, 1941 PC 11: 193 C 309; *Chandu Lal vs. Khatem-un-nissa*, 1943 Cal 76.
8. *In re Millard*, 10 Mad 218 at p 221.

CHAPTER IX

MUSLIM LAW OF DIVORCE

Now we have to study the Muslim Law relating to divorce

Chapter Map

a. DEFINITION OF TALAQ

Synopsis

In Hidaya Book-IV of talaq, the definition of Talaq is stated as under:

> "Talaq, in its primitive sense, means dismission, in law it signifies the dissolution of a marriage or the annulment of its legality by certain words "Kanzud and Mutaka-Dakaik "defines Talaq as follows: "Talaq is the removal of the restrictions established, according to law, by virtue of Nikah.

In Durral Mukhtar, Book on divorce, page 229 Calcutta edition the talaq is defined as follows: "Talaq is a word signifying the removal of restraints". In law it means removal of the restrictions or in future by reversible (expressed) by means of a particular word. when Nikah ensures the existence of a lineage and progency together with permissible fulfillment of one's desires and lusts. The divorce is permissible under Muslim Law for the perceptivity of the calmness and tranquility of society.

1. Reason for permissibility of Divorce :

Mufti Abdul Jaleel Qasmi in his book "The Complete system of divorce" published by "Adam publishers New Delhi" has given the reasons of permissibility of Talaq in Islamic system as under:

> "The reason being that in some cases after Nikah takes place a person is deprived of the benefits and comforts there of, due to their weakness, due to their physical or natural abilities, due to their inability to cope with the habits and nature of others or due to many other possible reasons. A veil is thrown over the merits and virtues of the opposite party and then instead of love, affection and strengthening of family ties are hatred, animosity revulsion and fostered. This leads to one's worldly life becoming a woeful existence. In this way, the, unity, cogendigity etc, which married life was supposed to credite are all laid to waste and destroyed. In fact, such strife leads to the opposite effect. Due to this strained and difficult relations a desperate need is created for separation between the spouses. Islam has permitted the concept of Talaq for such delicate and trying occasions, so that each of the spouses may go their own ways and pass their lives in peace elsewhere".

2. Restraints on talaq under Muslim law :

The practice of unrestrained divorce was prevalent in pre-Islamic Arabia. There was no restrictions of any kind to prevent the husband from severing the martial ties Talaq was originally forbidden and is still disapproved but was permitted by Mohammed for avoidance of greater evils.[1]

The Prophet (MPBUH) is reported to have said, "with Allah, The most detestable of all things permitted is divorce."

The Prophet (MPBUH) recognized the power of talaq in the husband almost to an unlimited extent but he looked upon it with great disfavour and introduced a number of conditions which constitute a salutary check upon the husband's power to divorce his wife. These checks may be classified into moral and legal.

2.1. Moral :

The most important check that the Prophet Mohammed (MPBUH) introduced was the placing of talaq among the acts which were barely permissible but it was declared to be very obnoxious in the eye of God. The following passages show that he had accorded only a very reluctant sanction to the institution of talaq:

(1) "Either retain them with humanity or dismiss them with kindness."[2]

(2) "The thing which is lawful but disliked by God is divorce."[3]

(3) "Talaq is the most detestable before God of all things."[4]

An arbitrary and unreasonable exercise of the right to dissolve the marriage is thus strongly condemned in the Quran and the reported sayings of the Prophet (hadis) and is treated as a spiritual offence.[5] Talaq is in itself a dangerous and disapproved procedure as it dissolves marriage an institution which involves many circumstances as well of a temporal as of a spiritual nature nor it its propriety at all admitted but on the ground of urgency of release from an unsuitable wife.[6] It would thus be seen that divorce was placed almost directly under divine displeasure and so long as the religious sanction continued to be strong, this in itself should have constituted a sufficient check upon

1. Bail I, 205.
2. Quran II, 229.
3. Jung Muslim Law of Marriage, at p 46 citing a hadis.
4. Ameer Ali II, 472 citing hadis.
5. *Asha Bibi vs. Kadir*, 33 Mad 22.
6. Hedaya 73.

the capricious exercise of the power of divorce. Law and religion were of course closely associated in those days and this check must have operated as a really effective one.

The Prophet also made provisions against a hasty pronouncement of divorce. He enjoyed, "and if ye fear a breach between the husband and the wife, appoint an arbiter out of his family and an arbiter out of her family. If they desire amendment, God will cause them to agree." The evident intention is that before the marriage is irrevocably terminated, the parties may get an opportunity reconciling themselves.

The above Hadith is in consonance with the injunction of Holy Quran as ordained in Ayath 35, Surah Nisa which runs thus:

> "If you fear a breach between them twain appoint (two arbitrators, one from his family and other from hers, if they wish for peace Allah will cause their reconciliation".

2.2. Legal :

Among the legal provisions which were intended to operate and did operate as checks upon the powers of divorce some are the following :

(i) *Dower :* It was of course not intended to operate as a check on the capricious exercise of power of talaq by the husband but the fixing of dower, particularly of heavy dower, does act as a healthy check on the power of the husband.

(ii) *Provision as to revocability :* Provision has been made to prevent divorce becoming irrevocable. In fact, the best form of talaq prescribed by law does leave a good deal of room for revoking a hasty pronouncement of talaq.

(iii) *Restraints on re-marriage :* Substantial restraints have been imposed upon re-marriage between divorced couple, (e.g., the ban on a marriage with a triple divorce). This would prevent a hasty pronouncement of divorce.

Subject, however, to these restraints (the legal among which are not strong enough and the moral ones are ceasing to be sufficiently effective with the weakening of the force of religious sanction), the husband has got an unlimited power of divorce. While a good deal of equality is conceded between the husband and the wife in other matters, the husband's position in the matter of talaq is one of distinct advantage. The policy behind the islamic law of divorce was viewed

by Justice *V.R. Krishna Iyer* in the case of *Yousuf Rowthan*[1], by observing that, "indeed a deeper study of the subject discloses a surprisingly rational realistic and modern law of divorce which was supported by Taher Mahmood in his book, "The Muslim Law of India", as unbiased and correct view.

In the case of *Sayeda Khanam vs. Mohd Sami,*[2] a reference was made to the book authored by E. Newfeld (Ancient Hebrew Marriage Laws 1949) who has classified the dissolution of muslim marriage under the following heads:

1. By the husband without the intervention of the court.
2. By common consent without intervention of the court.
3. By decree of court on the application of wife.
4. By the death of either party.

So broadly speaking the following are the modes of dissolution of Muslim marriage *viz.*

a. By the death of the spouse
b. By the act of parties *i.e.*, Talak (repudiation), illa (vow of conteinence), zihar (injuries assimilation), Talak by wife *i.e.* Talak-e-Tafweed divorce).
c. By common consent *i.e.* Khula (redemption)
d. Mubarat (mutual freeing), by judicial process i.e. .lient and fask (judicial recession).

Now we shall proceed with the common type of dissolution of Muslim marriage by divorce which is being pronounced by husband without the intervention of court.

b. CLASSIFICATION OF TALAQ

Synopsis

1. AIR 1971 Ker. 271
2. Pakistan Legal Decision 1952 Lahore 113 (Full Bench)

Following are the types of Talaq which are recognized in Islam:

1. Talaq-e-Ahsan (most approved),
2. Talaq-e-Hasan (good),
3. Biddat (innovated)

3. Talaq-e-Ahsan :

It is the most approved form of talaq where the man divorces his wife with one talaq in such a tuhur (free from mensuration) wherein there was no cohabitation, he leaves her within state until she completes her iddat, where after she comes out of the bond of Nikah, and is now free to marry another man.

The famous Islmaic Jurist Allauddin Al Kaassani Hanafi writes in Badda-I-wa sanaai" thus; Talaq-e-Ahsan is such a Talaq, where the husband give his wife, who is one that will mensurates, (One talaq-e-Raji in such a period (when she is pure) where in he had not had intercourse with her. He leaves her in this condition until she completes three menstruation cycles thus completing her iddat. (P1765)

The author of Badaai further explains that if the woman's pregnancy becomes apparent and the opportunity for talaq arises, then in such a case also, Talaq-e-Ahsan is the best option and the best is that he gives her one Talaq-e-Rajaee (P 1766).

In the case of *Shaik Fazal Rahamn vs. Mst. Aisha*[1] while citing Ameer Ali the court discussed the significance of Talaq-e-Ahsan or Talaq Al Suma (approved form) thus :

The Ahsan form consists of one single pronouncement in a period of purity when the woman is free from her menstrual courses, followed by abstinence from sexual intercourse during that period of sexual purity (TUHR) as well as during the whole period of iddat.

If any such intercourse takes place during the period mentioned the divorce is void and of no effect as per Ithna Ashare and Fatimid Law.[2]

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1. AIR 1929 Patna 690
2. Ballie II P.111.

Where the parties have been away from each other for a long time as held in the case of Fazlur Rahman (supra) or where wife is old and beyond the age of menstruation the condition of Tuhr is not necessary.

In case of Talaq-e-Ahsan it is revocable within the period of iddat which is three months from the date of declaration or when the woman is pregnant until delivery.

After the expiry of iddat period the Talaq-e-Ahsan will become irrevocable.

Talaq-e-Ahsan is most approved form because this form is in accordance with ordains of Almighty as stated in Surah Talaq "The Almighty Says:"

> Prophet (MPBUH) when you divorce your woman divorce then at this prescribed periods and count (accurately) their prescribed periods and fear "Allah your Lord":

4. Talaq-e-Hasan :

According to Hidya (Book IV of Talaq) Talaq-e-Hasan is where a husband repudiates and enjoyed wife by three sentences of divorce in three tohrs.

This consists of three pronouncements made during successive Tuhrs, no intercourse taking place of the three Tuhrs. Then it becomes irrevocable.[1] Talaq-e-Hasan differs from Talaq-e-Ahsan only on one point i.e. in case of Talaq-e-Ahsan the husband will pronounce divorce in Tuhr only and wait till the iddat period is completed to become the divorce effective and irrevocable, where as in case of Talaq-e-Hasan the husband will have to give divorce for three times as explained in the case reported in AIR 32 PC 25 which runs as under :

> "In other words if a husband is constrained to divorce his wife for any unavoidable reason he has to pronounce or divorce when his wife is in the state of purity and he has to wait for one thing to pronounce second divorce after the menusurate period. If the spouse want reconciliation by buying them differences and with a foul hope to start their martial life a fresh, then be reunion of with of them."

If during this period there is no reunion or cohabitation between the couple the husband can pronounce third divorce. But during all these three periods there shall not be cohabitation otherwise the divorce will be nullity.[2]

1. Fatawa-I-Alamgiri Vol I P 492.
2. Hidaya 72, 73, 78.

In the case of a wife who is not subject to menstruation or is pregnant, the pronouncement must be made at the intervals of 30 days between each pronouncement. The condition that the pronouncement should be made between two periods of tuhrs would not be applicable to a woman who passed the age of menstruation because it would be physically impossible to have any such periods.[1]

Shia Law :

Ameer Ali states that Shia Law recognizes both the above stated forms of Talaq.

5. Talaq-ul-biddat or Talak-badai (Triple Talaq in one sitting) :

This form of talaq is disapproved and irregular divorce. This form of talaq is where a husband repudiates his wife by three divorces at once include at once or he repeats the sentence thrice in one tuhr. It means three pronouncements made during a single that either on one sentence, *e.g.*, "I divorce thee thrice" or separate sentences, e.g., I divorce thee, I divorce thee, I divorce thee or a clear indication by a single pronouncement made during Tuhr indicating an unlawful irrevocably to dissolve the marriage e.g., I divorce irrevocably.

This type of talaq is abhorred and detested by the Shariah. The person who perpetrates such a Talaq is regarded as Sinner.

Though such type of Talaq amounts to a "Sin" but under Hanafi law still it is effective. Under Itna Ashari and Fatimid Laws it is not permissible.[2]

> ***Hadith :*** The prophet (MPBUH) reprimanded Hazrath Ibn Umar when ibn-e-Umar divorced his wife during the period of haidh and instructed him to take back his wife and keep her until she attains purity (Bukhari P 790)

In Durrul Mukhtar it is stated if a husband divorces his wife in the state of haidh then it is best that he should take her back. It is stated in Durral Mukhtar Vol II 684 that when once a news was brought to Prophet (MPBUH) that one of his disciple had divorced his

1. *Chandbi vs. Bandesha*, 1961 Bom 121; (1961) 1 Cr L J 470.
2. Cadi Noman 'Dalm Vol.II 978.

wife pronouncing the three talaqs at once and same time, the prophet stood up in anger of his carpet and declared that the man was making a play thing of the words of God and made him take back his wife.

Talaq bidaat or tiple Talaq in one sitting is not recognized by Muslim belong to Ahl-e-Hadith sect as evident from a Fatwa issued by SK.Ataul Rahman and Sk Ubaidul Rahman and Sk. Jameel Ahmed Siddique. Published in a weekly journal " Jareeda-e-Tarjuman" but the majority view of sunni ulemas is that it is effective and there can be no reunion unless Halalaa takes place which means after a woman is given three Talak she has to complete her iddat, where after she has to marry some one else and she has to cohabit with him at least once. Now when the second husband gives her Talak and after she completes iddat she may remarry his former husband. This type of Talaq is termed as Talaq-e-Bain also which completes the separation between husband and wife. This talaq may be given in writing which comes into operation immediately as severes the marital tie.[1]

Shia Law :

Shias does not recognize this type of Talaq as valid.

Thus Talaq-e-Badaai is the worst form of Talaq and amounts to sin still many of the Muslims who claim themselves to be the followers of the Islam do not act in accordance with the ordains of Allah as mentioned in Quran.

If the muslims resolved to follow the mode of Talaq as prescribed in Quran no ugly situation would arise. To curb this "evil practice" the apex court of India conducting a survey of various Ayats of Quran and Sunna and traditions and other authentic books written on Islam, has ruled in the case of *Shameem Ara* (AIR 2002 SC 3551) that a divorce in the absence of wife if pronounced, thrice in one sitting without adopting reconciliation process is void. *See*, full text of this judgment as Appendix 'A' at page 287.

Shafai Law :

All the three types of Talaq are discussed supra are accepted in legal by shafaees.[2]

1. *Md. Ali vs. Fareedunissa*, AIR 1970 AP 298
2. Hedaya 73, Milary 332.

6. Requirements of Talaq-ul-biddat :

In this irregular form of talaq, there are two main features of departure from the orthodox form of talaq (talaq-ul-sunnat).

6.1. In respect of time :

Talaq-ul-sunnat does not permit the pronouncement of talaq during the courses or during a tuhr in which there was sexual intercourse. In the case of talaq-ul-bidaat, there is no such restriction and talaq would be valid even though pronounced during menstruation,[1] or during a tuhr in which there was intercourse.[2]

6.2. In respect of the number :

In the case of ahsan talaq, the three pronouncements have to be made in three different tuhrs or in the case of a non-menstruating woman at intervals of one month.

Even a single pronouncement (and not a triple form) may effect an irrevocable talaq, if the intention is clearly indicated that it was intended to take effect as such.[3]

All forms of talaq other than those which conform to the ahsan and hasan forms are bidai.[4] Talaq would thus be valid as talaq-ul-biddat.[5]

(1) Where it is pronounced at the time when the wife is in her menstrual course;

(2) Where the husband had intercourse with her during the tuhr in which the talaq is pronounced;

(3) Where more pronouncements than one are made during one and same turh; and

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1. *Sheikh Fazlur vs. Mst Aisha*, 1929 Pat 81 (FB): 8 Pat 690.
2. Minhaj 337.
3. *Sarabai vs. Rabiabai*, 30 Bom 537; *Sheikh Fazlur vs. Aisha*, 1929 Pat 81 (FB): 8 Pat 690.
4. Durr 120.
5. Bail I, 207: *Rashid Ahmad vs. Anisa*, 1932 PC 25; *Sheikh Fazlur vs. Aisha*, 54 All 46.

(4) Where a single pronouncement is made indicating a clear intention to dissolve the marriage irrevocably. But intention to irrevocably dissolve marriage must be proved in such case.[1]

This form of talaq comes into operation at once and is irrevocable right from the moment of its pronouncement or of the execution of the deed if the talaq is in writing.[2]

6.3. Validity of talaq-ul-bidaat :

This form of talaq has been considered to be an improper form from the moral point of view. Such talaq is considered to be abominable but is valid.[3] This form is considered to be theologically improper.[4] The legal validity of this form of talaq has been challenged in many cases. In one case,[5] it was contended such talaq was not valid :

(1) because it is against the Quranic law and the court is bound not to give effect to the rule, if it is against law of the Quran; and

(2) because it is opposed to a tradition of the Prophet.

On the first point, it was held that Quranic verses,[6] have been differently interpreted by the different schools. They have been interpreted by the Hanafi jurists as being capable of the interpretation which sanctions the bidai form.

As to the tradition of the Prophet, it was held that the tradition only relates to the revocability of a talaq pronounced during the courses. The validity of the talaq in this form was accepted on the following grounds :

(1) that it has been accepted by all ancient texts like Hedaya, Fatawa-i-Alamgiri and Radd-ul-Muhtar and also by all modern text-writers;

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1. *Ghulam Mohy-ud-din vs. Khizar Hussein*, 1929 Lah 6: 10 Lah 470.
2. *Ahmad Gir vs. Mst Begha*, 1955 JK 1 at p 4.
3. Bail I, 287, 288.
4. *Sarabai vs. Rabiabai*, 30 Bom 537 at p545; *Sherif Saif vs. Usana Bibi*, 6 MHCR 452 at p453.
5. *Sheikh Fazlur vs. Aisha*, 1929 Pat 81 (F B): 8 Pat 690.
6. Quran, II, 229, 230.

(2) that the custom and practice has been obtaining since the second century of the Mohammedan era and rejecting it would be to introduce a drastic change in what has been the law of the Hanafi Mohammedans; and

(3) that it has been accepted in all cases in courts.

It has been most common prevalent practice, among Hanafi Mohammedans of India to pronounce three talaqs at one time in a single sentence or in separate sentences.[1] Such talaq has been accepted as valid in many other cases.[2] The matter has received the final sanction of the Privy Council.[3]

7. Effect of menstruation on the validity of talaqs :

In the case of a non-menstruating wife talaq may be pronounced at any time even immediately after the intercourse. So also in the case with a pregnant wife,[4] and a wife who has passed the age for period of menstruation in which case can the condition that oral declaration of divorce should be made between two periods of menstruation does not apply.[5] Talaq in such case would be talaq-ul-sunnat if three pronouncements are made by observing all the intervals of a month between the repetititons.[6] If such pronouncements are made without observing the intervals, the talaq would be bidai or Talaqual bidat.

In the case of menstruating wife whose marriage has not been consummated a talaq may be pronounced in the approved form at any time either in a tuhr or during actual occurrence of the course.[7] In the case of a consummated marriage, talaq in the approved form can be given only in tuhr.[8] But it has been held that this condition

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1. *Amiruddin vs. Khatun Bibi*, 39 IC 513; *Ibrahim vs. Syed Bibi*, 12 Mad 63.
2. *Sherif Saib vs. Usana Bibi*, 6 MHCR 452; *In re Kasam Pirbhai*, 8 BHCR 95; *Sarabai vs. Rabia Bai*, 30 Bom 537 at p547: 8 Bom LR 35; *In re Abdul Ali*, 7 Bom 180; *Nur Bibi vs. Ali Ahmad*, 1925 All 550: 88 IC 408; *Aisha Bibi vs. Kadir*, 33 Mad 22: 3 IC 370; *Ahmad Giri vs. Mst Begha*, 1955 J & K 1.
3. *Rashid Ahmad vs. Mst Anisa*, 1932 PC 25: 54 All 46.
4. Durr 119.
5. *Chandbi vs. Bandisha*, 1961 Bom 121 : (1961) 1 Cr L J 470.
6. Bail I, 207-208; Hed 73.
7. Bail I, 207; Hed 72.
8. Bail I, 206-207; *Maung Ba Shive vs. Ma Nyun*, 9 IC 457.

does not apply to divorce in writing.[1] A talaq even during courses would be valid according to the Hanafi law as a bidai talaq.[2] The onus of proving the absence of purity is on the husband who impugns the validity of talaq on that ground.[3]

Shia Law :

Shia law does not recognize the bidai form of talaq. In the case of a consummated marriage when the wife is subject to menstruation talaq would not be valid if the wife is in her courses or in nifas (puerperal discharge), unless the husband has been absent and has been so long away from her as to assured that she has passed from the period of purity in which he had intercourse with her to another such period.[4]

A talaq pronounced during a tuhr in which the husband had connubial intercourse with wife is ineffectual. Istibra (*i.e.,* purification) is also a necessary condition for pronouncement of a talaq except when the woman has not attained puberty or is past the child-bearing age or is pregnant.[5]

8. Effect of consummation on validity of talaq :

In the case of an unconsummated marriage, adherence to time is not required. A talaq pronounced even during iddat is not irregular or reprobated (*i.e.,* is talaq-ul-sunnat). It may be pronounced at any time during tuhr or menstruation.

In the case of a consummated marriage talaq in the regular form can be made only in a state when the woman is in a tuhr.[6]

Shia Law :

A talaq in an unconsummated marriage may be pronounced while the wife is in her course.[7]

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1. *Chandbi vs. Bandesha*, 1961 Bom 121: (1961) I Cr L J 470.
2. *Sheikh Fazlur vs. Mst Aisha*, 1929 Pat 81 (FB): 8 Pat 690.
3. Ibid.
4. Bail II, 110, 111, 118.
5. Bail II, 111.
6. Bail I, 206-207; Hed 73.
7. Bail II, 110.

9. Calculation of periods of months :

There is difference of opinion as to manner in which the period of months would be calculated for pronouncement of talaq. If a divorce is given in the beginning of the months, the three months from the date are to be counted by the lunar calendar. If however it is pronounced in the middle then, according to Abu Hanifa, the period is to be calculated by number of days. According to Abu Yusuf and Muhammed the second and third months are to be invariably calculated by the lunar calendar and the deficiency of the first months is to be taken from the fourth succeeding month.[1]

10. Number of talaqs :

The determination of number of talaqs effected by pronouncements is a matter of considerable importance. The giving of three talaqs become final and irrevocable. It also involves a restraint on re-marriage. In some cases even a single pronouncement may operate as irrevocable talaq. Whether any particular pronouncement or pronouncements amount to one, two or three talaqs depend upon the nature of the pronouncement. Numerous illustrations have been given in texts (mostly based on construction of the words in Arabic) on which the question of revocability is determined by reference to number of talaqs intended or implied.[2]

All talaqs in excess of three are redundant. Thus, if the husband says to wife, " a thousand talaqs to you", three talaqs will take effect.[3]

10.1. Single talaq :

In the case of ahsan talaq only one talaq is to be given. A talaq given in express words, "thou are repudiated or I have repudiated", only one revocable talaq is induced even though the husband intends more.[4]

A talaq in the case of an unconsummated marriage becomes irrevocable on the first pronouncement.

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1. Hed 73, 74; See also Bail I, 207, 208, expressing the view of Abu Hanifa.
2. See Bail I, 213-216; Hed 76-83; Bail II, 15, 16; M Y Khan, III, 198-224; Minhaj, 332-334.
3. Bail I, 237.
4. Bail I, 212.

Illustration

A says to his wife with whom the marriage has not been consummated. "You are divorced, divorced, divorced." Only one talaq would take effect as the first word "divorced" effects an irrevocable talaq and the other two are nugatory.[1]

Even in the case of talaq made in the bidai form by pronouncement during the courses of during tuhr in which there had been connubial intercourse only one talaq would come into effect unless of course more were actually intended.

A single pronouncement may take effect as more talaqs than one (for which see "three talaqs" below).

10.2. Two talaqs :

It is open to the husband to pronounce talaqs in a manner giving effect to only two talaqs.

Illustration

(1) A says to his wife: "thou are repudiated one after one". Two talaqs would take effect.[2]

(2) A says to his wife, "thou are divorced irreversibly" or "thou art divorced to a certainty." He intended by the word "divorced" one talaq and by the words "irreversibly" or "to a certainty" another talaq. Two talaqs will take place because these expressions are themselves capable of effecting talaq.[3]

10.3. Three talaqs :

Three talaqs may be given by expressly mentioning the fact.

Illustration

(1) A says to his wife: "thou are repudiated three times", three talaqs would take effect.

1. Hed 83.
2. Bail I, 227.
3. Hed 82.

(2) A says to his wife with whom the marriage has been consummated: "thou art repudiated and repudiated and repudiated". Three talaqs would take effect.[1] As to such pronouncements in the case of an unconsummated marriage, see "single talaq" above. Even in the case of an unconsummated marriage, three talaqs may be made by a single pronouncement.

Illustration

A says to his wife: "you are divorced thrice". Three talaqs would take effect.

Even a single pronouncement may be so worded that a triple divorce may come into effect in the bidai form. It would take effect as such if it was to intended. A strong expression is an aggravated form may effect three talaqs.[2]

Shia Law :

If the husband in pronouncing the talaq should merely explain himself by saying "twice" or "thrice", some insist that it would be void but, according to better opinion, one talaq would take effect by use of the word "talaq", the rest being surplusage.[3]

11. Talaq against a minor wife :

The Raddul Mukhtar states, however, that when a girl wife is under the age of puberty a "Rajai Talaq" pronounced against her would become Li'an on the expiration of there others and not the usual thee limits of puberty.[4]

12. Talaq against insane wife :

Under certain circumstances and subject to certain well defined conditions the power of dissolving the marriage relationship is verified if the husband on his paying the dower settled or his wife can a husband then who cannot have the marriage cancelled on the ground

1. Bail I, 213.
2. Bail I, 226.
3. Bail II, 115.
4. Quran IV, 35.

of his wife's insanity, dissolve the connection by and the process with the Talaq ? As a wife's knowledge of the proceedings is necessary in every case of Talaqs, and as the law provides a means of release for a person permanently insane, viz, by a proceedings before the Kazi, it would appear by parity of reasoning, that a Talaq pronounced against a woman who is insane, unless during a lucid intervals would be invalid.[1]

13. Talaq against a pregnant wife :

According to Abu Hanifa and Abu Yusuf a pregnant wife may be divorced in the regular way (i.e, by talaq-us-sunnat) by three talaqs. He is first to pronounce a single sentence of divorce upon her and then one at the expiration of one month and a third at the expiration of the next succeeding month. (i.e, in the ahsan form). According to Muhammad the only talaq-us-sunnat in the case of a pregnant woman is a single divorce (i.e., only in ahsan form).[2]

14. Right of husband to pronounce talaq :

The husband is entitled to pronounce a talaq at any time at his will without the consent of the wife, whether Muslim or kitabi.[3] Talaq is the mere arbitrary act of Muslim husband who may repudiate his wife at his own pleasure with or without cause.[4]

There is no legal restriction of any king and it may be pronounced on mere whim or caprice without any reason.[5] Impropriety of the husband's conduct will not affect the legal validity of talaq.[6] The court is not a court of morals and it cannot concern itself with the religious or moral aspects of a matter. It has to look at it from a strictly legal point of view.[7]

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1. *Asha Bibi vs. Kadir*, 33 Mad 22 at p26; *Zaker Begam vs. Sakina Begum*, 19 Cal 689 at p693: 19 IA 157.
2. Hed 74.
3. *Muncherji Gursetji vs. Jessie Grant*, 59 Bom 278: 1935 Bom 5: 154 IC 1075.
4. *Moonshee Buzulul Raheem vs. Lateefutioon-nissa*, 8 MIA 379.
5. Bail I, 208, 209; Hed 75: *Ahmad Kasim Molla vs. Khatun*, 1933 Cal 27.
6. *Asha Bibi vs. Kadir*, 33 Mad 22, *Ma Mi vs. Kallandar*, 1927 PC 15: 5 Rang 18.
7. *Ahmad Kasim vs. Khatun Bibi*, 1933 Cal 27: 59 Cal 833.

15. Conditions for a Valid Divorce

The only conditions for the validity of a pronouncement of a talaq are that the husband must be a person above puberty and must possess a sound mind.[1] There is a saying of the Prophet: "Every divorce takes place except that pronounced by an infant.[2]

Majority for the purpose of pronouncing divorce is to be determined by Muslim law. A talaq pronounced by a person before he attains discretion and understanding (i.e., so long as he remains a Saghir (minor) would be void. There is a difference of opinion as to whether a talaq pronounced by a person who has attained discretion (i.e., a Sagir) is valid or not but the better opinion is that a talaq pronounced by a person below puberty would not be effective even though he may be about to attain puberty and even though he ratifies it on attaining puberty,[3] nor can it become effective by the consent of the guardian.[4] The minor may however on attaining majority say: "I now put into effect the talaq". In such case it will take effect as talaq for the first time.[5]

16. Talaq by lunatics or person of unsound mind

Soundness of mind is also a necessary condition. A talaq pronounced by a lunatic would not be valid unless it is pronounced during a lucid interval.[6] A pronouncement made by a person suffering from some disease similar to lunacy or if the mind was so effected that he had fainted or had become astounded would not be valid.[7]

17. Against whom talaq may be pronounced

Talaq is subject to two conditions.[8]

(1) There must be an actual tie on the woman either of marriage

1. Durr 123; Bail I, 209; Hed 75; Bail II, 107-108.
2. Hed 525.
3. Durr 125; Bail I, 209; Bail II, 107; *Asha Bibi vs. Kadir*, 33 Mad 22.
4. Hed 525.
5. Bail I, 209; durr 125.
6. Bail I, 208-209; hed 75.
7. Durr 125-126.
8. Bail I, 205; hed 79-80; Bail II, 109, 112, Minhaj 331.

or of iddat. Talaq must refer to a time when the marriage was subsisting.

Illustrations

(i) A husband says to his wife, " you are under divorce previous to your marriage with me" or "you are divorced after my death" or "after your death". No divorce will take effect.[1]

(ii) A person supposing a stranger to be his wife says to her, "thou art repudiated." His wife is not divorced: (As to the converse case of the wife being supposed to be a stranger).

(iii) A man pronounces talaq against a woman whom he subsequently marries. No talaq takes effect.[2]

A talaq may also be pronounced while the wife is observing iddat—

(a) for a revocable talaq ; or

(b) for an irrevocable talaq which has not become final; or

(c) for separation which has the effect of a talaq (e.g., in consequence of ila or the husband's impotency or refusal of one of the parties to embrace Islam.[3]

(2) The woman must still be capable of being the subject of marriage. Thus, if a woman becomes unlawful to her husband by reason of supervenient affinity after consummation and has consequently to be separated and the husband then pronounces talaq while she is undergoing iddat, talaq would not take effect.[4]

18. Witnesses for talaq

While witnesses are required for contracting a marriage, no witnesses are necessary for the pronouncement of a talaq.[5]

1. Hed 79, 80; Minhaj 331.
2. Bail I, 109.
3. Abdur Rahman, Art 223.
4. Bail I, 205.
5. Bail II, 117 (f n)

Shia Law :

It is a necessary condition for the validity of a talaq that it must be pronounced in the presence of two male witnesses who should hear the actual words. Women are not proper witnesses for talaq.[1] It is not with regard to proof of divorce that the law insists on two witnesses but to the very act of divorce it cannot be held to be not substantive law reason.[2]

19. Talaq during intoxication

There is considerable difference of opinion among the Hanafi jurists as to the effect of intoxication on the validity of talaq. According to some, talaq during intoxication in any manner would not be validly effected. This view has however not been entirely accepted.[3] In the case of voluntary intoxication, talaq would be effective if it has been caused by a use of wine obtained from grapes or dates or from hemp-leaves, opium or henbane-seed as in such cases the person would be liable to punishment reason.[4] As to drink obtained from things which are not prohibited, such as grain, fruits or honey, there is a difference of opinion. According to Abu Hanifa and Abu Yusuf, such talaq would not be effective but according to Muhammad it would be effective. The view of Muhammad was accepted in Fatawa-e-Alamgiri.[5]

As to talaq pronounced in intoxication caused unwillingly or in a state of perturbation there is a distinct difference of opinion. According to some authorities such divorce is valid while according to others it does not take effect.[6] Intoxication even though voluntary would not be effective if it is caused by something taken for a necessary purpose, like opium or wine taken as a medicine.[7]

According to Hidya, page 76, "if, however, a man were to drink wine to so a great degree as to produce delirium or inflammation of the brain thereby suspending his reason,the talaq will not take effect".[8]

1. Bail II, 117-118.
2. *Ali Nawaz Gardezi vs. Mohd Yusuf*, PLD 1962 Lah 558.
3. Hed 76.
4. Bail I, 209; Durr 122.
5. Bail I, 209; Hed 76.
6. Durr 122 (f n).
7. Bail I, 209, Ameer Ali II, 481.
8. Hed 76.

Shia Law :

A talaq in intoxication is not valid as there can be no real intention in such cases[1] as mentioned in Bailee's digest.

Shafei Law :

There are two opinions reported from Shafei. It is said that at first he declared that a talaq by a drunken man was not effective but afterwards he is said to have modified his view and adopted the Hanafi view that a pronouncement of talaq by a drunken man is effective.[2] Minhaj-et-Talibin mentions that according to the majority of jurists, talaq by a person under intoxication is valid.[3]

20. Talaq under compulsion

According to the Hanfi schools a talaq pronounced under compulsion is valid.[4] The grounds for this view is given by Hedaya as follows:

> "The foundation of this is that the man alluded to has the choice of two evils, one, the thing with which he is threatened or compelled; and the other, divorce upon compulsion and viewing both, he makes choice of that which appears to him the easiest, namely, divorce; and this proves that he has an option, though he be not desirous that its effect should be established, or, in other words, that divorce should take place upon it."[5]

There is, however, also a tradition reported by Hazratha Ayesha (RZ) that she heard the Prophet saying, "there is no divorce or emancipation by compulsion".[6]

It has now been established under the Hanafi Law that talaq under compulsion is valid,[7] even though given to satisfy someone

1. Bail II, 108.
2. Ameer Ali II, 482, hed 76.
3. Minhaj 330-331.
4. Bail I, 208, 218; hed 75-76.
5. Hed 75.
6. Jung: Muslim Law of Marriage at p 49.
7. *Ibrahim vs. Enayetur*, 4 Beng LR (AC) 13: 12 WR 460; *Jorina Akthar vs. Hafizuddin*, 1926 Cal 242; 90 IC 633; 30 CWN 178; *Mohd Azam vs. Aktharunnissa*, 1957 PLD (Laj) 195.

else.[1] The view has been accepted by the jurists of the Hanafi school. So also, if a person under compulsion appoints another person to pronounce talaq, talaq pronounced by such person would be valid.[2]

As to what amounts to compulsion, it is stated that there are three conditions—

(a) that the compeller is able to do what he threatens;

(b) there is strong ground to apprehend that the threat will be carried into effect; and

(c) that the threat involves some serious injury to the person under compulsion or some dear to him.[3]

A trifliting injury is not sufficient to establish compulsion.[4] The principles are analogous to the provisons of Section 15 of the Contract Act.

As to whether a talaq under compulsion should be held to be bad on the ground of being opposed to public policy was left open in one case.[5] It can be taken to have been overruled by implication by the Privy Council.[6]

Ameer Ali has suggested that the divorce pronounced under compulsion may be avoided by the husband placing himself under the Shafei rules and in that case the repudiation would be invalidated.[7] It is doubtful if this course can be said to be open. As soon as a talaq is pronounced at the time when the husband is governed by the Hanafi Law, it would become effective and the subsequent change of sect cannot render ineffective something which had already taken legal effect.

Shia Law :

According to Shia doctrine, Talaq under compulsion is not valid.[8]

1. *Rashid Ahmad vs. Anisa Khatun*, 1932 PC 25: 54 All 46 at pp 52-53.
2. Hed 583; Bail I, 210.
3. Bail II, 108, Minhaj 339.
4. Ibid.
5. *Nur Bibi vs. Ali Ahmad*, 1925 All 550.
6. 1932 PC 25 supra.
7. Ameer Ali II, 522.
8. Bail II, 108.

Shafei Law :

Shafai law says that, "Talaq under compulsion is void unless it duly appears that the husbnd had the intention of repudiating his wife.[1]

20.1. Talaq in writing under compulsion

A talaq given in writing under compulsion is not valid, so also a writing obtained from the husband by beating and imprisonment will not be effective.[2]

20.2. Acknowledgement of talaq under compulsion

In the case of *Noor BiBi*, it was held that talaq under compulsion is valid but if there is a mere acknowledgment of talaq or even is confirmation, it would not be effective, if it is an fact proved to be untrue.[3] A written compromise signed by the husband and the wife addressed to the wife would not be a mere acknowledgment but it would result into a valid talaq as held in the case of *Jorin*.[4]

21. Talaq under mistaken belief

In the case of *Farzand Hussain*,[5] it was held that "if a talaq is pronounced in due form by a person against a woman who is in fact his wife, would be valid even though it was pronounced under the mistaken belief that she is not his wife. As to the converse case of talaq pronounced against a woman who is not the wife under the mistaken belief that she is so.

22. Talaq in jest or by mistake

There is a saying of the Prophet (MPBUH), "there are three things which whether done in joke or earnest, shall be considered as serious and effectual: one, marriage; the second, divorce; and the third, taking back."[6] Talaq is valid even though it is uttered in sport or jest or inadvertently or by mere slip of tongue or in talking facetiously (i.e.,

1. Minhaj 330.
2. Ameer Ali II, 485 (No authority cited)
3. *Nur Bibi vs. Ali Ahmad*, 1925 All 550;
4. *Jorin vs. Hafizuddin*, 1926 Cal 242.
5. *Furzand Hossein vs. Janu Bibee*, 4 Cal 588 at p590; Minhaj 330.
6. Tyabji at p 105.

without meaning what his words convey). It would also be effective even it if is pronounced carelessly.[1]

Shia Law :

One of the conditions for a valid talaq is design and intention. If there is no intention to effect a talaq (e.g., the husband was careless or asleep or labouring under a mistake), the talaq would not be effective.[2]

Shafei Law :

Intention is necessary for effecting a talaq but in the case of a person who pronounces talaq in jest, the talaq would be effective as in such case he acts from an option which is the cause of its validity.[3]

23. No Talaq during sleep or unconsciousness

It is necessary for the validity of a talaq that it must be pronounced while the husband is awake. If it is pronounced when he is asleep, unconscious or lost in astonishment, no legal effect will be affected to it. Such talaq would not be effective even if it is confirmed on awaking.[4]

24. Inability of the wife to understand the talaq

Unlike Khula, talaq is valid even if the wife does not understand the terms.[5] Ameer Ali has however stated, "both schools insist that the formula or sigha. by which the talaq is pronounced should in every case be understood by the wife. This being the rule it follows that when she is of such tender age as to be unable to comprehend the legal consequences flowing from the act of repudiation or does not possess discretion (rushd), a valid talaq cannot be effected against her."[6]

He has also by parity of reasoning come to the conclusion that a talaq pronounced against a woman who is insane would be invalid unless it is pronounced during a lucid interval.[7]

1. Bail I, 209; Hed 75; Durr 122; *Rashid Ahmad vs. Anisa Khatun*, 1932 PC 25: 54 All 46 at pp 52-53; *Mohd Azam vs. Akhtarunnissa*, 1957 PLD (Lah) 195; (1957) 1 WP 1100.
2. Bail II, 108.
3. Minhaj, 329. 330.
4. Bail I, 209; Durr 126: Hed 75: Bail II, 108.
5. Durr 246.
6. Ameer Ali II, 494.
7. Ibid.

It has been held in the case of *Khurshidunnisa* that talaq of a lunatic woman will not come into operation and will not deprive the wife of the right to maintenance till it is communicated to her during a lucid interval.[1]

Shia Law :

It requires sound mind for both sides for effecting a proper talaq and talaq against a minor or insane wife would therefore be invalid.[2]

25. Guardian's power to pronounce talaq :

The guardian of a minor husband is not competent to pronounce a talaq to the minor's wife. The power rests only with the husband, who can exercise it after attaining puberty as the minor does not understand the nature of the talaq and is not capable of desire.[3]

Shia Law :

According to shia law, the guardian of a lunatic who has attained puberty but is permanently of unsound mind may pronounce talaq if it is in the interest of the lunatic.[4]

26. Guardian's power to enter into khula :

If the father of a minor daughter enters into a contract of khula with the husband on her own property, the dower of the wife would not be dropped nor would the husband acquire any right to her property but, according to better opinion, the khula would take effect.

If the husband agrees to give khula to his minor wife it would be valid. If the father has given security the khula would take effect but the father would be liable to pay the consideration. If however no security is given, the matter must stand over for the sanction of wife and the separation would take effect on her sanction but not otherwise. The dower will not be lost in any case.[5]

The mother may also enter into a contract of khula for her minor daughter provided that she herself undertakes to pay the consideration and becomes a surety for it.[6]

1. *Khurshid-un-nissa vs. Abdul Basith*, 1955 NUC 5671 (Mad.).
2. Ameer Ali II, 494.
3. Hed 525; Bail II, 107.
4. Bail II, 107-108.
5. Bail I, 321; Hed 116.
6. Bail I, 321; Durr 257.

The guardian of a minor son cannot enter into a contract of khula on behalf of a minor without waiting for the sanction of the son.[1]

Shia Law :

The father of a woman may enter into a contract of khula on her behalf, but such khula will take effect as a revocable talaq and she would not be bound to deliver the dower unless she has expressly authorized it.[2]

Shafei Law :

In the case of an adult woman khula can be entered into only by the woman on agreeing to pay consideration and it is her personal right, even though the consent of the guardian is needed for the marriage of an adult virgin.

The father of a minor daughter may enter into a valid khula by giving up a part of the dower. So also, the father of a minor son may enter into a contract of khula. An executor may also enter into khula if the powers of the father are vested in him.[3]

27. Dissolution of marriage on the ground of impotency :

A dissolution of the marriage on the ground of impotency can be claimed only by a woman who is major.[4] A guardian cannot therefore make a claim on that ground.

28. Talaq through Agent

Muslim law had made elaborate provisions for the appointment and powers of agents for making various contracts, including contracts of marriage and the pronouncement of the talaq. A Muslim who has attained puberty and is of sound mind may appoint another person as an agent for pronouncing a talaq on his behalf.[5] The authority conferred on an agent may be revoked.[6]

28.1. Agency distinguished from the power to pronounce talaq

Talaq may be effected also by a person other then the husband. This may be done in three ways:

1. Bail I, 322.
2. Bail II, 135; Ameer Ali II, 508.
3. Ameer Ali II, 509.
4. Durr 273.
5. Durr 171.
6. Bail I, 254, 256.

(1) towkil, through an agent;

(2) rasalat, commissioning a third person to pronounce it; and

(3) tafweez, delegating to the wife herself (or any other person) the power to pronounce it.[1]

There is a distinction between the position of a person pronouncing talaq in his capacity as an agent and one pronouncing it in exercise of a power conferred by the husband.

Where a power is granted to any person, then (unlike the case of an agent):

(1) the husband cannot revoke it;

(2) the dower does not become extinct by the subsequent insanity of the husband;

(3) the grantor of a power may be a person of unsound mind;

(4) the power must be exercised in the same meeting in which it is granted unless otherwise provided.[2]

In the case of an agent, his function is not to take any decision about the pronouncing talaq. That decision is formed by the husband. The agent is only a medium through whom the formality of pronouncing a divorce is performed.[3]

28.2. Wife as agent

A person would be an agent for pronouncing the talaq, if the matter is not left in the pleasure of the agent but it would be a power to pronounce talaq if it is left in his pleasure. The position of the wife is somewhat different.

If A says to his wife, "repudiate thyself" (whether he leaves it to her pleasure or not), she would have power to pronounce talaq and will not be merely an agent.

The wife may however be appointed an agent for pronouncing a talaq of a co-wife. Thus, A says to his wife, "repudiate thyself and they companion", there is power in respect of wife and agency in respect of the companion.[4]

1. Durr 171.
2. Durr 173.
3. Bail I, 254-257.
4. Bail I, 254, 256; Durr 172-173.

Shia Law :

There is some difference of opinion but the better opinion is that the husband may lawfully appoint the wife as agent to repudiate herself.[1]

28.3. Express appointment of agent necessary[2]

It is necessary that an agent should be appointed expressly for the purpose of pronouncing talaq, that is, there must be ad hoc agency. A person appointed as a general agent (mukhtar-e-ram) cannot as such exercise the right to pronounce talaq.[3]

28.4. Agent's authority and its scope

An agent appointed to pronounce a talaq must act within the limits of his authority. When an agent exceeds the terms of his authority, his act, according to Abu Hanifa, would be entirely void, but, according to the disciples, it would be valid to the extent to which the authority permits him.[4]

28.5. Joint and separate agents

An agency for the talaq can be deemed to be joint only if expressly so directed, otherwise each agent is separately entitled to act.[5] As to grantees of power simultaneously appointed.

28.6. Agency subject to option

Option in the appointment of an agent is void.[6]

29. Contigent talaq[7]

For a valid pronouncement of a talaq it is not necessary (unlike the case of a contract of marriage) that it should come into effect immediately and unconditionally. It is open to a person to pronounce talaq which may take effect on the performance of some conditions or on the happening of some contingency, which is uncertain yet possible.[8]

1. Bail II, 109.
2. Bail I, 140-141; Durr 79-80.
3. Ameer Ali II, 497.
4. Bail I, 257.
5. Bail I, 248.
6. Bail I, 256.
7. Bail I, 218-219.
8. *Bachchoo Lal vs. Bismillah*, 1936 All 387: 1936 ALJ 302.

(a) A husband says to his wife "you are divorced when you enter Delhi or if you enter the house." Talaq will take place only when the wife enters Delhi or the house.

(b) A husband makes agreement for payment of maintenance to his wife of something to his father-in-law and agrees to send for his wife after paying maintenance for four months. It is provided that any default would operate as absolute divorce. A default is made. Talaq will take effect when default is made.

But it is necessary that the condition must be fulfilled. Thus, where the husband pronounced divorce thrice during an altercation arising out of the wife's desire to visit a lady friend by saying that he would divorce her if she visited the friend but the wife did not actually go to visit the friend, it was held that the divorce did not become operative.[1]

In one case however where it was stipulated that the husband would pay dower and maintenance by monthly installments and in default, the wife should be considered divorced, it was held that no divorce was effected even when there was default on the ground that the stipulation for a conditional divorce was illegal according to Muslim law.[2] It is submitted that this view is not correct.

Shia Law :

A conditional talaq is not valid. It must be free from any condtions.[3]

29.1. When contingent talaq becomes effective

A conditional or contingent talaq would become effective as follows:

(a) if there is only one condition or contingency – when the condition is fulfilled or the contingency happens;

(b) if there are more than one conditions or contingencies – when the last of such conditions is fulfilled or the last of such contingencies happens;

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1. *Bilquees Begum vs. Manzoor Ahmad*, PLD 1962Kar 491.
2. *Mohd Dad Khan vs. Mst Fatima*, 24 IC 881.
3. Bail II, 114, 115.

(c) if it is subject to any one of several conditions or contingencies – when the last of such conditions is fulfilled or the last of such contingencies happens.

29.2. When contingent talaq not effective

A conditional or contingent talaq would not take effect in the following cases:

(1) *If it is not within the power of husband :* It is necessary that the husband must have the power at the time when the talaq is pronounced.

(2) *If the power has been exhausted :* If on the occurrence of the condition the woman is out of the power of the man, talaq would not take effect.

(3) *If the condition is impossible :* Talaq cannot be suspended on a condition relating to something which is impossible or is left to divine will or is put off to a date at which its realization would be impossible.[4]

If however there is really no condition at all talaq would take effect.

A says to his wife: "thou are repudiated if the sky is above the earth". This would not be a talaq suspended on any condition and it would take effect immediately.[5]

30. Talaq subject to option

The husband cannot on pronouncing a talaq reserve an option for himself.

Illustration

A person says to his wife: "thou are repudiated and I have an option for three days". The talaq takes effect and the option is void.[6]

1. Bail, 266.
2. Bail I, 267.
3. Abdur Rahman, Arts 254, 255.
4. Bail I, 268-269.
5. M Y Khan III, 102.
6. Bail I, 218.

Shia Law :

A conditional or contingent talaq is void.[1] If however there is really no condition although the talaq is expressed conditionally, talaq would be effected.[2]

31. Talaq in future

Talaq is said to be referred to a time when its effect is postponed from the time of speaking to some future time specified without any condition. Both revocable and irrevocable talaqs are susceptible of being referred to future time.[3] (For instances of words in which talaq may be expressed.[4])

31.1. Talaq Futuro based on a condition

Where a talaq is so pronounced as to be conditional or contingent as also to take effect in future, it will take effect as follows :

(1) When it is made to depend on a fact and a time, talaq takes effect once on the occurrence of each of them;

(2) when it is made to depend on a fact or a time when—

(a) if the fact occurs first, talaq takes effect without waiting for the arrival of the time;

(b) if time arrives first, talaq does not take effect till the occurrence of the fact.

32. How talaq may be expressed[5]

A talaq may be pronounced either orally or in writing or in the case of a person who is unable to speak by positive and intelligible sings.[6] There are different provisions with respect to the manner of effecting a talaq made in writing or orally.

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1. Bail II, 115-116.
2. Bail II, 115.
3. Bail I, 219.
4. See Bail I, 218, 222; Hed 78-80.
5. Bail I, 213, 223, 229; Hed 76.
6. Bail I, 210; Hed 76; Durr 123-24; Bail II, 155.

33. Distinctions between oral and written talaq

In the case of *Chand Bibi*, it was ruled that There is an inherent distinction between the spoken and the written words. The former must be addressed to someone. It requires a speaker and an audience and even though the audience consist of one person, only an element of publicity is involved. With writing it is not so. A document may be written and known to the writer only; he may even put it in cipher with the intention that it never should become known. It is not therefore surprising to find that the Hanafi school distinguishes in this respect between writings of different kinds.[1] The condition that the declaration of talaq should be made between two periods of menstruation which applies to an oral talaq does not apply to a talaq in writing.[2]

34. Talaq in the absence of the wife

It is not necessary that an oral talaq may be pronounced in the presence of the wife. It would be valid even if it is pronounced in her absence.[3]

Talaq in writing may also be made in the absence of the wife. A deed of divorce will not become defective merely because it is not signed in the presence of the wife.[4]

In case a talaq is pronounced in the absence of the wife, the question would be from what date the talaq would take effect. Ameer Ali states, "it is not necessary for the husband himself to pronounce talaq in the presence of the wife but it is necessary that it should come to her knowledge."[5] On the basis of this statement, it has been held that the talaq should be deemed to have come into effect on the date on which the wife came to know it.[6] This view, it is submitted, is doubtful. It has been held that there is no authority for the

1. *Rasul Baksh vs. Mst Bholan*, 1932 Lah 498: 13 Lah 780.
2. *Chandbi vs. Bandesha*, 1961 Bom 121: (1961) 1 Cr L J 470.
3. *Ful Chand vs. Nawab Ali*, (1909) 36 Cal 184; *Kathuyumma vs. Urathel*, 1931 Mad. 647: 133 IC 375; *Rashid Ahmad vs. Anisa Khatun*, 1932 PC 25: 135 IC 762: 54 All. 46; *Ma Mi vs. Kallender*, 1927 PC 15: 25 ALJ 65: *Sarabai vs. Rabiabai*, 30 Bom 537; *Furzand Hossein vs. Janu Bibi*, 4 Cal 588; *Manoli vs. Moideen*, 1968 MLJ (Cr) 660 (Ker).
4. *Nurbibi vs. Ali Ahmad*, 1925 All 550: 88 IC 408; *Mst Waj Bibee vs. Azmut Ali*, 8 WR 23 (instrument of divorce given to the wife's father); *Mohd Ishaq vs. Mst Sairan*, 1936 Lah 611: 163 IC 953. No notice to the wife is legally necessary, 1936 Lah 611, Supra.
5. *Ful Chand vs. Nawab Ali*, (1909) 36 Cal 184 citing Ameer Ali.
6. *M M Abdul Khader vs. Azeera Bibi*, 1944 Mad 227: 45 Cr L J 672: 1944 MWN 64.

proposition that the talaq takes effect from the date on which the wife comes to know of it.[1]

Talaq in writing in the customary form takes effect from the time to writing even though the wife is absent and without the wife receiving the writing.[2] If however the writing is so expressed as to indicate the intention that the talaq would take effect from the date on which she receives the writing, talaq would not take effect till then.[3]

But it has been held that in respect of the wife's right to maintenance,[4] and dower,[5] time would run against her from the date on which talaq comes to her knowledge. If in a counter in an application U/s.488, Cr.P.C. the husband states that he had divorced the wife earlier and the fact of the earlier divorce is not proved, the divorce will operate from the date of the counter. Limitation for recovering deferred dower will start from that date and not from the date of the order of the Criminal Court.[6]

35. Form of Talaq

No particular form of words is prescribed for effecting a divorce. The words used are immaterial if the intention is clearly expressed.[7] All that the law requires is to see that the words of talaq pronounced by the husband should show a clear intention on his part to dissolve the contract of marriage. There is no special form of formula.[8] It is however of vital importance to know what are the extract words used by the husband.[9]

Hedaya has given certain expressions as establishing or not establishing a talaq.[10] These expressions are not exhaustive but merely

1. *Mohd. Shamsuddin vs. Noor Jahan*, 1955 Hyd 144: 1955 Cr L J 950.
2. Bail I, 234; *Ahmed Kasim vs. Khatun Bibi*, 1933 Cal 27 at p 31: 59 Cal 833: 141 IC 689; *Sarabai vs. Rabaiabai*, 30 Bom 537: 8 Bom LR 35.
3. Bail I, 234: *Mohan Mulla vs. Baru Bibi*, 1922 Cal 21: 64 IC 704.
4. *Ful Chand vs. Nawab Ali*, 36 Cal 184; *MM Abdul Khadr vs. Azeera Bibi*, 1944 Mad 227, supra.
5. 1931 Mad 664, supra.
6. *Ahmad Ali vs. Asgarunnissa*, (1968) Andh L T 236; (1936) 2 Andh WR 400.
7. *Ma Mi vs. Kallender*, 1927 PC 15: 5 Rang 18 affirming 1924 Rang 363. No special expressions are necessary to constitute a valid talaq, *Ibrahim vs. Sayed Bibi*, 12 Mad 63.
8. *Wahid Khan vs. Zainab Bibi*, 36 All 458: 25 IC 387.
9. *Sakina Khanum vs. Laddan*, 2 CLJ 218.
10. Hed 84-85 91.

illustrative of various forms in which talaq may be pronounced. The law does not pay any regard to direct or indirect forms of speech.[1]

36. Acknowledgment of talaq

Even an acknowledgment of talaq would effect a divorce at least from the date on which the acknowledgment is made.[2] Where the husband filed a written statement to the effect that he had already divorced the wife about 30 years ago, it was held that the statement, even if the fact of such divorce is not proved, operates as a declaration of divorce as from the date of the written statements and the wife would be entitled to maintenance only for the period of iddat from the date.[3] But this view was not accepted by the Supreme Court in the case of *Shamim Ara* (supra)

Mere willingness to divorce is however not sufficient to effect a divorce.[4]

37. Whether words of talaq should be addressed to the wife

It is not necessary that the words of talaq should be addressed to the wife.[5]

The talaq should however refer to the wife,[6] or should be such as can be reasonably interpreted as referring to a particular wife. Thus, if there is one wife when marriage is irregular and another whose marriage is valid and the pronouncement is equally applicable to both, the regularly married wife stands divorced.[7]

38. Oral talaq : express and ambiguous terms

It has already been pointed out that there is no formula prescribed for effecting a talaq. The law however marks a distinction between forms of expressions which are express (sarih) and clearly convey the

1. *Asha Bibi vs. Kadir*, 32 Mad 22 at pp 27,29.
2. *Asmatullah vs. Mst Khatunnissa*, 1939 All 592: 184 IC 517: 1939 ALJ 804: (1999) All 763.
3. *Chandbi vs. Bandesha*, 1961 Bom 121: (1961) 1 Cr L J 470.
4. *Mumtazuddin vs. Farukh Sultana*, PLD 1960 Kar 409.
5. *Asha Bibi vs. Kadir*, 33 Mad 22 at p 23 dissenting from *Furzund Hossein vs. Janu Bibee*, 4 Cal 588: *Ma Mi vs. Kallender*, 1927 PC 15: 5 Rang 18 affording 1924 Rang 363. see also *Rashid Ahmed vs. Aisha Khatun*, 1932 PC 25: 54 All 46.
6. 33 Mad 22 at pp 23, 24 supra.
7. Bail I, 215.

meaning of talaq and those which are not so clear and are ambiguous (kinayat).

38.1. Oral talaq : express forms

Express talaq is effected by the words: "thou art repudiated" or "I have repudiated". These forms are termed sarih or express as not being used in any form but talaq. The word "talaq" is an express form of divorce.[1] This seems to have been almost unanimously conceded in all cases. The word "talaq" is well understood as implying divorce. In a large number of cases the use of the word "talaq" has been presumed to be an express form of divorce.[2] Thus, where the word "talaq" is used, the word being express, intention would be immaterial and talaq would be effected even if it was not intended.[3] No evidence to show intention to the contrary is permissible.[4]

There is no other expression except the word "talaq" as a well understood expression implying divorce without proof of intention of circumstances. All other expressions are treated in the books not under talaq-i-sarih but under talaq-i-kinayat.[5] In fact, numerous instances of what constitutes talaq-i-sarih have been given but in all cases the term "talaq" or its grammatical variations have been used.[6] It seems that the mispronunciation of the term "talaq" (for instance) saying "talak" instead of "talaq" would make it an ambiguous expression. Thus, it would be effective but if it was not intended (e.g., the husband saying that it was intended only to frighten the wife) it would not be effective.[7]

Shia Law :

The Hanafi law permits the use of expressions which may either be express or ambiguous. In the case of the ambiguous expression, it

1. Bail I, 212: Hed 76.
2. *Wajid Ali vs. Jafar Hussain*, 1932 Oudh 34: 7 Luck 430; *Fulchand vs. Nawab Ali*, (1909) 36 Cal 184; *Sarabai vs. Rabia Bai*, 30 Bom 537 at p542; *Jorina vs. Hafizuddin*, 1926 Cal 242: 90 IC 633: 30 CWN 178.
3. *Ma Mi vs. Kallender*, 1927 PC 15: 5 Rang 18 affirming 1924 Rang 363: 1932 PC 15, supra.
4. 1955 NUC 2349 (MB).
5. *Wajid Ali vs. Jafar Husai*n, 1932 Oudh 34 supra.
6. See M Y Khan III, at pp1-225.
7. Ameer Ali, II 487; 1932 Ough 34; at p 38 supra, see also *Kalenther Ammal vs. Ma Mi*, 1924 Rang 363: 84 IC 175.

of course insists on the proof of an intention to divorce. If there is such intention even ambiguous words would be sufficient. The Shia law requires that talaq should not be pronounced in ambiguous terms. If the expression is ambiguous talaq will not take effect even if the husband intended to divorce.[1]

The Shia law prescribes the formula of talaq. It insists that the formula must be pronounced in one of the two following forms

(1) by the husband using the words "thou are repudiated" or "this person is repudiated" or " such person is repudiated"; or

(2) by the husband answering in the affirmative in replying to a question: "is thy wife divorced?" or "hast thou divorced thy wife?".

The following forms would therefore not be valid forms of talaqs even though intended to effect talaq (whether in the form of question and answer or otherwise): "Thou art the repudiation" or "repudiated" or "among the repudiated" or "thou art vacated" or "free" or "the reins are on thy neck" or "betake thyself to thy people" or "thou are absolutely separated" or "unlawful" or "cut off". The use of the word "count" intending talaq would also, according to better opinion, not be effective. These expressions would be sufficient to effect talaq under the Hanafi law if intention is proved.

It also insists that the formula must be pronounced in Arabic unless the person using it is not able to pronounce the words specially appointed.[2]

Shafei Law :

Besides talaq, the expressions 'separation", "dismissal" and "discharge" are explicit terms.[3]

38.2. Oral talaq: ambiguous expressions

In all cases in which the term "talaq" has not been used in some form, the expressions would be ambiguous which would require proof

1. Bail II, 108.
2. Bail II, 113-114.
3. Minhaj, 376.

of intention for causing a talaq. The distinction between sareeh and kinayat is this: when a person expresses legal act, whether it be a contract, release of right or dissolution of legal relations, in spoken words, the meaning of which is unmistakable, either because the expressions used have acquired a particular significance by along usage or otherwise, the law will take him to mean what his words convey and will neither permit him to say that he meant something else nor entertain such a question at all. When, on the other hand, the language used is ambiguous, it is open to the person using it to say what he meant and the circumstances may be taken into account to ascertain his meaning.[1]

The Hedaya mentions three forms of implied expressions as bringing about a revocable talaq. They are "count:, "seek the purification of thy womb", "you are single". There are 17 other forms of implied expressions which cause an irrevocable talaq. Some of them are: "you are separated", "you are cut off," "you are prohibited," "the reins are thrown on your own neck", "be united unto your own people", "I set you loose".[2] So also, if the husband says: "I have made khula with thee" without mentioning the consideration, it would be an indirect expression of talaq provided there is intention to divorce.[3]

38.3. Intention necessary where expression ambiguous

Talaq will not take place where ambiguous expressions are used except by intention or circumstantial proof.[4] In such a case, it is open to the person using such expressions to say what he meant and the circumstances may be taken into account to ascertain his meaning. Thus, it would be insufficient to effect a divorce without evidence of intention, if the husband says to his wife: "thou art not my wife," or "I am not thy husband" or on being asked by a third person "hast thou a wife?" answers "no".[5] So also where the husband says, "I give up all relations and would have no connection of any sort," the expression would by ambiguous and if it is admitted that the intention of the user of those words was not to effectuate a divorce, the words must be treated as innocuous altogether.[6] A letter written in furious

1. *Asha Bibi vs. Kadir*, 33 Mad 22: 3 IC 370.
2. Hed 84; see also Minhaj 327.
3. M Y Khan III, 290, 291.
4. Hed 84-85.
5. *Asha Bibi vs. Kadir*, 33 Mad 22.
6. *Wajid Ali vs. Jafar Hussain*, 1932 Oudh 34: 7 Luck 430.

language giving an option to the wife to apologise was held to be not sufficient to constitute talaq.[1] So also a mere charge of adultery would also not operate as a talaq.[2] Islam in the matter of divorce, just as in other matters, take more to the intention of the people rather than the form of mere words.[3]

The intention may be inferred from the circumstances in which an ambiguous expression is used.[4] Thus, where the husband used the words, "I divorce *Shameem Ara* for ever and render her haram for me", it was held that the words clearly showed an intention to dissolve the marriage.[5]

Where the husband used the words: "If you go to your father's house, you will be may cousin, the daughter of my uncle", it was held that it was intended to declare that there would be no other relationship with the woman and she would not be received back as a wife.[6] There is no doubt that an uncle's daughter is not within the prohibited degrees. The case has been criticized by Ameer Ali.[7] It appears, however, that from the facts of the case the court had held that talaq was intended.

39. Talaq expressed in writing[8]

The distinction between an oral talaq and a talaq in writing has already been pointed out. Muslim law makes a distinction between writings of two different kinds:

(1) *Customary :* By customary writing is meant a writing which is addressed and directed to somebody, such as an absent person.

(2) *Non-customary :* This is again of two kinds.

(a) Manifest: Such as writing on paper or wall or on the ground in such a way that it is possible to understand

1. *Mst. Badrulnissa vs. Mohd. Yusuf*, 1944 All 23 at p 28: 3 IC 730.
2. *Jaun Beebee vs. Sheikh Moonshee*, 3 WR 93.
3. *Mohd Irfan vs. Mahando*, PLD 1952 Pesh 55.
4. *Wahid Khan vs. Zaina Bibi*, (1914) 36 All 458: 25 IC 387; *Ibrahim vs. Syed Bibi*, 12 Mad 63.
5. *Rashid Ahmad vs. Mst. Anisa Khatun*, 1932 PC 25 at p 27.
6. *Hamid Ali vs. Imtiazan*, 2 All 71.
7. Ameer Ali II, 489.
8. Bail I, 233-34.

it. If the non-customary writing is manifest, a talaq would be effected if it was intended.

(b) Non-manifest: Such as writing in the air or upon water or upon something which it is no possible to understand or read. In such case no talaq would be effected even though husband might have an intention.[1]

39.1. Effect of customary and non-customary writings

There is a difference in the legal effects of the customary and non-customary writing. If talaq is expressed in the customary form of writing, it will take effect even if it was not intended by the husband,[2] or even if it is not brought to the knowledge of the wife.[3] Such talaq is irrevocable.[4]

On the other hand, if the writing is not in a customary form (even though manifest), it will not take effect as talaq until intention is proved.

Thus, where the husband executed a deed of talaq in the form of a declaration which was not addressed to the wife or to any other person and it was found that the husband did not actually intended talaq, it was held that no talaq was effected, the writing being manifest but ghari marssom.[5]

Shia Law :

Talaq cannot be effected by writing if a person is present and is able to pronounce the proper words but if he is unable to do so and writes them fully intending talaq, then it would be valid. Talaq by an absent husband in writing is, according to better opinion, not valid.[6]

Shafei Law :

A talaq may be made in writing even if the husband is able to speak but it would be ineffective if it was not seriously intended.[7]

1. M Y Khan III, 95.
2. *Sarabai vs. Rabiabai*, 30 Bom 537.
3. *Ahmad Kasim vs. Khatun Bibi*, 1933 Cal 27: 59 Cal 833; *Raja Saheb, In re*, (1920) 44 Bom 44: 54 IC 573; *Mohd. Ishaq vs. Mst. Sairan*, 1936 Lah 611: 163 IC 953; *Mohd. Shamsundih vs. Noor Jehan*, 1955 Hyd 144.
4. *Mst. Hyat Khatun vs. Abdullah Khan* 1937 Lah 270: 174 IC 332.
5. *Rasul Baksh vs. Mst Bholan*, 1932 Lah 498: 13 Lah 780: 138 IC 134.
6. Bail II, 114; *Ali Nawaz Gardezi vs. Mohd Yusuf*, PLD 1962 Lah 558.
7. Minhaj, 328.

39.2. Proof of writing

The document containing the pronouncement of talaq is subject to the provisions of the Indian Evidence Act in the matter of proof. The fact can be proved only by proof of the original document or, where secondary evidence of the document is admissible, it may be proved by such evidence. If the document itself is not produced, oral account of its contents is given by the person who has himself seen, it would be admissible as secondary evidence. But the statements of the witnesses who had not themselves read the document but had merely heard it read out by someone else are not secondary evidence of the document.[1]

Writing is not necessary for talaq but where valuable rights depend upon the marriage, the parties for their own security should have some document which might afford some satisfactory evidence of what they have done.[2]

40. Talaq when husband is dumb

A talaq by a dumb person is valid if it is expressed in positive and intelligible sings. Talaq by a dumb person would be valid as follows:

(1) in case of long continued dumbness, talaq made by sings (even though the man knows writing) or by writing is valid;

(2) in case of dumbness which is supervenient of birth and of not long continuance, talaq by signs would not be effective but it would be valid if made in writing.[3]

Shia Law :

Under Shia Law talaq can be pronounced by a dumb person by any signs sufficiently indicative of his purpose.[4]

41. Talaq-i-tafweez[5]

A Muslim husband got the power of pronouncing a talaq in respect of his wife. He is also entitled to delegate the power to his

1. *Ma Mi vs. Kallender*, 1927 at PC 15, at 16 on appeal from 1924 Rang 363.
2. *Gouhur Ali vs. Ahmed Khan*, 20 WR 214 PC.
3. Hed 76; Bail I, 220; Durr 123-24; Minhaj 328.
4. Bail II, 114.
5. Bail I, 238-254; Hed 87-94; Durr 171, 185; Minhaj 328-329.

wife or any other person to effect a talaq with his wife.[1] As to difference in the case of an agent to pronounce a talaq and the power to pronounce it. The delegation of power is technically called "tafweez". Tafweez means the making of another person owner of an act which appertains to the person making the tafweez.[2] It is a delegation by the husband of power of talaq to the wife desiring her to give the effective sentence.[3]

41.1. Competents for giving power of tafweez

A person who has attained puberty and is of sound mind is entitled to delegate the power of pronouncing talaq. But if the husband is same at the time of conferring the authority, the fact that he subsequently becomes insane and continues to be so would not invalidate his authority.[4] The husband cannot delegate his power to divorce before he becomes major but majority for delegation of power of divorce is to be governed by the Muslim law and not by Sec.3 of the Indian Majority Act. Such delegation amounts to an "act in the matter of divorce" within the meaning of Sec.2 of the Act.[5]

41.2. On whom power may be conferred

The power may be granted to any person including wife herself.[6] It is open to the husband to appoint another person as his vakil mutlaq or fully empowered agent in the matter of the divorce of his wife authorizing him to divorce her at any time and also to delegate that power to another person. Such a divorce would be equivalent to a divorce by the husband himself.[7]

A similar power may also be delegated to the wife in relation to another wife.

Illustration

A husband says to his wife: "Every woman I marry. I have sold repudiation to thee for a dhirem". After that he marries

1. Bail I, 238, 246; Hed 87.
2. MY Khan III, 257.
3. Hed 87.
4. Bail I, 247.
5. *Fatima Khatun vs. Fazal Karim*, 1928 Cal 303: 110 IC 52.
6. Bail I, 246.
7. *Fida vs. Sanai Badar*, 1923 Nag 262: 73 IC 1042: 6 NLJ 166; *Mohd. Amin vs. Mst. Himna Bibi*, 1931 Lah 134: 132 IC 573.

a second wife. As soon as the first wife becomes aware of a second marriage, she says: "I have accepted" or "I have repudiated her" or "I have brought her repudiation", the second wife becomes divorced.[1] The power may be conferred effectively on insane persons or minors and even non-Muslims. It may be conferred on the wife even is she has not attained puberty.[2] The power must however be expressly delegated and will not be implied.[3]

41.3. Husband's power to pronounce talaq not lost

The mere fact that the husband has granted a power of talaq to the wife or to any other person does not deprive the husband of his power to pronounce talaq.[4] The observation that such power may perhaps be given by a contract entered into at the time of the marriage[5] does not seem to be correct.

41.4. Grantees of the power simultaneously appointed

The position of two persons appointed as agents at one time is different from that of two persons appointed as grantees of the power to pronounce talaq is different. In the case of two agents, each one may separately act as agent and the pronouncement by anyone would be binding unless of course the husband has expressly directed otherwise. But in the case of tafweez, the exercise of power by one of them would be ineffective even though subsequently the other or others also do so.

Illustrations

(a) A husband says to two persons, "repudiate my wife". This is agency, anyone is competent to pronounce talaq.

(b) A husband says to two persons, "repudiate my wife, if you please". This is tafweez, one of them cannot pronounce talaq.[6]

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1. Bail I, 265.
2. Bail I, 248.
3. *Sayeda vs. Mohd Sami*, 1952 PLD (Lah) 113.
4. *Nag Kyw vs. Hi Hla*, 49 IC (Rang).
5. *Hasan Channea vs. Mi Sin*, 29 IC 659 (UB).
6. Bail I, 256.

41.5. When power may be granted

The power to pronounce talaq may be granted at the time of the contract of marriage or at any time after that. The validity of the granting of power after the marriage has been challenged in some cases. It has been held that there is no authority for challenging its validity and, in fact, most of the instances of tafweez given in the texts are of post-nuptial grant of power and refer to the authority given by a person to another who is already his wife.[1]

A pre-nuptial agreement conferring such power is also valid. The question was left open in a case as to whether there would be any difference in law in the case of ante-nuptial or post-nuptial agreements.[2] The contention that a delegation of power by an agreement made at the time of marriage would not be valid was raised in some cases but this intention was overruled.[3] It was pointed out that the provisions of Muslim law which provide for delegation of power of divorce after marriage is unlimited, and there was no reason for holding a pre-nuptial delegation to be invaid.[4]

41.6. Acceptance of power not necessary

The power may be granted even to a youth under puberty and even to an insane person.[5] Acceptance would therefore not be a necessary condition.

The grantee may however reject the power and in that case the power would be at an end (unless the terms provided that is shall be continuing or recurring).

Illustration

(a) The wife says, "I do not choose talaq" or "I abominate separation from my husband". It amounts to a rejection of the opinion.

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1. *Sainuddin vs. Latifunnisa*, 46 Cal 141: 22 CWN 924: 48 IC 609; *Mst. Fatma Khatun vs. Fazal Karim*, 1928 Cal 303.
2. *Babu Mian vs. Badrunnissa*, 40 IC 803: 29 CLJ 230.
3. *Fatima Khatun vs. Fazal Karim*, 1928 Cal 303: 110 IC 52.
4. *Hamidoolla vs. Faizunnissa*, 8 Cal 327; *Mir Jan Ali vs. Maimuna*, 1949 Assam 14; *Ayatunnissa vs. Karam Ali*, 36 Cal 23: 1 IC 513.
5. Bail I, 248.

(b) The husband says to his wife, "choose, today and choose tomorrow". The wife rejects her opinion today. The whole option would be at an end.[1]

41.7. Intervention of court not necessary

The power granted for tafweez-i-talaq does not require any declaration by court. It is sufficient by itself. If the wife pronounces a talaq in exercise of such right, a marriage by her with another person does not bring home the charge U/s.494 IPC.[2]

41.8. Kinds of tafweez[3]

The power to grant to his wife may be given to the wife herself or to any person in any of the following forms:

(1) *Ikhtiyar :* (choose or option) (e.g., if a man says to his wife, "choose" thereby intending talaq the woman has a power to divorce herself). It may also be expressed by the husband saying, "divorce thyself". This is however, strictly speaking, tafweez in musheeat form.[4]

(2) *Amar-ba-yad :* (Liberty), *e.g.*, the husbnd telling his wife, "business is in thy hand", intending a talaq thereby.[5]

(3) *Musheeat :* (pleasure or will) It requires the imperative mood of the word by which sareeh or express talaq is given, *e.g.*, the husband telling the wife, "repudiate if you please".

The first two of those forms are implied (kinayat) or ambiguous expressions from which talaq may be inferred while the third is the express form.

The discretion conferred by each kind of tafweez will be found to correspond with the nature of the expression by which it is constituted.[6] Just as a talaq may be pronounced in language which may be either express or implied, so also the power to pronounce talaq in the

1. Bail I, 241-242.
2. *Suroj Mia vs. Abdul Majid*, 1953 Trip 6 (1): 1953 Cr L J 1504.
3. Bail I, 238-255: Hed 84, 94; Durr 180-192.
4. Bail I, 238 (f n); Hed 87.
5. Hed 89; Bail I, 243.
6. Bail I, 238.

first two forms may be couched in implied terms. The forms being implied, the necessity of intention is insisted upon. Numerous expressions in which the power to pronounce talaq in one of those forms have been mentioned in the various texts.[1]

41.9. Manner in which talaq may be effected by tafweez

The marriage does not automatically become dissolved. A formal pronouncement of talaq must be made to the husband or it must be pronounced in the presence of witnesses.[2] The manner in which the power may be exercised in different forms of tafweez may be noted:

(1) *Ikhtiyar :* For exercising the power, it is necessary that the personal pronoun "self" or "talaq" must be mentioned by one or the other party. If this is not done talaq will not take effect. Repetition of the word "choice" is a substitute for the mention of the word "self".

Illustrations

(a) A says to his wife "choose thyself" or "choose talaq" and the wife says, " I have done it," talaq will take effect.

(b) A says to his wife, "choose" and the wife says, "I have chosen." Talaq does not take place as the personal pronoun "self" or the word "talaq" has not been mentioned by either party.[3]

(2) *Amar-ba-yad :* Talaq may be effected by expression in any form which conveys that the grantee has executed the power. It also, like ikhtiyar, requires the use of the word "self" or some substitute for it.

Illustration

A husband gives the business of his wife into her hands. The wife says, "I have accepted myself" or "I have accepted it" or "thou art unlawful to me" or "thou art separated from me" or "I am unlawful to thee" or "separated from thee", talaq will take effect.[4]

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1. As to the expressions conveying ikhtiyar, see Bail I, 240; Hed 88; for amar-ba-yad, see Bail I, 244, 245, 249-250; Hed 89-90.
2. *Mirjan Ali vs. Mst. Maimuna Bibi*, 1949 Assam 14.
3. Bail I, 240.
4. Bail I, 244-245.

(3) ***Musheeat :*** If the form of delegation is in the musheeat form, talaq would not take effect if the power is exercised in the form of ikhtiyar.

Illustration

A says to his wife, "divorce yourself". She replies, "I have chosen myself." The reply is nugatory and no talaq takes effect because there was no delegation of option (ikhtiyar).[1]

Shia Law :

When a person gives option to his wife intending that she may repudiate herself but she chooses herself immediately, the choice would, according to better opinion, be ineffectual.[2]

41.10. Different effects of the three forms of tafweez

The effect of exercising the power in the different forms of tafweez are different, in several matters. These differences are as follows :

(1) *Intention :* In the first two forms the expressions, being ambiguous, talaq will not take effect unless it is proved to have been intended. They are both implied forms in which the power may be given. But if the husband makes three repetitions of the expressions of ikhtiyar, by saying "choose, choose, choose", proof of intention is not required. It will be taken as proof of intention.[3] Where however the delegation is in the third form, it would take effect irrespective of the intention.

(2) *Number of talaqs :*

(a) *Ikhtiyar :* If the husband says only once, "choose, choose", and the wife chooses herself, it would take effect only as one irrevocable talaq even though the husband intended triple talaq.

This is unlike a talaq pronounced by the husband once but really intending three talaqs in which case three talaqs will take place.

1. Hed 91; Bail I, 254.
2. Bail II, 114.
3. Hed 88-89.

If however the husband himself states three times "choose, choose, choose", the number of talaq which would take effect would depend upon the number indicated in the exercise of the option. Thus, if the wife says, "I have chosen", or "I have chosen the choice", three talaqs will take place. If she says, "I have chosen the first" or "the second" or "the third", only one divorce will take place according to Muhammad and Abu Yusuf. (But three according to Abu Hanifa).[1]

(b) *Amar-ba-yad :* The number of talaq is regulated generally by intention. It will take effect as a triple talaq if the husband intended it (even though the grantee should pronounce less). In other cases it will take effect as a single talaq.[2]

(c) *Musheeat :* If the husband gives power for three talaqs, the wife may give herself less than three talaqs. But if he gives power for only one talaq and the wife gives herself more, then according to Muhammad and Abu Yusuf, one talaq takes place while according to Abu Hanifa nothing whatever takes place.[3]

Shia Law :

There is a differences of opinion but the better opinion agrees with the view of Muhammad and Abu Yusuf.[4]

(3) *Revocability of talaqs :*

(a) *Ikhtiyar :* A talaq resulting from the exercise of the option of ikhtiyar is irrevocable.[5] If, however, the husband says, "choose talaq" and if in exercising the option, the wife says, "I have chosen talaq", the talaq would be revocable,[6] however states that the only difference between ikhtiyar and amar-b-yad is that in the former the intention to give irrevocable talaq at once is not valid whereas in the latter it is.[7]

1. Hed 88-89.
2. Bail I, 243.
3. Hed 91, 92; Bail I, 254.
4. Bail II, 109.
5. Bail I, 240; Hed 89.
6. Bail I, 241, Ameer Ali.
7. Ameer Ali II, 496.

(b) *Amar-ba-yad :* In this form the talaq is irrevocable (even) in the case of single pronouncemnt.[1] In this case even if the wife delivers the reply in express terms (by use of the word talaq) and not in ambiguous terms, the talaq would be irrevocable.[2] This is unlike the case of ikhtiyar where such talaq should have been revocable.

(c) *Masheeat :* A talaq pronounced in exercise of the power granted in the express form is revocable unless otherwise intended by the husband.

Illustrations

(a) A says to his wife, "divorce yourself" with no particular intention. The wife says, "I have divorced myself". One revocable talaq takes place.

(b) In the same case, if the wife says, "I have given three divorces" and this was the intention of the husband, three talaqs take place.[3]

So also where option ikhtiyar is given along with the use of the word 'talaq" the talaq would be revocable.

Illustrations

A says to his wife, "choose with respect to single divorce". The wife says, " I have chosen myself." One revocable talaq take place.[4]

41.11. When right to the exercise of the power acquired

Where the husband directly authorizes the wife to pronounce talaq or appoints any agent to convey such authority to the wife, the power is vested immediately on the pronouncement. In such a case, even if the information is not formally communicated to her, she can exercise such power.

But if any other person is authorized to confer such power on the wife, the right to exercise such power will arise only after the information is formally conveyed.

1. Bail I, 243.
2. Hed 89.
3. Hed 91.
4. Hed 89.

41.12. Time at which and during which the power may be exercised

The time during which the delegated power may be exercised depends upon the terms of the authority.

(1) *Where no time is specified :* In such case, the right to exercise the power continues only during the meeting in which the power is conferred,[1] or if the person on whom the power is granted is absent, then during the meeting at which the wife first comes to know of it.[2] This is so in the case of all the three forms of delegation, ikhtiyar,[3] amar-ba-yad[4] and masheeat.[5] If no time is specified the power must be exercised at the first meeting (majlis).[6]

(2) *Where power is restricted to any particular time :* If the period mentioned but is not specified (e.g., a day or month or year) it will commence from the moment of giving the power. If however any particular day, month or year is specified the power can be exercised only within what remains of that period after receiving the information.

Illustration

A says to his wife, "choose thyself" or "thy business is in thy hand this day, or month or year, "the power must be exercised within what period remains out of the current day, month or year.[7]

This would be so even if the grantee is absent and the intelligence reaches him or her only a short time before the expiration of the period.[8]

(3) *Where power is general :* The power may however not be limited to any particular period but may be absolute as regards time.[9] Thus, if a man says to his wife, "thou art

1. Hed 90.
2. Bail I, 239; Durr 171-172.
3. Bail I, 239; Hed 87.
4. Bail I, 243.
5. Bail I, 255.
6. As to what constitutes meeting (majlis), see Bail I, 239; Hed 87; Durr 172.
7. Bail I, 242, 245.
8. Bail I, 243.
9. *Ashruf Ali vs. Arshad Ali*, (1871) 16 WR 260.

repudiated when or whenever thou will," or "at the time thou wish," the power is not restricted to the meeting and may be exercised at any time.[1] In such case the wife is not bound to use her power immediately even though the contingency on which the power depends have been fulfilled.[2]

41.13. Termination of power of talaq

In those cases in which the power is unlimited it would not be terminated by the lapse of time. The power may in other cases will terminate as follows:

(1) *Where the power is not exercised within the time allowed*[3] *:* If the intelligence reaches the grantee before the expiration of the period, the power can be exercised within the remaining period but if the period has already expired, the option is at an end.[4]

(2) *Where the grantee rejects the grant :* If the grantee rejects the power, it is exhausted unless it is in terms provided that is shall be continuing or recurring.[5] But if the power is exercisable on more occasions than one, then the rejection of power relating to one occasion does not determine the power in respect of other occasion.[6]

41.14. Conditional or contingent delegation

Just as a husband is entitled to pronounce the divorce conditionally or contingently, so also the delegation of power may be made subject to the fulfillment of any condition or happening of any contiengency.[7] There is nothing whatever unreasonable in the husband delegating to his wife the power to divorce in the event of the happening of certain circumstances.[8]

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1. Bail I, 256; Hed 92; Durr 172, 173.
2. *Sainnuddin vs. Latifunnissa*, 46 Cal 141: 48 IC 609.
3. Bail I, 246.
4. Bail, 243.
5. Bail I, 246; hed 89.
6. Hed 89.
7. *Nafisunnissa vs. Bodi Rahman*, 20 IC 642 (Rang).
8. *Fatima Khatun vs. Fazal Karim*, 1928 Cal 303 at p304: 110 IC 52; *Ayatunnissa vs. Karam Ali*, 36 Cal 23: 1 IC 513; *Mohd. Amin vs. Himna Bibi*, 1931 Lah 134:132 IC 573.

In the case of ordinary tamliks or transfers it is not valid to make a transaction dependent in any condition or contingency. But tafweez partakes of the character of tamlik only partially. Unlike ordinary tamliks, it may be made dependent on a condition or contingency.[1] It may also be made on a negative condition. Such condition will be fulfilled only by the expiration of the time within which it is possible for the event to happen.[2] If under the terms of a nikahnama, a marriage is to stand dissolved on default on the part of the husband to fulfil certain conditions, the deed itself would be treated as a talaqnama if there is default.[3]

41.15. Condition or contingency must be strictly fulfilled

It is necessary that the terms of the condition must be fulfilled. If a breach occurs which the husband is legally entitled to make, the right will not arise. The conditions entitling the wife to pronounce talaq must be clearly established.[4] The condition must be fulfilled strictly and fully and the condition must be shown to be reasonable and not opposed to policy of Muslim law.[5]

Illustration

(a) A husband leaves the business of his wife in her hands on the condition that she could repudiate herself if he strikes her without fault. The wife goes out of the house without the husband's permission and the husband then beats her. Her prompt dower has been paid off. She cannot repudiate because she is at fault and the beating is justified.

(b) In the same case, the prompt dower has not been paid. It is then open to her to go to her father's house without his permission. Her going out would not then be fault. She can repudiate herself if the husband beats her.

41.16. More conditions or contingencies than one

If the power of talaq is made to depend on more conditions or contingencies than one, then the power can be exercised only on the

1. *Sainnuddin vs. Latifunnissa*, 48 IC 609 at p 610 (Cal).
2. Minhaj 339.
3. *Aziz vs. Mst Naro*, 1955 HP 32.
4. *Mirjan Ali vs. Mst Maimuna*, 1949 Assam 14: 53 CWN 302.
5. *Ahmad Ali vs. Sabha Khatun*, PLD 1952 Dacca 385.

fulfillment of all the conditions or the happening of all the contingencies. Thus, the power of pronouncing talaq is made to depend on the doing of more things than one, talaq would not take effect till all are done. But if it is made dependent on the not doing of more things than one, then talaq would become effective by not doing any one of them.

Illustration

A says to his wife: "If I am absent from thee for six months and do not join thee in person and send the maintenance within the time, thy business is in thy hands." A is absent and does not join in person but sends maintenance. The wife has the power by reason the not doing of one of the two things.[1]

41.17. Tafweez in matrimonial agreement

Agreements before or at the time of or after marriage are binding unless they are illegal or opposed to the policy of Muslim law. The power to pronounce talaq is often provided in matrimonial agreements on certain conditions. It is doubtful if a valid power can be given absolutely and unconditionally to the wife or to any other person. The question of the validity of the conditions has been raised in many cases. Where absolute and unconditional power was granted to another person, it was pointed out that such power authorized the person to pronounce a divorce for any reason that would entitle the husband to do so with the exception perhaps of mere whim or caprice of his own in which case the exercise of the power by an agent would be an unreasonable and unjustifiable use (or abuse) of his power.[2] Such an agreement may be validity made by a guardian also.[3]

41.18. Legal and valid conditions or contingencies

The following conditions on the breach of which the wife would have the power to divorce are valid:

(1) *Marrying another wife :* An agreement that the wife may pronounce talaq if the husband marries another wife is valid.[4]

1. Bail I, 253.
2. *Fida vs. Sanai Badar*, 1923 Nag. 262: 73 IC 1042: 6 NLJ 49.
3. *Marfat Ali vs. Jabedannessa*, 1941 Cal 657: 197 IC 326: 45 CWN 910.
4. Bail I, 251; *Mohd Amin vs. Mst. Himma Bibi*, 1931 Lah 134: 132 IC 573; *Sultan Ahmad vs. Sabra Khatun*, 43 IC 17; *Sadiqa vs. Ataullah*, 1933 Lah 685; *Mahram Ali vs. Ayesa*

It has been held that such agreements are not opposed to public policy or to the policy of the Muslim law.[1]

Such agreement does not restrain the husband from contracting any other marriage nor has such agreement the effect of rendering another marriage of the husband invalid. There is no restraint on the marriage of the husband with another wife. It is only an enabling provision by the effect of which the wife secures a talaq for herself. As to an agreement restraining another marriage by the husband.

(2) *Ill-treatment of the wife :* An agreement that the wife would be entitled to pronounce talaq if the husband abuses or assaults the wife,[2] or beats her without any fault or otherwise ill-treats her,[3] would be valid.

An agreement that the husband does not cause any mental pain to his wife and does not misconduct himself,[4] is valid. An agreement would also be valid if the power of talaq is given in the event of dissensions between the parties.[5]

(3) *Payment of dower :* An agreement that the husband pays her some dower on demand is valid.[6]

(4) *Maintenance :* An agreement for giving power of talaq on failing to send maintenance to the wife within a time would be valid provided that the wife's right to maintenance is established according to Muslim law.[7]

An agreement to give separate maintenance to the wife for a specified period would be valid.[8]

Khatun, 19 CWN 1226: 31 IC 562; *Badrunissa vs. Mafiatullah*, (1871) 7 Beng LR 442: 15 WR 555; *Badu Mian vs. Badrunnissa*, 40 IC 803: 29 CLJ 230; *Ayatunnissa vs. Karam Ali*, 36 Cal 23: 1 IC 513; *Saifuddin vs. Soneka*, 1955 Assam 153: 59 CWN 139; *Sainuddin vs. Latifunnissa*, 48 IC 609.

1. *Khalil Rahman vs. Mariam*, 59 IC 804: 1920 LB 59; Aziz vs. Mst, Naro, 1955 HP 32.
2. *Nafisunnissa vs. Bodi Rahman*, 20 IC 642.
3. Bail I, 252, 253; *Hamidoolla vs. Faizunnissa*, 8 Cal 327; Aziz vs. Mst, Naro, 1955 HP 32.
4. *Mst Fatima vs. Fazlal Karim*, 1928 Cal 303: 110 IC 52: 47 CLJ 372.
5. *Ahmad Kasim vs. Khatun Bibi*, 1933 Cal 27: 59 Cal 833; *Buffatan vs. Abdul Salim*, 1950 Cal 304.
6. Bail I, 252-253: *Hamidoola vs. Feizunnissa*, 8 Cal, 327.
7. *Ahmed Ali vs. Sabha*, (1951) Dacca 793.
8. Bail I, 252-253; *Saifuddin Sheikh vs. Mst Soneka*, 1955 Assam 153; *Buffatan Bibi vs. Abdul Salim*, 1950 Cal 304.

(5) *Other valid conditions :* That the husband shall deliver some gold ornaments to the wife on demand,[1] or that he would not forsake the community,[2] are reasonable conditions for conferring the power of talaq. An agreement to the effect that the wife may divorce herself even if the husband demures to carry out her most unreasonable wishes and provides that the husband will serve his wife as servant is not so unreasonable in its nature as would not be countenanced by any court of law. Such an agreement when drawn out in oriental language should not be construed too literally but in a reasonable and intelligent manner.[3]

41.19. Void conditions

It has been held in one case that an agreement providing for payment of dower and maintenance due by monthly installments and declaring that in default the wife should be considered as divorced is invalid as condition divorce is illegal in Muslim law.[4] A condition requiring the husband to live with the wife at her parent's place and failing that she would be entitled to exercise the power of talaq, is void as being opposed to the policy of Muslim law.

41.20. Revocation of the power of talaq

Once the power of talaq is exercised it becomes irrevocable. Before the exercise of the power, the power would be terminated in the case of ikhtiyar, if the husband takes the wife by hand and raises her up standing or has matrimonial intercourse with her with or against her will,[5] Amar-ba-yad is like ikhtiayar in respect of the husband having no power to recall the authority given to the wife.[6]

In the case of masheeat the husband has no power of revoking the authority till the specified time.[7] The power cannot be withdrawn without the consent of the wife. Such power may be exercised even

1. *Nooruddin vs. Chenuri*, 3 CLJ 49.
2. *Fida vs. Sanai Badar*, 1923 Nag 262: 73 IC 1042: 6 NLJ 166.
3. *Sahra Jan vs. Abdul Raoof*, 1921 Lah 194: 3 LLJ 519.
4. *Mohd. Dad vs. Fatima*, 24 IC 881 (Sind): 7 SLR 138, Submitted view not sound.
5. Bail I, 239.
6. Bail I, 242-243.
7. Bail I, 254-255.

after the husband files a suit for restitution of conjugal rights.[1] Any delay in the exercise of the right does not terminate the power.[2]

Shafei Law :

A husband may retract his words so long as the wife is not really repudiated.[3]

41.21. Revocation of talaq

The husband has been given the power of revoking a talaq in certain circumstances. This is founded on the following authority of the Quran:

> "Where ye have divorced women and they reach their term then retain them in kindness or release them in kindness. Retain them not to their hurt so that ye transgress (the limits)".[4]

The law has made a division of talaqs into irrevocable. The legal effects of the two kinds of divorce are different. Where the talaq is revocable, the husband has got the right to revoke it in order to prevent it from being legally effectual in terminating the status of marriage between the parties. Such power rests in the husband irrespective of wishes of the wife, he can revoke it even in the wife is not willing,[5] or even if the wife refuses to be retained, or if the husband says that he has no right of revocation or that he has given up such right.[6]

So long as the talaq continues to be revocable, the marriage tie is not broken and the martial authority over the wife is not taken away till the completion of iddat. In the case of the death of one of the parties before expiry of iddat, the other party is entitled to inherit. After the expiry of iddat, the marriage ceases and no revocation can be made after that.[7]

1. *Sainuddin vs. Latifunnissa*, 48 IC 609.
2. *Ayatunnissa vs. Karam Ali*, 36 Cal 231: 1 IC 803; *Ashraf Ali vs. Arshad Ali*, (1871) 16 WR 260.
3. Minhaj 329.
4. Quran II, 231.
5. Bail I, 287; Bail II, 12.
6. Durr 217.
7. *Mozaffar Ali vs. Kameerunnissa*, 1864 WR (Supp) 32.

41.22. Revocation (rajaat)

In its primitive sense means restitution. In law it signifies a husband returning to or receiving back his wife after talaq and restoring her to her former situation.[1]

It means the expressions of an intention on the part of the husband to continue the status of marriage while the wife is still in her iddat.[2] It is only the revocable talaqs which can be revoked till they become irrevocable.[3] The revocation of talaq would continue the marriage as if it has not been dissolved but each revocable talaq would still stand as a talaq, so that if two revocable talaqs have already been pronounced, the third pronouncement would operate as a bar to remarriage between the same parties without going through an intermediate marriage.

41.23. Revocable and irrevocable talaqs

A revocable divorce is called talaq-i-rajai while an irrevocable divorce is called talaq-i-bain.[4] A revocation or retraction is called rajat whence the expression rajai which means revocable. The word "bain" means manifest, notorious, complete or final and in relation to divorce means an irrevocable divorce. Every talaq-i-rajai becomes talaq-i-bain as soon as it become irrevocable. One or two revocable talaqs may be revoked till the expiry of iddat.[5]

41.24. When talaq becomes irrevocable

(1) In the case of an unconsummated marriage, talaq becomes irrevocable immediately on pronouncement.[6]

(2) In the case of a consummated marriage, talaq becomes irrevocable as follows:[7]

(a) ahsan talaq – on the expiration of the period of iddat;

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1. Hed 103.
2. Bail I, 287.
3. *Amiruddin vs. Khatun Bibi* 39 All 371: 39 IC 513.
4. Bail I, 205; Bail II, 118.
5. Bail I, 287.
6. Hed 83 (fn); Bail I, 291.
7. Bail I, 205-207; Hed 71, 73.

(b) hasan talaq – as soon as the third pronouncement is made;

(c) talaq-il-bidaat—

(i) in single revocable form on the expiry of iddat;

(ii) in single irrevocable or triple form as soon as it is pronounced.

Ahsan talaq continues to be revocable during iddat but cannot be revoked after the expiry of iddat. Hasan talaq continues to be revocable till the time of the third pronouncement. It may be revoked till then.[1] The talaq would become revocable on the third pronouncement without waiting for the expiration of the iddat or the delivery of a child if she happens to be pregnant.[2]

In the case of talaq-ul-bidaat where one pronouncement which is not irrevocable is made *e.g.*, where is pronounced during the courses or where intercourse has taken place during the tuhr in which the talaq is pronounced, the talaq would be revocable during the period of iddat. A talaq in the other bidai forms is always irrevocable. Even a single pronouncement with the intention to effect an irrevocable talaq would be talaq-i-bain and cannot be revoked.[3]

In the case of a triple talaq pronounced either at once (e.g., by saying "I divorce thee thrice") or separately (e.g., I divorce thee, I divorce thee, I divorce thee), the pronouncement would be irrevocable. In the latter case it would become irrevocable on the third pronouncement.

41.25. Talaq in writing

A divorce by a husband evidenced by a written document the contents whereof have been duly communicated to the wife is irrevocable.[4] Where talaq is reduced to manifest for customary writing it becomes bain (irrevocable) talaq by the mere writing.[5]

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1. *Mohan Molla vs. Baru Bibi*, 1922 Cal 21: 64 IC 704: 1864 WR (Supp) 32.
2. Bail I, 206.
3. *Amiruddin vs. Khatun*, 39 All 371: 39 IC 513; *Fazlur vs. Anisha*, 1929 Pat 81: 8 Pat. 690 (F B).
4. *Mst. Hayat Khatun vs. Abdullah Khan*, 1937 Lah 270.
5. *Sarabai vs. Rabiabai*, 30 Bom 537.

41.26. Talaq at the request of the wife

If the wife asks for a revocable talaq but the husband pronounces an irrevocable or triple talaq, it would take effect as a revocable talaq. Cohabitation would be lawful and there will be mutual rights of inheritance.[1]

41.27. Presumption as to revocability or irrevocability of talaq

Where from the words used, a talaq comes into effect, the further question may arise as to whether such pronouncement amounted to a revocable or irrevocable talaq. A number of rules have been laid down in Muslim law for determining as to whether the talaq is revocable or irrevocable. Some of these presumptions are as follows:

(1) *Where the expression is itself clear :* If the pronouncement is clear about its irrevocability, the talaq would be irrevocable. Thus if the husband says to the wife, "You are divorced irrevocably", an irrevocable divorce takes effect whether the marriage was consummated or not.[2] So also, if the pronouncement is expressed by the mention of the number three either formally or with a slow of fingers it would be irrevocable.[3]

(2) *Where words are express :* A talaq pronounced in express terms by tafweez is always revocable unless otherwise intended.[4]

Illustrations

A says to his wife, "Divorce yourself" to which she replies, "I have divorced myself", a revocable talaq would take effect.

(3) *Where the expressions are ambiguous :* Any ambiguity in expression should be interpreted in a serious favourable to marriage whether the ambiguity concerns the fact of talaq itself or the number of pronouncements.[5] Where ambiguous expressions are used talaq would take effect only if there was intention. In such cases, if words used are "court",

1. Durr 207.
2. Hed 82.
3. Abdur Rahman, Art 239.
4. Hed 91.
5. Minhaj 335.

"seek the purification of thy womb", "you are single" the talaq would be revocable. Where other expressions such as "choose", "you are separated", "you are cut off" are used the talaq would be irrevocable.[1]

Shafei Law :

Under the doctrine of Shafei Law, divorce resulting from such ambiguous expressions is revocable.[2]

(4) *Pronouncement in aggravating words :* Where the pronouncement uses language which shows strength and aggravation, the talaq is irrevocable. Thus, if the husband says to his wife, "Thou are repudiated the strongest of repudiations" or "thou are repudiated certainly" or "hardest repudiation," or "you are under most enormous divorce", a most base or "the worst kind of divorce", " a diabolical divorce" or "a most vehement divorce, "or divorced like a thousand" or "a houseful", the talaqs would be irrevocable.[3]

Where the expression does not amount to an aggravation it is revocable. Thus, if the husband to his wife, "thou are repudiated a repudiation that does not affect thee" or "thou art repudiated the best," or "the most excellent" or "the most beautiful," or "the more just of repudiations". There is no aggravation and the talaq is revocable.[4]

(5) *Where there is a reference to a place :* A revocable divorce would take place if it is pronounced with reference to a place (e.g., the husband says to his wife, "you are divorced from this place to Syria.").[5]

(6) *Where smile is used :* There is a difference of opinion between Abu Hanifa and Abu Yusuf as to the effect of a talaq with smile. If a reference is made to the greatness or magnitude in the pronouncement which likens the talaq to anything, the talaq would be irrevocable both according to Abu Hanifa and Abu Yusuf but if there is no mention to any magnitude

1. Hed 84, 86, 87.
2. Hed 86.
3. Bail I, 226; Hed 882.
4. Bail I, 226.
5. Hed 78.

then according to Abu Yusuf it is revocable while according to Abu Hanifa it is irrevocable even in that case.[1]

Illustrations

(a) A says to his wife, 'thou are divorced or repudiated like the magnitude of the point of a needle, or "of a mountain". It would be irrevocable talaq according to the both Abu Hanifa and Abu Yusuf.

(b) A says to his wife, "thou art divorced like the point of a needle or a grain of mustard seed or like a mountain". This is irrevocable according to Abu Hania but revocable according to Abu Yusuf.[2]

(7) *Words referring to difficulty, length or breadth :* If a pronouncement of talaq refers to a difficulty (e.g., you are repudiated by a heavy talaq) or to the length (e.g., by a long talaq) or to breadth ("by a broad talaq"), an irrevocable talaq takes effect. It is however recorded from Abu Yusuf that the talaq is revocable.[3]

(8) *Talaq declared to be bidai :* If A says to his wife, "you are divorced irregularly," "(*i.e.* by bidai talaq)" an irrevocable divorce takes effect, as revocable talaq is restricted to talaq-us-sunnat. But an opinion is recorded from Abu Yusuf and once from Muhammad that only a revocable talaq would take effect unless intended to be irrevocable.[4]

41.28. Agency for revocation

A revocation of talaq may be made through an agent duly authorized by the husband in that behalf. A revocation made by an unauthorized person (fuzuli) would take effect if the husband ratifies it.[5]

41.29. Conditional or contingent revocation

The revocation must be unconditional and immediate. A

1. Bail I, 226; Hed 82-83.
2. Hed 82.
3. Hed 83.
4. Hed 82.
5. Bail I, 289.

conditional or contingent revocation of talaq or one which is subjected to an option of cancellation is invalid.[1]

41.30. Revocation under compulsion or in jest, etc

A revocation would be valid even though made under compulsion or in jest or sport or by mistake.[2]

41.31. Revocation, how made[3]

As in the case of talaq, revocation may also be made either in the regular or in the irregular manner. If the revocation is made by speech and attested by witnesses and if it is also intimated to the wife, it would be revocation according to sunnat. If, one the other hand, it is done in any other manner, for instance, if speech is not used, witnesses do not attest or if intimation is not given, it would be irregular or bidai. This would also be so if revocation is made by conduct (*e.g.*, by having sexual intercourse). Revocation in the bidai form is also, like bidai talaq, valid although it is considered abominable.[4]

A revocation may thus be made in two ways :

(1) *By speech :* It may be made in the form of words which like the expressions of talaq, may be either sareeh (express) or kinayat (implied). Such expressions as "I have returned to thee," "my wife is recalled", "I have retained thee", or "restored thee" are express forms, while such expressions as "thou are to me as thou went" or 'art my wife" are implied. Implied expressions can take effect only on proof of intention.[5]

(2) *By conduct :* It may also be made by conduct unequivocably showing intention to revoke, for instance, having matrimonial intercourse, touching with desire, or kissing on the mouth with desire.[6] It is however, necessary that the conduct of the husband should be such as to be peculiar to the right of enjoyment of the wife. Otherwise it would not amount to revocation. Retirement with a wife who is undergoing is

1. Bail I, 289.
2. Bail I, 289.
3. Bail I, 287-289; Hed 103; Durr 216-217.
4. Bail I, 287-288.
5. Bail I, 288.
6. Bail I, 287; Bail II, 126-127.

not sufficient revocation because that is not peculiar to the right of enjoyment.[1]

In the case of revocation by speech, it is necessary that the husband must be a person of a sound mind, but this is not necessary where revocation is made by conduct. Conduct amounting to revocation would nullify a revocable talaq even in the case of a person of unsound mind. A revocation by an insane person can be made only by conduct.[2]

Shia Law :

Even a denial of talaq will be equivalent to revocation.[3] A dumb person may revoke a talaq by intelligible sings.[4]

Shafei Law :

A revocation otherwise than by express words, is not approved or regular. It cannot be effected tacitly (*e.g.*, by coition). The husband must declare that he takes his wife back.[5]

41.32. Revocation does not affect number of talaqs

The revocation of a talaq does not annul the previous talaqs. Thus, if two revocable talqs are revoked, a third pronouncement of talaq will make marriage prohibited without going through a marriage with another person.

c. ILA[6]

Synopsis

1. Bail I, 289; Ameer Ali II, 324.
2. Bail I, 289; Hed 103.
3. Bail II, 129.
4. Bail II, 126.
5. Hed 103; Minhaj 345.
6. Bail I, 296, 304; Hed 109; Minhaj 348, 351; Bail Ii, 147-151.

42. Definition and Meaning of *Ila*

Ila is close form of Talaq where a Muslim who has attained puberty and is of sound mind swears by God or takes a vow (involving a penalty for its breach) not to have sexual intercourse with his wife for a period of 4 months or more or for an unspecified period and in pursuance of such oath or vow refrains from intercourse for a period of 4 months he is said to make *Ila*.

It is praiseworthy for every husband to cohabit with his wife but he is legally bound to do so atleast once during the abstinence of the marriage.[1] Mere abstinence from it would not have any legal effect but a express vow against it will have legal effect in certain conditions.

The term "*Ila*" literally means "oath" and in law, it signifies a vow of abstinence from approaching the wife for a period. The person who takes such vow is called "muli". He is a person who cannot approach the wife except on doing something which he becomes bound to do. The wife in such case is known as mula.[2]

43. Quranic authority

The authority for *Ila* is based on a verse of the Quran: "Those who forswear their wives must wait for four months".[3]

1. Abdul Rahman, Art 151.
2. Durr 233; Hed 109.
3. Quran II, 226; Bail I, 296 (F.N.).

44. Conditions for effective *Ila*

In order that a pronouncement of *Ila* may be legally effective, the following conditions must be satisfied:

(1) *As to the husband :* A person who is competent to pronounce talaq is competent to effect *Ila* according to Abu Hanifa but according to the disciples he must be one of whom expiration is incumbent.[1]

Shia Law :

The husband must also have the freedom of choice of intention. *Ila* by an eunuch and, according to better opinion, also by a majboor (one with emasculated organ) would be valid.[2]

Shafei Law :

The husband should not be emasculated.[3]

(2) *As to woman :* A woman in respect of whom *Ila* can be effective must be the lawfully married wife at the time of the pronouncement. *Ila* made in respect of a woman before marriage is nugatory, even though the man marries the woman afterwards.[4]

Where no period is specified and the vow is perpetual, *Ila* can be effective if the wife was pure (*i.e.*, not in her menses) at the time of the vow because in the case of woman who is in her menses the abstinence is due to pollution rather than to the vow. If however a period of 4 months or more is specified, *Ila* would take effect even if the woman is in her menses.[5]

Ila would be effective even if pronounced while the woman is undergoing iddat for revocable talaq but not if the iddat is for an irrevocable talaq.[6] The right of succession of either party remains intact.[7]

1. Bail I, 298; Durr 233.
2. Bail II, 148.
3. Minhaj 348.
4. Hed 111.
5. Durr 234, 236.
6. Hed 111; Bail II, 150.
7. Minhaj 346.

Shia Law :

According to Isna Ashari Law it is necessary that the marriage must have been consummated. According to better opinion, *Ila* is effective only in respect of a permanent marriage not muta.[1]

According to Ismaili Law, it is further necessary that the wife was not in her menses and that the husband had no intercourse with her since her last mensuration.[2]

Shafei Law :

The wife must not have ratka (narrowness of female organs allowing passage only for urine) or karn (some fleshy protrufernace of bone in the womb preventing coition).[3]

45. Nature of the vow of *Ila*

No express form of pronouncement by the husband has been prescribed for *Ila* but it may be contracted by any words which are sufficient to effect a vow.[4] The pronouncement may be made either in express or in implied words. If the words are not express the intention to effect divorce must be proved.[5] An unequivocal declaration that his wife would be a wife only in name would not amount to lia.[6]

Express words are such as first present to the mind the idea of sexual intercourse while implied words are those which do not but which are susceptible of another meaning as long as *Ila* is not intended by them. "I will not approach thee", "I will not unite with thee" or "I shall not lie with thee" are express forms, while such forms as "I will not come to her" or " I will not approach her bed" are implied expressions.[7]

Oath is the pillar or necessary element of a vow of *Ila.* The oath must take either of the following two forms:

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1. Bail II, 148.
2. Tyabji, ML, Sec.158.
3. Minhaj 348.
4. Bail I, 298.
5. Durr 239, 240.
6. *Rehana Khatun vs. Iqtidaruddin*, 1943 All 184: 1943 ALJ 98.
7. Bail I, 298; Durr 235.

(1) *It may be an oath by God :* In such case the husband would be liable to expiration.

(2) *There may be a penalty imposed for the breach of the vow :* In such case he will have to act accordingly to the conditions imposed under vow.[1] A muli is one who cannot approach his wife without incurring some difficult or troublesome liability.[2]

It is however not sufficient if the vow undertakes the performance of some duty which is incumbent of the breach of which does not involve any penalty.

Illustrations

(a) A says to his wife, "if I approach thee, 'pilgrimage' or 'alms' or 'fasting' be incumbent on me". This is a valid *Ila*.

(b) A says to his wife, "if I approach thee, 'prayer' or 'to follow a corpse' is incumbent on me." There is no *Ila* as these duties are incumbent on all.[3]

It is necessary that there must be some difficulty or troublesome liability. If the muli says, "I shall be liable to recite the whole Quran 100 times" or "would be liable to accompany one hundred funeral processions", it would amount to *Ila*.[4]

Shia Law :

Ila is an oath by God and cannot be made without one of the divine names. Thus if a man says, "if I do so I am liable for so much," it would not be *Ila* because the name of God is not involved.[5]

Shafei Law :

According to Shafei in the second period the oath need not necessarily be expressed by involving the name of God. It is sufficient to make a declaration under penalty.[6]

1. Durr 235.
2. Bail I, 297.
3. Bail I, 298-299.
4. Durr 235; Bail I, 299.
5. Bail II, 147.
6. Minhaj 348.

46. Period of *Ila*

The shortest period of *Ila* is four months. There is no limit prescribed for the longest period. No *Ila* would take effect if the husband takes vow to abstain for a period of less than the shortest period.[1]

If a man takes a vow that he will not have carnal connection with his wife for a year excepting a day, *Ila* would not be established on the instant. But if after taking the vow the husband has carnal connection at any time when four months or more of the year still remain, *Ila* would be established.[2]

Shia Law :

While under the Hanafi Law, four months are sufficient, under the Shia Law, *Ila* is not contracted unless the prohibition is absolute and perpetual or for a time exceeding four months.[3]

47. Period during which *Ila* remains effective

A pronouncement of *Ila* would remain effective as follows:

(1) Where it is for a specified period of four months it would take effect at the end of four months.

(2) Where it is for a specified period of more than four months or for an unspecified person or perpetual, it would take effect at the end of 4 months, during the subsistence of the marriage in which it is pronounced and in the case of re-marriage with the same husband it will continue to be effective as a pronouncement of a *Ila* until three talaqs are effected.

A says to his wife "by God I will not approach thee for a year". When four months expire, an irrevocable talaq takes effect. He then marries her again and four months having passed, another irrevocable talaq is effected. He marries her a third time. A third talaq will not take place because less than four months would remain of the year after the third marriage.[4]

1. Durr 234; Hed 110.
2. Hed 111.
3. Bail II, 148.
4. Bail I, 302.

48. Consequences of *Ila*

During the pre-Islamic days the practice of taking such vows was prevalent and in such cases, the pronouncements took effect as an absolute talaq. This practice was strongly condemned by the Prohpet and one of the many reforms introduced by him was to place some restraint on the levity with which such pronouncements were made. Such vow prevents an immediate talaq coming into effect and also affords an opportunity for preventing a talaq coming into effect by the husband going through expiation.

If the husband, after pronouncement of *Ila*, approaches the wife within four months even though insane, the vow would be violated. In such case, if the *Ila* had been made on the oath of God, he would become liable to expiration of if some penalty is imposed in the vow the conditions of the vow will have to be carried out. If this is done the vow comes to an end.[1]

If however the vow is maintained inviolate for a period of 4 months, an irrevocable talaq would take effect.[2]

Shia Law :

The mere expiation of the time does not take effect as divorce. She must bring the matter before the judge after the expiry of four months. In that case the judge would give an option to him either to pronounce talaq or to return to her. If he pronounces talaq then, according to better opinion, a revocable talaq will take effect. If he does not, the judge would imprison and straiten him till he pronounces talaq or returns to her but the judge cannot compel him to do one thing in preference to the other. If, a definite time is mentioned and it expires while the matter is still before the judge, *Ila* abates.[3]

Shafei Law :

An irrevocable talaq does not come into effect by *Ila*. In such cases the right to demand separations rests with the woman. The decree of a judge is required, and an irrevocable talaq comes into effect as a result of such decree.[4]

1. Durr 235.
2. Hed 109.
3. Bail II, 149.
4. Hed 109.

49. Revocation of *Ila*

Pronouncement of *Ila* can, so long matrimonial intercourse is possible, be made only by resumption of matrimonial intercourse. Revocation cannot be made in that case by mere words, or even by kissing or touching her or by looking at her nakedness with desire.

Revocation may however be made by speech, if the intercourse is impossible either because of sickness of either party which continues beyond the period of four months, or if it cannot be made for any other cause beyond the control of the husband (e.g., impotency, physical obstruction in the woman or her withholding herself). In such cases, revocation may be made by speech, but revocation would be ineffective except by intercourse if the pronouncement is made while in health, even if subsequent illness appears, or if the pronouncement is made during illness which is removed before the expiry of the period of four months. So also if intercourse was not possible for some voluntary cause (*e.g.*, being in pilgrim's does or on being on piligrimage), *Ila* can be revoked only by actual intercourse.[1]

Shafei Law :

Ila cannot be revoked except by carnal connection.[2]

50. Talaq during *Ila*

If a person pronounces *Ila* in respect of his wife and then pronounces an irrevocable talaq, a second talaq would take effect if the period of *Ila* expires before the expiry of her iddat but not otherwise.[3]

51. *Ila* under compulsion or in intoxication

Ila like talaq under compulsion or under intoxication is valid as in the case of talaq.

Shia Law :

Freedom of choice is a necessary condition for *Ila*. *Ila* under compulsion would not be valid.[4]

1. Bail I, 302, 303; Hed 112.
2. Hed 112; Minhaj 350.
3. Durr 238.
4. Bail I, 148.

52. Conditional *Ila*

Ila may be so pronounced as to make it conditional on the will of the wife or any other person. It will take effect, if the wife or such person declares the will at the same meeting.[1]

Shia Law :

According to better opinion, *Ila* cannot be constituted either in dependence on a condition or to take effect from a future time. Any such condition would be surplusage.[2]

53. *Ila* in respect of more wives than one

When a simultaneous *Ila* is pronounced in respect of more wives than one, it would take effect as if it were separately pronounced against each. If a man pronounces *Ila* in respect of two wives, he may lawfully have intercourse with one of them and *Ila* would be void in respect of her but would be subsisting for the other and he would not be liable for expiration unless he approaches both.[3] Provided that if one of them dies before the expiry of four months, the *Ila* of the other or others would also become void.[4]

The talaq of one of several wives against whom *Ila* has been pronounced does not however make *Ila* of other void.[5]

d. "ZIHAR"

Synopsis

1. Bail I, 304.
2. Bail II, 147.
3. Bail I, 299; Bail II, 150.
4. Bail I, 299; Bail II, 150; Minhaj 349.
5. Bail I, 299; Bail II, 150.

54. Meaning and definition of "zihar"

The term "zihar" is derived from "zuhur" the back.[1] It means to oppose back to back: when there is discord between husband and wife they instead of remaining face to face towards each other turn their backs one against the other.[2]

In the language of law it signifies a man comparing or likening his wife to any of his female relations who are within perpetually prohibited degrees by consanguinity, affinity or fosterage or to any undivided part of any member which implies the whole person or to a part which it is not lawful for him to see of any such realtion.[3]

This form of divorce has the authority of Quran behind it and it has also received express statutory recognition under the Shariat Act of 1937.

55. Quranic authority

"Such of you as put away your wives by saying they are as their mothers). They are not their mothers; none are their mothers except those who gave them birth – they utter an ill word and a lie ….

1. Bail I, 323; Hed 117.
2. MY Khan III, 325.
3. Bail I, 323; Hed 117.

Those who put away their wives (by saying they are as their mothers) and afterwards would go back on that which they have paid (the penalty), in that case (is) the freeing of a salve before they touch one another ….

And he who findeth not (the wherewithal), let him fast for two successive months before they touch one another; and for him who is unable to do so (the penance is) the feeding of sixty needy ones. This, that ye may put trust in Allah and His messenger. Such are the limits (imposed by Allah) ….."[1]

Allah hath not assigned unto any man two hearts within his body, nor hath he made your wives whom ye declare (to be your mothers) your mothers, nor hath he made those whom ye claim (to be yours sons) your sons. This is but a saying of your mouths. But Allah sayeth the truth and he showeth the way.[2]

56. Origin of zihar

The institution of zihar is also a survival from pre-Islamic days. The practice seems to have been quite prevalent for repudiating a wife by use of words "thy back is as my mother's back for me."[3] They considered an approach after this as unnatural as though they were really mothers. The practice was disapproved by the Prophet. It was however maintained in the reformed shape given to it by the Islamic Law on the authority of the Quran although it was not entirely abolished.

In the pre-Islamic days zihar stood as a talaq. The law afterwards preserved which is prohibition but altered its effect to a temporary prohibition which holds until the performance of expiration but without dissolving the marriage.[4] The idea behind the origin of zihar is uncertain. According to Prof. Smith the woman so addressed was thereby promoted from the subordinate statues of a wife to the highly honourable position of an adoptive mother.[5] Tyabji observes that while at the start the formula was a sign for the husband's respect and regard for the wife by the time of the Prophet it has degenerated into

1. Quran LVIII, 2-4.
2. Quran XXXIII, 4.
3. Pickthal: Quran at p 301 (f n).
4. Hed 117.
5. Robertson Smith: Kinship and Marriage in Early Arabia at p.289.

an engine of oppression and while the husband an excuse for declaiming the obligations of a husband she was still kept tied to him. The Quran has removed this hardship.[1]

57. Zihar, how made

Zihar like talaq can be made either in express terms or by ambiguous expressions. If the terms employed expressly signify zihar (e.g., the husband saying to the wife, "you are to me like the back of my mother") nothing but zihar is established, even though he actually intended talaq. It would take effect as zihar whether the husband intended zihar or had no particular intention.[2]

So also zihar would take effect by use of such expressions as "you are to me like the 'belly' or 'thigh' or 'pudendum' of my mothr" or "your 'head' or 'waist' is like the back of my mother."[3]

Where the expression is ambiguous, the husband should be asked for an explanation, if he were say it was to do her honour, the expressions would also be taken according to his intention.[4] The following are instances of ambiguous expressions:

> "Thou art my mother" or "O, my daughter" or "if I have intercourse with you I have it with my mother", or "thou are unlawful to me as my mother" or "you are to me prohibited like my mother".

In such cases the question would be one of intention and a zihar or ila or talaq will take effect as intended.[5]

Zihar may be made by one who is dumb in writing or by known signs.[6]

58. Likening to any prohibited relations sufficient

Zihar is not confined to assimilation to the mother. The likening to any perpetually prohibited relation is enough whether by consanguinity (*e.g.*, sister or aunt) or by fosterage (*e.g.*, foster-mother

1. Tyabji: ML at p 240.
2. Bail I, 325; hed 117; Minhaj 353.
3. Bail I, 324, 326; Hed 117.
4. Bail I, 326 (F.N.).
5. Bail I, 326; Hed 118.
6. MY Khan III, 332.

or foster-sister).[1] So also if the likening is to the wife of his father or of his son, it would be a zihar, whether the marriage was consummated or not. If the likening is with a woman with whom the father or son had illicit intercourse there would be zihar according to Abu Yusuf (but not according to Muhammad). But if the likening is to "the back of thy daughter", it would be zihar only if the marriage had been actually consummated but not otherwise.[2] Zihar would not be valid if there is a likening to a woman who is prohibited only by temporary illegality such as triple divorcee.[3]

Shia Law :

Zihar becomes effective if there is a comparison with the mother or, according to better opinion, to any other woman whom the husband is prohibited from marrying by consanguinity or fosterage. But if there is an assimilation with a woman prohibited only by affinity, even though perpetually (*e.g.*, wife's mother, the daughter of an enjoyed wife or the wife of a father or son, or one prohibited on the ground of unlawful conjunction (*e.g.*, wife's sister or aunt), zihar would not be induced.

In the case of likening to relations other than the mother the comparison to be effective must be to the back and to no other part of the body (*e.g.*, belly, hair, *etc.*,) In the case of likening to the mother also, it would be ineffective although there is a weak tradition to the contrary.[4]

59. Competency of parties for valid zihar

As to husband, it is necessary that he should be above the age of puberty and should be of sound mind. Zihar by a person who has not attained puberty is not valid.[5] So also, zihar by an insane person or by one who is of unsound mind or by one who is astonished, plueritic or in a faint or asleep would not be valid.[6] Zihar by a drunken man is binding on him.[7] Zihar by a dumb person is effective.[8]

1. Bail I, 323; Minhaj 352.
2. MY Khan III, at p. 328.
3. Bail I, 323.
4. Bail II, 138.
5. Bail I, 326; Hed 111; Bail II, 139.
6. Bail I, 326.
7. Bail I, 327; Minhaj 352.
8. MY Khan III, 332.

As to woman, zihar is valid to an infant wife, or one under physical obstruction or in her courses or under purification after child-birth or one who is insane or unenjoyed.[1] Zihar made by a woman with her husband is void and no expiation is incumbent on her but according to Abu Yusuf expiation is necessary in such case also.[2]

Shia Law :

If the husband of the woman be present with her and she is of an age to be subject to courses (but not otherwise), it is necessary that the woman should be in tuhr (period of purity) during which there has been no connubial intercourse. Consummation of marriage is not, according to better opinion, a necessary conditon.[3]

60. Witnesses

Shia Law :

It is necessary that two just persons should be present at the time of the pronouncement.[4]

61. Subsistence of marriage necessary

The woman must be the married wife of the man at the time of the pronouncement of zihar otherwise it would not be effective.

Illustrations

(a) A man marries a woman without her authority and then pronounces zihar. The woman subsequently sanctions the marriage. The zihar would not be effective.[5]

(b) A man says to a strange woman, "thou art to me like the back of my mother if thou enterest the house". This is not valid zihar.[6]

A zihar pronounced during iddat of a revocable divorce will however be effective.[7]

1. Bail I, 327.
2. MY Khan III, 332.
3. Bail II, 139-140.
4. Bail II, 139.
5. Bail I, 323; Hed 117-118; Bail II, 139.
6. Bail I, 328.
7. Bail I, 327.

Shia Law :

According to better opinion, zihar would be effective even in the case of muta.[1]

62. Intention for zihar

Intention is not necessary for a valid zihar. Zihar would be effective even though if it is made in jest, by mistake or under compulsion.[2]

Shia Law :

Freedom of choice and intention are necessary. Zihar by a man who is incapable of intention through drunkenness, stupor or a paroxysm of passion would be invalid. If one should pronounce the formula of zihar but intending talaq, there would neither by talaq for want of that word, nor zihar for want of intention.[3]

63. Option in zihar

It is not necessary that zihar should be free from a stipulation of option. It is valid with such stipulation.[4]

64. Time limited for zihar

Zihar may be absolute or perpetual. But it may also be for a limited period (day, month or year). Such expiation would be obligatory if he approaches her within the period so fixed. But zihar would drop if he does not approach her within that period.[5]

65. Conditional or contingent zihar

The husband may make a zihar subject to the fulfillment of some condition or the happening of some contingency.[6]

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1. Bail II, 140; see *Ludden vs. Mirza Kamar*, (1882)8 Cal 736.
2. Bail I, 326; Durr 121.
3. Bail II, 139.
4. Bail I, 327.
5. Bail I, 325.
6. Bail I, 328; Minhaj 352-353.

Illustrations

A man says to his wife "If thou enterest the house, thou art to me like the back of my mother", zihar will be effective if she enters the house.

If zihar is made subject to some such conditions as "if so and so wishes" or "if it pleases thee", it would be referable to the same meeting.[1]

Shia Law :

A zihar made to depend upon a condition would, according to better opinion, be effective.[2]

66. Future zihar

Zihar so pronounced as to take effect in future is valid.

Illustrations

(a) A says to his wife, "thou art to me like the back of my mother tomorrow." There is one zihar.

(b) A says to his wife, "thou art to me like the back of my mother in everyday." Zihar would be renewed each day.[3]

Shia Law :

It is a necessary condition that the zihar should take effect immediately, so that, if the effect should be suspended till the expiration of the month or entering upon Friday, there would be no zihar according to the better opinion.[4]

67. Expiation of zihar

One of the forms of expiation for zihar was emancipation of a slave. The forms of expiation now possible are that—

1. MY Khan III, 331-332.
2. Bail II, 139.
3. Bail I, 327.
4. Bail II, 139.

(1) a fast should be kept for two months; or

(2) if he is unable to undertake a fast he must feed 60 poor persons.

Certain conditions have been prescribed with respect to the keeping of fasts and as to feeding of poor persons.[1]

e. KHULA

Synopsis

1. Bail I, 328, 334; Hed 119, 123; Bail II, 142, 145; Minhaj 356-357.

68. Definition and meaning of khula

Khula is a dissolution of marriage by an agreement made between the parties to the marriage on giving some consideration to the husband for release of the wife from the marriage tie.[1] The grantor of the release is called khali and the woman obtaining the release the mukhtalia.[2]

Khula in its primitive sense means "to draw" or "dig up" or "to take off" (*e.g.,* you take off your clothes or take off your boots). Its secondary meaning is to take off clothes. The spouses are as clothes to each other and when they make khula, each of them takes off his or her clothes. In law it signifies an agreement entered into for the purpose of dissolving a connubial connection in lieu of compensation paid by the wife to her husband out of her property. It is destroying milk-i-nikah or ownership of the marriage with the consent and acceptance of the wife.[3] If is dismission of laying down by a husband

1. *Buzulul Raheem vs. Luteefoonissa*, 8 MIA 379 at p 395.
2. Sircar II, 405.
3. Hed 112; Bail I, 305; MY Khan III, 282; *Umar Bibi vs. Mohd Din*, 1945 Lah 51: 1944 Lah 542: 220 IC 9.

of his right and authority over his wife for an exchange.[1] Khula is not demandable as a right by the wife on the payment of consdieration.[2]

69. Authority and origin of khula

The institution of khula is another step in reform introduced by the Prophet for amelioration of the condition of women. In the pre-Islamic days the wife did not possess any right to claim a dissolution of marriage on any ground. A revelation in the Quran is as follows:

> "And it is not lawful for you that ye take from women ought of that which ye have given them; except (in the case) when both fear that they may not able to keep within the limits (imposed by Allah). And if ye fear that they may not be able to keep the limits of Allah, in that case it is no sin for either of them if the woman ransom herself. These are the limits (imposed by Allah)."[3]

The matter had according to a tradition come before the Prophet at the instance of the wife of Sabit-bin-qais who expressed a desire to separate from her husband. The Prophet asked her if she would give back to Sabit the garden which he had given her as her settlement. She agreed to do so. The Prophet then asked Sabit to divorce her at once.[4]

The rule was introduced to afford an opportunity to the wife to release herself from the marriage tie where the parties disagreed with each other and there was apprehension that the limits prescribed by God may not be observed.[5]

70. Who can effect khula?

An agreement by way of khula may be made—

(1) by one of the parties to the marriage; or

(2) by duly authorized agents of one or the other party or of both; or

1. Bail I, 305.
2. *Moulvee Abdul Wahab vs. Mst Hingoo*, 5 SDA 200; Sircahr I, 433.
3. Quran II, 229.
4. MY Khan I, 121.
5. Bail I 306; Hed 112.

(3) in the case of minors or lunatics, by their guardians.

The court cannot effect a khula by virtue of the powers vested in it.[1]

71. Competency for effecting khula

An agreement for khula may be made by parties who are above puberty and are of sound mind except under the influence of intoxication. Majority for the purpose of an agreement of khula is covered by the expressions contained in Sec.2 of the Indian Majority Act, 1875 (9 of 1875). An agreement to pay a certain amount of dower is a part of the contract of marriage and there is no reason to suppose that although a person who is a minor under the Majority Act but a major under the Muslim Law is capable of entering into a contract of marriage, he is incapable of fixing the amount of dower and on the same ground an individual who is a major under the personal law, is capable of relinquishing the dower as consideration of obtaining khula.[2] As to majority for purposes for relinquishment of dower.

The parties must be of sound mind but khula by a drunken person is valid.[3] A khula may be made during a period of menstruation.[4]

A khula must be effected during the subsistence of the marriage or during the iddat of the wife for a revocable divorce.[5]

Shia Law :

Puberty and sanity are necessary conditions for competency to effect khula. A khula made by a minor, even though a murahik (one approaching puberty) and with the permission of his guarding or another person would not be valid.[6] A khula made by a man in a sate of intoxication is not valid.[7] Khula granted by an idiot is valid

1. *Umar Bibi vs. Mohd Din*, 1945 Lah 51.
2. *Qasim Husain vs. Kaniz Sakina*, 1932 All 649, follg. *Mazharul Islam vs. Abdul Gani*, 1925 Cal 332: 80 IC 914 and dissenting from *Abidhunnisa vs. Mohd Fathiuddin*, 41 Mad 1926: 44 IC 293.
3. Bail I, 322.
4. Durr 120.
5. Abdur Rahman, Art, 274.
6. Sircar II, 405 citing tahrir-ul-Ahkam.
7. Bail II, 133.

but in that case the woman must deliver the consideration to the guardian and will not be exonerated from it even if she delivers it to the husband.[1] A Khula made by a person under inhibition for insolvency is valid.[2]

The further conditions required in the woman are:

(1) That she should be in a tuhr (period of purity) in which no connubial intercourse has taken place, if she is a woman whose marriage has been consummated and is not past child bearing age and her husband is present.

(2) That there is some aversion on her part to the husband.[3] Khula would not be valid if given while the dispositions or tempers are in harmony. If he should repudiate her for an exchange in like circumstances, he would not become proprietor of exchange but the talaq would be valid as a revocable talaq.[4]

Khula would however be valid even—

(1) If there is some appearance of sanguinary discharge, if the woman is pregnant;

(2) If the woman is in her course, if the marriage has not been consummated; or

(3) If there has been connubial intercourse during the tuhr in which it has been effected, if the woman is past child bearing age.[5]

72. Contract of khula with a minor wife

If the husband makes a contract of khula with a minor wife who has attained discretion on the condition on her paying some specified compensation, the khula would be valid but the compensation will not be binding on her and her right to dower will remain intact. Khula will operate as a revocable talaq.[6]

1. Sircar II, 406 citing Tahrir-ul-Ahkam.
2. Bail II, 134.
3. Bail II, 133.
4. Bail II, 135.
5. Bail II, 133-134.
6. Abdur Rahman, Art 291.

73. Khula under compulsion

Khula like talaq is valid even though it is given under compulsion.[1] If the wife is compelled by ill-treatment or otherwise to seek a divorce and the woman is forced to accept the khula, talaq would take effect but the wife would not be liable to pay the compensation.[2]

Shia Law :

Besides puberty and insanity freedom of choice and intention is also necessary. A Khula made by a man under compulsion is not valid. If however a man pronounces talaq after compelling his wife to enter into an agreement for khula, the talaq would be valid as the revocable talaq without any obligation on her part to pay the compensation.[3]

74. Khula not applicable to irregular marriage

Khula means getting rid of the ownership by marriage. An irregular marriage cannot be dissolved by khula.[4] The husband is bound to return any sum received by him by way of compensation for khula.[5]

75. Agency for khula

A contract of khula may be entered into through agents duly authorized in that behalf by either party.[6] An agent for effecting khula must be specially authorized to enter into a contract.[7]

75.1. Who may be an agent

Sound mind and puberty are not a necessary condition in an agent. A youth can be appointed as an agent, so also a person below puberty.[8] One and the same person may be appointed as an agent to

1. Bail I, 322; *Vadaka Vitil vs. Odakel*, 3 Mad 347 at p.350.
2. Durr 248.
3. Bail II, 133-134.
4. Durr 244-245.
5. Abdur Rahman, Art 297.
6. Bail I, 320; Sircahr II, 411.
7. Ameer Ali II, 515.
8. Bail I, 421.

act for both parties,[1] although according to Muhammad one and the same person cannot act as agent for both parteis.[2]

The wife herself may be appointed as agent to give khula from the husband to herself, for instance, by the husband saying to the wife, "make khula upon thyself". In such case the forms of authority may be of different kinds.[3]

Shafei Law :

A husband may lawfully appoint a woman to be his agent. According to better opinion, one and the same person cannot be appointed to represent both parties.[4]

75.2. More agents than one

Where more agents than one are simultaneously appointed, one of them cannot act.

Illustration

A man says to two persons, "give khula to my wife for one thousand dirhems". One of them says, "I have given khula for one thousand dirhems". The second person says, "ratify it". According to Abu Yusuf, khula is not valid. But if the second person says, "I have made khula", the khula would be valid.[5]

75.3. Father of woman acting as agent

The father of an adult woman may act as an agent with the authority of an adult daughter. If however he makes khula without her authority or subsequent sanction, the khula would not be valid, if he does not give security but if he gives security it would be valid. In that case, if she does not ratify it, she can recover the dower from the husband and he can sue the father on the seucirty.[6]

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1. Bail I, 320-21.
2. MY Khan III, 313.
3. see MY Khan III, 291.
4. Minhaj 321.
5. Bail I, 320; MY Khan III, 312.
6. Bail I, 321.

Shia Law :

If a father contracts khula without the authority of an adult daughter, a single revocable talaq will take effect but the husband will not be discharged from the dower and the father will not be responsible.[1]

75.4. Limits of authority of agent

An agent must act within the terms of his authority. If he enters into an agreement beyond the terms of his authority, the agreement would be valid only to the extent to which it was within the terms or his authority.

Illustrations

> A woman authorizes her agent to enter into a khula with her husband for 500 dirhems. The agent enters into an agreement on payment of 1000 dirhems. The agreement is valid but the wife is liable only for 500 dirhems.[2]

It is not competent for an agent to make khula except in lieu of property.[3]

Shia Law :

Where an agent is appointed by the wife generally, he cannot enter into a contract of khula on a consideration in excess of the proper dower. If an agent gives more than the proper dower to an agent of the husband appointed generally, the consideration would be void and a revocable talaq will take effect without any responsibility on the part of the agent.

If an agent appointed by the husband grants khula for less than the proper dower, the khula would be void and if he gives her talaq for such consideration, the talaq would not take effect.[4]

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1. Sircar II, 412; Ameer Ali II, 516.
2. Ameer Ali II, 518.
3. MY Khan III, 292.
4. Bail II, 135; Sircar II, 411.

75.5. Termination of agent's authority

The authority of an agent may be revoked but the withdrawal of the authority shall not be effective till the agent knows of it and the power is taken away from him.[1]

75.6. Liability of agent for the consideration of khula

An agent is not liable to the husband for the consideration of khula which be payable only by the woman. But if the agent expressly refers to the consideration to himself (*e.g.*, if he says, "give khula to thy wife in consideration of my thousand") or if he stands as surety, he and not the woman could be liable to pay to the husband. The agent may however recover from the woman even though she had not asked him to stand a surety.[2]

76. Khula, how made ?

An agreement by way of khula be made by a proposal made by one of the parties and accepted by the other. No particular form has been prescribed for expressions which may effect khula. All that is needed is that a proposal is made by one side and the consent is formally expressed by the other. It is however a condition precedent that before the wife accepts khula she must understand the meaning of the terms used by the husband because the transaction is an exchange unlike talaq which involves a loss of rights.[3] The use of the word khula is not necessary nor will the use of the word in every case bring about khula. Khula may be effected by use of the following expressions:

(1) *Use of the word khula or mubaraat :* Khula bears the sense of divorce and it is classed with implied expressions of it. If the word khula is used with the mention of a compensation, it would amount to khula, independently of the intention. Intention would not be essential for khula because the term khula or account of its being frequently used to effect talaq had become similar to an express term.[4]

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1. Bail I, 320; MY Khan III, 312.
2. MY Khan III, 305.
3. Durr 246.
4. Durr 247.

If, however, there is no mention of compensation for khula, the mention of the word would not cause khula. Thus, if the husband says to his wife, "I have made khula with thee" and the woman says, "I have accepted", this will not amount to khula, as no property has been mentioned as consideration but one irrevocable talaq shall be caused.[1] Where in a suit for dower by the wife, the husband set up a khulanama by which the wife was alleged to have given up her dower and it was found that it had been obtained under compulsion or duress, it was held that by admission of khula and the failure of the husband to prove that it was made with free consent, it must be presumed that there was an effective talaq (and not khula).[2]

So also, if mubaraat (mutual release) is used (*e.g.*, if the husband says, " I have released thee for a thousand", khula would be effectd.[3]

(2) *Use of the word talaq :* If the husband says, "I have repudiated thee (*i.e.*, given thee talaq) for a thousand dirhems", it would be equivalent to khula,[4] even though the word khula has not been used. An irrevocable talaq takes effect.[5]

(3) *Use of the word talaq by one and khula by the other :* Where the husband used the word "khula" (e.g., by saying to the wife, "give thyself a khula") and the wife in accepting it uses "talaq" (*e.g.*, by saying "I have given myself talaq") it would be taken to be an acceptance of the husband's offer and be a khula, and would not be without property unless otherwise intended by the husband.

On the other hand, if the wife makes an offer of khula (e.g., by saying "give me a khula for a thousand dirhems") and the husband uses the word "talaq" in acceptance (*e.g.*, by saying, "I have given thee talaq", there is difference of opinions, some holding that it would be khula while others holding that it would be a talaq. The former opinion is more approved. It would however be a question of construction of the language for ascertaining the intention of the parties.[6]

1. MY Khan III, 290; Bail I, 310.
2. *Buzulul Raheem vs. Luteefoonnissa*, 8 MIA 379 at p.395.
3. Bail I, 306; Durr 245.
4. Bail I, 306.
5. Bail II, 138.
6. Bail I, 310-311; MY Khan III, 350.

Shia Law :

If one woman asks for talaq in exchange for something and the husband makes khula without using the word "talaq", it would not take effect. But if she asks for khula and the husband gives a talaq, there is a difference of opinions, some holding that the woman would be liable for the consideration while others holding that she would not be liable.[1]

(4) *Words implying sale or purchase :* Khula may be effected words of sale and purchase and also by words in Persian language. The wife is at liberty with her husband's consent to purchase from him her freedom from the bonds of marriage.[2] Khula would thus be effected if the husband says, "I have given thee a khula for a thousand dirhems" or "sold thyself to thee" or "thy talaq to thee for a thousand dihrems". In such case, if the offer is accepted, it would effect khula.[3]

Other expressions would however not effect khula unless the terms clearly indicate the intention of the parties.[4] Thus, if the husband declares that he will not force the wife to remain with him if she would indemnify him or that he wished for the separation, the expressions do not clearly indicate the intention but if the husband says that he is willing to dissolve the union if the wife wished it, or that he would do so if she gives up her dower and agreed to terms, the khula would be valid as these expressions would clearly disclose the intention.[5]

Shia Law :

It is necessary for the validity of a contract of khula that it must be made before two witnesses who are present at the same time.[6] The words must be express in their significance and must be pronounced in Arabic if there is ability to do so.[7]

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1. Bail II, 129-130.
2. Macnaughten : Princip 28: Sircar I, 245.
3. Bail I, 306. For other such expressions, see Bail I, 311-312; MY Khan III, 313-317.
4. Durr 247.
5. Ameer Ali II, 512.
6. Bail II, 134.
7. Ameer Ali II, 507.

77. When khula may be effected

Khula may of course be effected by an agreement made by parties during the subsistence of the marriage. An agreement of khula may also be made contingently on a person marrying the woman later on but according to Abu Hanifa the acceptance must be made after marriage. According to Abu Yusuf, acceptance even before marriage is sufficient.[1]

An agreement for khula may also be made during the iddat of revocable talaq.[2]

If, however, a talaq is given while the wife is undergoing iddat for khula, no consideration shall be payable by her as the consideration in that case would be stipulated for nothing.[3]

Shia Law :

A woman released by khula is not affected by a talaq pronounced after the khula.[4]

78. Acceptance of the offer

Khula is regarded on the part of the wife as transfer for an exchange and the offer must be accepted by her—

(a) if she is present – at the same meeting; or

(b) if she is absent – at the meeting on which intelligence reaches her; or

(c) if it is suspended on a condition or referred to a further time – when the time comes or condition is fulfilled.[5]

79. Retraction of offer

The husband has no right to retract the proposal before acceptance. Khula is regarded on the part of the husband as a suspension of talaq on acceptance by the wife so that his retraction is invalid.

1. Bail I, 315; MY Khan III, 304.
2. Durr 245.
3. MY Khan III, 306.
4. Sircar II, 408.
5. Bail I, 310.

On the part of the wife, it is as a transfer for an exchange as in sale, so that she may retract before acceptance. But this must be done at the same meeting.

The husband cannot terminate the meeting at which a proposal has to be accepted by rising from it but the wife can do so and the proposal would stand cancelled by her rising from the meeting.[1]

Shafei Law :

Where the husband makes an offer for some compensation, it is a conditional offer to make a bilateral agreement and the husband can withdraw his offer before it is accepted. So also if the wife makes the offer, she can withdraw it before it is accepted.[2]

80. Revocation of khula

The husband has no power of revoking khula even if he reserves an option. If an option is reserved for three days it would not be valid if reserved by the husband. If however the option is reserved by the wife it would be valid according to Abu Hanifa and the wife may reject the proposal within three days. According to Muhammad and Abu Yusuf such option is null in either case, and talaq takes effect and consideration becomes payable by the wife.[3]

It is open to the wife to reclaim the consideration but as the husband cannot revoke the khula after the expiry of the period of iddat, the wife can also reclaim the consideration only during the same period so that the husband may have an equal option to put an end to the contarct.[4]

Shia Law :

Where a man enters into khula and stipulates for a power to revoke, the khula would not be valid.[5]

The husband has no power to revoke the khula after it is established in the case of a wife on whom iddat is not incumbent

1. Bail I, 316.
2. Minhaj 322-323.
3. Hed 115; Bail I, 316. See also *Abdul Rahamn vs. Ma Kye*, 26 IC 102: 1915 LB 53.
4. *Qasim Hussain vs. Bibi Kaniz Sakina*, 1932 All 649: 1932 ALJ 781.
5. Sircar II, 407; Bail I, 135.

(*e.g.*, if the marriage has not been consummated or the woman is past the child bearing age), whether the khual was given by the word "talaq" or by other words and whether he returned the exchange or not.[1]

The husband has no power in other cases also but the wife may reclaim the compensation during the iddat and if she does so he may revoke the khula if he so desires.[2]

81. Conditional contingent or future khula

The husband may make a proposal for khula so as to take effect at some future time or on fulfillment of some condition or the happening of some contingency. The suspension of khula by the husband on a condition (*e.g.*, when A arrives) or to a future time (*e.g.*, when tomorrow comes) is valid. In such cases the wife has to accept after the arrival of the person or the coming of the tomorrow.

The offer cannot be however made conditional or contingent by the wife as the offer on the part of the wife is to be regarded as a transfer for an exchange as in a sale and neither its suspension on a condition nor a referring of it to a future time is lawful.[3]

Shia Law :

Khula must be unconditional. It should be free from any conditions which the contract itself does not require.

But if the condition is such as the contract itself requires, then it would not be invalid (*e.g.*, if the husband says, "if you revoke, I revoke") or if the wife expressly stipulates for a right to reclaim reconsideration.[4]

82. Consideration for khula to be settled by the parties

A khula is virtually a divorce purchased by the wife from the husband for a price. The terms of the bargain are a matter of arrangement between the husband and wife and the wife may as a

1. Sircar II, 408 citing Tahrir-ul-Ahkam.
2. Bail II, 135; Sircar II, 413, 461.
3. Bail I, 316.
4. Bail I, 134.

consideration release her deyn-mehar and other rights or make any other agreement for the benefit of the husband.[1]

The stipulation of an indemnity is a necessary condition to the validity of khula.[2] Consideration would be payable according to the terms of agreement.

Illustrations

(a) A woman says to her husband, "Divorce me for one thousand dirhems." The husband pronounces a single talaq. Only one third of one thousand dirhems would be payable by her because she required each talaq separately for one-third of the sum.

(b) A husband says to his wife, "Divorce yourself thrice for one thousand dirhems." She pronounces one talaq on herself. It will not have any effect as the husband did not desire her to separate herself for anything short of the whole sum.[3]

82.1. Subject of consideration

As a general rule what is lawful in dower may be an exchange in khula.[4] Thus, crop of the woman's land, her own services not requiring retirement with her or service of stranger are sufficient as these being profits are subjects of dower.[5] Any obligation on the part of the wife, or some particular thing or even the use of such thing may form the consideration.[6] There is no limit, minimum or maximum, fixed for consideration.[7]

The undertaking given by the wife to provide her own maintenance during pregnancy or to renounce her right of custody over her children or to maintain them herself would be a valid subject of consideration for khula.[8]

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1. *Buzulul Raheem vs. Luteefoonnissa*, 8 MIA, 379, at p395.
2. Ameer Ali II, 512.
3. Hed 114.
4. Bail I, 312; Hed 114; Bail II, 130.
5. Bail I, 316; Hed 114.
6. Minhaj 320.
7. Durr 245; Minhaj 320.
8. Ameer Ali II, 51.

But everything which may lawful form the consideration of khula need not be fit for being paid as dower. Thus, khula may be effected for a consideration of less than 10 dirhems which is the prescribed minimum for dower. So also, things which are not in existence, such as future produce of some trees, or what is in the womb of the flocks cannot be the valid subject of dower,[1] but flocks in the womb may be the valid subject of consideration for khula. There is however some difference of opinion.[2] In such case khula will be valid. If however there is no future produce at all, the wife shall be bound to return her dower.[3]

Shia Law :

Where the consideration is the foetus of which a beast is pregnant the khula would not be invalid.[4]

82.2. Keeping of child as consideration

Where the consideration is the keeping of a child by the wife, khula would be void unless a period is distinctly specified. If however a period of not less than two years is specified, then the position would be as follows:

(a) where the mother is to keep a child of which she could be guardin (a female below puberty), the khula is valid;

(b) where mother is to keep a child of which father alone could be guardian (son above 7 years of age), the khula itself would be void;

(c) where the father is to keep a child of which mother alone could be guardian (female or male infant), the khula is valid but the condition is void.[5]

In case the child or the wife dies or the wife marries another husband before the expiry of the stipulated period the husband may, unless there is a contract to the contrary, recover the portion which should have been or has to be spent on the child in the remaining period.[6]

1. Bail I, 94.
2. Durr 245.
3. MY Khan III, 296.
4. Bail II, 131.
5. Bail I, 309-310; Ameer Ali II, 514-518.
6. MY Khan III, 289, 290, 310, 311; Abdur Rahman, Art 286, 287; Sircar II, 410.

82.3. Illegal consideration

Things prohibited by Islam are not proper consideration for khula. Thus wine, port, carrion or blood etc. which are haram under the Islamic Law,[1] or stolen property known by the husband to be stolen[2] are not proper consideration. In such case, separation is established between the parties, by virtue of the term khula as one of the kinayat or ambiguous expressions by which talaq is effected.[3] Separation made for illegal consideration by the use of the word khula would result in irrevocable talaq. While if it is made by the use of the word talaq it would be revocable.[4]

The consideration is not payable in such case as the husband agrees to accept prohibited articles as consideration and he cannot be supposed to have any intention to obtain any exchange.[5] Such consideration is not mal (property) under the Muslim law.[6]

Shia Law :

When the consideration is something the property which is lawful for the Muslims (*e.g.*, wine), the khula is invalid. Some however say that the khula should take effect revocably which would be right if it were followed by a talaq, but otherwise it is better to say that the khula is void.[7]

Shafei Law :

According to better opinion, proper dower would be payable.[8]

82.4. Failure of consideration

There may be a failure of consideration in the following cases:

(1) *Property not in existence :* If the fact is already known at the time when the khula is entered into that the property does not exist, the khula will take effect gratuitously.

1. Bail I, 312.
2. Ameer Ali II, 513-514.
3. Bail I, 312.
4. Hed 113; Bail I, 312, 317; Durr 248.
5. Ameer Ali II, 513.
6. Bail I, 312.
7. Bail I, 130-131.
8. Minhaj 321.

Thus, if a husband agrees to khula on what is in the house and knows that there is nothing in the house, the khula would be valid and nothing would be payable to him. This is because in such cases the husband has not been deceived.[1]

If however the husband does not know the non-existence of the subject of consideration, the khula would be valid and would be deemed to have been made for dower. The husband will be entitled to recover it if it had already been paid, and the wife will not be entitled to recover if it has not been paid.

Shia Law :

When consideration is not produced, its kind, quality and quantity must be mentioned.[2]

(2) *Blind acceptance :* A woman says to her husband, "grant me khula for what is in my hand." He agrees to it. It is found that she has nothing in her hand. The talaq will take effect but nothing would be payable to the husband as he had not been deceived.[3]

If the husband has a jewel belonging to his wife in his hand and he offers khula in consideration of it and the wife accepts the offer, the jewel would become his whether she knew the fact or not.[4]

(3) *Where the woman has no right to the property or the property is destroyed :* If the consideration is that found to belong to some other person, khula would be valid and the wife would have to pay its price, if it is a marketable commodity or its equivalent so also, if the property is destroyed before it is delivered by the wife to the husband or has been disposed of by her, the khula would be valid.[5]

Ameer Ali however states that if the woman gives in compensation something over which he has no right, khula is not obligatory on the husband.[6]

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1. Bail I, 309; Durr 250; Hed 114.
2. Bail I, 130.
3. Hed 114.
4. Durr 249.
5. Durr 248; MY Khan III, 295.
6. Ameer Ali II, 512.

Shia Law :

There is a difference of opinion but, according to better opinion, such khula is valid, and the husband is entitled to the value of the article or one similar to it, if it belongs to the class similars.[1] The same is the case if the property is destroyed before possession is delivered.[2]

(4) *Wrong description of consideration :* If a lawful object is specified as consideration for khula under a false denomination (for instance, a particular case of vinegar which is afterwards found to contain wine), the husband has a claim to get back the dower if he was not aware of it, otherwise he will get nothing.[3]

Shia Law :

If the khula is for vinegar and it proves to be wine, the transaction is valid but the husband is entitled to have the full quantity of vinegar.

If the contract is made for a consideration sufficiently described and which when delivered does not come up to the description, he may return what has been so delivered and demanded in exchange something corresponding to the description. So also, if the thing delivered is blemished, he may return it and claim an exactly similar unblemished thing or its value or he may retain the thing and require a compensation for the blemish.[4]

82.5. Increase of consideration

Any addition to the compensation settled between the parties is void. This is unlike the case of dower where the increase is valid.[5]

82.6. Consideration in excess of proper dower

Where an agreement for khula is made on the aversion being on the part of the wife and not the husband, the husband may receive as consideration even more than what he had paid her as dower, although it is abominable to take anything more than the dower.

1. Bail I, 132; Ameer Ali II, 513 (FN).
2. Sircar II, 411.
3. Durr 249; Hed 113.
4. Bail II, 131-132; Sircar II, 410.
5. MY Khan III, 300.

If the aversion is on the part of the husband also it is abominable to take anything at all, but even in such case it is lawful.[1]

82.7. When consideration not payable

An agreement for khula would be valid but the consideration shall not be payable in the following cases:

(1) Where the consideration is known to be non-existing.

(2) Where the consideration is known by the husband to be illegal.

(3) Where the agreement of khula has been obtained by compulsion.

(4) Where the wife is entitled to the dissolution of the marriage even otherwise than on the basis of the agreement of khula consideration would thus not be recoverable in the following cases:

(a) Where the marriage has to be annulled on the ground of infringing the laws of prohibition. Such marriage would be irregular or void and there can be no khula in such cases.

(b) Where the marriage is annulled in exercise of the right of the option of puberty available to the wife.

(c) Where the wife is entitled to obtain separation from the court, for instance, under the Dissolution of Muslim Marriages Act.

(d) Where the husband himself takes the initiative in giving talaq.[2]

82.8. Consideration left to be determined later

It is not necessary for the validity of khula that consideration must be determined before the contract. It may be left to be fixed either by the husband or the wife or by a stranger. In such case however the standard is the proper dower. If it is so to be fixed by the husband or the wife, it cannot be specified at more than the proper dower by the husband without the consent of the wife or at

1. Hed 113; Durr 247-48; Bail I, 306; *Abdul Wahab vs. Hingu*, 5 SDA (Sel Rep) 238.
2. Ameer Ali II, 516.

less than it by the wife without the consent of the husband. If it is fixed by a third person and he specifies it at more or less than the amount of dower given by the husband, the abatement or excess is not established without the consent of the husband or wife as the case may be.[1]

82.9. Time when consideration payable

The consideration may be agreed to be postponed to a term which is capable of being fixed (*e.g.*, the reaping of the crops or even her marriage with another person).[2] If however no term is fixed or the term fixed is the very uncertain (*e.g.*, the death of so and so or until so and so arrive) the consideration would be payable immediately.[3] The dissolution of the marriage is however not contingent on the payment of consideration.[4]

82.10. Non payment of consideration does not invalidate khula

The non-payment by the wife of the consideration for the divorce no more invalidates the divorce than in England the non-payment of the wife's marriage-portion invalidates the marriage.[5]

The only right which the husband got in the event of wife's failing as to pay the consideration is to sue the wife for the amount agreed to be paid or set it off against any claim that she may make for her dower.

The non-payment of consideration would not entitle the husband to cancel the khula on the ground of her failing to fulfil the contract.[6] So, where the husband executed a khulanama in which he repudiated his wife in unequivocal terms but the consideration had not been paid, it was held that an irrevocable talaq came into effect and it did not become invalid by the mere fact of non-payment of the consideration.[7]

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1. Bail I, 313.
2. Ameer Ali II, 515.
3. Bail I, 316.
4. *Buzulul Raheem vs. Luteefoonnissa*, 8 MIA 379, at p 395.
5. 8 MIA 379.
6. Ameer Ali II, 511.
7. *Mst Saddan vs. Faiz Baksh*, (1920) 1 Lah 402: 55 IC 184.

f. MUBARAAT

Synopsis

83. Meaning of the term Mubaraat

A dissolution of marriage at the desire of the wife alone for consideration is called khula. Where there is aversion to the marriage on the part of both the parties who are desirous of dissolving it, it is called mubaraat.[1] The Sunni law places mubaraat under the head of khula. Khula may be effected by use of the word mubaraat, so that it comes under the definition of khula.[2] There is however some difference in effects in the use of the term "mubaraat" and "khula" in respect of dower.

Shia Law :

Mubaraat is a distinct proceeding.[3]

84. Formalities for mubaraat

No particular formalities are prescribed for mubaraat. It may be expressed in any manner as is the case with khula.

Shia Law :

Mubaraat is effected by such words as, "I have liberated thee for so much and thou art repudiated." While in respect of khula there is a difference of opinion as to whether it is necessary to use the word "talaq" but with respect to "mubaraat" it is a condition that the word mubaraat should be followed by the word "talaq" in so much that, if the husband should stop at the word mubaraat, no separation of the

1. Bail I, 305; Bail II, 136-137; *Abdul Rahman vs. Ma Kye*, 26 IC 102 (LB); *Sayeeda vs. Mohd Sami*; 1952 PLD (Lah) 113.
2. Durr 244-45.
3. Ameer Ali II, 507.

parties would take effect.[1] The pronouncement must be made in Arabic unless the parties are unable to use Arabic.[2]

Intention is a necessary condition both for khula and mubaraat.[3]

85. Consideration in mubaraat

Ismaili law :

While in the case of khula consideration paid may be the dower or something more, in the case of mubaraat it is less than dower.[4]

Isna-Ashari Law :

In exchange no more can be taken that what had actually been received by husband, any excess being unlawful while in khula it is quite lawful.[5]

g. LI'AN

Synopsis

1. Bail II, 136-137.
2. Ameer Ali II, 517.
3. Ameer Ali II, 517.
4. Tyabji, ML at p 232.
5. Bail II, 137.

86. Meaning of term Lian

The term "li'an" is derived from lann which means to drive away. It is infinitive of the past tense' Lanna".[1] When the husband makes a charge accusing his wife of adultery (which term includes all cases of unlawful sexual connection whether incest, fornication, whoredom or adultery) the procedure for the settlement of the accusation by swearing and imprecating upon them the curse of God is technically called li'an.[2] They are testimonies by oaths.[3]

87. Quranic authority

And those who accuse honorable women but bring not four witnesses, scourge them (with) eighty stripes and never (afterward) accept their testimony. They indeed are evil-doers.[4]

As for those who accuse their wives but have no witnesses except themselves; let the testimony of one of them be four testimonies (swearing) by Allah that he is of those who speak the truth; and yet a fifth, invoking the curse of Allah on him if he is of those who lie; and it shall avert the punishment from her if she bear witness before Allah four times that the thing he saith is indeed false; and a fifth (time) that the wrath of Allah be upon her if he speaketh truth.[5]

88. History and origin of li'an

In order to appreciate the correct principles underlying the doctrine

1. MY Khan III, 353; Durr 262.
2. See 1931 ALJ (Journal) 5.
3. Bail I, 335.
4. Quran XXIV, 4.
5. Quran XXIV, 6-9.

of li'an it is necessary to bear its history and origin in mind. The law has been based mainly on two considerations :

(1) Very severe punishment is prescribed both for scandal by way of a false charge of adultery and for the offence of adultery itself.

According to the strict Muslim law if the husband makes a false charge of adultery against his wife he is to receive a punishment of eighty stripes,[1] and this punishment for slander is known as hadd-ul-kazaf or specific punishment for slander.

The hadd or specific punishment for zina was stoning to death if the wife was moohsin. A moohsin was a person who was free, sane, adult, a Muslim and married by a valid contract that had actually been consummated to one in whom the same qualities are combined.[2]

(2) The law of evidence for proving the charge of adultery was very strict. It insisted on the production of no less than four lawworthy witnesses as laid down in the Quran.

The law of li'an was introduced with a view to mitigate the stringency of the law on the point. The origin of the revelation of the Quranic verses with respect to li'an is to be found in a tradition mentioned in Bukhari. It appears the one Hilal and accused his wife of adultery. He was called upon to produce witnesses or to be prepared to receive the punishment of eighty stripes. Hilal exclaimed, " I am truthful and God will save me from being flogged."[3] It was on this occasion that the Quranic verse relating to oaths and imprecations were revealed. The whole object of introducing this procedure as to the making of the li'an was intended to prevent both the husband and the wife receiving the punishments, prescribed respectively for slander and adultery which should have been inevitable because of the stringency of law as to evidence. In a proceeding li'an, the curse on the part of the man becomes a substitute for the hadd-ul-kazaf (specific punishment for slander) and the ghazab or wrath on the part of the wife becomes a substitute for hadd-uz-zina (specific punishment for adultery),[4] and the invoking of God when giving evidence is more destructive in its effect than punishments.[5]

1. Bail I, 325.
2. Bail I, 1-2; *Mohd Hussain vs. Begam Jan*, 1927 Lah 155.
3. MY Khan I, 128.
4. Bail I, 335; Durr 262.
5. MY Khan III, 352.

89. Charge which can be made the basis of Li'an

Proceedings for li'an may be taken where a charge of adultery is made by the husband against the wife. Such charge can be made in three different ways:

(1) direct charge of zina;

(2) denial of paternity of child; and

(3) denial of pregnancy of the wife by the husband.

89.1. Direct charge of zina

The charge may be directly against the wife for having committed zina. Such imputation of adultery may be made in any language involving imputation of adultery.[1] A charge of adultery to give rise to li'an must satisfy the following documents:

(1) *Such charge must be express :* There would be no hadd if the charge is not express.[2] Thus, if a man should scandalize the wife of another, and the other should say, " I believe that she is what thou hast said," his wife may resort to li'an.[3] But if he merely says, "I believe" (without saying anything further), there would be no li'an as the charge would not be express.

A charge of an unnatural offence would not, according to Abu Hanifa, be deemed to be a charge of adultery of giving rise to li'an.[4]

(2) *It should not be conditional :* A conditional charge of adultery will not entitle the wife to take li'an. Thus, if a man says to his wife "thou art an adulteress if such an one will". The words would be nugatory and the wife would not be entitled to li'an.

(3) *The wife must be above 9 years of age :* The charge of adultery against a wife below the age of nine years would not give rise to li'an as penalty of hadd would not apply in respect

1. Bail I, 341.
2. Bail I, 336; hed 125.
3. Bail I, 339.
4. Bail I, 336.

of a female of less then 9 years. If she is above 9 years of age she may sue after attaining puberty.

(4) *The person alleged to commit adultery must be above puberty :* The charge of adultery with a boy would not give rise to li'an.

(5) *Charge must be of voluntary zina :* A charge of having committed zina under compulsion would be scandal.[1]

89.2. Denial of paternity

The husband may disclaim or disown a child on the ground of impossibility of cohabitation whether the impossibility arose from disease, physical capacity or want of acess.[2] Paternity of a child cannot be disclaimed except of li'an.[3] If the paternity of the child is denied, it would involve a charge of adultery. It would give rise to li'an whether the denial is of a child belonging to himself or a child of the wife from a former husband.[4]

If a child is denied after the husband pronounces a talaq, the descent of the child would not be extinguished without li'an.[5] The paternity of a child who is alive can be denied at the time of receiving congratulations on the birth for which the customary period is seven years, or at the time of purchasing articles on the occasion of the birth but not after that as otherwise the husband would be deemed to have acknowledged the paternity of the child indirectly and in that case there would be no li'an. There will also be no li'an if he child or either the husband or the wife dies before a decree for separation is passed whether the child was denied before or after its death.[6]

If the husband dies before the completion of the proceedings of the li'an both the wife and the child who has been denied will inherit from him and if the wife dies the husband will inherit from her.[7]

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1. Bail I, 341.
2. Ameer Ali II, 195.
3. Bail II, 158.
4. Durr 262; Minhaj 359.
5. MY Khan III, 358.
6. Hed 125; Bail I, 342; Durr 265; Abdur Rahman, Art 336, 337.
7. Sircar II, 425, citing Tahrir-ul-Ahkam.

89.3. Denial of pregnancy

The husband may deny that the wife was pregnant from him. So long as the child is not born the husband does not by denying the pregnancy necessarily make kazaf because there is no certainty that what is apparently a pregnancy is really a pregnancy. If a child is delivered after more than 6 months from the date of denial of pregnancy by the husband there is no li'an. But if the child is born within 6 months, there is a difference of opinions. Abu Hanifa holds that there will still be no li'an by mere denial of the pregnancy but, according to Abu Yusuf and Muhammad, li'an must be administered. The accepted view is that of the disciples.[1]

90. Competency for li'an

Certain qualifications must be possessed by the parties to entitle them to take li'an. These qualifications are as follows :

(1) *For both parties*[2] *:* The spouses must be competent to give evidence against Muslims (i.e., they must be above puberty, must be possessed of sound mind, must also be both Muslims) and neither of the parties should be dumb or have undergone hadd or specific punishment or fined or suffered any corporal punishment for a penal offence.

Profligacy or blindness is not a disqualification for li'an. An adulterer is also not excluded from li'an as he is competent to be a witness against Muslims.

(2) *For the wife :* It is necessary that the woman should not be notorious for loose life and should not have borne a child of unknown paternity.[3] She must be one who had not cohabited even once with any person in an irregular marriage or a semblance of marriage.[4] Li'an is induced only by a charge of adultery by the husband against his muhsina and chaste wife.[5] There is no li'an if the wife is a kitabia (Christian or Jew).[6]

1. Bail I, 341; Hed 126; MY Khan III, 356, 357.
2. Bail I, 336-337; Hed 124:125; Durr 264; Abdur Rahman, Art 335.
3. Bail I, 336; Hed 123; Minhaj 359-360.
4. Durr 263.
5. Bail II, 152.
6. Hed 124, *Ghulam Bhik vs. Hussain Begum*, 1957 PLD Lah 998.

Shia law :

It differs on the following points :

(1) Li'an arises if the husband had ocular demonstration and has no other proof. Since ocular demonstration is required on the part of the husband, there can be no li'an for scandal in the case of a blind man, though there may be for denial of a child.[1]

(2) The li'an of a dumb husband is valid if made by approved signs.

(3) The wife should not be deaf, dumb or blind.[2]

Shafei Law :

Li'an by a dumb person is valid. They agree with the Shias on this point.

The mere fact that a woman is of questionable character is no bar to li'an.[3]

91. Subsistence of valid marriage necessary

It is necessary for giving rise to li'an that a valid marriage whether consummated or not must be subsisting between parties at the time of li'an (and not merely at the time when the charge of adultery was made). If the husband makes an accusation of adultery and then pronounces triple talaq, there would be no li'an because marriage is at an end.[4] Li'an may also be made during the iddat of a revocable talaq.[5] The marriage would be deemed to be subsisting. But there is no li'an after an irrevocable talaq. There is no li'an in the case of a charge of adultery against a woman who is a stranger.[6]

So also, if a man says to a woman, "when I marry thee, then thou art an adulteress", the words are nugatory as there was no subsisting marriage.[7]

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1. Bail II, 152.
2. Bail II, 155; Sircar II, 423, 426.
3. Ameer Ali II, 527, 529.
4. Bail I, 336, 339-340.
5. Abdur Rahman, Art 325.
6. Bail II, 152.
7. Bail I, 340-341.

There is no li'an in an irregular marriage.[1]

Shia Law :

Li'an arises only in the case of permanent marriage and not Muta.[2] As to whether the marriage should have been consummated there are three options, (1) that there is no li'an without consummation; (2) that the li'an is lawful; (3) that its legality is restricted to the case of scandal excluding denial of child.[3] The Sharaya has expressed preference for the first opinion.[4] Li'an is valid in the case of a pregnant woman.[5]

Shafei Law :

Li'an is admissible even where the wife has been irrevocably repudiated or where the charge is made in general or with reference to a fact subsequent to the dissolution of marriage, provided that there is a child who is to be disowned. But if the change is on account of a fact that took place before the marriage, li'an cannot be made after dissolution of marriage.[6]

92. Initiation of proceedings of li'an

It is a condition of li'an that the wife should demand it. She should apply to Kazi. If the paternity of a child is involved in the case, it cannot be rejected except by li'an which the husband may himself have recourse to.[7]

The proceedings for li'an do not admit of agency. If one of the parties appoints an agent for li'an the li'an would not be valid.[8]

93. Proof of allegation

The making of the allegation of adultery is to be proved first. If a woman makes a claim that her husband has falsely accused her

1. Bail I, 336; Hed 123.
2. Bail II, 153, 155.
3. Bail II, 155.
4. Bail II, 152; Sircar II, 424.
5. Bail II, 155.
6. Minhaj 363-364.
7. Bail II, 158.
8. Bail I, 335.

to adultery then unless the husband admits the accusation, and the woman establishes proof by witnesses to substantiate her claim, then Kazi shall order them both to make li'an. Proof by witnesses would however be sufficient and would be just as good as if the husband had admitted the accusation.[1] If the husband denies the fact and there are no witnesses on either side, the proceedings in li'an would drop.[2]

94. Reference to judge necessary

Li'an can be effected only by proceedings before the judge.[3] So long as the wife does not refer the matter of the charge of adultery to the court, there would be no effect of the charge and the woman shall continue to be the wife.[4]

Shia Law :

Li'an would not be valid except in the presence of the judge but if the parties are content with a private person and take li'an before him, it is lawful. Its effect is established on the mere order when pronounced though some say it requires subsequent consent of the parties.[5]

95. Composition not permitted

Li'an does not admit of forgiveness or release or composition so that, if the wife should forgive her husband before the matter is brought before the judge or should enter a composition with him for property, the composition would not be valid and she would be liable for restitution of the amount received in exchange and might still demand li'an.[6] After li'an is going through it would be the duty of the judge to separate the parties. This would also be so if the child whose paternity is denied sues for relief against the slander.[7]

1. MY Khan III, 355.
2. Durr 264.
3. Ameer Ali II, 529.
4. MY Khan III, 354.
5. Bail II, 156.
6. Bail I, 335.
7. Durr 264.

96. Procedure for li'an

The original procedure followed by the Muslim jurists was as follows:

> "The Kazee first applies to the husband, who is to give evidence four separate times, by saying, 'I call God to witness to the truth of my testimony concerning the adultery with which I charge this woman, and again, a fifth time, 'may the curse of God fall upon me if I have spoken falsely concerning the adultery with which I charge the woman', after which the Kazee requires the woman to give evidence four separate times by saying, 'I call God to witnesses that my husband's words are altogether false, respecting the adultery with which he charges me' and again, a fifth time, 'may the truth of God alight upon me if my husband is just in bringing a charge of adultery against me.' On both making imprecation in this manner, a separation takes place between them; but not until the Kazee pronounces a decree to that effect.[1]

In the case of a denial of paternity of a child, the oath by the husband is, "I testify by God that I was a true speaker in what I imputed to her by denying her child," and by the wife saying, "I testify by God that he was a liar in what he imputed to me by denying the child". Where there is combined charge expressly of adultery and also denial of paternity the above formula is to be modified by adding a reference to "zina" also.[2]

There are more or less exactly similar forms under the Shia law. The husband should conclude with the word "curse" while the wife should concluded with the word "wrath". The parties should say, "I testify by God" and not "I swear" otherwise it would not be lawful.[3]

97. Refusal of parties to take oath

According to Muslim law, if the husband refuses to take the oath he would be imprisoned unless he makes li'an or admits the falsehood of his allegation. So also, if the wife refuses to take oath she would

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1. Hed 124; Bail I, 338; Minhaj 360-361; *Mst. Fakhre Jahan vs. Mohd Hamidulah*, 1929 Oudh 16:4 Luck 168.
2. Bail I, 343; Hed 125.
3. Bail II, 156-157; Hed 124.

be imprisoned until she makes li'an or admits the truth of the husband's allegaiton.[1] Ameer Ali observes that these provisions are not enforced by the Hanafi Kazees of Algeria.[2]

98. Judge must separate the parties

If li'an is gone through, a separation takes place between the parties when the judge pronounces a decree to that effect. He may direct the husband to pronounce talaq and if he refused to do so, the judge may himself pronounce a separation. It is the duty of the judge to separate the parties even if the parties make a joint request to the contrary.[3]

The parties have to swear five times. Separation would however take effect if the husband makes li'an only three times instead of five the woman also does the same. Such separation would be valid but if is done less then three time it would not be vaid.[4]

99. When li'an drops

The proceedings of li'an would be dropped in the following cases:

(1) If either of the parties becomes disqualified. If anything should happen to the parties or either of them before the decree of separation that would have prevented the li'an, it becomes void.[5] Thus, if one or both of the parties become dumb li'an would drop. So also, if the woman commits adultery or cohabits under a doubt.[6] If either of the parties apostatizes, the right of li'an would be lost and would not be revived on re-embracing the faith.[7]

Although sanity is a condition for li'an, the right would not be lost by a subsequent disappearance of sanity.[8]

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1. Durr 264-265; Bail, I, 337; Bail II, 157.
2. Ameer Ali II, 528.
3. Hed 124; Bail I, 338-339.
4. MY Khan III, 360; Durr 267; Bail I, 339.
5. Bail I, 339; Minhaj 363.
6. Durr 266.
7. Bail I, 339; Durr 266.
8. Durr 267.

(2) If the husband retracts the accusation or the wife admits truth of the accusation either before or after taking oath or before judicial separation takes place.[1]

(3) If some fact is discovered by reason of which parties could not have gone through li'an.

(4) If the husband gives an irrevocable talaq or a triple talaq to the wife after charging her with adultery, li'an would be extinguished. In such a case the husband would not be liable to punishment and the right would not revive by his marrying her against after that. Li'an is however not to be dropped if the talaq is given is revocable.[2]

(5) If a witness to the fact of the slander is dead or absent but not merely if he becomes blind or commits adultery or apostatizes, li'an would be dropeed.[3]

100. Applicability of law of li'an in India

The provisions of the Muslim Law about li'an have been discussed so far. The question of the applicability of the doctrine of India has been considered in many cases. The result of the decisions may be briefly noted:

(1) *Procedure :* The procedure prescribed by the Muslim Law for li'an applicable to Muslims in Muslim countries where no other evidence existed is not applicable to India.[4] The procedure of taking oaths in the course of the trial was a method of proof only.[5] The taking of special oaths is a mere matter of evidence and had been superseded by the Evidence Act.[6] In one case, before evidence was led in the original court the parties had both taken the special oaths prescribed for li'an with the necessary imprecations on the application of the wife. But the marriage was not immediately dissolved and the parties were called upon to

1. Abdur Rahman, Article 335.
2. MY Khan III, 354; Durr 266.
3. Durr 266.
4. *Khatyabibi vs. Umar Saheb*, 1929 Bom 285: 52 Bom 295: 110 OC 131.
5. *Rahiman Bibi vs. Fazil*, 1927 All 56: 48 All 834; *Lelan vs. Rahim Baksh*, 1951 PLD (BJ) 91.
6. *Zaffar Hussain vs. Ummatur Rahman*, (1919) 41 All 278: 49 IC 256.

produce evidence, on the ground that as the parties had not undertaken to be bound by oath of the opposite party, it could not be conclusive proof U/s.11 of the Oaths Act.[1]

(2) *Doctrine applicable in modified form :* It has however even held that the doctrine is still applicable in India. It has been held that although in the changed circumstances of the present day it is not possible to follow the letter of the original Islamic law, the spirit of the law should be kept in view and the principle underlying it should be adhered to as far as possible.[2] It has been held that the provisions of the law on the point have not become absolutely obsolete and the doctrine is an extant doctrine. The court should dissolve the marriage on being satisfied according to the rules of evidence that a false imputation of adultery was made by the husband.[3] While the formalities prescribed for oaths are not applicable in Indian courts, the right to obtain dissolution on the ground of a charge of adultery is still available to a Muslim wife.[4]

(3) *False charge of adultery :* If a false charge of adultery is made, the wife would be entitled to the dissolution of the marriage. If the court is satisfied on the evidence that the charge is not true, a claim for divorce shall be allowed.[5] Where criminal complaints U/s.497 IPC, were already dismissed a false charge of adultery was made and the husband could not prove it, dissolution of the marriage was allowed.[6]

The onus of proving that the charge was false is always on the plaintiff (the wife) and the suit would be decreed only if she established the falsity of the allegation against her chastity and not otherwise.[7]

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1. *Khatyabibi vs. Umar Saheb*, 1929 Bom 285.
2. *Mst Fakhre Jahan vs. Mohd Hamidullah*, 1929 Oudh 16:4 Luck 168.
3. *Zaffar Hussain vs. Ummatur Rahman*, (1919) 41 All 278; *Banno Begum vs. Inayat Hussain*, 1948 All 34.
4. *Mohd Husain vs. Begum Jan*, 1927 Lah 155: 93 IC 1017.
5. *Ahmed Suleman vs. Bai Atima*, 1931 Bom 76: 55 Bom 160; *Rahiman Bibi vs. Fazil*, 1927 All 56: 48 All 834; *Banoo Begum vs. Inayat Hussain*, 1948 All 34; *Shamsunnessa vs. Abdul Manaf*, 1940 Cal 95; *Tufail Ahmad vs. Jamila Khatun*, 1962 All 570: 1962 All LJ 971.
6. *Mohd Hussain vs. Begum Jan*, 1927 Lah 155: 93 IC 107.
7. *Mst Ralli vs. Khair Din*, 1954 Pepsu 97.

But in a Pakistan case, it was held that the burden lies on the husband to prove the charge is true.[1]

(4) *True charge of adultery :* The court has to enquire into the matter of falsity of the charge. If a charge of adultery is proved to be true, the marriage cannot be dissolved. Thus, where the woman was found to have an illegitimate child in existence, it was held that there was no room left for the procedure of li'an. It is only for an innocent wife who proves that her husband has falsely charged her and not for the wife who is proved to be guilty. If the accusation is proved to be true, the wife cannot maintain a claim for divorce.[2]

(5) *Retraction of the charge :* According to Muslim Law li'an drops if the charge of adultery is admitted to be false and the wife will not be entitled to a dissolution of marriage although the husband would be liable for hadd (punishment for slander). The question of the applicability of the rule has been considered in some cases. The result of decisions is briefly as follows:

(a) *Whether the rule is applicable :* On this point there is some difference of opinions. It has been held in some cases that the rule is still applicable and if the charge is retraced, the claim would be rejected.[3]

On the other hand, it has been held that retraction has no place in the procedure of the Indian courts.[4] In one case, it was held that while under Muslim Law a retraction made by the husband in the written statement would be valid and cannot be rejected merely on the ground of delay or made only to defeat the suit, now after the passing of the Dissolution of Muslim Marriages Act of 1939, the plea of retraction is no longer available as the Act is complete and sufficient and nowhere prescribes that its effect can be nullified by retraction.[5] This view was however dissented from the later.[6]

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1. *Abdul Aziz vs. Bashiran*, 1958 PLD (Lah) 59.
2. *Khatyabibi vs. Umer Saheb*, 1928 Bom 285: 52 Bom 295: 110 IC 131.
3. *Rahiman Bibi vs. Fazil*, 1927 All 56: 48 All 834: *Fakhare Jahan vs. Hamidullah*, 1929 Oudh 16: 4 Luck 168; *Mst. Banno Begum vs. Inayat Husain*, 1984 All 34.
4. *Ahmad Suleman vs. Bai Fatima*, 1931 Bom 76: 55 Bom 160.
5. *Kalloo vs. Imaman*, 1949 All 445.
6. *Tufali Ahmad vs. Jamila Khatun*, 1962 All 570: 1962 All LJ 971: ILR (1962) 2 All 283.

(1) The doctrine of li'an is an extant doctrine (including the law as to retraction of the charge) and must be given effect to as far as possible in India.

(2) The procedure of li'an is not applicable because—

(a) it is a matter of procedural or adjective (and not substantive) law;

(b) the procedure is only a matter of proof (*i.e.*, one relating to evidence); and

(c) the procedure cannot be given effect to as the Oaths Act does not permit the administering of prescribed oaths.

(3) Whether the marriage can be dissolved on the ground of charge of adultery depends upon the proof of truth or falsity of the allegation—

(a) if it is proved to be false, the marriage will be dissolved;

(b) if it is proved to be true, the marriage will not be dissolved.

101. New grounds for dissolution of marriage not permissible

Muslim Law has prescribed certain specific grounds on which a marriage may be dissolved. It is clear that no new ground for dissolution of marriages can be given effect to in India except by express legislation. A number of grounds, some of which were extremely doubtful, were introduced by the provisions of the "Dissolution of Muslim Marriages Act". Several grounds which were accepted by the other schools, were also extended by the Act in their application to all the schools of Muslim Law. This was done obviously, because the somewhat liberal provisions of any particular school were found to be in conformity with the trends of modern progressive civilization. It would, however, not be permissible to add any new grounds of the dissolution of marriages, apart from those contained in Muslim Law or the Act.

As to charge of adultery constituting a ground for the dissolution of marriage, the Act does not make any express provision. It has made a residuary provision U/s.2(ix) of the Act by which any other right to the dissolutions of marriage provided under Muslim Law has been preserved. Evidently, the provisions of Muslim Law for dissolution on the grounds of li'an were in view.

If may be noted that most of the decisions noted above belong to the period before the passing of the Act and expressly purported to give effect to the Muslim Law of li'an. Even subsequently the same law has been enforced. It may also be noted that even in cases decided after the Act came into force, dissolution is not sought to be based on the provisions Sec.2(viii)(a) and the marriage is not dissolved on the ground of making the life of the wife miserable by cruelty of conduct in making a charge of adultery. All cases start on the presumption that in all cases where the charge of adultery is made by the husband against his wife, the marriage would be dissolved if the charge is proved to be false.

102. Muslim Criminal Law as to the charge of adultery

The Muslim law as to the charge of adultery, as already noted, is very strict and severe. Whenever a charge of adultery is made, the question in each case arises as to who should be awarded the specific punishment. If the charge is true, the women charged with adultery would be condemned to death, if, on the other hand, the charge is proved to be false, the person making the charge would receive punishment of scourging with eighty stripes.

The question may arise in respect of two situations :

(1) *Where the charge is made against a stranger :* (*i.e.*, a woman who is not a wife of the person making allegations). In such cases, the question is entirely one of proof. If the person who makes the charge cannot prove his charge by producing four witnesses, he would received hudd for it. There is no escape from punishment by at least one of the parties.

(2) *Where the husband charges his wife with adultery :* In this situation also, normally the law as to punishment may be applied. If the wife proves by evidence that the charge is

false, the husband would be punished. If one the other hand the husband proves the charge by the evidence of four witnesses to be true the wife would be punished. In such a case there would be no li'an and consequently, no dissolution of marriage.

In the case of a charge by the husband, special exception has however been made for the situation in which he has got no evidence except his own testimony. It is in this situation in which under the criminal law neither party receives the punishment, if the process of li'an is gone through. The punishments are relegated to the sphere of divine justice.

103. Situation in which alone li'an is permissible under Muslim law

Li'an is permissible in one and the only one situation, *viz.*, where there is no evidence other than of the husband.

This is amply supported by the other authorities.

Li'an would arise only in the case of

> "those who charge their wives with adultery and have no witnesses but themselves……."[1]

If the accuser has proof but declines to produce it in order to a li'an, li'an would not, according to accepted view of Mubsoot, be valid on the ground that the want of proof is made a condition in the sacred text.[2]

An imprecation (li'an) may be pronounced only where there has previously been an accusation of the crime of fornication and where this crime cannot be proved in the manner prescribed by law.[3]

Where a charge of adultery is made against a strange woman, then if the person making the charge proves the same by four witnesses, he discharges the burden but when he makes accusation and is unable to produce the required number of witnesses, he makes himself liable to hudd. Therefore, if the husband makes such accusation

1. Inayah cited in Bail II, 152.
2. Ibid.
3. Minhaj, 358.

against his wife and cannot produce the required number of witnesses, he brings an accusation by which he makes himself liable to hudd, if the woman accused had not been his wife, he must, therefore, in the case in question, make li'an.[1]

It is clear that according to all the authorities the question of li'an can arise only in the case of a charge of adultery which cannot be proved by evidence. In fact, Ameer Ali himself observes: "From the nature of the offence, however, the cases in which ocular or direct evidence is available are extremely rare. In order to obviate the evils which would necessarily result from a denial of all redress to the injured husband, in those instances in which he is morally convinced of the guilt of his wife, but has no direct testimony to establish it, or when the alone is cognizant of the fact, the law has prescribed the proceeding by li'an".[2]

104. Where the charge can be proved or disproved by evidence

It is to be noted that the case of li'an is strictly an off-shoot of the criminal law of punishment. The punishment on one side cannot be avoided if there is no evidence except in the case of a charge by the husband against his wife in which case alone punishment would be averted and marriage dissolved.

According to the provisions of Muslim Law, the situation in which the parties could produce evidence is quite different one. If the charge is proved to be true, the wife would receive the punishment. On the other hand, if the charge is proved to be false, the husband would receive punishment. No question of li'an would in that case at all arise. In such case, the question of marriage by li'an was never contemplated. There is no authority for the view that if the charge is proved to be false, the marriage would be dissolved. The only consequences would be the punishments.

This is clearly borne out by authorities. If the husband should produce four witnesses (including himself provided that he had not been previously guilty of slander) to the charge of adultery against his wife, he would not be liable to li'an but she would be subject to the hadd for adultery.[3]

1. YK III, 353.
2. Ameer Ali, II, 525.
3. Bail I, 345.

If the husband pleads generally that his wife is an adulteress and claims to adduce proof that she is as he has alleged, the matter will be postponed till the rising of the Judge; and if he should then produce his witnesses, good and well. If not, the li'an must be administered to him.[1]

In the case of li'an being gone through, four consequences would arise, *viz.*, both the liabilities are at an end; the child is cut off from the man but not from the woman; she ceases to be a wife and becomes perpetually prohibited to the man. If, however, he gives himself the lie (*i.e.*, he admits that the charge was false) or retracts it in the midst of li'an or refuse to take it, the liability to hudd is established against him but none of the other consequences are established.[2]

It is thus clear, that even, if the husband himself admits that the charge was flase and the necessity of evidence is thus dispensed with, the most important consequence (*viz.*, the dissolution of marriage) would not arise and only the punishment would be awarded. In all these cases the question of li'an would not arise at all and there would be no dissolution of marriage which can result only from li'an.

The position under Muslim Law is therefore as follows:

(a) if evidence is available and the charge of adultery or its falsity is established, either of the parties will get hudd (specific punishment) but the marriage will not be dissolved;

(b) if the evidence about the charge is only that of the husband, the proceedings of li'an must be gone through (and the charge having remained unproved on either side) the marriage would be dissolved but there will be no punishment which would be left to divine justice.

In dealing with the question there is one case which may be said to have become leading case on the subject.[3] It may be noted in this case not that one of the original authorities have been cited to support the broad pro-position that if a false charge of adultery has been made by the husband, the marriage would be dissolved. In such case only punishment will be given and there will be no li'an.[4] In

1. Bail I, 346.
2. Bail II, 157.
3. *Zafar Husain vs. Ummat-ul Rahman*, 41 All 278.
4. Bail I, 345.

fact, it would be difficult to conceive that if there was to be dissolution of marriage in case of proof of falsity of charge, a statement to that effect may not have been found in any of original authorities.

In the case cited, the leading authority is the statement of Ameer Ali to that effect.[1] No authority has been cited by Ameer Ali, only a reference to some Algerian cases has been made. It is this respected authority which seems to have been accepted.

The opinion of Wilson has also been cited, but Wilson himself is in doubt when he states: "The fact of husband having (whether truly of falsely) charged his wife with adultery will (probably) entitle her to claim judicial divorce without prejudice to any proceedings for defamation which she may be advised to institute and independently of the result of such proceedings." It may be noted that Wilson does not propound "the same view" as Ameer Ali as had been stated in the case cited. Ameer Ali's observation does not contemplate the case of separation in the case of a true charge. Muslim law does not seem to envisage any further proceedings if li'an is once gone through.

The opinion of these modern text-writers may be entitled to respect but they cannot be treated as valuable, much less conclusive, unless any authorities are cited in support. The original authorities seem obviously lay down otherwise.

The statement of law by Yusuf Khan in Tagore Law Lectures is also presumed in this case to support the same view. But it is clear from the passage cited that it does not go beyond stating the law relating to li'an and speaks only of separation "if both husband and wife had made their respective oaths."

After this leading case, almost all other cases cited it as an authority for that proposition and in some cases it had been presumed to be beyond question without the necessity of discussing it.[2]

105. Confusion of legal issues

It would be clear from what has been stated that in the case of charge of adultery by the husband against his wife, there may be two different situations:

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1. Ameer Ali, II, 575 (3rd Ed), p 530 (5th Ed).
2. *Tufali Ahmad vs. Jamila Khatun*, 1962 All 570; *Mohd. Ali vs. Hajrabai*, 1955 Bom 265.

(1) There may be evidence to prove or disprove the charge.

(2) There may be no evidence besides the testimony of the parties.

According to the provisions of Muslim Law, in the former case, it would be a matter of mere evidence and the punishment must be awarded to one of the two parties. There would, in that case, be no li'an and consequently no dissolution of marriage. In the later case, there would be no question of proving whether the charge was false or true. The punishment would be averted but the marriage would be dissolved. It is only in the later case that the situation for li'an would arise.

These two different situations have been confused in the decisions.

106. Problems in applying the law of li'an in India

The courts in India are naturally faced with some difficulty in adminstring the Muslim Law on the point. Some of those difficulties are as follows:

(1) In Muslim Law the adjective law relating to procedure and evidence and substantive law relating to the effect of dissolution of marriage are almost inextricably mixed up. The adjective law is not applicable in India and substantive law must be given effect to.

(2) The law expressly requires the application of the Muslim Law of marriages to all Muslims. This had already been provided in almost all the local Acts which were in force prior to 1937. Till then, the law on the point was subject to custom.

In 1937, the Indian Shariat Act made the express provision :

> "Notwithstanding any custom or usage to the contrary in all questions … regarding …. dissolution of marriage including … li'an, … the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

(3) The courts are thus under statutory duty of deciding cases relating to li'an according to the Muslim Law. But in enacting the Shariat Act, unfortunately the Legislature did not make

any provisions in respect of the matters which cannot be given effect to in India (e.g., the power of the courts to imprison either party for refusing to make li'an).

(4) The punishments which were at the root of the li'an cannot now be awarded in India.

The question then arises as to how far the Muslim Law can be administered in India. Being under a statutory duty to give effect to the Shariat Act, the court must give effect to such part of it as is possible and ignore that part which cannot be enforced. In determining as to how far the provisions of Muslim Law relating to li'an can be applied to India, two aspects have to be considered—

(1) In what cases li'an can be administered ?

(2) How far is the procedure prescribed under Muslim Law to be given effect to ?

107. Cases in which li'an be administered

In cases in which the evidence to prove or disprove the charge is produced by the parties, there would be no question of administering li'an are consequently of dissolution of marriage, only such punishments as are available would be enforced. The wife may sue the husband for damages or may criminally prosecute him for defamation. So also, the husband may resort to proceedings U/Ss.494 to 498, IPC. He may also refuse maintenance to his wife. (This is of course besides his right to pronounce talaq). This would not be a case of li'an at all and would be entirely in conformity with the Muslim Law. The only difference would be that the nature of punishments would be different.

There would be cases for li'an if neither party has any evidence to produce except their own testimonies. The wife may ask for proceedings of li'an. In such cases there may be two alternative situations :

(1) the husband may agree to go through li'an; or

(2) the husband may not agree to do so.

In the first case, there would be no difficulty in administering li'an and dissolving the marriage. Such a situation may normally not arise but it is easily possible to conceive that the parties may agree to do so in order to be able to avert the punishments which may be given now. The wife would lose her right of claiming her damages or of prosecuting the husband. The wife may also then escape the consequences of the proof of charges of adultery which may affect children also.

A difficulty would naturally arise if the husband does not agree to it. There is no legal machinery for compelling the husband to do so. In that case, the proceedings of li'an cannot be gone through. The necessary result would be that the marriage would not be dissolved and the wife will be left only to seeking reliefs available by way of punishments.

The result is that Muslim law of li'an can be enforced in India only in those cases in which the parties agree to go through li'an and in that case alone the marriage can be dissolved.

108. Procedure for li'an whether procedural law

The procedure prescribed by Muslim law for li'an has been considered to be inapplicable for several reasons.

The procedure is said to be a merely procedural law in respect of which Muslim Law has been superseded. It is difficult to think that the procedure prescribed is a purely adjective law. The provisions relating to the forum of dispute and other incidental matters would of course be a matter of mere procedure. The place of the Kazi may now be deemed to have been taken by the courts. The main provision about the marriage being dissolved by the parties going through a particular procedure cannot however be possibly considered to be nothing more than adjective law. When a question arises in court, adjective law would apply to the manner in which the parties are to proceed for obtaining a decision of the question by the court. But it cannot possibly be applicable to the matter of deciding the question itself. This would be particularly so where it involves the application of so vital provision of substantive law having its effect on the status of the parties in the matter of marriage and even affecting legitimacy of children. The administering of procedure prescribed for li'an to be gone through cannot be rejected merely because it is merely a procedural law which has been suspended by the Indian Law.

109. Whether li'an procedure a matter of evidence

It has been held that the procedure of taking oaths was a matter of proof only and has been superseded by the Evidence Act. The whole function of the law of evidence is to ascertain if the fact under investigation has been "proved" or not. The view taken is evidently based on the presumption that the procedure was prescribed to prove or disprove the fact alleged, namely, adultery of the wife.

It is submitted that the procedure provided for li'an is not intended to ascertain if the allegation is true or false. To hold that the procedure for li'an is a matter of proof of truth or falsity of the allegation would be to ignore the basic conception of the law of li'an. The law of the li'an is provided exactly for the situation where the court does not find as to whether the fact alleged by one party or the other is true. The court does not decide on the evidence if the allegation of one side or other is true. In fact, the whole procedure is calculated to leave the truth or otherwise of the allegation entirely undecided. The actual decision of the question and the consequential punishment to the party ultimately adjudged to be guilty was left to the divine court of justice. Even if the charge could be proved to be wholly true, if evidence could be available, the marriage must be dissolved, if oaths are taken by the parties.

It would be difficult to think that the procedure is only a matter of evidence. The court gives effect to some rights affecting the status of marriage, irrespective of the question as to which party's allegation is true. Such a situation would be strictly a matter of substantive law and cannot be said to have been superseded by the Evidence Act.

110. Whether procedure of li'an is affected by the Oaths Act

The question is whether the administering of the law of li'an is in any way affected by the provisions of the Oaths Act.

Tyabji is of opinion that Sec's.8 to 12 of the Oaths Act partially provide machinery for the enforcement of the law. The procedure suggested by him is as follows:

> "When a wife sues for dissolution of marriage, she may be taken to make an offer U/s.9 of the Act and the husband must agree to make li'an in terms bringing the matter under Secs.8 & 9 of the Act. If the husband neither adduces justifying

proof his accusation nor agrees to make the oath nor retracts the accusation, it all becomes "part of the proceedings" U/s.12."

The court would then be authorized to dissolve the marriage on the grounds of justice, equity and good conscience (Tyabji, Sec.194).

It is submitted with respect that the provisions of the Oaths Act cannot possibly be utilized for the purpose of li'an. Even if the offer of the wife can possibly be U/s.9 of the Act, there is no room for the suggestion that the other side must undertake to go through li'an. In fact, the Act makes no provision whatsoever for a case in which two counter-oaths have to be taken by the parties. In such situation, the applicability of the Oaths Act would not arise at all.

The administration of Oaths in li'an is not under the Oaths Act but under the express provisions of the Shariat Act (and prior to that under the various Local Acts) requiring the administration of the Muslim Law of li'an. These enactments expressly provide for such situation. There is nothing in the Oaths Act which may be repugnant to the administering of oaths prescribed for li'an. The Oaths Act is a general law relating to the administration of oaths for giving "evidence", while, in the matter of li'an, the parties are subject to the provisions of the special Shariat Act. Its provisions as to the taking of prescribed oaths (which, strictly speaking, are not merely for "evidence") with dissolution of marriage as a consequential effect must be given effect to. These provisions of the special Act cannot be affected by the general Oaths Act. There is nothing in the procedure prescribed which may be against any principles of public policy or otherwise improper to be gone through.

111. Conclusion

From what has been submitted above the extent to which the Muslim Law of li'an can be administered in India consistently with the provision of Indian Law would be as follows:

(1) If the parties produce evidence and prove or disprove the charge of adultery, the punishments available to the parties in the Indian Law may be enforced. In such case there would be no li'an and the marriage cannot be dissolved under the Muslim Law and it would not be permissible to add a new ground for dissolution of marriage, namely, proof by evidence that the charge was false.

(2) If the evidence available is only that of the parties and they are qualified to go through li'an then:

(a) If the parties agree to go through li'an, it would be administered exactly in the manner prescribed by Muslim Law. In such case the truth or falsity of the allegation would not be inquired into and the marriage would be dissolved.

(b) If the parties do not agree, the truth or falsity of the allegation would be determined according to the evidence produced by the parties. In that case only punishments can be claimed against each other but the marriage would not be dissolved.

It is submitted that some legislative change is necessary. Sec.2(ix) of the Dissolution of Marriages Act was evidently based on the assumption that a sufficient provision has been made for dissolution of marriage in the Muslim Law of li'an. The Act itself nowhere lays down that a false charge of adultery against the wife is a good ground for divorce. This ground may fall within the omnibus ground provided for in Cl.(ix) of Sec.2 of the Act.[1]

The difficulty would be removed if a false charge of adultery is expressly included in the meaning of the term "cruelty" U/s.2(viii) of the Act. The question may also arise for decision as to whether such a charge may be brought within the term "cruelty" on the ground of such charge making the life of the wife miserable within the meaning of Sec.2(viii) of the Act. It would be better if an express provision is made in the Act giving the wife the right to secure a dissolution of marriage if a false charge of adultery is preferred against her.

112. Separation resulting from divorce and cancellation of marriage

Apart from the dissolution of marriage by the death of either party, a marriage may be dissolved in two other ways,—

(1) by divorce in the form of talaq or in any other form having same effect; and

(2) by a cancellation of marriage in certain circumstances.

1. *Tufail Ahmad vs. Jamila Khatun*, 1962 All 570: 1962 All LJ 971.

There are thirteen different kinds of separations. Seven of them require a judicial decree. They are separations on the ground of jubb, impotence, option of puberty, inequality, insufficient dower, the refusal of husband to adopt Islam and li'an. There are six other kinds of separation which do not require any judicial decree. Three of them are ila, apostasy and irregular marriage.[1] The other three grounds would not apply to India.

Some of these grounds for dissolution of marriage involve the same effects as of a talaq while others only lead to the cancellation of the marriage.

113. Dissolution having the effect of talaq

The general rule is this every separation originating in the husband has the same effect as talaq while those not originating in him would be a cancellation of the marriage contract.[2] Thus dissolution by ila, zihar, li'an, khula and mubaraat or on the ground of impotency will have the same effect as of irrevocable talaq.

Shia Law :

There is difference of opinions with respect to the effect of khula being a talaq or cancellation. Dissolution by li'an or on the ground of impotency is cancellation and not divorce.

114. Grounds for cancellation of marriage

The various grounds for cancellation of marriage with or without intervention of the court are the following :

(1) Apostasy.

(2) Inadequacy of dower.

(3) Inequality in marriage.

(4) Any of the parties suffering from certain diseases.

(5) Conversion of one of the parties to Islam. If one of the parties is converted to Islam, the other party is to be called

1. Bail I, 203.
2. Bail I, 203.

upon to embrace Islam. According to Abu Hanifa and Muhammad, a separation of the refusal of the party to embrace Islam would be a talaq but according to Abu Hanifa, separation would not be a talaq and would only be a cancellation.[1]

(6) *Supervenient illegality :* If the marriage is dissolved by reason of some supervenient illegality, for instance, by one of the parties kissing any ascendant or descendant of the other with desire or by fosterage (such as the suckling of a co-wife) it would be a cancellation not talaq.[2]

(1) Defects or blemishes in the parties.

(2) Exercise of the option of puberty by either party.

(9) *Fraudulent contract of marriage :* If either party has entered into a contract of marriage on fraudulent misrepresentation, such party is entitled to ask the judge for cancellation of the marriage. Thus, if a marriage is made on the condition of the husband being legitimate and equal and later on it is found that the husband wrongly represented the facts, the wife may ask for cancellation of the marriage.[3]

Where a woman was suffering from illness which prevented consummation and the fact of illness was concealed from the husband, she ultimately died, the marriage was held to be invalid.[4] It was however held in another case that concealment of pregnancy will not by itself be a ground for cancellation of the marriage unless there is an express stipulation as to virginity.[5]

Where the money was spent in negotiations for a marriage, and it was discovered that the woman suffered from epilepsy which fact had not been disclosed, it was held that the contract could be rescinded on the ground of fraud although damages would not be recoverable U/s.75 of the Contract Act.[6]

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1. Hed 64.
2. Durr 41, 276.
3. Ameer Ali II, 383.
4. *Abdul Latif vs. Niaz Ahmad*, 1 IC 538: 31 All 343.
5. *Kulsumbi vs. Abdul Kadir*, 1921 Bom 205: 45 Bom 151.
6. *Haji Ahmad Yar vs. Abdul Gani*, 1937 Nag 270: ILR 1937 Nag 299 (defect of epilepsy in the girl not disclosed).

Shia law :

A marriage contracted by fraud may be cancelled. Thus, if a muta is made on the positive condition that the woman is a Muslim but is found to be a kitabia, the husband has the power of canceling the marriage.

A marriage cannot however be cancelled if it is made on the stipulation of the woman being a virgin but not being found so. But in this case the husband is entitled to make a deduction from the dower equivalent to the difference between the dower of a virgin and one who is not so.[1] In such case where the marriage is contracted by the guardian, the husband is not entitled to refund of the dower.[2]

115. Effects of dissolution by death

In the case of dissolution by death, the effect would be as follows:

(1) *Inheritance :* Parties will have mutual rights of inheritance.

(2) *Iddat :* The wife will have to observe iddat as required by law.

(3) *Dower :* The wife would be entitled to the dower payable to her according to law.

(4) *Maintenance :* The wife is entitled to maintenance in the case of the dissolution of marriage by talaq but in the case of a widow there is no right to maintenance during iddat.

116. Effects of talaq

As soon as a talaq becomes irrevocable, it will have the following effects:

(1) *Iddat :* The wife is bound to observe iddat according to the provisions of the Muslim Law.

(2) *Mutual re-marriage :* The parties may re-marry at any time provided that if three talaqs have come into effect, the parties would be entitled to re-marry on satisfying the conditions

1. Bail II, 65.
2. Sircar II, 348.

legalizing such marriage. In the case of a triple talaq the parties can re-marry only after the woman has married some other person and the marriage has been actually consummated and legally dissolved. This procedure is called Halala.

(3) *Marriage with other person :* The wife may marry any other person after complying with the halala procedure or she may marry her former husband also—

(a) in the case of an unconsummated marriage – at any time;

(b) in the case of consummated marriage – after the expiry of iddat.

(4) *Dower :* The wife would be entitled to recover her dower which is payable to her, whether it is prompt or deferred. Deferred dower is payable on the termination of the marriage by death or divorce.

Time for recovery of dower shall being to run. The mere fact that the parties live together for some time and a talaq is again given would not give a fresh cause of action.[1]

(5) *Inheritance :* The parties are entitled to inherit to one another so long as the talaq remains revocable,[2] but all mutual rights of inheritance cease in the case of an irrevocable talaq even during iddat,[3] except in the case of talaq during death-illness, or where the wife asks for a revocable talaq but the husband pronounces an irrevocable talaq.[4]

Shia law :

The wife would lose her right of inheritance even during the iddat of revocable talaq, if it has been pronounced on her own solicitaton.[5]

(6) *Cohabitation :* Cohabitation between the parties becomes unlawful and any children conceived after it become illegitimate. Such children will not become legitimate,[6] even

1. *Mst. Hayat Khatun vs. Abdullah Khan*, 1937 Lah, 270.
2. *Bhaghari vs. Khatumal*, 1921 Sind 177: 80 IC 118.
3. *Sarabai vs. Rabiabai*, (1905) 30 Bom 537 at pp 556-567.
4. Durr 207.
5. Sircar II, 404.
6. Bail I, 3.

if the parties live together as husband and wife and even if the husband makes an acknowledgement of the children.[1]

Shafei Law :

Cohabitation is not lawful during the iddat even if it is a revocable talaq.

(7) *Maintenance :* The wife is entitled to maintenance during iddat.

(8) *Custody of children :* Under the Muslim Law, the mother is entitled to the custody of a boy below 7 years of age and of girl below the age of puberty. The right is not lost by talaq.[2]

The right would however be lost, if she marries a person not related to the child within the prohibited degrees by consanguinity but would again revive on the dissolution of such marriage.[3] The burden lies on the father to establish circumstances which would disentitle the mother of her legal right.[4]

(9) *Right of residence :* The wife is entitled to right of residence.

(10) *Nursing charges.*

117. Effects of khula

The dissolution of a marriage by an agreement of khula has the following effects :

(1) *talaq irrevocable :* Where a marriage is dissolved by an agreement of khula it takes effect as an irrevocable talaq. It is classed with implied expressions of talaq and where talaq is implied it is irrevocable.

This is also because it is not to be imagined the woman would relinquish any part of her property but with a view to her own safety and ease which cannot be obtained except by a total separation.[5]

1. *Rashid Ahmad vs. Anisa Khatoon*, 1932 PC 25: 54 All 46.
2. *Zarabibi vs. Abdul Razzak*, 8 IC 618: 12 Bom LR 891; *Allah Rakhi vs. Karam Illahi*, 1933 Lah 969: 14 Lah 770; *Emperor vs. Ayshabai*, 6 Bom LR 536; *Abdul Jabbar vs. Khatija Begum*, 1964 MPLJ (Notes) 119.
3. Bail I, 436; Hed 138; Durr 309; *Ansar Ahmad vs. Samidan*, 106 IC 822.
4. *Abdul Jabbar vs. Khatija Begum*, 1964 MPLJ (Notes) 119.
5. Hed 112.

Shia Law :

Talaq resulting from khula continues to be irrevocable so long as she does not reclaim the consideration and during iddat, but if she claims the husband may revoke the talaq.[1]

Shafei Law :

According to better opinion, a talaq for compensation is never revocable unless the parties have reserved this right but such reservation ipso facto annuls the stipulation as to the compenstaion.[2]

(2) *Number of talaqs :* Dissolution of marriage by khula has the same effect as a single irrevocable talaq and will be treated as one of the talaqs for prohibiting a marriage in the case of three talaqs. But where a khula is so intended, it would effect as triple talaq.

If a triple talaq was intended by the pronouncement of khula, or if khula is given in two other marriages with same person, the parties will not be entitled to re-marry without satisfying the conditions which would validate re-marriage in the case of a triple talaq.[3] The Ismaili Shia law is also the same.[4]

Shia Isna-Ashari Law :

There is a difference of opinion among the authorities. According to Ali Moortza whose opinion is supported by tradition, it amounts to a talaq. The Sheikh, however, prefers to consider it as a cancellation of and in this view of it, no account can be taken of it in the number of talaqs.[5]

Shafei Law :

It will not be treated as talaq for prohibiting a marriage after three talaqs.[6]

(3) *Maintenance of the wife :* In the absence of a contract to the contrary, the right to maintenance during iddat would not

1. Bail II, 137.
2. Minhaj 323.
3. Bail I, 305; Hed 112.
4. Tyabji, ML Sec 165.
5. Bail II, 129.
6. Tyabji, ML Sec 165.

be lost by khula.[1] Even, if the khula is taken by the wife in consideration of "all rights which she has upon him," she would still be entitled to maintenance because maintenance during iddat is not her right at the time of the khula, but is the right which arises after the khula.[2]

(4) *Right of residence during iddat :* The right cannot be put to an end even by express agreement. But is she gets khula on the condition that the charge of residence shall be on her, she is bound to hire a house either from the husband or someone else and observe iddat there.[3]

(5) *Maintenance of child:* A father is bound to maintain his children under all circumstances.

(6) *Payment of dower in case of khula*

(i) expressly in exchange for a part or whole of the dower; or

(ii) without any express agreement about dower.

(a) *Khula for whole dower :* If khula is entered into in exchange of the whole dower, then if the marriage was consummated, the husband may recover the whole dower if it has been paid and the wife will not be entitled to recover it if it has not been paid. This would also be so on favouralbe construction (isteshsan) even if the marriage was unconsummated. But the effect would in this case would be different according to analogy (qiyas).[4]

(b) *Khula for part of dower :* Where khula has been entered into in lieu of a part of the dower, there is a difference of opinions. According to Abu Hanifa, if the wife has obtained possession of the dower the husband would be entitled to that part of dower in the case of consummated marriage and that part of one-half of the dower in the case of an unconsummated marriage. But if the wife has not obtained possession of dower, then wife will not be entitled to recover any dower at all, whether the marriage was consummated or not.

1. Bail I, 307.
2. MY Khan III, 301.
3. MY Khan III, 285, 310, 311.
4. see MY Khan III, 286.

The disciples agree with him in the case of a consummated marriage in which the dower has been obtained by the wife. But if the dower has not been obtained, the wife would, according to them, be entitled to recover the remaining part of the dower. In the case of an unconsummated marriage, if the dower is one thousand, and the khula is in exchange of one-tenth of the dower, the husband will be entitled to recover five hundered and fifty if the dower has already been paid and the wife four hundred and fifty if it has not been paid.[1]

(c) *No dower mentioned :* Whenever, however, no mention of dower is made in the agreement, there is a difference of opinion as to the effect of khula on dower.

According to Abu Hanifa, all the rights depending on marriage terminate both in khula and mubaraat and marriage is terminated together with all its rights and effects. The result, according to him, would be that, if the dower has already been paid, it will not be refundable to the husband or if it has not been paid it would not be revocable by the wife. This would be so whether the marriage has been consummated or not and even if the whole dower has been paid in an unconsummated marriage where only one-half of the dower is payable. Neither party has any rights or recovery of any dower from each other.

According to Muhammad and Abu Yusuf nothing is done away with in the case of khula except what is particularly mentioned. Khula only requires that the woman be freed from the restraint of the husband and as that is obtained by the dissolution of the marriage, it does not require that all its effects be terminated.

The result is that according to Abu Yusuf and Muhammad the rights of dower would stand intact. Thus, if the marriage has been consummated, the wife is entitled to the entire dower. If it has not been paid the wife is entitled to recover it, and it is has been paid the husband would not be entitled to get it back. So also, if the marriage was unconsummated the wife would be entitled to one-half of her dower.

If it has not been paid she can recover it from the husband and so also, if the whole dower has been paid the husband is entitled to recover one-half from her.[2]

1. Bail I, 308; MY Khan III, 285-287.
2. Bail I, 307; Hed 116; MY Khan III, 285.

The opinion of Abu Hanifa has been preferred in Fatawa-i-Alamgiri and Durrul-Mukhtar.[1]

(7) *Other debts :* Where a khula is made by means of the use of two words, khula or purchase, it does not occasion a release of any debts other than dower, according to Abu Hanifa whose opinion is accepted. Only the rights depending on marriage are terminated.[2]

118. Effects of mubaraat

The effects of both khula and mubaraat are the same except that in the case of dower there is a difference of opinions. If no mention of dower is made according to Abu Hanifa and Abu Yusuf, the right to dower is extinguished with the result that if it has not been paid, the wife is not entitled to recover it. Muhammad holds that the right is not extinguished. In the case of khula on this point, Abu Yusuf and Muhammad are of the same opinion and differ from Abu Hanifa but in the case of mubaraat Muhammad disagrees with both Abu Yusuf and Abu Hanifa. Fatawa-i-Alamgiri accepts the view of Abu Hanifa.[3]

The rights of the maintenance of the wife as also that of the child are the same as in the case of khula.[4]

119. Effects of ila

When it becomes effective at the end of 4 months, it has the following effects:

(1) One or more pronouncements of ila made at one meeting will take effect as a single irrevocable talaq, according to Muhammad and Abu Yusuf.[5]

(2) Where more pronouncements of ila than one are made at different meetings before the expiry of four months the date of first ila, then each of them would take effect as if it was a separate pronouncement of an irrevocable talaq.[6]

1. Bail I, 307.
2. Bail I, 307.
3. Bail I, 307; Hed 116; MY Khan III, 287.
4. MY Khan III, 289.
5. Bail I, 301-302.
6. Bail I, 301.

(3) If talaq is pronounced after ila before the expiry of the iddat, it would be treated as an addition to the talaq resulting from ila at the end of 4 months.[1]

(4) The wife would be entitled to maintenance and residence during the period of iddat as the separation is not induced by any fault of the wife.[2]

Shafei Law :

After the expiry of the period of 4 moths the judge may effect the separation at the instance of the wife. This would operate as a single irrevocable talaq.[3]

119.1. Effects of li'an on the wife

Before a decree is passed by the judge dissolving the marriage on the ground of li'an, cohabitation becomes unlawful to the parties and so also all excitement to it.[4] Cohabitation would remain prohibited so long as the li'an does not drop.

Except for the prohibition of cohabitation, the woman continues to be the wife for all purposes till the judge pronounces a separation between them. The marriage remains still in existence so that the husband may pronounce talaq or ila or zihar against her. There are mutual rights of inheritance if either of them should happen to die.[5]

After the parties are separated by the judge the parties become perpetually prohibited to each other.[6] Ameer Ali, however, states that under the Hanafi law the husband can re-marry a woman separated by li'an.[7]

According to Abu Yusuf a re-marriage between the parties is prohibited perpetually even if the li'an drops; but according to Abu Hanifa and Muhammad, the parties may re-marry if the li'an drops

1. Bail I, 300.
2. Bail I, 444, 455.
3. Hed 100.
4. Bail I, 337; Durr 367.
5. Bail I, 338; Hed 124; MY Khan III, 355.
6. Hed 124-125; MY Khan III, 359.
7. Ameer Ali II, 196, no authority cited.

even after the separation is made by the judge. Thus, re-marriage would be valid in the following cases.[1]

(1) If original proceeding of li'an is itself found to have been bad owing to some impediment, for example, by reason of one of the parties being dumb or insane or apostate or if the formula of li'an was not correctly observed.

(2) If the woman commits adultery.

(3) If the husband retracts the allegation and acknowledges that is was false or the wife admits her guilt. This is so according to Abu Hanifa and Muhammad who treat the subsequent retraction as sufficient for dropping the li'an but according to Abu Yusuf, there is perpetual prohibition.

In respect of re-marriage, li'an differs from talaq as in the case of a talaq perpetual prohibition does not arise from three talaqs but in the case of li'an, the prohibition becomes perpetual unless the li'an drops.

Except in respect of restriction on re-marriage, the separation made by the judge operate as an irrevocable talaq and has the same consequences. There would be no rights of inheritance but the wife would be entitled to maintenance and also to residence during the period of iddat as in the case of talaq.[2]

Shia Law :

Separation arising from li'an is a cancellation of the marriage and not a talaq.[3] The parties are, however, perpetually prohibited to each other.[4]

119.2. Effect of li'an on the child

Paternity of a child can be denied only in li'an. The paternity of the child will not be destroyed if li'an drops on any ground or if it is not gone through. So also, if it drops after the li'an has been gone through, the paternity of the child would be restored.[5]

1. Bail I, 343, 344; MY Khan III, 359, Hed 125; Bail II, 157-159.
2. MY Khan III, 355; Durr 367; Bail I, 455.
3. Bail II, 159.
4. Sircar II, 343-344.
5. Bail I, 342, 392, 416, 154; Bail II, 154, 157.

But if the li'an has been gone through and does not drop, the descent of child (walad-ul-mulai'naa) is cut off from the father and would be established from the mother.[1] The child will have no rights of maintenance from the father, just as in the case of a bastard or illegitimate child (walad-uz-zina). The mutual rights of inheritance would be only between the mother and the maternal relations. The residuaries of a child of li'an like those of an illegitimate child, would be only the relatives of his mother, and there would be mutual rights of inheritance between the kindred of the mother and the child.[2]

In one respect, however, the rights of a child of li'an would be different. In the case of an illegitimate person a twin brother would be treated as a uterine brother and will have a right of inheritance as such.[3] In the case of a child of li'an such brother would be treated as a full brother.[4]

But if the child is denied and then dies the descent of the child cannot be extinguished from the husband because the child by its death has ceased to exist, and the father is relieved from such duties as liabilities to maintenance, *etc*.[5]

The descent of the child is, however, not lost except for purposes of inheritance and maintenance. Thus, a person other than the imprecator cannot claim the child even if the later corroborates the claimant unless the claimant is such that he could be the father of the child or the claim is made after the death of the imprecator.[6]

Shia Law :

According to Shia law unlike the Hanafi law, even the relations with the mother are cut off and there are no mutual rights of inheritance in the case of an illegitimate child. But in the case of a child of li'an, these are mutual rights of inheritance through the mother. If the li'an drops for any reason, the paternity of child is restored with his right of inheritance but neither the father nor anyone related through him would be entitled to inherit from the child.[7]

1. Durr 268.
2. Bail I, 703; Bail II, 157; Monhaj 362; *Bafatun vs. Bilati*, 30 Cal 683.
3. Bail I, 703; Durr 439.
4. Durr 269.
5. MY Khan III, 358.
6. Durr 271-272.
7. Bail II, 152.

120. Effects of zihar

(1) *Prohibition of intercourse :* The only effect of zihar is to prohibit not only matrimonial intercourse but also solicitation of or any conjugal familiarity (*e.g.*, kissing, touching with desire, *etc*).[1] The prohibition continues till expiation is made.

The duty of expiation is so strict that intercourse would continue to be prohibited till expiation if the marriage is dissolved by talaq and the woman is re-married. This would be so even in the case of a triple and re-marriage after an intermediate marriage or in the case of the apostasy of the husband even if the husband returns to faith.[2]

If the husband has the intercourse without expiation the only penalty is expiation.[3]

(2) *Maintenance :* The wife is entitled to maintenance as the husband is responsible for the failure to obtain conjugal intercourse.[4]

(3) *Expiation :* The husband is bound to make expiation if he pronounces zihar. If the pronouncements are repeated, then an expiation will be obligatory for each pronouncement unless the intention is only to re-affirm and repeat the first.

So also, if a man makes zihar with more wives than one, expiation would be obligatory on him in respect of each wife.[5]

(4) *Separation :* Under the Muslim law zihar did not operate as a talaq. In case the husband failed to make expiation, the judge could imprison him until he expiated or pronounced talaq against her.[6]

The court has no power to enforce expiation in the manner provided by Muslim law. It may, however, be noted that under the Indian Shariat Act of 1939 it has been pointed that –

> "in all questions … regarding … dissolution of marriage including … zihar … the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

1. Bail I, 324, 325.
2. Bail I, 324-325; MY Khan III, 333-334.
3. Bail I, 324-325; Hed 117.
4. Bail I, 444.
5. MY Khan III, 332; Bail II, 141.
6. Bail I, 325; MY Khan III, 334.

Zihar has thus, according to the provisions of the Act, been expressly included within the meaning of "dissolution of marriage". Zihar may perhaps also be said to be a failure to perform "martial obligations" U/s.2(iv) of the Dissolution of Muslim Marriages Act of 1939, by making cohabitation prohibited by his conduct. The power of dissolving marriage by granting a divorce may now be exercised in case husband refuses to expiate.

Such divorce would be treated as a single irrevocable talaq as should have been the case if the husband and exercised the choice of granting talaq on not performing expiation.

Shia Law :

In Shia law also nothing is established except the prohibition of connubial intercourse till expiation is made. It, however, differs from Hanafi law on the following points :

(1) If the husband has sexual intercourse before expiation, two expiations would be necessary and further expiations would be required by each repetition of the act.[1]

(2) There is a difference of opinions whether expiation would be due for nothing short of connubial intercourse (*e.g.*, kissing or touching).[2]

(3) No expiation would be due if the husband first gives her talaq and then marries her after the expiry of iddat, or, in the case of an irrevocable talaq even during iddat, or if either of the parties apostatises.[3]

121. Effects of dissolution for supervenient cause

If marriage is dissolved by reason of a supervenient illegality arising from the side of the wife, she will have no right of maintenance but if it is caused by the husband she would be entitled to it. Thus, if the husband has connection with some prohibited relation (for example, the mother of wife), she would be entitled to maintenance but if she herself has connection with some prohibited relation she would

1. Bail II, 140.
2. Bail II, 141.
3. Bail II, 140.

not be entitled to maintenance unless the connection was made against her will.[1]

So also if the wife apostatizes she would not be entitled to maintenance during her apostasy even if she returns to faith during iddat. But if the woman apostatizes during the iddat of an irrevocable or triple talaq, she would continue to be entitled to it if she is not imprisoned and is allowed to remain in the husband's house.[2]

Shia Law :

In the case of apostasy, the wife becomes entitled to maintenance on her return to faith.[3]

122. Effects of dissolution on the ground of impotency

The effect of the dissolution of a marriage on the ground of impotency will be as follows:[4]

(1) It would take effect as one irrevocable talaq (whether the talaq is pronounced by the husband under the order of the judge or the separation is pronounced by the judge himself). Ameer Ali, however, describes it as a "cancellation" of the marraige.[5]

(2) If the husband had not retired with the wife, no iddat would be required and only half of the dower, if it was specified or a present would be payable.

(3) If the husband had retired with the wife, iddat would be necessary and full dower would be payable.

Shia Law :

Dissolution on this ground would be cancellation.[6]

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1. Bail I, 454.
2. Bail I, 455, 456.
3. Bail II, 101.
4. Bail I, 349; Durr 41; Hed 127.
5. Ameer Ali II, 380, submitted, not correctly.
6. Bail II, 62-63.

123. Effects of dissolution by cancellation

There is a considerable difference between the effects of dissolution of marriage by talaq and that by cancellation. There difference are as follows:

(1) *Number of talaqs :* If a marriage is dissolved by talaq or by divorce in any other form having the same effect as talaq, each such talaq would be treated as one of the three talaqs which would make a re-marriage of the same parties illegal without satisfying some other conditions.

The cancellation of marriage would not be treated as one talaq for this purpose. It would not reduce the number of talaqs which would make a re-marriage illegal.

(2) *Dower :* In all cases in which a marriage has been consummated, the whole dower specified or proper, as the case may be, would become due whether the marriage was valid or irregular or if the wife apostatized. This would be so whether the marriage was dissolved by divorce or by cancellation. Thus, the wife would be entitled to the dower even in the case of the cancellation of marriage by her own apostasy. The fact that the wife changed her religion out of ulterior or even oblique motives does not disentitle her to recover the dower amount.[1]

The position would, however, be different if the marriage was unconsummated. In such case, if a valid marriage was dissolved by divorce, the wife would be entitled (except in the case of the apostasy of the wife herself) to one-half of the dower but if it is dissolved by cancellation, no part of dower shall be payable.[2]

Shia Law :

The wife has no right to dower if the marriage is cancelled before consummation except in the case of cancellation for impotency of the husband in which case she would be entitled to one-half of her dower.[3] It may be noted that a dissolution for impotency would amount to

1. *Sarawar Yar vs. Jawahar Devi*, (1964) 1 Andh WR 60: (1964) 2 Andh LT 124.
2. Bail I, 182, 203; Durr 99-100.
3. Bail II, 62-63.

talaq under the Sunni law, while under the Shia law and the Shafei law,[1] it would be cancellation.

(3) *Inheritance :* In the case of an irrevocable talaq, the right of inheritance is extinguished. In the case of a cancellation of the marriage, the rights continue in those cases in which a decree is necessary, till the decree is passed by the judge. The marriage continues for all purposes and talaq, ila and zihar may be pronounced.[2]

h. How Muslim Marriage is dissolved with an intervention of the Court

A Muslim marriage can be dissolved under Section 2 of The Muslim Marriage Dissolution Act of 1939.

A wife seeking divorce from her husband can approach a competent court of law under the above said act, and she must invoke the jurisdiction of the court by filing a petition under of this said Act.

A. In her petition she will have to make averments regarding ill treatment meted out to her by her husband or that her husband is not paying any maintenance to her from the past two years preceding the date of filing of the petition or that he is suffering from a vulnerable and contagious disease which makes her impossible to live together etc.

B. The grounds for seeking dissolution of marriage through a court of law is specifically mentioned under the provisions of section 2 of the said Act.

C. This Act is based on Quranic injunction according to which the almighty ordained that if a wife is not willing to continue her relationship with her husband she can offer something

1. Hed 127.
2. Sircar I, 326.

money and demand her husband to divorce her and on such demand the husband will have to divorce her (Ayath No.229, Surah Al Baqrah).

By virtue of the above referred injunction of Quran a wife is entitled to get her marriage dissolved under the Dissolution of Muslim Marriage Act, the provisions of which are incorporated below:

THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939

[Act No.8 of 1939]

[17th March, 1939]

An Act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie.

WHEREAS it is expedient to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie;

It is hereby enacted as follows:

1. Short title and extent.—(1) This Act may be called the Dissolution of Muslim Marriages Act, 1939.

(2) It extends to the whole of India [1][except the State of Jammu and Kashmir].

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

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1. Subs. by Act 48 of 1959, for certain words, *w.e.f.* 1-2-1960.

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

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

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

(v) that the husband was impotent at the time of the marriage and continues to be so;

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

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

Provided that the marriage has not been consummated:

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

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

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

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

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

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

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

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

Provided that—

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

(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

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

3. Notice to be served on heirs of the husband when the husbands whereabouts are not known.— In a suit to which clause (i) of Section 2, applies—

(a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint,

(b) notice of the suit shall be served on such persons, and

(c) such persons shall have the right to be heard in the suit:

Provided that paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

4. Effect of conversion to another faith.—The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage:

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in Section 2;

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

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

6. [Repeal of section 5 of Act 26 of 1937].—Rep. by the Repealing and Amending Act, 1942 (25 of 1942), s.2 and Sch.I.

i. Effect of Divorce under Dissolution of Muslim Marriages Act

Once the divorce is pronounced the marital relationships between the husband and wife will come to an end permanently unless the divorce is recalled adopting the procedure of halala as envisaged in the holy Quran and in accordance with the Hadith.

A divorcee wife is not entitled for any share in the matruka property of her husband. But she is of course entitled for residence and maintenance, reasonable and fair provision till the completion of iddat period. However, the injunctions of Quran on this aspect are quoted below :

But it is awful to note the attitude of the most of the muslim husbands who will not accept the proposal of their wives seeking dissolution of the marriage, owing to harassment of their husbands. When a wife approaches a court of law the husband would leave no stone unturned causing mental torture and harassment to their wives instead of conceding their demands.

One who has faith in Almighty and in yow-mi-ddin (the day of judgment) will never adopt such dubious methods.

The otherside of the ugly face of the muslim society that the husbands in most of the cases exercise their unfettered right of divorce without any justifiable reasons.

The injunctions of Quran as mentioned in surah Al Talaq, surah Al Baqra and surah Al Nissah are not being followed. Thus the procedure laid down in Quran has no importance for muslims even though they have faith that the Quran is the Holy book a revealation of Almighty and a living miracle and that they have to believe in each and every word of Quran.

This is the hightime that the social reformers and religious leaders should come forward to make endeavour to guide the muslims regarding the procedure laid down to pronounce divorce.

APPENDIX 'A'

SUPREME COURT'S VERDICT ON TRIPLE TALAQ

The question as to whether triple talaq in one sitting as usually pronounced by a Muslim husband is legally valid or not and whether it is in accordance with the Shariat of Islam fell to the consideration of the Apex Court of India, in the case of *Shameem Ara vs. State of U.P.* reported in AIR 2002 SC 3551.

> "The singular issue arising for decision is whether the appellant can be said to have been divorced and the said divorce communicated to the appellant so as to become effective from 5-12-1990, the date of filing of the written statement by the respondent No. 2 in these proceedings.

"Talak may be oral or in writing. A talak may be effected (1) orally (by spoken words) or (2) by a written document called a talaknama (d).

(1) Oral Talak:- No particular form of words is prescribed for effecting a talak. If the words are express (saheeh) or well understood as implying divorce no proof of intention is required. If the words are ambiguous (kinayat), the intention must be proved (e). It is not necessary that the talak should be pronounced in the presence of the wife or even addressed to her (f). In a calcutta case the husband merely pronounced the word "talak" before a Family Council and this was held to be invalid as the wife was not named (g). This case was cited with approval by the Judicial Committee in a case where the talak was valid though pronounced in the wife's absence, as the wife was named (h). The Madras High Court has also held that the words should refer to the wife (i). The talak pronounced in the absence of the wife takes effect though not communicated to her, but for purposes of dower it is necessary that it should come to her knowledge (j); and her alimony may continue till she is informed of the divorce (k). As the divorce becomes effective for purposes of dower only when communicated to the wife, limitation under the Article 104 for the wife's suit for deferred dower ran from the time when the divorce comes to her notice (l), under the Act of 1908. See also the Limitation Act, 1963.

Words of divorce:- The words of divorce must indicate an intention to dissolve the marriage. If they are express (saheeh) *e.g.*, "Though art divorced", " I have divorced thee", or "I divorce my wife for ever and render her haram from me" (*Rashid Ahmad vs. Anisa Khatun* (1932) 59 IA 21), AIR 1932 PC 25, they indicate an intention to dissolve the marriage and no proof of intention is necessary. But if they are ambiguous (kinayat), *e.g.*, "Though art my cousin, the daughter ofmy uncle, if thou goest" (*Hamid Ali vs. Imtiyazam*, (1878) 2 All 71) or "I give up all relations and would have not connection of any sort with you" (*Wajid Ali vs. Jafar Husain*, (1932) 7 Luck 430, 136 IC 209, (32 AO 34), the intention must be proved. AIR 1932 Oudh 34.

Pronouncement of the word talak in the presence of the wife or when the knowledge of such pronouncement comes

to the knowledge of the wife, results in the dissolution of the marriage. The intention of the husband is inconsequential. *Ghansi Bibi vs. Ghulam Dastagir* (1968) 1 Mys LJ 566.

If a man says to his wife that she has been divorced yesterday or earlier, it leads to a divorce yesterday or earlier, it leads to a divorce between them, even if there be no proof of a divorce on the previous day or earlier."

AIR 1927 PC 15 [(f) *Ma Mi vs. Kallander Ammal*, supra; *Ahmad Kasim vs. Khatoon BiBi*, (1932) 59 Cal 833; 141 IC 689, (33) AC 27; *Fulchand vs. Nazib Ali* (1909) 36 Cal 184, 1 IC 740; *Sarabai vs. Rabiabai* (1905) 30 Bom 536 (obiter).

(g) *Furzund Hussein vs. Janu Bibee*, (1878) 4 Cal 588.

(h) *Rashid Ahmad vs. Anisa Khatoon*, (1932)59 IA 21, 54 All 46, 135 IC 762, (32) APC 25.

(i) *Asha Bibi vs Khadir*, supra.

(j) *Fulchand vs. Nazib Ali*, supra.

(k) *Ma Mi vs. Kallandar Ammal* supra; *Abdul Khader vs. Azeeza Bee* (1944) I MLJ 17, 214 IC 38, (44) AM 227.

(l) *Khahiyumma vs. Urathel Marakkar*, (1931) 133 IC 375, (31) AM 647.

The statement of law by Mulla as contained in para 310 and footnotes thereunder is based on certain rulings of Privy council and the High Court. The decision of A.P. High Court in (1975) 1 ALLJ 20 has also been cited by Mulla in support of the proposition that the statement by husband in pleadings filed in answer to petition for maintenance by wife that he had already divorced the petitioner (wife) long ago operates as divorce.

8. We will offer our comments on this a little later. Immediately we proceed to notice a few other authorities.

9. In Dr. Tahir Mahmood's The Muslim law of India (Second edition at pp. 1134-119), the basic rule stated is that a Muslim husband under all schools of Muslim law can divorce his wife by his unilateral action and without the intervention of the court. This power is known the power to pronounce talaq. A few decided cases are noticed by the learned author

wherein it has been held that a statement made by the husband during the course of any judicial proceedings such as in wife's suit for maintenance or restitution of conjugal rights or the husband's plea of divorce raised in the pleadings did effect a talaq.

10. Such liberal view of talaq bringing to an end the marital relationship between Muslim spouses and heavily loaded in favour of Muslim husbands has met with criticism and strong disapproval at the hands of the jurists.

11. *V. Khalid* J. as His Lordship then was, observed in *Mohammed Haneefa vs. Pathummal Beevi*, 1972 Ker LT 512- "I feel it is my duty to alert public opinion towards a painful aspect that this case reveals. A Division bench of this court, the highest Court for this state, has clearly indicated the extent of the unbridled power of a Muslim husband to divorce his wife. I am extracting below what Their lordships have said in *Pathayi vs. Moideen* (1968 Ker LT 763).

"The only condition necessary for the valid exervise of the right of divorce by a husband is that he must be a major and of sound mind at that time. He can effect divorce whenever he desires. Even if he divorces his wife under compulsion, or in jest, or in anger that is considered perfectly valid. No special form is necessary for effecting divorce under Hanafi law……The husband can effect if by convenying to the wife that he is repudiating the alliance. It need not even be addressed to her. It takes effect the moment it comes to her knowledge."

Should muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleniate their sufferings? My judicial conscience is disturbed at this monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed. (p.514)

In this illuminating judgment, virtually a research document, the eminent judge and Jurist *V.R. Krishna Iyer*, J., as His Lordship then was, has made extensive observation. The judgment is reported as *A. Yousuf Rawther vs. Sowramma*, AIR 1971 Ker 261. It would suffice for our purpose to extract and reproduce a few out of several observations made by His Lordship:

"The interpretation of a legislation, obiviously intended to protect a weaker section of the community, like woman, must be informed by the social perspective and purpose and, within its grammatical flexibility, must further the beneficent object. And so we must appreciate the Islamic ethos and the general sociology background which inspired the enactment of the law before locating the precise connotation of the words uses in the statute, (para 6)

"Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim Jurists that the Indo Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy prophet or the Holy Book. Marginal distortions are inevitable when the judicial committee in downing street has to interpret Manu and Mohammad of India and Arabia. The soul of a culture-law is largely the formalized and enforceable expression of a community's cultural norms-cannot be fully understood by alien minds. The view that the Muslim husband enjoys and arbitrary, unilateral power to inflict instant divorce doest not accord with Islamic injunction." (para7)

"It is a popular fallacy that a Muslim made enjoys, under the Quranic law, unbridled authority to liquidate the marriage "The whole Quran expressly forbids a man to seek pretexts for divorcing his wife, so long as she remains faithful and obedient unto him, "if they (namely, women) obey you, then do not seek a way against them'." (Quran IV:34). The Islamic "law gives to the main primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy, but in the absence of serious reasons, no man can justify a divorce, either in the eye of religion or law. If the abandons his wife or puts her away in the simple caprice, he draw upon himself the divine anger, for the curse of God, said the prophet, rests on him who repudiates his wife capriciously." (para 7)

"Commentators on the Quoran have rightly observed- and he tallies with the law administered in some Muslim countries like Iraq- that the husband must satisfy the court about the reasons for divorce. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the prophet or the Holy Quran laid down and the same misconception vitiates the law dealing with the wife's right to divorce." (para 7)

"After quoting from the Quoran and the Prophet, Dr. Galwash concludes that "divorce is permissible in Islam only in cases of extreme emergency. When all efforts for effecting a reconciliation have failed, the parties may proceed to a dissolution of the marriage by 'Talaq' or by 'Khola'…….. Consistently with the secular concept of marriage and divorce, the law insists that at the time of Talaq the husband must pay-off the settlement debt to the wife and at the time of Khula she has to surrender to the husband her dower or abandon some of her rights, as compensation." (para 7)

13. There is yet another illuminating and weighty judicial opinion available in two decisions of Gauhati High Court recorded by *Baharul Islam*, J. (later a judge of Supreme Court of India) sitting singly in *Sri Jiauddin Ahmed vs. Mrs. Anwara Begum*, (1981) 1 GLR 358 and later speaking for the Division Bench in *Must. Rukia Khatun vs. Abdul Khalique Laskar*, (1981) 1 GLR 375. In *Jiauddin Ahmed's* case, a plea of previous divorce, *i.e.* the husband having divorced the wife on some day much previous to the date of filing the written statement in the court was taken and upheld. The question posed before the High Court was whether there has been valid talaq of the wife by the husband under the Muslim law? The learned Judge observed that though marriage under the Muslim law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage-tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution, (Para 6).Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well recognized scholars of great eminence the learned judge expressed disapproval of the statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on concept that women are chattel belonging to men, which the Holy Quran does not brook. The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters- one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected (para 13).

In *Rukia Khatun's* cases, the division bench stated that the correct law of talaq, as ordained by Holy Quran, is : (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay view which, in their opinion, did not lay down the correct law.

14. We are in respectful agreement with the above said observation made by the learned judges of High Courts. We must note that the observations were made 20-30 years before and our country has in recent times marched steps ahead in all walks of life including progressive interpretation of laws which cannot be lost sight of except by compromising with regressive trends. What this court observed in *Bai Tahira vs. Ali Hussain*, AIR 1979 SC 362 dealing with right of divorcee is noteworthy. To quote:

"The meanings derived from values in a given society and its legal system. Article 15(3) has compelling compassionate relevance in the context of S. 125 and the benefit of doubt, if any, in statutory interpretation belongs to the ill-used wife and the derelict divorcee. This social perspective granted, the resolution of all the disputes projected is easy. Surely, parliament in keeping with Art. 15(3) and deliberate by design, made a special provision to help women in distress cast away by divorce. Protection against moral and material abandonment manifest in Art 39 is part of social and economic justice, specificated in Art. 38, fulfillment of which is fundamental to the governance of the country (Art 37). From this coign of vantage we must view the printed text of the particular Code." (para 7)

We are also of the opinion that the talaq to be effective has to be pronounced. The term 'pronounce' means to proclaim, to utter formally, to utter rhetorically, to declare, to utter, to articulate (See chambers 20th Century Dictionary, New Edition, p.1030). There is no proof of talaq having taken place on 11-7-1987. What the High court has upheld as talaq is the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5-12-90. We are very clear in our mind that a

mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effecting talaq on the date of delivery of the copy of the written statement to the wife. The respondent No.2 ought to have adduced evidence and proved that pronouncement of talaq on 11-7-87 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. We do no agree with the view propounded in the decided cases referred to by Mulla and Dr. *Tahir Mahmood* in their respective commentaries, wherein a mere plea of previous talaq taken in the written statement, though unsubstantiated, has been accepted as proof of talaq bringing to an end of the marital relationship with effect from the date of filing of the written statement. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on the wife on the date of filing of written statement in the court followed for delivery of a copy thereof to the wife. See also the affidavit dated 31-8-88, filed in some previous judicial proceedings not inter parte, containing a self serving statement of respondent No.2 could not have been read in evidence as relevant and of any value."

CHAPTER X

POST DIVORCE OBLIGATION

Chapter Map

So far we have studied about the muslim law of marriage and divorce in the preceeding chapters. Now, we will discuss about the post divorce obligations of the husband and wife as per the injunctions of quran and in the light of Hadits.

a. POST DIVORCE OBLIGATIONS OF A DIVORCEE WOMAN

Synopsis

A husband who has validly divorced his wife has to pay her dower, iddat period maintenance, fair provision and the divorcee wife will have to undergo iddat and she has to undergo iddat even if her marriage is dissolved in accordance with a decree of a court of law under Dissolution of Muslim Marriage Act or as a result of Khula or after the death of her husband before contracting a second marriage is so wishes.

1. Meaning of Iddat

The literary meaning of iddat, is the period of mourning which is occasioned on divorce or death of husband.

According to shariat, iddat is the waiting period, it means it is the period during which a divorcee woman or a widow will have to restrain herself from marrying another person.[1]

In Hidaya it is stated that, iddat is understood as, a period wherein a woman abstains from use of perfumes and ornaments.[1]

2. Period of Iddat for Divorcees and Pregnant Women

The almighty ordained in Ayath 4 and 6 of Surah Talaq, regarding the period of Iddat as, "such of your women as have any doubts, is three months, and for those who have no courses, (it is the same): For those who carry (life within their wombs), their period is until they deliver their burdens: and for those who fear Allah, he will make their path easy."

"Let the women live in (in Iddat) in the same style as you live, according to your means: do not annoy them, so as restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring), give them their recompense: and take mutual counsel together, according to what is just and reasonable. And if you find yourselves in difficulties, let another woman suckle (the child) on the (father's) behalf."

1. Hidaya Book of Iddat, vol.ii, p.104.

For a Divorcee, Khula or as a result of a decree of dissolution of marriage by the court, the period of Iddat is three menstruations", as stated in Bahar-ul-Raik based on Quran and Hadiths.

It is further stated that three months of Iddat period in case of divorce, will be calculated by appearance of the new moon, if divorce took place on the first day of the month, otherwise, by days. In case, of pregnant wife, it is further explained that, even when a divorcee wife is a slave or a Kitabeeyan or conceived through an illicit connection and after the marriage, the husband may have had sexual intercourse with her and then may have died, or divorced her, the iddat would expire on delivery of child.[1]

3. Period of Iddat for Widows

The almighty ordains in quran regarding the iddat period of widows, thus: "if any of you die and leave widows behind, they shall wait concerning themselves four months and ten days: when they have fulfilled their term, there is no blame on you if they dispose of themselves in a just and reasonable manner and Allah is well acquainted with what to do".[2]

4. Significance of Iddat

Iddat is incumbent upon a divorcee or widow for the purpose of ascertaining the wombs.[3] It is primarily imposed with a view to ascertain whether the woman is pregnant by her husband so that the paternity of the child that is born to a woman, whose marriage is dissolved by virtue of divorce or death of her husband, may be fixed.[4]

But ascertainment of pregnancy is not only the object of iddat apart from that it is a religious duty as stated supra with reference to Hadith of Prophet (PBUH).

It was also clearly held in the case of *Jariman vs. Ruhia*,[5] that the iddat of a widow in the case of a child widow has been imposed simply as a mark of respect for the deceased husband. So iddat is also a mark of respect for the deceased husband.

1. As referred above with reference to ayyat ii surah talaq of quran.
2. In Ayyat No.224 in surah al_baqra the holy Quran.
3. Bailies digest vol. iv p. 352 and hidaya p. 128.
4. As held in *Bazul-ul-raheem vs. Lateefunnisa*, 379.
5. 25ic 43.

Iddat is necessary in cases, both of consummation and non-consummation of marriage and also obligatory in the case of irregular marriage where it was consummated, not otherwise.[1]

In case of a divorced woman whose mensurational cycles have stopped, it is ordained by the Almighty in surah talaq that they will have to observe iddat for three months.

In Hanafi Law iddat is necessary in all cases of consummated marriages, dissolved by divorce.[2] But in shia law iddat for divorcees is not necessary in the case of a woman who has passed the child bearing age or has not attained puberty and whose mensuration has stopped, is absent or is irregular.[3]

5. Iddat in case of adulterous intercourse

No iddat is necessary to be observed after adulterous intercourse or on the dissolution of a sabka marriage, (an invalid marriage), or after cohabiting with a stranger by mistake on the first night.

If a woman who has no husband, is pregnant by zina (fornication) there is no difference of opinion as to the validity of her marriage, with such person other than adulterer.

Similarly it is stated in "hadaik" that if a woman is pregnant by zina, there is no iddat for an adulteress, whether she be pregnant or not by fornication and if she be pregnant it is lawful for her to marry before delivery.

At the same time in order to keep the nasab pure, it is recommended that a man should not marry a woman who is pregnant by fornication with another until she is delivered.

Shia Law :

Under shia law a woman against whom a proceeding of 'liaan' has taken place, on the ground of adultery and who is thereby divorced from her husband, cannot under any circumstances remarry him. The shafaii and malikis agree in this opinion with the shiaas.

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1. Sayeed Saib vol.1, p.355.
2. Bailies digest vol.ii, p.162.
3. Durr-ul-Mukhtar, Chapter on iddat, p.274, Calcutta edn,; p.264, Bombay edn.

The Hanafis however allow a remarriage with a woman divorced by liaan.

6. Iddat in an invalid marriage

According to fatawa-e-alamgiri, vol I, chapter 8, pg 466, when an invalid marriage has taken place, the Qazi must effect a separation between a husband and wife and if there is no khilwat-e-sahiha (consumation), she has to observe iddat.

In case of wife of a person, who divorced her absolutely on his death-bed, should the husband die, while she is yet undergoing the iddat period, the iddat period will be longer, thus combining the two periods fixed for iddat, after divorce and upon death of her husband.

In case of an invalid nikah iddat beings from the date of separation effected between them by the qazi.

In case if a divorcee receives the intimation of divorce after the expiry of period of iddat, it is not incumbent upon her to observe iddat.

b. Post Divorce Obligations of Husband

The foremost obligation of a husband who has divorced his wife is the payment of Dower.

Dower or Mehr is defined under the Muslim Law as a sum of money or other property, which the wife is entitled to receive from her husband in consideration of marriage.

The basis of the law relating to Dower is mentioned in Quran (IV:4)

> "Give the woman (on marriage) their dower as a free gift, but if they of their own good with pleasure remit any part of it to you take it and enjoy it, with right good cheer".

It is stated in Fatwa-e-Alamgiri[1], Hedaya[2], Fatwa-e-Kazikar[3], Jamaush-Shillat, Sharai-ul-Islam, Kanzul Daqduq Al-Makkawi[4], that dower is an obligation imposed by the Islamic law on the husband as a mark of respect for wife.

It is a property incumbent on the husband, either by reason of its being named in the contract of marriage or by virtue of the contract itself as opposed to the unsurfruct of the wife's person.

Dower is a safeguard against the husband's arbitrary power of divorce and is not an exchange or consideration given by the man for marriage contract because the contract requires union of parties.

Though Dower is an essential condition for marriage, its validity does not depend upon the express mention and thus even if the dower is not mentioned, the law attaches liability to the husband.

A.A.A. Fayzee, in his celebrated work on Muslim law states that the Muslim concept of Dower has no reference to the price under some systems of law was paid to the bride when she was given in marriage. On the other hand, it is considered as a debt with consideration for submission of her person by the wife. The result, Dower is purely in the nature of a marriage settlement and is for consideration. It was held in the case of *Kapan Chand vs. Khaderunnissa*,[5] that "it is a claim arising out of a contract by the husband and as such has preferred to bequests and inheritance but on no principle of Mohammedan Law, it can have priority on other contractual debts."

Explaining the Dower as debt. Lord. Parker of Waddington, in *Hamira Bibi's*,[6] case, ruled that Dower is an essential incident under the Mohammedan Law to the status of marriage, to such an extent that, when it is unspecified at the time of contracting of marriage the law declares that it must be adjudged on definite principles.

Regarded as a consideration for the marriage, it is in theory, payable before consummation, but the law allows its division into

1. Page 429.
2. Page 58.
3. Page 425.
4. Page 270.
5. 1950 SCR 747.
6. 1916 (43) Indian Appeals 294.

two parts, one of which is called prompt and the other is deferred. But the Dower ranks as a debt, and the wife is entitled along with the other creditors to have it specified on the death of the husband out of his estate. Her right is however, no greater then that of any other unsecured creditor, except that if she lawfully obtains possession of the whole or part of his estate to satisfy her claim with the and issues accruing there from. She is entitled to retain such possession until it is satisfied. This is called as widow's lien for Dower.[1]

Marriage without a Dower is valid, as stated in Hidaya.[2] A marriage is valid although no mention be made of the Dower by the contracting parties. It is also mentioned in the same chapter of Hidaya that, a wife may remit the whole Dower, if a woman exonerates her husband for any part or even from the whole of the Dower, it is approved because after the execution of the contract it is her sole right and the case supposes her dereliction of it to take place as a subsequent period.

According to Sharia Law a debt cannot be waived even if with the parties to marriage agree to it, as this debt is like a "Ibadat" (pious obligation).[3]

The Almighty order in Quran that "there is no blame on you if you divorce women before consummation or the fixation of their Dower, but bestow on them, (a suitable gift), the wealthy according to his means and the poor according to his, a gift of a reasonable amount is due for those who wish to do the right thing."

"And if you divorce them before consummation, but after the fixation of Dower of them, then half of the Dower (is due to them) unless they remit it or (the man's half) is remitted by him in whose hands is the marriage lie and the remission (of the man's half) is the nearest to righteousness", as stated in Quran.[4]

Seeing that you derive benefit for the (wives), give them their Dowers (atleast) as prescribed, but it after a Dower is prescribed you agree mutually (to vary it) then there is no blame on you and Allah is all knowing.[5]

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1. Also cited in *Syed Sabir Hussain vs. Farzand Hussain*, 1937 (65) IA 127.
2. Ch.III Book of Marriage, 1994 Edn (Hidaya) published by Kitab Bhavan, New Delhi.
3. Islamic Qanoon by Moulana Mufti Fuzzil Rahman Osmani Member AIMPLB,
4. Ayyat No.236, 237, Surah 2 Al-Bakra.
5. Al-Nisa ayyat No.24, as stated in Quran.

c. IDDAT PERIOD MAINTENANCE

The second liability of the husband after divorce is to provide maintenance to his divorcee wife for the iddat period. Of course no maximum or minimum limit of Quantam of maintenance is fixed in Quran not it is mentioned in any Hadith as to what should be the Quantam of Maintenance for iddat period. However Holy Quran says:

> "Let the woman live (in iddat) in the same style as you live, according to your means, do not annoy them so as to restrict them and if they carry (life in their wombs) then spend (your substance) on them until they deliver their burden, and if they suckle your (off spring) give them their recompense and take mutual counsel together according to what is just and reasonable (Surah Talaq Ayat No.6).

At another place in the same Surah The Allah ordains thus:

> "Let the man of means spend according to his means and the many whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what he has given him." (Ayat 7 Sura Talaq).

While discussing the liability of a husband to provide maintenance to his divorcee wife (East while) Hyderabad High Court in the case of *Md. Shamsuddin vs. Noor Jahan Begum*,[1] ruled that, "under Muslim Law, divorced wife does not become a free agent and is not competent to contract a second marriage for the period of iddat then intent being to ascertain whether the woman being pregnant or not because the incapacity for a second marriage, the wife is entitled to maintenance for the period. Thus with the divorce their liability for maintenance of the divorced wife does not came to an end."

It is stated in Baillie that a wife is entitled to be maintained by her husband during the iddat on the same scale as before the divorce.

Shia Law

Does not recognize the right to maintenance to a divorced wife unless she be pregnant. Anglo Mohamedan Law a difer by R.K.Wils on 4th Edition P.432.

1. AIR 1955 Hyd 144 : 1955 Crl.J. 950

It is also ordinance Ayat No.241.

> For divorce women maintenance (showed be provided) on a reasonable (Seale) this is duty of the righteous.

If divorce is not communicated to the wife until after the iddat period, she is entitled to maintenance until she is informed of the divorce. Similar view has been expressed by Asaf A.A.Fyzee in his celebrated work "Outlines of Muhammadan Law" (4th Edition) while explaining the principle for payment of maintenance that "The wife's right to maintenance commences on divorce, or when she comes to know of the divorce.." and further adds that," … and ceases on the death of her husband, for her right of inheritance supervenes. The widow is therefore not entitled to maintenance during iddat of death. It is otherwise in the case of divorce, where she is entitled to maintenance during the iddat. Ameer Ali in his classical work on Mohammedan Law (Vol.II), however, further attaches a qualification for being entitled to maintenance, when the learned author states at P.494.

> "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 is the separation is caused by her misconduct".

Thus, according to Ameer Ali husband's liability to support the wife is subject to conduct of the parties and the wife is disqualified to claim maintenance 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 divorcee is revocable or irrevocable, whether single or triple, and whether she is pregnant or not, unless the marriage has been dissolved for cause of a criminal nature originating from the woman. Under Shiite and Shafi Law, the wife is entitled to maintenance during her iddat if revocably divorced but not if irrevocably divorced, unless a 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.

d. DOWER

Synopsis

The third liability of the husband is to pay dower to his divorcee wife.

Ameer Ali in his celebrated work commentary on Mohammedan Law Vth Edition states that in order to constitute a valid marriage, the Mohammedan Law requires that there should always be a consideration moving from the husband in favour of the wife for her sole and exclusive use and benefits. The consideration is called Maher or Dower. (Ameer Ali chapter-XII, pg.1512).

7. Quantum of Dower

Quran is silent on the fixation of quantum of Dower nor the Prophet (MPHB) has enunciated the minimum and maximum limit of dower amount to be fixed by a Muslim husband while contracting marriage under Muslim Law.

However the dower of the most beloved daughter of Prophet Bibi Fathima was fixed as 400 Dirhams.

"Sharaya" Says, "there is no limit either to the maximum or minimum dower", it being a matter of contract between husband and wife.

There is no distinction so far as this principle is concerned between Shias & Sunnis. Both sects however disapprove excessive dower are regard it as improper, though not absolutely illegal.[1]

1. Ref: Fatawa-i-Kazika.

It is not incumbent to fix dower in term of money only, the Prophet (MPBUH) has given in under marriage a woman to a man, as narrated by Sahl Bin Sad, "for what he knows about the Quran".[1]

8. Kinds of Dower

There are various kinds of Dower *viz.*,

(1) Prompt Dower

(2) Deferred Dower

(3) Customary Dower or Mahv-i-Misl.

Let's discuss the same in detail :

8.1. Prompt Dower

If the Dower is agreed to be paid immediately and at once at the time or after the Nikah without consummation such dower is termed as Prompt Dower or (Mahr-i-Muajjal). Of course nothing in Quran or traditions that payment of prompt dower prior to consummation is obligatory in law but wife can refuse to allow her husband to cohabit with her unless the Prompt Dower is paid.

8.2. Deferred Dower

The Dower which is payable on the death of husband or on divorce or occasioned by a degree of dissolution of marriage under Dissolution of Muslim Marriage Act is termed as deferred dower or (Mahr-i-Muwajjal).

8.3. Customary or Mahv-i-Misl

When no dower is fixed at the time of Nikah the woman becomes entitled to what is called Mahr-i.Misl or Customary Dower.

The Customary dower is regulated with reference to the social position of the Father's family of woman but there is no prohibition to take into consideration of the custom prevailing in the mother's family of the bride.

1. Ref: Summarised Sahi-ul-Bukhari, Book of Nikah, Hadith No.1845.

A detail account of case law on dower is given below:

9. Case Law

Dower is an essential incident and fundamental feature of marriage with the result that even if no dower is fixed the wife is entitled to some dower from the husband.—*Sabir Hasan v. Farzand Hasan,* AIR 1938 PC 80.

Presumption as to widow's possession – In absence of any contract if the widow has possession she would *prima facie* be held to hold possession on behalf of the husband.—*P.S Narayan Ayyar v. Biyari Bibi,* AIR 1922 Mad. 221

Presumption as widow's possession – Merely permissive is however not sufficient.—*Sampatia v. Mahboob Ali,* AIR 1936 All 528

Presumption as to widow's possession – The possession of property of the husband by the widow may be presumed to be on the ground of its being in lieu of dower.—*Jahirdas v. Sakina* AIR 1934 Cal 210

Presumption as to widow's possession – The presumption which Mohammedan Law has designed for benefit of the widow, as means of protection to her, is not a presumption of law but it is presumption of fact depending upon circumstances of each particulars.—*Jahurdan Galib Khan v. Sakina Bibi,* AIR 1934 Cal 210

Presumption as to widow's possession – Where a possession is obtained after the death of the husband there is a presumption that it was legally and peacefully obtained. It is for heirs to prove that possession is not in lieu of dower.—*Mohd. Karimullah v. Amant Begum,* AIR 1917 All 93

Presumption as widow's possession – Where Rahimunissa's possession was not of a co-tenant for possession of co-widow in Mohhamedan Law in lieu of her dower does not represent the possession of the other widow or her heirs. The possession is assumed as her own personal and independent right.—*Cooverbhai Nasarwanji Bulsara v. Hayatbi Budhanbhai,* AIR 1943 Bom 372

'Prompt' and 'Deferred' – The prompt dowr becomes payable when is demanded by the wife.—*Nawab Begum v. Allah Rakha,* IR 1922 Lah. 117

Prompt – It is absolute right of wife to recover her prompt dower and while it may be open for husband to enforce his right in a suit for resignation of conjugal rights prompt dower cannot be made conditional on wife's residing with the husband

Prompt – The payment of even prompt dower is often postponed till the dissolution of the marriage but wife is under no obligation to demand it at any time during converture.—*Mst. Amtal Rasul v. Karim Baksh*, AIR 1933 Pesh 31

Prompt – The prompt dower becomes due as soon as the marriage contract is made, and it is payable when demanded by the wife.—*Mahadco Lal v. Maniran*, AIR 1933 Pat 281

Prompt – The wife is entitled to realize the prompt dower at any time.—*Rehana Khatoon v. Iqtidaruddin*, AIR 1943 All 184

Prompt – Where the wife has been demanding the entire dower debt her demand could not have been made until whole dower was prompt.—*Haji Faquir Bux v. Pandit Thakur Prasad*, AIR 1941 Oudh 457

Prompt – Wife is entitled to recover her prompt dower at any time before or after consummation. Consummation has not the effect of converting the prompt dower into deferred dower.—*Mohd. Taqui Ahmed v. Farmoodi Begum,* AIR 1941 All 181

Deferred – Deferred dower cannot be demanded till it is due. But the husband may pay it off by transferring property in lieu thereof.—*Mangnat Rai v. Mst. Sakina,* AIR 1934 All. 441.

Deferred – If there is an agreement for payment of dower earlier than the dissolution of marriage such an agreement may be given effect to.—*Mst. Nawab Begum v. Allah Rakha*, AIR 1922 Lah. 172.

Deferred – It becomes payable on termination of marriage by death or divorce.—*Sarb Krishna v. Mst. Fatima,* AIR 1937 Lah. 859.

Deferred – It is an unsecured debt and the remedies which the other unsecured creditors have in such a situation would equally be available in case of transfer in favour of a

wife in lieu of deferred dower, no less, no more.—*Ghiasuddin Babu Khan v. C.I.T., A.P.,* 1985 Tax L.R. 1058.

Deferred – The deferred dower does not become prompt by the demand of the wife during the continuance of marriage.—*Mst. Manihar v. Rekha Singh,* AIR 1954 Manipur 1.

Deferred – The husband may pay the deferred dower may be recoverable on demand.—*Mst. Nawab Begum v. Allah Rakha,* AIR 1922 Lah. 172.

Relinquishment – Burden of proof of – Under the law it was for defendant who set up a case of relinquishment to show that it was made by lady voluntarily and her own free will and without any pressure.—*Sajjad Hussain v. Mohd. Sayid Hasan*, AIR 1931 All 7

Relinquishment of – A relinquishment made at the time when the wife is in great mental distress owing to her husband's death or is seriously ill will not be binding on her.—*Hasanunmiya v. Halimunnisa,* AIR 1942 Bom. 128

Relinquishment of – A majority of purposes of relinquishment of dower is to be determined according to Mohammedan Law *i.e.,* majority is obtained on property as per Allahabad and Calcutta High Court.—*Qasim Hussain v. Bibi Kaniz*, AIR 1932 All 649; *Mazharulv, Abdul,* AIR 1925 Cal 322

Relinquishment of the majority for purposes of relinquishment of dower is to be determined according to Section 3 of Majority Act as per Patna High Court.—*Nurunesa v. Serajuddin*, AIR 1939 Pat 133

Relinquishment of- Where an agreement is made at the same time of marriage that the wife shall not be competent to relinquish her dower without the consent of her relations, the agreement would be valid and relinquishment without such consent of her relations, the agreement would be valid and relinquishment without such consent would be void.—*Mst Khadija v. Nisar Ahmad*, AIR 1936 Lah 887

Remission of – A remission may be made conditionally *e.g.,* in lieu of annularity.

Remission of – A remission may be made conditionally *i.e.,* on execution of a waqfnama.—*Latafat Hussain v. Hidayat Hussain,* AIR 1936 All. 573

Remission of – A remission may be made in lieu of annulity.—*Gulam Mohd. v. Gulam Hasain*, AIR 1932 PC 81

Remission of – It is open to a lady to relinquish her entire dower debt in whatever claim she had on account of the dower debts against the heirs of her husband.—*Ram Prasad Singh v. Mst. Bibi Khodaijatul Kubra*, AIR 1948 Pat 163

Right not a Mortage – When a Muslim widow gets into possession of her husband's property already mortaged she cannot set up the right to retain possession which must be delivered to the purchaser on sale.—*Ameer Ammal v. Samkra,* AIR 1926 Nag 307

Right not a mortgage – The widow's right of retention is a personal right given to her by Islamic Law and does not by any means amount to an interest in the land. A decree holder is not prevented from attaching the property and putting it for sale.—*Kale Khan v. Huro,* AIR 1932 Nag. 18

RIGHT – The widow's right of retention is to some degree analogous to mortgage yet there is no real analogy between the two.—*Mst. Mania Bibi v. Vakil Ahmed,* AIR 1925 PC 63.

Right of Retention – Consent of heirs – A Muslim widow is entitled to retain possession if she gets into with the consent of heirs which is necessary.—*Mst. Izhar Fatima v. Ansar Bibi*, AIR 1939, All 348

Right of Retention – consent of heirs – A Muslim widow is entitled to retain possession only if she gets into possession with consent of heirs.—*Sabur Bibi v. Ismail*, AIR 1924, Cal 508

Right of Retention – Consent of heirs – A Muslim widow is entitled to in lieu if she goes into possession lawfully and without force or fraud. There was no question of consent of heirs.—*Maina Bibi v. Vakil Ahmed*, AIR 1925 PC 63

Right of Retention – Consent of heirs when after death of husband the heirs made no opposition whatsoever that is enough to show in Mohammedan Law to show that the widow entered into possession lawfully in lieu of her dower, without force or fraud.—*Abdul Wahab v. Mushtaque Ahmed*, AIR 1944 All 36

Right of Retention – Heirs consent – A Mohammedan widow is entitled to retain possession if she gets into it lawfully

and without force or fraud even though without the consent of the heirs.—*Hasnumiya v. Halimunissa*, AIR 1942 Bom 128

Right of Retention of Property – It was necessary that Muslim widow should have entered into possession upon a claim for her dower, that character of her possession must be that of creditor and no other character.

Specified – failure to prove – if it is admitted that dower was specified, but there is no satisfactory evidence of it, the burden of proof being on wife only the amount admitted by the husband to have been settled may be allowed.—*Mst. Bhuri v. Asgari*, AIR 1926 Lah. 458.

Specified – failure to prove – it has been held where definite amount of dower is proved to have been fixed what is payable is sharai dower.—*Mst. Jaddo Begum v. Nawab Sharf Jehan Begum,* AIR 1927 Oudh 194.

Specified Prove – in case of verbal contracts of huge dowers cogent and satisfactory evidence is required.—*Md. Zahur Hasan v. Maimuna*, AIR 1929 All. 142.

Specified_Prove of - dower is generally arranged by her relative. In such a case the mere fact that plaintiff has not come into witness box ought not to be construed against her when other relatives come into witness box.—*Sultan Begum v. Sarajuddin*, AIR 1936 Lah. 183.

Suit By Heir Of Wife – any of the heirs of the wife may sue the husband separately for his or her share. The cause of action is not a joint one. The presence of all the heirs is however necessary.

Surety of – A stranger may also make a contract of suretyship for dower.—*Mst. Fatima v. Ahmed Ali*, AIR 1937 PC 121.

Surety of – in Shia Law when the marriage of an infant son is contracted by his father and the child is poor, the obligation rests entirely on the father, and in the event of his must be discharged out of the whole of his property whether child should arrive at maturity and become wealthy or die before it.—*Syed Sabir Hussain v. S. Farzand Hasan Khan*, AIR 1938 PC 80.

Surety of - it is not correct to say that a father by giving his consent to the marriage automatically becomes a surety for the payment of the dower debt.—*Mohd. Siddiq v. Sahabuddin*, AIR 1927 All.364.

Surety of – it is valid for a person who is guardian (whether for husband or wife or both) to stand a surety for payment of dower although the wife may be minor.—*Mst. Fatima Bibi v. Lal Din,* AIR 1937 Lah. 45.

The absence of any power to Court for decreasing amount of dower has been judicially deplored.—*Mohd. Sultan Begum v. Sarajuddin*, AIR 1936 Lah. 183.

Court has no power to decrease the contracted amounts of dower.—*Amina Bibi v. Mohd. Ibrahim,* AIR 1929 Oudh 520.

The presumption which Muslim Law has designed for the benefit of widow will not be made if the widow has transferred possession by gift.—*Fahiman v. Bulaqi*, AIR 1935 Oudh 68.

Dower of the wife is considered to be property and the dower to be the price.—*Saburannesra v. Sabdu Sheikh,* AIR 1934 Cal. 693.

There are essential differences between the widow's lieu and a mortage.—*Aminuddin v. Ramkhelawan*, AIR 1949 Pat. 427.

There is even a presumption that dower was fixed. In fact, even a stipulation that a wife would not be entitled to any dower would be invalid.—*Mashul Islam v. Abdul Ghani*, AIR 1925 Cal. 322.

Time for fixing of – Dower can be fixed as consideration for past and also future cohabitation.—*Mst. Mahtabunnissa v. Rifaqathullah*, AIR 1925 All.474.

Time for fixing of – The dower may be fixed either before or at the time of the marriage or after the marriage.—*Mst. Amina Bibi v. Mohd Ibrahim,* AIR 1920 Oudh 520.

Transfer of Property in lieu of Dower – a Muslim marriage is a contract of which dower is the consideration and transfer in lieu of dower is in nature of a hiba-bil-ewaj.—*Subyrannessa v. Sabdu Shaikh,* AIR 1934. Cl.643

Transfer of Property in lieu of Dower of Section 53 of transfer of property Act does not effect the provisions of Mohammedan Law and cover all communities.—*Har Prasad v. Mohd. Usman Khan,* AIR 1943 All. 2. *Bibi Kubra v. Joinandan Prasad,* AIR 1955 Pat.270

Transfer of Property in lieu of Dower – when a transfer is made with a view to defeat or delay creditors, the creditors can avoid it under Section 53 of the Transfer of Property Act.—*Syed Mohd. Haidar v. Safdar shah,* AIR 1930 Oudh 230.

Transfer of Property in lieu of Dower – a transfer in lieu of a time barred debt is valid.—*Zohra Bibi v. Ganesh Prasad,* AIR 1925 Oudh 267.

Transfer of Property in Lieu of Dower – A transfer in lieu of dower cannot be impeached under Section 53 of the Transfer of Property Act.—*Rameshwar Nath v. Aftab Begum,* AIR 1936 All.803.

Transfer of Property in Lieu of Dower – transfer in lieu of dower will be valid if the dower is really due even if other creditors are defeated.—*Mahadeo Lal v. Bibi Maniram,* AIR 1933 Pat. 281.

Transfer of Property in Lieu of Dower – if dower is really not due and a fictitious transfer is made through collusive arbitration proceedings, it can be avoided.—*Kulsambi v. Bilan Khan,* AIR 1929 Nag.121.

Transfer of Property in Lieu of Dower – if the widow wishes to forestall other creditors and to obtain what is due to her first, there is nothing fraudulent in her action in carrying out such a wish.—*Zamin Hussain Khan v. Tussaduq Ali Khan,* AIR 1925 Oudh 171.

Transfer of Property in Lieu of Dower – in case of a void marriage the consideration for such marriage would be only void and not unlawful.—*Mst. Mahtabunnissa v. Rifaqat Ullah,* AIR 1925 All. 474.

Transfer of Property in Lieu of Dower – the burden of proving that the transaction was fraudulent or colourable lies on the party challenging the transfer.—*Kulsambi v. Bilan Khan,* AIR 1928 Nag. 121.

Transfer of Property in Lieu of Dower – the question whether the dower was to be prompt or deferred is of minor importance as satisfaction of deferred dower debt can be valid consideration for a transfer between husband and wife.—*Kulsambi v. Bilan Khan*, AIR 1929 Nag. 121.

Transfer of Property in Lieu of Dower – the transfer in lieu of dower is not fraudulent.—*Kasna Chand v. Mst. Wazir Begum*, AIR 1937 Nag.1.

Transfer of Property in Lieu of Dower – the transfer of property was made only to limited extent otherwise the wife would become absolute owner and a sale by her cannot be challenged.—*Abdul Majid v. Mst. Sahib Jan,* AIR 1927 Lah. 229.

Transfer of Property in Lieu of Dower – the transfer to one wife requires her acceptance.—*Sadiq Hussain v. Hashim Ali,* AIR 1916 PC 27.

Transfer of Property in Lieu of Dower – the widow being a creditor for her dower debt a transfer in lieu of dower will be valid if dower is really due.—*Mst. Bibi Saira v. Saliman*, AIR 1927 Pat. 395.

Transfer of Property in Lieu of Dower – when the husband was not the owner of the property when he made the transfer acquiring title to it afterwards, the Court of equity will compel the husband to perform the contract. The entire property would pass to her under the principle of feeding the estoppels.—*Rustam Ali v. Abdul Jabbar*, AIR 1923 Cal. 535.

Transfer of Property – there is no rule of Mohammedan Law which may be inconsistent with the provisions of Section 53 of T.P.Act.—*Ahmed Hussain v. Kallu Mian,* AIR 1929 All. 277.

Unlike the Jewish Law which considers all marriages without consideration to be invalid, it must be presumed that dower was fixed.—*Mashrul Islam v. Abdul Ghani,* AIR 1925 Cal. 322.

When due – the law allows the division of dower in two parts "prompt" and "deferred". In case in which the wife has a right to demand immediate payment before she is called upon to enter conjugal domicile, the dower is called prompt otherwise deferred.—*Hamira Bibi v. Zubaida Bibi*, AIR 1916 PC 46.

Where a Mohammedan widow who is in possession of husband's property still claims the dower debt due to her then her right to retain possession of the property till the dower debt is discharged exists provided she came into possession lawfully and without force or fraud.—*Mirvahedali Kadumiya v. Rashidbeg Kadumiya*, AIR 1951 Bom. 22.

Whether heritable – the right of dower is heritable and heirs are entitled to claim it.—*Abdul Wahab v. Mustaq Ahmed*, AIR 1944 All.36.

Widow entitled to retain possession – there is no right to recover possession except under Section 9 of the Societies Registration Act.—*Mashal Singh v. Ahmed Hussain*, AIR 1927 All. 534.

Widow's lieu – A Muslim widow in possession of her husband's property in lieu of dower is entitled to continue in possession and husband cannot recover possession till her dower is satisfied and heirs cannot recover possession till then.—*Haider Mirza v. Kailash Narain*, AIR 1925 Oudh 136.

Widow's lieu – A Muslim widow in possession of her husband's property in lieu of dower is liable to render accounts of profits of the property to heirs.—*Mania Bibi v. Vakil Ahmed*, AIR 1925 PC 63.

Widow's lieu – A Muslim widow in possession of property in lieu of dower does not for that reason become the exclusive owner by lapse of time.—*Hira Singh v. Mosaheb,* AIR 1921 Pat. 353.

Widow's lieu – a widow in possession in lieu of dower does not for that reasons become exclusive owner of the property. She is one of the owners and has her rights and remedies as such but no length of possession would confer any title on her.—*Abdul Wahab v. Mustaq Ahmed*, AIR 1944 All. 36.

Widow's lieu – Although the right of retention is transferable yet it can be transferred only along with dower debt itself and not separately.—*Sheikh Abdur Rahman v. Sheikh Wali Mohammed,* AIR 1923 Pat 72

A plea as to widow being in possession in lieu of dower should be raised as it is doubtful whether such plea can be raised in appeal.—*Mst. Fatima v.* 1935 Oudh 68

Widow's Lieu – Dower suits – A widow must sue for recovery of the entire dower debt due to her at one time she cannot afterwards sue for the balance.—*Kaneez Fatima Begham v. Ram Nanda Dhar Dube*, AIR 1923 All 331

Widow's Lieu – Dower suits – There is nothing to prevent a widow for instituting a suit for dower for the purpose of obtaining a simple money decree against all the assets of her husband including the property in her possession at least by surrendering possession of such property in her hands.—*Amir Hasan Khan v. Mohd Nazir Hasan*, AIR 1932 All 345

Widow's lieu – Dower suits – Where the first suit is filed against the minor and her father for ejectment, it does bar a suit for dower debt against the minor and the father where in a joint decree is claimed along with the minor though some facts to be proved in both the cases are the same.—*Shaikh Abdul Rashid v. Mst. Quadratunnissa*, AIR 1924 All 713

Widow's lieu – If a Muslim widow transfers the husband's property in her possession such transfer ineffectual except to the extent of the interest of widow herself.—*Mst. Maina Bibi v. Vakil Ahmed*, AIR 1925 PC 63

Widow's Lieu – If a widow transfers the property but does not deliver possession the heirs can sue for a declaration that the transfer is not binding on them but in such a case, they are not entitled to recover possession because the lieu has not been lost.—*Mohd. Zobair v. Bibi Sahidan*, AIR 1942 Pat 210

Widow's lieu – If the widow is in possession of the property and dies after that her heirs are entitled to retain possession as widow's lien is heritable.—*Cooverbai v. Hayabi*, AIR 1943 Bom 372

Widow's lieu – If the widow is in possession in lieu of dower she is not liable to piece meal suits by every separate heir. She is entitled to retain property until the entire dower is satisfied.—*Mst. Jan Bibi v. Mst. Batulan Bibi*, AIR 1924, All 729

Widow's Lieu – If the widow makes a transfer of the property without expressly or impliedly transferring the lieu the right of retention itself will be extinguished.—*Sitaraa Bibi v. Ganesh Prasad*, AIR 1928 Oudh 209

Widow's Lieu – In case all the heirs file suits, even though separately for recovery of their shares against widow in possession of property in lieu of dower a decree may be passed allowing them to recover separate shares of property on payment of proportionate amounts.

Widow's lieu – The Court may instruct to widow on the dower debt due to her.—*Mst. Fakrunnissa v. Moulvi Izarus Sadik*, AIR 1921 PC 55

Widow's lieu – The Courts have however some discretion in determining whether interest should be allowed in case of dower.—*Niwasi Begum v. Dilafroz*, AIR 1927 All 39

Widow's Lieu – The possession of transfer of property from the widow does not become adverse.—*Abdulla v. Shamshul Haq,* AIR 1921 All 262

Widow's lieu – The Privy Council has expressed some doubt whether the widow can assign either her dower or her right to hold possession although the question was not decided.—*Maina Bibi v. Vakil Ahmed*, AIR 1925 PC 63

Widow's lieu – The right of possession which the widow secures as creditor for her dower debt, is property and is *prima facie* transferable.—*Abdullah v. Shamshul Haq,* AIR 1921 All 262

Widow's lieu – The right of possession which widow secures as creditor for her dower debt is transferable.—*Cooverbai v. Hayatbi*, AIR 1943 Bom 372

Widow's lieu – The right of retention of property by widow is not transferable at all.—*Mohd. Zobair v. Bibi Sahidan,* AIR 1942 Pat 210

Widow's lieu – The right of the widow to retain the possession of her husband's property until satisfaction of the dower debt does not carry with it the right of selling, mortgaging or gifting of otherwise transferring the property.—*Sitaran Bibi v. Ganesh Prasad*, AIR 1928 Oudh 209

Widow's lieu – the right of widow to whom dower is due and who has got into possession of property of her husband in lieu thereof to remain in possession until her dower is paid

may perhaps be descendible to her heirs, but no right to possession is descendible in a case where widow herself never got possession at all.—*Tahir-un-unissa Bibi v. Nawab Hasan*, AIR 1914 All 186

Widow's lieu – The transfer of property will be deemed to operate at least in respect of the right of retention.—*Nabijan v. Sahifan*, AIR 1923 Pat 153

Widow's lieu – The transfer of property will be deemed to operate at least in respect of the right of retention.—*Sitaran Bibi v. Ganesh Prasad*, AIR 1928 Oudh 209

Widow's lieu – The widow in possession of her husband's property in lieu of dower must deliver possession to heirs as soon as the dower debt is satisfied.—*Maina Bibi v. Vakil Ahmad*, AIR 1925 PC 63

Agreement with regard to at the time of marriage – Amount becomes recoverable under agreement.

In a case where there has been an agreement between the parties at the time of their marriage with regard to the amount of dower payable by the husband the amount becomes recoverable under the agreement. The agreement between the husband and wife for payment of dower undoubtedly is part of the cause of action for maintaining a suit for it's recovery and the place where such agreement was entered into would be a place where a part of cause of action for such suit arises.

In the instant case the agreement to pay dower was entered into at the time of marriage at Bareilly. Bareilly Courts would therefore, have territorial jurisdiction to try the suit. The order under appeal cannot be sustained and has not to be set aside.—*Nasra Begum v. Rijwan Ali*, AIR 1980 All 118 at p.120 (DB)

Widow's lieu – The widow is entitled to equitable compensation by way of interest on dower as she is creditor of the husband.—*Mst. Maimuna v. Sarafatullah*, AIR 1931 All 403

Widow's lieu – Transfer of property – If a widow makes a gift of the property to any of the heirs a decree against the deceased husband can be executed against the property in

hands of heirs. If an execution was once taken out against the widow and it was decided that the decree could not be executed so long as she was in possession in lieu of dower, the decision would not operate as *res judicata* if the decree is again executed after the property is transferred to the heirs by widow.—*Aminuddin v. Ram Khelawan,* AIR 1949 Pat 427

Widow's lieu – Transfer of property the transfer of property of husband in possession of a Muslim widow would be valid only during her lifetime. Limitation would begin to run against the true owner upon her death.—*Sheikh Abdur Rahman v. Sheikh Wali Mohd.,* AIR 1923 Pat 72

Widow's lieu – When a Muslim widow is dispossessed by the heirs of the husband or their transferees the right to recover possession is available to her only under Section 9(now 6) of Act 47 of 1963 of the Specific Relief Act.—*Mashal Singh v. Ahmad Hussain,* AIR 1927 All 534

Widow's lieu – Where a Muslim widow is dispossessed by a rank trespasser she can be given within twelve years under Article 64 Limitation Act, 1963.—*Abdul Wahab v. Mustaq Ahmad,* AIR 1944 All 36

Widow's lieu – Whether transferable the widow can transfer merely her right to retention without parting with her dower debt.—*Mst. Bibi v. Mst. Msi Bibi,* AIR 1923, Pat 33

Widow's lieu – presumption as to – It is not necessary that widow's possession should have been taken with the express intention of holding it in lieu of dower.—*Mohd. Sahib v. Zaib Jahan,* AIR 1927 All 850

Widow's Possession – presumption as to – the presumption as to widow's possession comes into existence for the first time on the dissolution of marriage.

Maintenance – According to theory of Shafei Law – maintenance is debt and as the nature of gratuity as is the doctrine of Hanafi Law.—*Mohd. Hazi v. Kalima Bi,* AIR 1918 Mad 722

Maintenance – Agreement of – In absence of an agreement the Kharch-i-pandan is unalienable.—*Altaf Begum v. Briji Narain,* AIR 1929 All 281

Maintenance – Agreement of – Since the marriage under Mohammedan Law is purely a civil contract the terms of the Kabulnama must be looked at and constructed in the same way as the provision in any kind of contract.—*Ahmed Kasim v. Khatun Bibi,* AIR 1933 Cal 27

Maintenance – Agreement of – The purpose of a grant of maintenance is *prime facie* an indication that the grant was intended to be only for the life of the grantee.—*Mohd. Siddiqui v. Risaldar Khan*, AIR 1926 Oudh 360

A debit – A Muslim wife like any other creditor institute a suit for her dower and can obtain a decree against the assets of her husband.—*Zamin Ali v. Azizunnisa*, AIR 1933 All. 329.

A debit – A wife is not liable to be displayed by happening of any event, not even her own death, because her heirs can claim the money if she dies and it is a debt within the meaning of Section 9(1)(b) of Provincial Insolvency Act.—*Bibi Janabi v. Abbas Ali*, AIR 1941 Nag. 167.

A debit – The deferred dower is incapable of being fairly estimated and if husband becomes an insolvent it should not be entered in schedule of creditors.—*Sugra Bibi v. Prasad,* AIR 1930 All.580

A debit – The dower cannot be called a loan as there has been no advance according to the provisions of U.P. Agricultural Relief Act.—*Rehana Khaturn v. Iqtidaruddin,* AIR 1943 All. 134.

A debit – wife can institute a suit for her dower against assets of her husband and her own share is also proportionately liable for satisfaction of her debt.—*Amir Hasan v. Mohd Nasir Hassan*, AIR 1932 All 345

Addition to post nuptial agreement of dower requires the concurrence of both the parties *i.e.,* an offer by husband and acceptance by the wife or her guardian.—*MST.Hakimbibi v. Mir Ahmed*, AIR 1931 Sind 17.

Addition to – Dower may also be increased at any time after it is fixed.—*Jahuran v. Soleman Khan,* AIR 1934 Cal. 210.

Amount of dower – Determination of – can be fixed by oral contract. No limit of maximum or minimum of dower

amount – Amount depends on considerations of financial circumstances of husband and wife, position of woman's family, personal attractions and qualifications *etc.*

The amount of dower is ordinarily fixed by oral contract, and this is valid. There is also no limit either to the maximum or minimum of the amount of dower, although the early Hanafi lawyers had fixed ten dirhems as the minimum for it and the Malikis considered even a smaller sum as permissible – these minima have now become obsolete and the amount of dower depends entirely upon other considerations such as the circumstances of the husband and the wife, the necessity of a device to prevent on the part of the husband the arbitrary exercise of the power of divorce vested in him, the position of the paternal family of the woman, her intellectual attainments or personal attractions and the desire of self-glorification and vanity on the oart of the parties. All these considerations are settlement of the amount of dower.—*Mohammed Shahabuddin and another v. Mst. Umaator Rasool and others,* AIR 1960 Pat. 511 at p.512.

An actionable claim – it can be taken in execution of a decree like any other debt – it does not fall within the exception assignable property created by Section 6(e) of the Transfer of Property Act.—*Saibanbi v. Mahamudalli,* AIR 1941 Nag. 8.

An actionable claim – the prohibition being absolute, any transfer in defiance of Section 316 is calculated to defeat its provisions and as such is void.—*Amir Hassan Khan v. H.Mohd. Nasir,* AIR 1932 All. 345.

Bar of limitation for claim to dower not relevant – when the widow in possession of property in lieu of dower – right of the widow to transfer her rights for consideration not fettered.

It is contended that the Judicial Committee held that the right to dower is barred by time and as such the right to property founded upon the claim for dower does not subsist. This approach is inconsistent with unequivocal declaration that the widow is entitled to retain possession of the property in lieu of dower.

The Mohammedan widow is entitled to retain possession of the property in lieu of dower debt payable to her and such right is heritable. In the event of sale of such property the

purchasers step into the shoes of the widow and acquire right to possession coupled with right to payment of dower notwithstanding the recital in the sale deed purporting to convey absolute rights. The rights of the widow to transfer her rights widow purports to convey absolute rights such sale deed executed, accompanied by the right to payment of dower debt.—*Ghouse Yar Khan and others v. Fatima Begum and others*, AIR 1988 AP 354 at pp.357, 358 : (1987) 2 APLJ 282 : 1987 (2) ALT 639 : (1988) 1 Cur. C.C. 477

A decree in suit filed by widow for her dower debt ought to be passed against the assets left by husband and not personally against those into whose hands those assets fall.—*Sultan Nachi v. Salamar Bibi,* AIR 1938 Mad. 25.

A Muslim widow's dower is a simple money claim and though the decree may be executed against any property it cannot be charged against any specific portion thereof.—*Abdul Rahman v. Mst.Inayati Bibi,* AIR 1931 Oudh 63.

The decree for dower should not be passed creating a charge if a decree is actually passed and is allowed to become final between the parties, a charge would be created.—*Syed Quaisim Hussain v. Habibur Rahman*, AIR 1929 PC 174.

Dower debt – claim of – A Muslim lady thereafter her heirs can retain husband's father's property till dower debt discharged. Partition of some item alone of family property permissible under Muslim Law.

A Mohammedan husband may settle any amount that he likes by way of dower debt upon his wife though it may be beyond his means and though nothing may be left to his heirs after the payment of the amount, but he cannot in any case settle less than ten Dirhams. Where a Mohammedan widow, who is in possession of her husband's property, still claims the dower debt due to her, then her right to retain possession of the property till the dower debt is discharged exists and it is immaterial in what character whether as a creditor for dower debt or otherwise she came into possession of the property, provided she came into possession lawfully and without force or fraud.

Possession can also be exercised by her heirs after her death. On admitted facts, the dower debt of the two widows

had not been satisfied. A suit for partition of even an item of property is maintainable in case of tenants in common. The ordinary rule that a suit for partition of the properties owned by the parties to the suit is not maintainable does not however, apply to the case of co-owners who hold land as tenants. In common as distinguished from the co-sharers holding land as joint tenants. In the case of tenancy in comman each co-owner has no interest in each item of the property held as tenancy in commandant he is entitled to claim partition in respect of even one of these items without seeking for partition of the other items. In the case of Mohammedans, the co-heirs are only tenants-in-comman, and there is no joint family in the items of the properties given in schedule A of the plaint. Therefore, the suit cannot fail if all the properties left by Habibul Hassan and Mohd. Eliyas Husain have not been included in this suit.—*Mst. Hallman v. Md. Manir*, AIR 1971 Patna 385 at pp.389-390.

Dower debt – not a charge upon property of her husband – she has only interest in personal enjoyment of property speaking a charge upon the property of her husband, and the interest which she has in the property in her possession in lieu of dower debt is therefore an interest restricted in its enjoyment to her personally within the meaning of Section 6(d) of the Transfer of Property Act, and as such is not capable of allocation.—*Zohair Ahmed and another v. Jain Anand Prasad Singh,* AIR 1960 Patna 147 (148).

Dower debt – Dower was fixed in kind, *i.e.* immovable properties which are the suit lands – transfer is in law to be considered as by way of gift pure and simple 'Hiba'. As absolute title has not passed, the relief of declaration that she is owner, of suit lands cannot be granted to her.

It is clear that amount of dower in coins is not mentioned. It is also clear that in suit lands were given to the plaintiff to meet the dower debt. Whether the words of dower would in these circumstances be of special significance and import is to be considered in the light of various decision rendered by various High Courts while dealing with this aspect of the matter of registration and the question whether such transfer is simple gift (hiba), or hiba-bil-iwaz' or sale. The principle that under Mohammedan Law, dower is an obligation imposed upon the husband as a mark of respect to the wife has been accepted

by all the High Courts. It is well settled that dower or Mahr can be in law recovered by the wife concerned by instituting an action in law as if it was a debt due to her. Hence it follows that the obligation to pay dower to his wife that Mohammedan Law imposes on a husband gives rise to a debt in favour of his wife. Dower in law can be prompt or deferred. If it is prompt that obligation is to be discharged at the time of the marriage". If it is deffered, it is to be discharged when the specified event occurs and on demand made by the wife. It is well settled dower or Mahr can be in cash or in kind".

In case dower or Mahr is agreed to be paid in cash and it is prompt dower, no question of registration arises in regard to such terms of agreement. In case dower is fixed in kind such as immovable property the question of registration arises as transfer of such property is required to be made by the husband in favour of his wife. Such transfer arises out of the obligation already referred to. It is in this background that the words 'in lieu of dower' have been gone into by the various High Courts under given set of facts and circumstances.

Dower was fixed in kind *i.e.* immovable properties, which are the suit lands. It was not fixed in cash so as to bring into existence a dower debt in discharge of which transfer of the suit lands either by way of gift or otherwise was agreed upon at the time of the marriage. There is no consideration involved. There is no promise in question. There is no acceptance of the promise in question. What should be the dower is settled because of the pious obligation cast by the Mohammedan Law on defendant land that obligation is to be met. The transfer is not for consideration. It cannot in law be anything other than the simple gift. All the ingredients of Section 122 of the Transfer of Property Act are satisfied therefore the transfer is in law to be considered as by way of gift *i.e.* pure and simple 'Hiba' under Mohammedan Law.

Absolute title in favour of *Imambi* did not pass by virtue of this gift. But at the same time it is made clear that *Imambi* has been continuously in possession, apparently from the date of gift, and even till the date of suit under such an invalid title. That law cannot make her a trespasser. As absolute title has *not passed* in her favour, the relief of declaration that she is the owner of the suit lands cannot be granted to her, but her possession under such circumstances does entitle her to the

relief of injunction.—*Imambi v. Khaja Hussain,* AIR 1988 Karnataka 51 at pp.54, 56, 58: ILR 1987 Kant. 3397: (1988) 24 Reports 28: (1988) 1 Kant. L.J. 294: (1988) 2 DMC 67: (1988) 2 Hindu LR 325.

Dower debt – Mohammedan woman filing suit for dower debt against heirs of deceased husband – Heirs not personally liable for dower debt – Yet each heir liable for such debt to the extent of his share in estate – Thus suit to be filed against all heirs.

Although the heirs of deceased Mohammedan are not personally liable for the dower debt, each heir is liable for the debt to the extent only of a share proportionate to the share of the estate. After the death of her husband, herefore if a widow brings a suit for recovery of her dower. It must be brought against all the share her deceased husband (sick).—*Imperial Bank of India having its Branch at Gaya v. Bibi Sayeedan,* AIR 1960 Patna 132 at p.135.

Dower debt – Oral transfer of property by husband in lieu of dower debt – Passing of title to wife – Held, does not convey title.

The hiba-bil-ewaz so called in India is a sale within the meaning of Section 54 of the Transfer of Property Act and unless made by a written instrument, duly registered will not convey title to the person, in whose favour such a conveyance is made and an oral conveyance of immovable property worth more than Rs.100/- to the wife by a Mohammedan husband is not valid.—*Masum Vati Saheb v. illuri Modin Sahib,* AIR 1952 Madras 671 at p. 674.

Possession of property in lieu of dower debt – widow being in possession of deceased husband's property in lieu of dower debt – Liability for account to other sharers — Widow is liable to account for the income received.

There can be no doubt that under the Mohammedan Law, a widow is entitled to be in possession of her husband's estate in lieu of her Mahr debt. She has lien over that property and such lien she would have till her dower debt is discharged. While that is so, it cannot be said that her liability to account for the income received by her from the properties of her husband does not exist. While she can exercise her right of

lien, she is liable to account to the other sharers with regard to the income as any other co-sharer would be if he is in possession of property of more than his share.—*Shail Salam v. Shaik Mohammad Abdul Kadar Umoodi*, AIR 1961 AP 428 at p.429: 1961 ALT 205.

Dower debt – Widow's right to remain in possession of her husband's property – such right exists till dower debt is discharged — Here heirs are also entitled to such right.

The right of the wife to retain property arises provided the following conditions are satisfied. She must have entered into possession of the property lawfully and without force or fraud. There must be a debt due to her in respect of her dower and she should make claim in respect of that dower. If these conditions are satisfied, then the wife is entitled to retain possession of the property till the debt is discharged. It is further clearly established that the debt in respect of dower is enforceable not only by the wife, but also her heirs. It is further established to retain possession, but also her heirs.—*Mirvahedali Kadumiya and others v. Rashidbeg Kadumiya,* AIR 1951 Bom. 22 at p. 23: 52 Bom. LR 884: ILR (1951) Bom. 169.

Suits limitation – in case of prompt dower – time would begin to run from the date of demand during subsistence of marriage.—*Razina v. Abiba*, AIR 1937 All.9.

Suits - limitation – if no demand is made – time for prompt dower will run from the dissolution of marriage.—*Sabir Hussain v. Farzand Hussain*, AIR 1934 All.52.

Suits – limitation – if talaq once becomes effective the mere fact that the parties lived together and the talaq again given would not prevent the running of time from the date of first talaq.—*Mst.Hayat Khaturn v. Abdullah Khan,* AIR 1937 Lah.270.

Suits – limitation – in case of registered deed under Article 62 of Limitation Act period of limitation is 12 years if immovable property is hypothecated.—*Mazahrul v. Azimuddin*, AIR 1923 Cal.507.

Suits – limitation – the period of limitation in case of immovable property is 3 years in terms of Article 55 of Limitation Act, 1963.—*Mst. Kubra Begum v. Fazal Hussain,* AIR 1927 All.268.

Suits – limitation – time will not run against the wife for suit for recovery of dower debt until in case of prompt dower there is positive and unambiguous demand – also a refusal.—*Mst.Zohrabibi v. Ganesh Prasad*, AIR 19256 Oudh 267.

Suits – limitation – time will not run against the wife for suit for recovery of dower debt where the marriage is dissolved by divorce only when it comes to wife's notice.—*Kathiyumma v. Urathel Marrakakar*, AIR 1931 Mad.637.

Suits – limitation- when a woman dies leaving her husband and three sons one of whom being minor as heir. A suit of recovery of their shares of dower debt is brought by all. The suit is within time.—*Mohd. Zahur Ahsan v. Mst. Maimuna*, AIR 1929 All.142.

Suits – limitation – when the plaintiff did not know of her right to claim dower by reason of fraudulent conduct of the defendant, time would only begin to run against the plaintiff when she knew of the fraud.—*Mst. Khadim Bibi v. Bure Khan*, AIR 1943 Lah. 215.

Effect of Consummation – in case of consummated marriage, the dower will not be lost in any case even by apostasy or other misconduct of wife such as committing adultery or concealing illicit pregnancy or even by murder of husband by her.—*Kulsambi v. Abdul Khadir*, AIR 1921 Bom.205.

Effect of death of either Party – in case of valid marriage full specified dower or if it has not been specified then proper dower whether the marriage has been consummated or not because of the death of the husband or the wife the marriage is rendered complete and everything becomes established and confirmed by its completeness.—*Malik Itikhar Wali v. Sarwari Begum*, AIR 1929 All 369.

Effect of – the fixing of high dower does operate as a healthy check on the husband's capricious exercise of such rights – Dower is frequently fixed out of all proportion to the means of the husband for this reason.—*Kulsambi v. Bilan Khan,* AIR 1929 Nag.121.

Entitlement of widow to retain possession – A Muslim widow would be entitled to retain possession provided she lawfully and without force or fraud gets into possession.—*Amir Hasan v. Mohd. Nasir,* AIR 1932 All 345.

Excessive – legislative control – the Courts have discretion to reduce excessive dowers to reasonable amounts.—*Abdul Rahman v. Mst. Inayaati Bibi,* AIR 1931 Oudh.63.

Failure to claim – if the husband files an application under U.P. Encumbered Estate Act and there has been no demand by the wife and refusal by the husband, in respect of prompt dower, the failure of the wife to make a claim for it would not extinguish the debt under Section 13 of the Act.—*Mst. Khatoon Begum v. Saghbir Hussain,* AIR 1945 All 321.

Fictitious – the onus of proving the fictitious nature of dower is on party making the allegation as its being fictitious.—*Mohd. Sultan Begum v. Saraj uddin,* AIR 1936 Lah.183.

If the dower is not specified it must be adjudged on definite principle.—*Humira Bibi v. Zubaida Bibi*, AIR 1916 PC 46

Dower in shape of land – whether registration necessary – the assignment of land by bride-grooms to bride in lieu of mahr at the time of marriage is in nature of gift (Hiba) and is neither a sale nor a hiba-bil-iwaz – No writing is necessary for such gift. Since Section 129 of T.P. Act exempts a gift by Muslim.—*Mohd. Hashim v. Aminbai*, AIR 1952 - 3 Hyderabad 3.

Insolvency Act – effect of – if the transfer insofar as it was for deferred dower is tainted with fraud the whole transaction must be set aside.—*Sarb Krishna v. Mst. Fatima*, AIR 1937 Lah. 859.

Insolvency Act – Effect of – On giving fraudulent preference to his wife by transferring his property in lieu of dower. In such cases the only remedy to other aggrieved creditors is to approach the Insolvency Court within two years of transfer when they would be placed on same footing as the preferred creditor.—*Mst. Razina Khatun v. Abida Khatun,* AIR 1937 All 39

Insolvency Act – effect of – When alienation was made more than two years before the adjustment of the insolvent it could be set aside under Section 4 and under Section 53, Provincial Insolvency Act and the Insolvency Court could only deal with question according to same principle which would have governed a suit for avoidance of the transfer under the ordinary law.—*Basharat Ali Shah v. Ram Ratan*, AIR 1938 Lah. 73

Invalid Khula – The right to dower revives if for any reason the Khula fails up.—*Qasim Hussain v. Kaniz*, AIR 1932 All. 649

It is not exactly a consideration for marriage in the sense of a consideration for any other contract – It is an obligation imposed by law on husband as a mark of respect for the wife.—*Mst. Fatima Bibi v. Lal din*, AIR 1937 Lah 345

It is not uncommon for a dower of a Mohammedan wife to be fixed at figure which was out of all proportions to the husband's means.—*Kulsambi Itfikhar Wali v. Sarwari Begum,* AIR 1929, All 359

Lien created by Mohammedan Law – The Muslim widow's right to the possession of the property of her deceased husband in lieu of the dower debt is creature of Mohammedan Law.—*Imtiyaz Begum v. Abdul Karim*, AIR 1930 All 881

Lien – Not a charge on property – The right of retention of property in lieu of the dower is fresh charge if there are no other debts on heirs.—*Nawab Begum v. Hussain Ali,* AIR 1937 Lah. 589

Not a secured debt – A decree of dower creating a charge would be set aside on appeal.—*Abdul Rahman v. Inayaati Bibi,* AIR 1931 Oudh. 63

Not a secured debt – A Muslim widow's claim for dower is a simple money claim though that decree may be executed against the husband's property.—*Abdul Rahman Khan v. Inayaati Bibi*, AIR 1931 Oudh. 63; *Durga Das v. Mst. Hanifa Begum,* AIR 1940 Oudh. 104

Not a secured debt – If there are no other debts outstanding the dower would be recoverable before any legacies are paid.—*Mst. Nawab Begum v. Hussain Ali,* AIR 1937 Lah 589

Not a secured debt – She is not a secured creditor.—*Kaniz Fatima v. Ram Nandan,* AIR 1923 All 331

Not a secured debt – The Court would not ordinarily create a charge on any property while passing a decree for dower. It can pass a simple money decree.—*Mst. Ahmadi v. Abdullah,* AIR 1934 Oudh. 437

Not a secured debt – The decree of dower would be a nullity for want of jurisdiction.—*Qasim Hussain v. Habibur Rahman,* AIR 1929 PC 174

Not a secured debt – the dower is a debt chargeable against the general estate of the deceased husband.—*Imtiyaz v. Abdul Karim*, AIR 1930 All 881

Not a secured debt – The widow ranks equally with other creditors her right is not except in one point (Section 480) greater than that of any other unsecured creditor.—*Munniram v. Mukhjtyar Begum*, AIR 1940 All 521

Not a secured debt – The wife is not entitled to any priority over other creditors as she is not a secured creditor.—*Imtiyaz v. Abdul Karim,* AIR 1930 All 881

Not a secured debt – Though decree of dower may be executed against the husband's property it cannot be charged against any specific portion thereof.—*Hussian Khan v. Tasadduq*, AIR 1925 Oudh 171

Not specified – Whether prompt or deferred – It has been held by High Courts at Allahabad, Bombay, Patna and Lahore that only reasonable proportion should be presumed to be prompt, regard being had to custom status of parties and the amount of dower settled.—*Rehana Khatoon v. Iqtidaruddin*, AIR 1943 All. 184

Not specified whether prompt or deferred – The Madras High Court has held if the character of dower is not specified to be prompt the whole of the dower shall be presumed to be prompt.—*Sheikh Mohd. v. Auesha Bibi*, AIR 1938, Mad 107

Payment of – some payments may be made for satisfaction of dower by mutual agreement or some sort of family agreement may be made or life interest transferredv*Jagdish Narain v. Bande Ali,* AIR 1939 Pat 406

Payment of – The lapse of time since marriage and the fact that the husband has been in a position to pay the dower raises no presumption that the dower has been actually paid. A burden lies on the person alleging that the dower has been paid to prove it.—*Hazl Faqir v. Thakur Prasad,* AIR 1941 Oudh 457

Payment of – The provision is not correct that payment of money by Shia husband to his wife during continuance of their married life should be presumed to be payments of her dower debt and it should be for her to establish the contrary.—*Fakhar Jahan v. Sharaf Jahan*, AIR 1928 Oudh. 460

Payment of – Where payments were made from time to time in varying amounts and there is no evidence that husband allocated any of these payments to the dower debt, nor there was any attempt at the trial to show that the lady accepted them as such, it cannot be said that dower debt was satisfied

by such payments.—*Nawab Mirza Mohammed Sadiq Ali Khan v. Nawab Fakr Jahan Begum*, AIR 1932 PC 13

Possession in lieu of – widow's lieu – A Muslim widow is entitled to remain in possession of the property of her husband though the dower has not been ascertained or has left to be subsequently settled and she is entitled to remain that possession until her dower is satisfied. The heirs or creditors or alienees can disturb her possession unless they satisfy the dower debt.—*Nawab Begum v. Hussain Ali,* AIR 1937 Lah. 589, *Mst Ghafooran v. Ram Chandra*, AIR 1934 All. 168

Possession in lieu of – Widow's lieu – A Muslim widow who was in possession of her husband's property in lieu of her dower debt could not mortage her right of possession.—*Ram Prasad Singh v. Abdul Karim*, AIR 1930 All 881

Possession in lieu of – Widow's lieu – The dower debt of the Mohammedan widow is not properly speaking a charge upon property of her husband and the interest which she has in the property in her possession in lieu of dower debt is therefore an interest restricted in its enjoyment to her personally within the meaning of Section 6(d) of T.P Act and as such is not capable of alienation.—*Sheikh Mohammed Zobair v. Bibi Sahidan*, AIR 1942 Pat 210

Possession in lieu of – widow's lieu – The right of a Muslim widow to remain in possession of her husband's property until the satisfaction of her dower debt was a right restricted to her personally and was not capable of alienation whether with or without the dower debt.—*Abdul Samad v. Alimudin,* AIR 1944 Pat. 174

Possession in lieu of – Widow's lieu – The right of Mohammedan widow to hold the property as a security for the dower debt and to continue possession thereof until the dower debt was satisfied such property was both inheritable and transferable.—*Mst Bibi Makbulnnissa v. Mst. Bibi Umatunnissa*, AIR 1923 Pat 33

Possession in lieu of – Widow's lieu – The widow has right to possession of the properties of her husband in lieu of dower debt and so long as her dower debt remains unsatisfied and does not transfer the dower debt itself, she can transfer for her lifetime possession of the property.—*Abdur Rahman v. Wali Mohammed*, AIR 1923 Pat 72

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CHAPTER XI

INTERPRETATION OF SECTION 3

Synopsis

1. Reasonable and Fair Provision

Section 3(a) deals with the post divorce obligation of a Muslim husband regarding payment of "reasonable and fair provision" to his former wife within the iddat period.

The expressions "reasonable and fair provisions" have not been defined by the law makers in the Act. The concept of reasonable and fair provision and maintenance cannot be read as meaning of two different things but they convey the same meaning.

This position is recognized by the Supreme Court in *Shah Bano's* case (supra). In Para 15 of the judgment their Lordship of the Apex Court have referred to the Arabic version of relevant verses of the Quran where word 'Mata' has been used which means provision. The expression a "reasonable and fair provision" in Section 3(1) seems to represent this Arabic word Mata while the word maintenance, it appears, has been imported from Section 125 Cr.P.C. and other laws providing for grant of maintenance. Therefore, the words a reasonable and fair provision and maintenance in Section 3(1) though ostensibly may appear to be distinct, but in reality they are one and the same thing.

According to Section 3(1)(a) of the Act, a reasonable and fair provision and maintenance to be made and paid to her (a divorcee wife) within iddat period by her former husband. After the

decision of Supreme Court in Shah Bano case, the Act 26 has been enacted to make the law of maintenance in conformity, so far as, it relates to the right of maintenance of a Muslim woman after divorce. Let us now discuss the Muslim Law of Maintenance at this juncture.

2. Muslim Law of Maintenance

Under the Muslim Law, Maintenance means "NAFQA"

It is sacred duty of a muslim husband to maintain and look after the welfare of his wife.

Almighty ordains regarding the responsibility of husband towards his wife thus :

> *"Women have rights (over the husbands as regards living expenses) similar (to those of their husbands) over them (as regards obedience and respect) to what is reasonable, but means have a degree over them and Allah is Almighty, all wise".* (Surah Al Bakhra Aiyat No.228)

2.1. Husband's liability towards his divorcee wife

Regarding husband's liability towards divorced wife Almighty ordains in the Quran as under:

> *"When you divorce women, and they (are about to) fulfil the term of their (iddat), either take them back on equitable terms or set them free on equitable terms, but do not take back to injure them (or) to take undue advantage, if anyone does that, he wrongs his soul. Do not treat Allah's signs as jest, but solemnly rehearse Allah's favours on you".* (Surah Al Bakhra Aiyat No.231)

It was further ordained that let the women live (in iddat) in the same style as/ye live according to your means, annoy them not, so as to restrict them. And if they are pregnant, then spend (your substance) on them until they deliver their burden : and if they suckle your (offspring). And give them their recompense : and take mutual Counsel together, according to what is just and reasonable. And if ye find yourselves in difficulties. Let another woman suckle (the child) on the (father's) behalf." (Surah : Al-Talaq : 6)

The husband is also duty bound and under obligation to maintain his divorcee wife, and if she has given birth to a child till his sucking period is over, as per Quranic Injunction *viz.*

"The mother after divorce shall give suck to their children for two whole years, (that is for those parents who desire to complete the terms of sucking but the father of child, shall bear all the cost of their mother's food and clothing on a reasonable basis".

(Surah Al Bakhra Aiyat No.233)

"There is no sin on you, if you divorce women while you have not touched (had sexual relation with) them nor appointed them unto their Mehar, but bestowed on them (as suitable gift) the rich according to his means and the poor according to his means, a gift of reasonable amount is a duty on the doers of good".

(Surah Al Bakhra Aiyat No.236)

2.2. Husband's right over the Property of Divorcee Wife

During the wedlock or after divorce a muslim husband is duty bound not to compel her or coerce his divorcee wife in any manner by any means to part with her properties (movable and immovable) as ordain in the Holy Quran.

"But if ye decide to take one wife in place of another, even if ye had given her latter a whole treasure for dower, take not the least bit of it back, would you take it by slander and a manifest sin ? and how could you take it when you have gone in unto each other, and they have taken from you a solemn covenant ?

(Surah Al-Nisa Aiyat No.20, 21)

One of the verses of Holy Quran Almighty ordaines that:

" 'O' Prophet, who ye do divorce woman, divorce them at the prescribed period and fear Allah your Lord and turn them not out of their houses, nor shall they (themselves) leave, except in case they (themselves) leave, except in case they are guilty of some open lewdness, those are limits set by Allah : and anyone who transfresses the limits

of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah being about thereafter some new situation."

(Surah Al-Talaq : 1)

In the book "outline of Mohammedan Law' by *Asaf A.A. Faizee*, the author explained the obligation in the following words : - "the highest obligations arise on marriage, the maintenance of wife and children is a primary obligation. The second class of obligations arise when a certain person has "means' and another is 'indigent'. The test appears to be : Are you prevented by Islamic Law from accepting 'alms' ? if you are, you are possessed of means, otherwise you are indigent. For instance, in one case, according to Fatawa Alamgiri, the possession of a surplus 200 dirhams (60-80 rupees) over a man's necessities was deemed sufficient to prevent him from begging and to include him in the class which is designated as being possesses of means. The wife's right to maintenance ceases on the death of her husband for her right of maintenance supervenes. The widow is, therefore, not entitled to maintenance during 'iddat' on death, it is otherwise, in the case of divorce where she is entitled to maintenance during iddat. "Similarly in the Book, "the Hedaya", a Commentary on the Muslim Law by *Charles Hamilton* (2nd Edition, 1870), Chapter XV, explained the law with regard to 'nafqa' or maintenance. A relevant passage at pages 140 and 145 is quoted below : "when a woman surrender herself custody of her husband, it is incumbent upon him thenceforth to supply her with food, clothing and lodging whether she be a Musalman or infidel, because such is the percept, both in the Koran and in the tradition and also because maintenance is recompense for the later matrimonial restrain ; The rule holds the same with respect to any other in the present case. "Where a man divorced his wife, her subsistence and lodging are incumbent upon him during the term of her iddat. Whether the divorce be of reversible or irreversible kind - Shafei says that no maintenance is due to women repudiated by irreversible divorce, unless she became pregnant.

In another book "An introduction on Islamic Law" by *Joseph Schaht* (Oxford University Publication) the author has explained the outline of the system of Islamic Law. At page 167, the author says "the maintenance of the wife comprises food, clothing and lodging *i.e.*, a separate house or at least a separate room which can be locked, for the well-to-do also, a servant, she is not obliged to bear any part of the expenses of the matrimonial establishment. Her claim to maintenance is suspended if she is minor, is disobedient (in particular, if she leaves the house unauthorizedly or refuses to marital intercourse), is imprisoned

for debt, performs the pilgrimage without her husband, or is abducted (by ghasb), all cases in which she cannot fulfil her marital duties. The claim to maintenance continues during iddat, provided the marriage has not been dissolved through a fault of hers." (Emphasis given)

In another Classical Book, namely, "Mohammedan Law" by *Syed Ameer Ali* (Vol. 2, 5th Edition) which is accepted as an authority on Mohammedan Law, in Chapter VI under the heading "rights and duties of married parties", the author explained the law with regard to maintenance at page 419 which reads thus, "when the woman abandons the conjugal domicile without any valid reason, she is not entitled to maintenance. The husband's liability to support the wife continues during whole period of probations, if the separation has been caused by any conduct of his, or has taken place in exercise of right possessed by her. The husband would not, however, be liable to support the wife during 'iddat' if the separation is caused by misconduct. "The author has further quoted the passage of the Book 'Fatwa-e-Alamgiri" which is reproduced hereinbelow : "A woman is undergoing iddat' says Fatwa Alamgiri on account of Talak is entitled to maintenance and lodging whether the Talak is revocable or irrevocable, whether she is induced by any cause proceedings 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. But is separation is induced by any fault of the wife, she is not entitled to it.".

In the book "principles of Mohammedan Law" by *D.F. Mulla* which is the most successful book on Mohammedan Law, both in India and Pakistan, and has been accepted as an authority since nine decades and 9th Edition of this book has been revised by Mr. *M. Hidayatulah*, the then Chief Justice of India. Section 279 of the book explains provision with regard to maintenance during the period of iddat. If the divorce is not communicated to her until after expiry of that period, she is entitled to maintenance until she is informed of the divorce. A widow is not entitled to maintenance during the period of iddat consequent upon her husband's death.

The next important authority on this subject is the classical work of *Faiz Badruddin Tayabji i.e.*, "Principles of Mohammedan Law". The author has also subscribed the law on this subject stating under the Hanafi Law, on divorce, a wife is entitled to maintenance during her iddat period irrespective of fact that the divorce is revocable or

irrevocable. For better appreciation Section 300 of this Book at page 337 (second Edition, 1919) is reproduced thus, "According to Hanafi Law a wife who is divorced is revocable or irrevocable (or triple) and whether or not she is pregnant, unless the marriage has been dissolved for some cause of a criminal nature, originating from the women".

According to Shia and Shafi Law, "a wife who is revocably divorced is entitled to maintenance during her 'iddat', but not a wife who is irrevocably divorced; provided that if, at the time when an irrevocable divorce is pronounced, the wife is pregnant, she is entitled to maintenance during her pregnancy".

The author also takes guidance on this subject from one important Book "Institutes of Mussalman Law" by *Nawab A.F.M. Abdul Rahman* (1907 Edition). This is the excellent and classical work of the author with reference to the original Arabic Sources. The provisions of Law have been arranged in this book under different articles. Articles 324 deals with the maintenance to a wife which reads as under: "No dissolution of marriage, proceeding releases a husband from the obligation to pay for the wife's maintenance during her period of iddat, however, long its duration. Thus, in the following cases the wife, during iddat, is entitled to maintenance (1) When, pregnant or not, she is repudiated under a revocable or irrevocable, imperfect or perfect from. (2) When the marriage is dissolved by reason of an oath of imprecation, or a vow of continuance or when the wife is repudiated in Khula form, unless at the time of such Khula repudiation she renounces her right to maintenance. (3) When, after conversion to Islam, she is separated from her husband, consequent upon her husband's refusal to accept that faith (4) When, the husband on attaining puberty, exercises his right of option and dissolves the marriage. (5) When, the marriage is dissolved by reason of her husband's apostasy.

In the very same book Article 312 prescribed the period of iddat as under:

> "for every wife who is not subject to menstruation, whether this is due to her not having reached the age of puberty or to advance years, and for every young wife, who has attained the age of puberty and is not subject to menstruation the duration of iddatis three months. When iddat commences on the first day of the month, the three months are to be counted by the appearance of the moon even when the number of days is less than thirty."

It, is therefore, clear from the authorities referred to hereinabove, that there is no two opinions on the principles of Mohammadan Law that a divorcee wife is entitled for a fair just reasonable provision for maintenance and residence only for a period of iddat.

As per the injunction of the Quran, reasonable and fair provision can be translated as 'Mata' into Arabic language.

2.3. Mataa

In order to understand the Arabic expression Mata, the relevant Aiyat No.241 of Surah Al Bakhara is quoted below :

WALIL - MUTALLAQATI MATTAUM-BIL-MA-RUUF, HAQQAN ALAL MUTTAQIN

Translation : "For divorced women give suitable gift, this is a duty on the righteous.

Dr. *Syed Abdul Latif* in his translation "AL-QURAN", translated the word Mata as "FAIR PROVISION".

The emphasis is given on the word GIFT as the meaning of MATA, the Almighty thus, conferred unlimited powers on a muslim husband to give whatever he likes (house, gold ornaments, cast *etc*.,) to his wife after the divorce or at the time of divorce within the iddat period as per his means; at the same time, a right is created for a divorcee to collect gift "from her former husband". The word "gift" is subscribed by *Abdulla Yousuf Ali* for the word MATA, and the same has got a very vast scope.

Taking into consideration the above quoted Aiyat, the Apex Court of India, in the case of *Shah Bano* (supra) interpreted that is anonymous to the expression of fair and reasonable provision and ruled thus, 'it is therefore, evident from the Quran, the word 'mata' is used in Aiyat 241 Surah Al Baqhra means reasonable and fair provisions.*

The question of 'mataa' has been constantly present throughout the debates over the terms of Sections 125 and 127 of the new Code of Criminal Procedure, the *Shah Bano* case and the Muslim Women Protection of Rights on Divorce) Act but it has been more or less on

* *Author's Note*.—The arabic word 'mata' was wrongly interpreted as maintenance by the Apex Court in *Shah Bano's* case and for this reason there was an uproar by Muslims in India, which was attempted to be subsided by Parliament, enacting the Act of 1986.

the sidelines. To be sure, the precise provisions of one or other personal law are irrelevant to a consideration of Section 125 of the Cr.P.C. but "personal law" was (needlessly, irrelevantly and ambiguously) brought into the picture by the amendment of Section 127 of the Code and the Muslim Women Act explicitly purports to codify the Muslim Personal Law on (*inter alia*) the matter of the economic rights of the divorced Muslim Women.

In the case of *Amirshah v. Salimabi*,[1] the Nagpur Bench of Bombay High Court dealing with a case of recovery of dowry articles by way of filing a suit by divorced muslim woman and taking into consideration the provision of the Section 3 of the Act answered the question as to whether both the remedies are available to such woman thus:

> "Perusal of the above referred provisions clearly dembustais that notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to make an application for recovery of dahaj articles or mahr, *etc.* under Section 3 of the Act of 1986. However, the provisions of Section 3 neither expressly nor impliedly oust of jurisdiction of the Civil Court. The remedy under Section 3 of the Act of 1986 is undoubtedly in addition to other remedies available to the Muslim divorced woman for recovery of dahej articles or mahr.
>
> I cannot lose sight of the fact that if a right pre-existing in common law is recognised by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the Civil Court"s jurisdiction, then both the common law and statutory remedies are available to the concerned person and it is for such person to select the remedy available. in the instant case, non applicant has a pre-existing right under the provisions of the Act of 1986 and the said Act also provides remedy for its enforcement with expressly excluding jurisdiction of the Civil Court. In such situation, in my considered view, both the remedies are available to the Muslim divorced woman one under the provision of Section 3 of the Act of 1986 and other for approaching the Civil Court. It is for such woman to select/elect the remedy, which she wants to undertake."

The controversy as to the meaning of the 'provision' and 'maintenance' has only been further clarified by the Supreme Court in *Shah Bano's* case, holding that there is no difference between these two words as that is nothing but a distinction without any difference. (See Author's note supra)

1. AIR 2006 Bom. 302

The concept of reasonable and fair provision was taken into consideration by a Full Bench of A.P. High Court in the case of *Usman Khan Bahmani*[1] thus, "The concept of reasonable and fair provisions and maintenance cannot be read as meaning of two different things. The word Mata used in Ayat 241 indicates that the words fair and reasonable provision and maintenance convey the same meaning".

> "In order to ascertain correct import of the words a reasonable and fair provision and maintenance to be made and paid to a divorcee wife occurring in clause (a), it would be useful here to refer to the position of the Muslim Personal Law on the point. After divorce, the wife is entitled to maintenance during the period of iddat (s). 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. So, after divorce, a Muslim wife is entitled to maintenance from her former husband during the period of iddat".
>
> "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. Doest it mean that husband should provide reasonable and fair provision and maintenance as a compendious whole or is to be taken that a reasonable and fair provision is something distinct and separate from maintenance. This aspect of the matter is of considerable importance because of 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 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 iddat. This argument is advanced on the premises 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 foremost

1. 1990 Cri.LJ. Page 1364.

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 period of iddat, that 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 maintenance should be made and paid 'within' the period of iddat. If it is recognized 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 extended beyond the period of iddat under Section 3(1)(a) of the Act of 1986. What has been recognized as one end is regarded to maintenance cannot be taken away the other for providing reasonable and fair maintenance. There is another difficulty which clearly demonstrates the fallacy inherent in such a submission if reasonable and fair provision is to be made by the husband for a period beyond the iddat period of a divorced woman then it is clear that such provision will have to be made within the period of iddat which is normally a period of approximately 3 months."

The essential fact to realize is that 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 second limb of the section clearly stipulates that the provision and maintenance must be made and paid in full within the period of iddat.

From a bare perusal of Section 3 of the Act it is manifest that a divorced wife shall be entitled to reasonable and fair provisions and maintenance from her former husband within iddat period apart from other obligations as envisaged in Section 3(b)(c)(d) and sub-section (3) of Section 3.

A reading of the provisions of Act 25 of 1986 clearly shows that this particular enactment has an overriding effect. Section 3(1) begins with the words 'notwithstanding anything contained in any other law for the time being in force. The Act is also a special enactment to protect the rights of Muslim women, who have been divorced or by reason of divorce, the status of the parties has changed. So, after 14.5.1986 the rights of the wife are governed by the provisions of special enactment *i.e.* Act 25 of 1986. Under Section 3 of the Act a divorcee wife is entitled to approach the Court and seek the relief for a reasonable and fair provision and maintenance for the period of

iddat from her former husband. She is also entitled to claim maintenance for two years for her children if the children are being brought up by her. She is also entitled to Mahr or Dower amount agreed to be paid at the time of marriage and also for return of all the properties given to her before or at the time of marriage or after the marriage by her relatives, friends or husband or relatives of the husband or his friends, sub-section (2) of Section 3 of the Act contemplates the procedure by which the divorcee woman can obtain relief.

In the case of *Majitha Beevi v. Yakooba,*[1] a question was posed to Kerala High Court as to whether the property purchased by the husband during the subsistence of marriage in the name of his wife would exonerate him from paying fair and reasonable provision. Answering this question Kerala High Court held as under:

> "U/s.3(1)(a) of the Act the divorced woman is entitled to reasonable and fair provision to be made and maintenance to be paid to her within a period of iddat from her former husband. It has to be noted that the provisions of Sec. 3(1)(a) of the Act is enacted in tune with the Quranic mandate contained in verses 236 and 241 of Chapter II. (Surah Al Bakhra)."

The Kerala High Court has also taken into consideration, the following verses of Quran while delivering the judgment in the above case.

> "VERSE 236 of Chaper II Surah Al Bakhra stipulates that - "there is no blame on you if you divorce woman before consummation or before fixation of the dower, but bestow upon them a suitable gift the wealthy according to his means and the poor according to his means, a gift of a reasonable amount is due from those who wishes to do the right things."
>
> VERSE 241 of Chapter II Surah Al Bakhra mandates that - "for divorced woman provision should be made on a reasonable sale and this is the duty on the righteous, "this

1. 2000 (2) Crimes 601

fact is evident from the Statement of Objects and Reasons to the Muslim Women (Protection of Rights on Divorce) Act, 1986 which among other things states that a Muslim divorced woman shall be entitled to reasonable and fair provision and maintenance within the period of iddat by her former husband. Therefore, the fact that the entitlement of a Muslim divorced woman to a reasonable and fair provision from her former husband be made during the period of iddat is beyond disture."

The Kerala High Court further held that - "it is true that clause (d) of sub-section (1) of Section 3 of the Act provides that a divorced woman is entitled to all the properties given to her before or at the time of or after her marriage by her relatives or friends or the husband or at the time of or after her marriage".

The Patna High Court in the case of *Abdul Sattar v. Arifa Biwi* also expressed the same view holding that "The properties referred to in clause (d) of Section 3(1) of the Act cannot be construed as properties in its widest sense, as the revision petitioner wants in this case. The Court also held that the word 'property' occurring in clause (d) of Section 3(1) should be considered in a strict and restricted sense than the wide amplitude given to the word in common parlance. If the word 'property' occurring in clause (d) of Section 3(1) of the Act is interpreted so widely as contended by the revision petitioner so as to embrace the vast properties or the entire properties acquired by the former husband in the name of divorcee wife during the subsistence of the marriage. It will jeopardize the very intentment of providing reasonable and fair provision at the time of divorce to his divorced wife is to protect her from destitution and vagrancy due to the divorce. Therefore, by a reasonable, pragmatic and harmonious interpretation of the provisions of the clauses (a) and (d) of sub-section (1) of Section 3 of the Act, it is clear that clause (d) deals with the properties given by the former husband to the divorced wife during the subsistence of the marriage by way of gift or otherwise. But clause (d) of sub-section (1) of Section 3 does not take in the entire or the major portion of the property acquired by the husband during the subsistence of the marriage in the name of his wife due to his own reasons for such acquisition without the intention to give the property to the wife as her exclusive property.

Referring to various Quran Injunctions, the Court further held that "the provision of Section 3(1) of the Muslim Women (Protection of Rights on Divorce) Act, it is clear that the primary object of direction to the former husband to make fair and reasonable provision for, the divorced woman is to provide for her maintenance after divorce. The quantum of provision has to be made by the former husband in accordance with his means and standard of living that is enjoyed by the divorced woman during the subsistence of the marriage. The mandate to make reasonable and fair provision is not in anyway intended to harass the former husband or to enable the divorced woman to make any unlawful gain or unjust enrichment out of the divorce. It is a fair and equitable provision to be made by the former husband to his divorced wife. Even though reasonable and fair provision has to be made by the former husband to the divorced woman within the period of iddat if the husband has already made such reasonable and fair provision in favour of the divorced woman during the subsistence of their marriage, it certainly is a factor to be taken into account while considering whether the former husband is liable to pay any and what reasonable and fair provision to the divorced woman".

> "In this context, the contention of the revision petitioner (divorcee wife) that in view of Section 3(1)(d) of the Muslim Women (Protection of Rights on Divorce) Act divorced woman is entitled to all the properties given to her before, at the time or after the marriage by the husband or any relatives of the husband or his friends, the properties admittedly given by the husband to the revision petitioner (divorcee wife) during the subsistence of her marriage will come within the ambit of clause (d) of sub-section (1) of Section 3 of the Act and as such those properties standing in the name of the revision petitioner cannot be taken into account while considering the eligibility of the revision petitioner for reasonable and fair provision from the respondent and therefore, the lower Court in absolute error in disallowing her claim for reasonable and fair provision under clause (a) of sub-section (1) of Section 3 of the Act is not sustainable. The properties referred to in clause (d) of Section 3(1) of the Act cannot be construed as properties in its widest sense, as the revision petitioner wants in this case. The word "property" occurring in clause (d) of Section 3(1) should be considered in strict and restricted sense then the wide amplitude given to the word in common parlance. If the word, "property" in Section 3(1)(d) of the Act is interpreted, so widely as contended by the revision petitioner, so as to embarrass the vast properties or the entire

properties acquired by the former husband in the name of INS divorced's wife during the subsistence of the marriage, it will be jeoparadized, the very intentment of providing reasonable and fair provision by the former husband to his divorced wife from the Quranic injunction and the provisions of Section 3(1) of the Act referred to above, it is pertinent that the idea behind the former husband providing reasonable and fair provision at the time of divorce to his divorced wife is to protect her from destitution and vagrancy due to the divorce. Therefore by a reasonable pragmatic and harmonious interpretation of the provisions of the clauses (a) and (d) of sub-section (1) of Section 3 of the Act, it is clear that clause (d) deals with the properties given by the former husband to the divorced wife during the subsistence of the marriage by way of gift or otherwise. But clause (d) of sub-section (1) of Section 3 does not take in the entire or the major portion of the property acquired by the husband during the subsistence of the marriage in the name of his wife due to his own reasons for such acquisition without the intention to give the property to the wife as her exclusive property."

Therefore, it was held that the properties acquired in the name of the revision petitioner exclusively and in the joint names of the revision petitioner and the respondent by utilizing the funds of the respondent will not assure the character of property given by the husband before, at the time or after the marriage to the revision petitioner so as to attract the provisions of Section 3(1)(d) of the Act as contended by the revision petitioner. The Court also referred a decision of the same Court which was delivered in the case of *Ahmed* where it was held even a divorcee wife who lives in luxury and affluence is also entitled to claim relief under the Act.

It was ultimately held by the Court that the scheme of the Act itself established that the primary concern is to protect the divorced woman from destitution and vagrancy and that primary responsibility is upon her former husband. In case the former husband is not in a position to make the payment, the liability is cast upon her relatives to maintain till her death as provided in Section 4(1) of the Act and in case, the relatives mentioned in Section 4(1) of the Act are incapable to maintain, the divorced woman, the liability is cast on the State Wakf Board to maintain her under Section 4(2) of the Act. But the primary liability of the husband to make the fair and reasonable provision as contemplated under Section 3(1)(a) of the Act will not be absolved so long as he has got the means to pay the same.

What follows from the foregoing discussions is that the liability of the former husband to make reasonable and fair provision in favour of his divorced wife within the period of iddat is absolute.

Examining the provisions of Section 3 of the Act a Division Bench of A.P. High Court in the case of *Nayeem Khan v. Union Law Secretary Government of India*[1], held that:

> "The Act was enacted 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 sum and substance of the above 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 insofar 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.

As regards the question whether a divorced Muslim woman can be left in the lurch was tested on the touchstone of clauses (a) to (d) of sub-section (a) of Section 3. It was further held by the A.P. High Court in the case referred above that:

> "The words used in this clause are "all the properties" which include movable as well as immovable properties. The divorced woman will, therefore, be entitled to lay claim for return of all the movable and immovable properties given to her before or at the time of marriage by her husband or by the relatives of the husband or friends. Al 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. Insofar 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".

Upon consideration of the clause mentioned, the learned Judge relied upon *Mohd. Ahmed Khan v. Shah Bano Begum* wherein it was

1. 2001 (5) ALD 145 = 2001 (4) ALT 666 (DB).

held that the provision and maintenance have the same meaning. It was held therein.

> "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 lifestyle *etc.* 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 under Section 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 fair provision is to be made separately from that of maintenance to be given to the wife, such reasonable and fair provision is confined only for the period of iddat, as defined in Section 2 of the Act.
>
> Even assuming (without conceding) that the maintenance referred to in Section 3(1)(a) is confined to maintenance for the period of iddat, there still remains the question of provision. This provision (mataa) is neither defined by the Act nor subjected to a statutory maximum. The determination of what constitutes, on the facts of any given case, reasonable and fair provision rests completely in the discretion of the Magistrate. Section 3(3) of the Act instructs the Magistrate to determine what would constitute reasonable and fair provision and the husband and the standard of life the woman enjoyed during the marriage.

Yet again, it is also interesting to note that Calcutta High Court in *Shakila Parveen v. Haider Ali*, following several decisions opined thus:

> "The word provisions itself indicates that something is provided in advance of meeting some needs. This means that

> at the time of giving divorce the Muslim husband is required to visualize or contemplate the extent of the future needs and make preparatory arrangement in advance for meeting the same. May be that the provision can be made that every month a particular amount be paid to the wife; may be that some property be reserved for her so that she can purchase article for livelihood. Reasonable and fair provision may include provision for her residence, provision for her food, provision for her clothes and other articles. The husband may visualize for her clothes and other articles. That means a provision for residential accommodation is made. Apart from the residential accommodation for clothes, food and also for other articles some fixed amount may be paid or he may agree to pay it by installments. That would also be a provision. Therefore, the provision itself contemplates future needs of divorced woman. If the husband is rich enough. He may provide separate residential accommodation and that can be said to be a provision for residential accommodation. Therefore, it cannot be said that under Section 3(1)(a) divorced woman is entitled to provision and maintenance only for iddat period."

Explaining Sec.3(3)(4) of the Act, the High Court of Bombay in the case of *Abdul Abid Abdul Sattar v. Sultana Parveen*,[1] held that "it is seen that in Section 3, sub-section (4) of the Muslim Women (Protection of Rights in Divorce) Act, 1986, the word used is 'sentence', which presupposes commission of offence in the event of each failure. In the case on hand it is a composite order for maintenance of iddat period, case on hand with payment of reasonable amount for provision for future and the petitioner has failed to comply with the same. The amount is recoverable, 'notwithstanding any length of duration of non-payment.

Since the consequences are styled as "sentence", failure to comply with is punishable only once. Moreover, if it is a case of non-payment of liability which is not recurring. Had it been a case of monthly maintenance, every 12 months non-payment may create fresh cause of action, however, this being an order of single payment, the right to sentence would extinguish by imprisonment on one occasion. In the result any subsequent sentence would be hit by Article 20 of the Constitution.

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1. 2005 (3) Mah. L.J. 471

2.4. Liability of Muslim Husband under the statute

The liability of Muslim husband is not restricted to payment of dower, iddat period maintenance amount and return of jahez articles, on one hand, he is not only bound to discharge his liabilities within the iddat period but also pay maintenance to his divorcee wife till her lifetime or till she remarries.

The expression "within" should be read as 'during' or 'for' and this cannot be done because words cannot be construed contrary to this meaning as the word "within" would mean 'on or before' 'not beyond' and therefore it was held that the Act would mean that on or before the expiry of the iddat period the husband is bound to make and pay maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided under Section 3(3) but nowhere the Parliament has provided that reasonable and fair provision and maintenance is limited as for the iddat period and not beyond that.

Interpreting Section 3(3) the Apex Court ruled in the case of *Danial Latifi* (supra) that a Muslim husband is liable to make reasonable and fair provision for the future of the divorcee wife which obviously includes maintenance as well. Such a reasonable and fair provision beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act. It would extend to the whole life of the divorced wife unless she gets married for a second time. This ruling of Supreme Court has virtually taken away the soul from the body of statute and left it as toothless enactment. It is very unfortunate that the Muslims of India have accepted this verdict without raising their little finger and above all, this verdict has given a new life to much controversial judgment which was rendered in the case of *Shah Bano*.

The judgment of *Danial Latifi* case[1], was followed by the apex Court in the case of *Shahbana v. Imran Khan* (See p.287 Appendix-A) The study of both the cases would lead us to conclusion that the very Act and its purpose of enactment has been defeated. The intention of Parliament was to exonerate a muslim husband from his liability to maintenance to his divorced wife in accordance with the Muslim Law, as was demanded by muslims after the verdict of *Shah Bano's* case.

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1. *Danial Latifi and another v. Union of India*, 2001 (2) ALD (Crl.) 787 (SC).

2.5. Nature of proceedings

The proceedings under this Act are of civil in nature. The expression 'Civil Proceeding' is not defined in the Constitution nor under the General Clauses Act, a criminal proceeding is ordinary one, in which if carried to its conclusion it may result in the imposition of sentences such as death imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the orders to prevent apprehended breach of peace, order to bind down persons who are a danger to the maintenance of peace and order or order aimed at preventing vagrancy are contemplated to be passed.

The nature of the proceedings were also examined by Kerala High Court in the case of *Assyn v. State of Kerala*,[1] and held that:

> "The proceedings under this Act are essentially civil in nature. Making amounts due to divorced woman available to her is the statutory obligation. Sentencing a defaulter in violation of the order is only a method to enforce compliance. That is not the purpose of the statute. The primary purpose is to make the amounts due available to the hapless woman. If law has no teeth to overcome obstacles and enforce such a direction, the legislative dream and vision cannot be translated into the tangible assistance to the women."

A Full Bench of Kerala High Court in the case of *Balan Nair v. Valasamma*,[2] held that provision of Section 125 Cr.P.C. is a measure of social legislation and specially enacted to protect women and children and further held that proceeding under Chapter IX of Cr.P.C. are essentially of civil nature. The Full Bench followed the earlier decision of the Apex Court pronounced in the case of *Nandlal v. Kannailal*,[3] where it was ruled that proceedings under Chapter IX of Cr.P.C. are essentially civil in nature.

2.6. Amendment can be allowed

Answering a question raised by an aggrieved party as to whether a petition under this Act can be amended, a Single Judge, Kerala High Court, in the case of *Zainulabedin*,[4] ruled that the amendment

1. 2004 (2) ALT (Crl.) 9 (Ker.)
2. 1986 (1) Ker. L.J. 1378
3. AIR 1960 SC 882
4. 2004 Crl.LJ. 2351

can be carried out and thus, answered the question in affirmative. The learned Single Judge followed the decision rendered by the Full Bench of Kerala High Court in the case of *Balan Nair* (as stated supra) and in the above case, bone of contention was that the criminal Court has illegally allowed the petition for amendment invoking its inherent powers. The learned Single Judge of Kerala High Court, deciding the controversy held that:

> "Section 482 gives power to the High Courts only to pass order using inherent powers and it is settled law that there is no inherent powers for the criminal Courts subordinate to the High Court. But, in *Madhavi v. Supran*, 1987 Ker. L.J. 737, this Court held that even though inherent powers U/s. 482 of the Code of the Criminal Procedure is only available to the High Court. Subordinate Criminal Courts are not powerless to do what is absolutely necessary for dispensation of justice in the absence of enabling provision provided there is no prohibition or no illegality or miscarriage of justice is involved. Both Full Bench decisions cited were concerned with Section 125 of the Code of Criminal Procedure as Courts were considering the revision applications filed from that. We are considering a petition arising from the Muslim Women (Protection of Rights on Divorce) Act, 1986. It is a self-contained Code. The Central Government has also framed Muslim Women (Protection of Rights on Divorce) Rules, 1986. Rule 4 proviso made specifically for proceeding with the case *ex parte* and for setting aside the *ex parte* order. In both the Act and Rules wherever the procedure as per the Code of Criminal Procedure is to be taken, that is specifically mentioned. Effect of Section 5 of the Act is that operations of Section 125 or 127 of the Act are excluded on the commencement of the Act. Even pending applications under Section 125 or 127 of the Code have to be disposed of in accordance with the provisions of the Act unless separate affidavit or declaration is made as provided U/s.5 as can be seen from the decision reported in *All India Muslim Advocates' Forum v. Osman Khan*, 1990 (1) Ker LT (SN) 72. A reading of the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 would show that it is a proceeding in quasi-civil and quasi-criminal matter even though the Magistrate is made as the adjudicating authority. Since impugned order in this case is passed by a Magistrate, in view of the judgment of the Apex Court in *Narayan Row's* case, such orders can be challenged using provisions of the Code of Criminal Procedure, even

assuming that the proceedings and the Magistrate has no specific power to amend the pleadings as in the Code of Civil Procedure, I am of the opinion that an interference under Section 482 is not warranted to quash the order on the facts of the case. There is no specific prohibition in the Code of Criminal Procedure in allowing amendment of a petition filed under Chapter IX of the Code of Criminal Procedure. In the absence of express prohibition in the Code of Criminal Procedure, being quasi-criminal or quasi-civil, no interference is needed by using the powers under Section 482 of the Code of Criminal Procedure by this Court, if Magistrate Court allows amendment of a petition filed under Section 6 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. This petition is filed under Section 482 of the Code. The High Court need interfere under Section 482 using inherent power only if it is satisfied that there is abuse of process of the Court or to secure the ends of justice. Powers under Section 482 of the Code of Criminal Procedure is sparingly used by the Court. I am of the opinion that by allowing the amendment application, no justice is caused. It cannot be stated that there is abuse of the process of the Court or miscarriage."

In the case of *Subhan Ara Bibi*, the Orissa High Court is also of the view that, "So far as the petition for amendment is concerned, contention of the learned Counsel for the petitioner regarding unreasonable approach of learned S.D.J.M. in rejecting such petition on the ground that a fresh application should be filed was not convincingly countered by the learned Counsel appearing for the opposite party though he tried to advance argument in the line of the reasoning assigned by the learned S.D.J.M. In that context, it may be mentioned that S.D.J.M. completely ignoring the principle and the object behind the provision U/s.125 regarding grant of protection to the destitute and to save them from vagrancy, rejected the petition on filmsy ground. When the status of minor child is not at dispute and he is entitled to maintenance U/s. 125 Cr.P.C. notwithstanding the provisions in the Act and when he is in the custody of the mother guardian learned S.D.J.M. should not have asked the petitioner to file another application for her minor child. Whether or not the prayer for maintenance of the petitioner U/s.125 is acceptable (that depends upon the proof or disproof of the factum of divorce) at the same time, the claim of maintenance of the minor child should be considered so as to expedite remedy to a minor child who has no source of income to sustain his livelihood. Therefore there is no logic and

reasonableness available in support of the impugned order in rejecting the amendment petition.

2.7. Family Court Jurisdiction

A Family Court has no jurisdiction to entertain a petition filed under the Act 25/86 after the advert of it. The provisions of the Act have overriding effect on all the provisions contained in earlier enactments.

Kerala High Court in the case of *E.A. Koya*, decided the question relating to jurisdiction of Family Court *visa-a-vis* Court of a Magistrate and held that: As per clause (2) (a) of Section 7, the Family Court shall have and exercise jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order of maintenance of wife, children and parents) of the Code of Criminal Procedure. But for this specific provision, the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX of the Code of Criminal Procedure would not have been vested in the Family Court, Section 7(2)(b) states that the Family Court shall also have and exercise such other jurisdiction as may be conferred on it by any other enactment. In the above case, it was urged that this provision takes within its ambit such other jurisdiction as may be conferred on the Magistrate of the First Class by any other enactment and that if by any other enactment jurisdiction similar to those falling within Chapter IX of the Code of Criminal Procedure is conferred on the Magistrate must also be transferred to the Family Court. We do not find our way to countenance this of clause (2) deals with two different aspects. Sub-clause (a) deals with the jurisdiction exercisable by a, Magistrate of the First Class under Chapter IX of the Code of Criminal Procedure. Over and above the jurisdiction of the civil Court that has been transferred on matters mentioned in Section 7(1), the jurisdiction of the Judicial First Class Magistrate in matters coming under Chapter IX are also transferred to the Family Court under Section 7(2)(a). Apart from these two provisions if the Legislature in future wants to confer jurisdiction on any other matter on Family Court, then that power is protected by Section 7(2)(b), which says that the Family Court shall also have and exercise such other jurisdiction as may be conferred on it by any other enactment. Thus, sub-clause (b) of clause (2) of Section 7 cannot be considered as dealing with other jurisdiction as may be conferred on Judicial First Class Magistrate by any other enactment. The words "conferred on it" in sub-clause (2)(b) can refer to only conferment of jurisdiction on the Family Court by any

other enactment if by any other enactment jurisdiction is specifically conferred on the Family Court, that Court can exercise that jurisdiction. In other words, Family Court can exercise jurisdiction only if it is specifically conferred on it and it cannot assume any jurisdiction which is conferred on any other Court.

So, in view of the law laid down and as per Section 7(1) of the 1986 Act, a Family Court gets the jurisdiction of the District Court or any subordinate civil Court on matters referred to in the Explanation on that clause. Under Section 7(2)(a), the Family Court can exercise the jurisdiction of Judicial First Class Magistrate under Chapter IX of the Code of Criminal Procedure. Family Court can also exercise jurisdiction that may be conferred on it by any other enactment as well.

The jurisdiction of the Judicial First Class Magistrate under Section 3 of the 1986 Act does not fall within any of the categories comprehended by Section 7 of the 1984 Act. Even though the jurisdiction of the Judicial First Class Magistrate while entertaining a petition under Section 3 of the 1986 Act is quasi-civil in nature, that jurisdiction will not stand transferred to the Family Court. That jurisdiction is one specifically conferred on the Judicial First Class Magistrate. It is not one coming within Chapter IX of the Code. So, the jurisdiction of the Judicial First Class Magistrate under Section 3 of the 1986 Act cannot in any way be affected by the establishment of the Family Court.

The Family Courts Act was enacted in 1984. That Act was published in the Gazette of India dated 14.9.1984. No provision of the 1986 Act confers any jurisdiction under that Act on the Family Court. On the other hand Section 3(2) of the 1986 Act provides that the application is to be made to a Magistrate as defined under the Act and not to the Family Court. Apart from that Section 3 of the 1986 Act, which was enacted subsequent to the Family Courts Act, begins with *a non obstante* clause. The *non obstante* clause states :

> "Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to……"

this makes the provision contained in that Section complete in itself. It does not depend on any other enactment for its enforcement. This makes it clear that the provision contained in the 1986 Act shall have overriding effect on all provisions contained in the earlier enactments, including the Family Act of 1984.

Identical question as the one raised in this proceeding came up for consideration before a Division Bench of the Allahabad High Court in *Amjum Hasan Siddiqui v. Salma Bibi*[1]. The learned Judges of the Division Bench took the view that the Family Court was not competent to deal with a petition move under Section 3 of the 1986 Act for want of jurisdiction.

Following the ratio laid down in *EA Koya* (supra) A.P. High Court also formed an opinion and ruled that the Family Court Act was an earlier enactment so Act 86 overrides its provision and a petition under Section 3 of the Act cannot be entertained by Family Court. If the Legislature wanted to invest jurisdiction to the Family Court they would have clearly mentioned it in Section 3[2].

Division Bench of Allahabad High Court is also of the view that the Family Court is not competent to entertain an application under Section 3 of the Act[3].

The divorcee wife in order to invoke Section 3 of the Act need not approach the Family Court as held in the case of *Mariamma Ninan @ Mariamma P. Thomas v. K.K. Ninan*, Division Bench[4]. In the case of *Mohd. Naseeruddin Khan (v) Sabiha Naseer* the learned Single Judge of Andhra Pradesh High Court distinguished the said judgment on the point that in the *Maniamma Ninan* case, as that was all claimed by the wife was for provision of petition and scheduled payment and the same was rightly entitled by the Family Court under Section 7 of Family Court, but the same ratio would be applied in the case of *Mohd. Naseeruddin Khan v. Sabiha Naseer*, since in the case of *Naseeruddin Khan*, the wife has claimed for provision for maintenance, dower amount and return of jehez articles, for this relief the Court held that she rightly approached to the jurisdiction of Family Court. Similar view was also taken by the Allahabad High Court in *Anjum Hasan Siddiqi v. Salma,*[5] and also by the Division Bench of Kerala High Court.

The question of jurisdiction was also considered by the Allahabad High Court in the case of *Amjum Hasan Siddiqui v. Salma*[6].

1. AIR 1992 All 322
2. 2000 (3) ALT 571
3. AIR 92 All 322. See also (1993 Cri.L.J. 1118) (1994 (1) An.W.R.NRC)
4. 1996 (2) ALD 712 (DB)
5. AIR 1972 92
6. AIR 1992 All. 332

In the above case it was ruled by the Kerala High Court that the application under Section 3 of the Act of 86 can lie before the Magistrate concerned and the Family Court cannot exercise the jurisdiction unless the same had been specified or conferred upon the Family Court under Section 2(a)(b) of the Act. The Family Court in this case held that it is not competent to deal with application under Section 3 of the Act of 86.

2.8. Section 125 Cr.P.C. not maintainable during the iddat period

In order to claim maintenance and fair provision during the iddat period a divorced woman cannot invoke Section 125 Cr.P.C. as held in the case of *Imtiyaz Ahmed v. Shamim Bano*[1].

However the proceedings under Section 125 Cr.P.C. are civil in nature even if the Court notices if there was a divorced Muslim woman who had an application under Section 125 Cr.P.C. it is open to a Court to treat same as petition under the Act of 1986 considering the beneficial nature of the legislation, especially since proceedings under Section 125 and claims under the Muslim women Act are tried by the same Court in *Iqbal Banu v. State of Andhra Pradesh*[2].

2.9. Court to pass an order expeditiously

A divorced woman is entitled to maintenance during the period of iddat under Section 3 of the Act. It becomes payable by the husband the moment the divorce is effected. In other words, the obligation to pay maintenance during the period of iddat arised the moment divorce is effected. Undoubtedly, the Act is intended to provide ameliorative safeguards to protect the rights of divorced Muslim women. The provision to pay maintenance by the husband during the period of iddat has definitely got a salutary object. The legislative intent appears to be to ensure that a divorcee woman is not left in lurch during the period of iddat, especially since the divorced woman is supposed to remain in seclusion. She may not be able to carry on with or pursue such job or avocation. It is therefore that the law has made it a mandatory obligation on the husband to see that the divorced woman is provided with adequate maintenance to look after herself especially during 'iddat' period. It does not stand to reason that the divorced woman should be asked to wait for the expiry of the iddat period and

1. 1998 Cri.L.J. 2343
2. (2007) 6 SCC 785

then only approach the Court seeking maintenance for that period. If such an interpretation is given it will defeat the very object and purpose of the statutory provision. In this context, it may also be noticed that Section 3 makes it obligatory on the Court to pass orders on the application for maintenance within one month from the date of the receipt thereof.

2.10. Quantum

There is no hard and fast rule nor there is any straight jacket formula to fix the quantity amount and fair provision and the maintenance liable to be paid by the husband during the period of iddat. In the case of *P. Abdul Azeez v. K. Aysha*,[1] it was held that taking into consideration over all circumstances the sum of Rs.1,500/- was fixed as maintenance during the period of iddat and a sum of Rs.25,200/- was fixed as fair and reasonable provision.

Interpreting the words reasonable and fair provision and at what rate it should be fixed, the Kerala High Court, in the case of *M.C. Haseena v. M. Abdul Jaleel*,[2] held that educational needs to the divorced wife are quite relevant for fixing the quantum of reasonable and fair provision and is irreverent denying education and is not all justified, only with the help of education in future she could sustain herself and maintain her child, so her husband is bound to pay reasonable and fair provision and maintain including educational expenses to divorced wife. In this case, the sum of Rs.2,50,000/- was fixed as just and reasonable and fair provision but the terms fair and reasonable in Section 3(1) of Act 86 will not include highly expensive education.

In the case of *Ali v. Sufaira*[3], quoting a question the Court held 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. 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 recognized in sub-clause (a) of clause (1) of Section 3 of the Act. This liability is cast upon the husband on account of the past

1. 2007 TLS 1109455
2. 2007 Cri.L.J. 1554
3. 1988 (2) KLT 94

advantage received by him by reason of the relationship with the divorced woman or on account of the past disadvantage suffered by the reason of matrimonial consortium. It is in the nature of a compensatory gift or a solatium to sustain the woman for her life after the divorce.

In the case of *Aliyar v. Pathu*,[1] a Division Bench of Kerala High Court also had an opportunity to interpret 'Reasonable and Fair Provision and Maintenance' and held that 'Under clause (a) of sub-section 3(a) of the Act, divorced wife is entitled to reasonable and fair provision to be made and maintenance to be paid within the iddat. The clause emphases that provision is to be made and maintenance is to be paid, or course provision is to be made to secure livelihood of the wife. That need not be in the shape of money. It could be in the shape of provision by grant of immovable property or other valuable assets or other income yielding property. Provision has to be made within the iddat period; it has to be fair and reasonable. Provision must certainly be capable of being realized or secured by her. Besides the provision to be made and she is also entitled to be paid maintenance during the period of iddat. The expression is reasonable and fair provision and maintenance to be made and paid cannot be understood to have been used disjunctively. In the context 'and' cannot mean 'or'. The two expressions convey different ideas and give rise to two different connotations. The argument is that just as maintenance is to be paid to cover the needs of the divorced woman during the iddat period, reasonable and fair provision is to be made only for the iddat period.

The Hon'ble Apex Court in the case of *Iqbal Bano v. State of Uttar Pradesh* (supra) interpreted the terms 'Reasonable and Fair Provision in following manner "The important section in the Act is Section 3 which provides that a divorced woman is entitled to obtain from her former husband "maintenance", "provision" and "mahr", and to recover from his possession her wedding presents and dowry and authorizes the Magistrate to order payment or restoration of these sums of properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations : (1) to make a "reasonable and fair provision" for his divorced wife; and (2) to provide "maintenance" for her. The emphasis of this section

1. 1988 (22) KLT 446

is not on the nature of duration of any such "provision" or "maintenance", but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely within the iddat period". If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged the obligation of both "reasonable and fair provision" and "maintenance" by paying these amounts in a lump sum to his wife, in addition to having paid his wife's mahr and restored her dowry as per Section 3(1)(C) and 3(1)(d) of the Act. Precisely, the point that arose for consideration in *Shah Bano* case was that the husband had not made a "reasonable and fair provision" for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provision iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 Cr.P.C. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are "a reasonable and fair provision and made and paid" as provided under Section 3(1)(a) of the Act these expressions cover different things, firstly, by the use of the different words - "to be made and paid to her within her iddat period" it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4 of the Act, which empowers the Magistrate to issue an order for payment of maintenance to the divorced woman. Obviously, the right to have "a fair and reasonable provision" in her favour is a right enforceable only against the woman's former husband, and in addition to what is obliged to pay as "maintenance", thirdly, the words of the Holy Quran, as translated by *Yusuf Ali* of "mata" as "maintenance" though may be incorrect and that other translations employed the word "provision", this Court in *Shah Bano* dismissed this aspect by holding in *Shah Bano* case that it is a distinction without a difference. Indeed, whether "mata" was rendered "maintenance" or "provision", there could be no pretence that the husband in *Shah Bano* case had provided anything at all by way of "mata" to his divorced wife. The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to "mata" is only a single or one-time transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word "provision" in Section 3(1)(a) of the Act incorporates "mata" as a right of the divorced Muslim woman distinct from and in addition to mahr and maintenance for the iddat period, also enables "a reasonable and fair provision" and "a reasonable and fair provision" as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman,

the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in *Shah Bano* case actually codifies the very rational contained therein.

Whether a divorcee is entitled to maintenance and fair provision under Section 3 of this Act even when she is working ?

The Himachal Pradesh High Court answered the question in the case of *Mst. Balkish v. Talib Hussain,*[1] by holding that "considering of the needs of the divorced woman" would mean that her own source of income, if any, has also to be taken note of while determining the quantum of reasonable and fair provision and maintenance. Therefore, before a divorced Muslim woman is held entitled to a reasonable and fair provision and maintenance within the ambit of Section 3(1)(a) of the Act beyond the period of "Iddat". She has to show that she is unable to maintain herself.

While interpreting the expressions of Reasonable and Fair Provision the Gujarat High Court in the case of *Mumtazben Jusabbhai v. Mahehbubhkan Usmankhan Pathan,*[2] held that "Under the Muslim Women Act a divorced woman is entitled to have a reasonable and fair provision from her former husband. Reasonable and fair provision would include provision for her future residence, clothes, food and other articles for her livelihood. She is also entitled to have reasonable and fair future maintenance. This is to be contemplated and visualized with the iddat period. After contemplating and visualizing it, the reasonable and fair provision and maintenance is to be made and paid to her on or before the expiration of iddat period. The contemplation may depend upon the prospect of the remarriage of the divorced woman. The conclusion is inescapable in view of the different phraseology used by the Parliament in Section 3(1) and it claused and Section 3(3), Section 3(1)(a) contemplates reasonable and fair provision and maintenance Section 3(1)(b) lays down objective criteria for its determination. Under Section 3(1)(b) reasonable and fair provision and maintenance is to be made and paid only for a period of two years from the respective dates of birth of children. While the Parliament has not prescribed any such period under Section 3(1)(a). Section 4 only provides for reasonable and fair maintenance. Apart

1. 1999 Cri. LJ 4467
2. 1999 TLS 201758

from this, even Section 5 gives option to the parties to be governed by the provisions of Section 125 to 128 of the Criminal Procedure Code.

Under Section 4 of the Muslim Women Act a divorced woman is entitled to get maintenance from her relatives such as her children or parents or from Wakf Board if she is not able to maintain herself after the iddat period from the provision and maintenance made and paid by her former husband.

As per the provisions of Section 5 the application filed under Section 3(2) of the Muslim Women Act by a divorced woman can be disposed of by following the provisions of Sections 125 to 128 of the Cr.P.C. if the divorced woman and her former husband filed affidavits to that effect.

Under Section 7 of the Muslim Women Act, all applications filed by a divorced woman under Section 125 or 127 of the Cr.P.C. which are pending for disposal before the Magistrate on the date of the commencement of the Act are required to be disposed of by the Magistrate in accordance with the provision of the said Act.

There is no provision in the Muslim Women Act which nullifies the orders passed by the Magistrate under Section 125 or 127 of the Cr.P.C. ordering the husband to pay maintenance to the divorced woman or takes away the vested rights which are crystallized by the order passed under Section 125 or 127 of the Cr.P.C.

Any gift presented at the time of marriage became the absolute property of the appellant (divorcee wife) and, therefore, she is entitled to recover the same. It is submitted that under Section 3(1)(d) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short 'the Act'), a divorced woman shall be entitled to retain 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. Therefore, in view of Section 3(1)(d) of the Act, the appellant is entitled to recover the gold ornaments which were given to her by the first defendant at the time of marriage. On the other hand, the learned counsel for the respondents contended that the Act was passed in 1986 and the suit was filed in 1982 and since the Act has no retrospective effect, the learned Judge was right in not granting the relief in respect of the Chadava.

It is not disputed that the gold chain was given at the time of marriage by the first respondent and it was taken by the husband.

Admittedly, the property that was given at the time of marriage become the 'stridhna' of the wife and, therefore, the appellant is the absolute owner of the property. It is a gift given to her by the first respondent at the time of the marriage and she has accepted the same, and therefore, it cannot be revoked later on. Hence, she is entitled to retain the same.

As regards the scooter, admittedly, it was a gift given to the first respondent at the time of marriage by the parents of the appellant. Since, it is a gift given by the parents of the appellant, once it is accepted, it becomes the absolute property of the donee and, therefore, he is entitled to retain the same.

There cannot be any dispute that the Muslim Women (Protection of Rights on Divorce) Act, 1986 was brought into force on 19.5.1986 and there is no provision making it retrospective in operation. Therefore the appellant cannot seek relief under Section 3(1)(d) of the Act.

However, before the Act came into force the Muslim Law in force is applicable to both the parties. Tayyabji's Muslim Law Sub-para (1) (4th Edition, P : 425) says that under Hanafi Law, a gift cannot be lawfully revoked where at the time when the gift is made the donor is the husband or wife, of the donee. Sub-pare (2) says that the Shiite authorities are agreed that to revoke such a gift is abominable, and some hold it unlawful; but the better opinion is that it is unlawful. Therefore, the Muslim Law recognizes that a gift given by the husband or wife cannot be revoked. At the time when the 'chadava' was given to the appellant the first respondent was her husband. Therefore, such gift is irrevocable and the first respondent cannot retain the same. She is entitled to recover the same and her appeal to that extent is allowed.

As regards the scooter, it is no doubt given by the parents of the appellant at the time of her marriage to the first respondent. When it was gifted to him no condition was imposed stating that on the happening of any event it is revocable. Further, they have not reserved the right to revoke the gift. Since it was accepted by him *i.e.*, the first respondent the appellant is not entitled to recover the same as the gift is not revocable on the facts and circumstances of the case.

In view of the above, the appeal is allowed to the extent indicated above namely that the appellant is entitled to recover the gold chain which was given to her at the time of the marriage by the first respondent as Chadava.

2.11. Power to direct interim conditional attachment

This question was answered in detail, by Kerala High Court in the case reported in 2004 (2) ALT (Cri.) 409 as under:

> "Sections 3 and 4 explained. "Does the Criminal Court exercising jurisdiction under the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short 'the Act') have the powers to direct interim conditional attachment of properties belonging to the respondent/divorced husband when there is apprehension that he may dispose off his properties to frustrate the attempts of his divorced wife to claim and recover amounts from him under Section 3 of the Act ?
>
> The compassion of the Legislature in favour of the weaker section of the polity is reflected in and underlines the provisions of the Act. The Court must have shown a commitment to the purpose and objects of the statute. Courts are not to be committed to individuals of ideologies. But they must certainly be committed to the constitutional humanism reflected in its preamble and which runs through the entire Constitution. A Court called upon to implement the legislative mandate cannot afford to ignore or overlook the statutory rationale, compassion and humanism reflected in and underlying a welfare legislation like the Act. Instrumentalities called upon to translate the legislative vision and mission must imbibe the legislative compassion. They must have a commitment to implementation of the statutory scheme. They must vibrate to the resonance of the constitutional philosophy and the humane sentiments underlying such a welfare legislation. The inadequacies of the legislative draftsman shall also have to be overcome by purposive interpretation. It is easy to throw one's hands up in despair and lament that there is no specific provision in the statute. Such an approach belies an unwillingness to play an active role in the translation of the legislative mandate into tangible benefits to the target group. The draftsman is, of course, human. He may not have contemplated all the contingencies. Myraid are the fact situations in which the legislative provisions will have to be applied and if the draftsman has not specifically to meet such eventually the Court should not hesitate to draw appropriate inference about the intendment of the Legislature. The shortcomings of the draftsman cannot prompt a Court to

throw its hands up in helplessness, payment of interim maintenance pending disposal of a claim under Section 125 of the Cr.P.C. their Lordships of the Supreme Court held that such power can be read into the provisions of Section 125 of the Cr.P.C. This conclusion has been reached from the principle referred above that every Court must be deemed to possess by necessary intendment all such incidental and ancillary powers as are necessary to make its orders effective. There can hence be no doubt whatsoever on the crucial and vital proposition.

A reading of Sections 3 and 4 clearly shows that unless the Court is able to actively and dynamically interpret the provisions, the purpose of the statute would be defeated. An example can be considered. Under Section 3(1)(d) it is declared that a divorced woman shall be entitled to all the properties given to her before or at the time of marriage by her relatives or friends or husband or any relatives of the husband or his friends. Section 3(2) of the Act mandates that the order to be passed by Magistrate can include a direction for the delivery of such properties referred to in clause (d) to sub-section (1) of the Act. Under Section 3(4) while specifying the method for enforcement of the order all that is mentioned is that 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 Cr.P.C. If it is not paid, he can be sentenced to imprisonment. There is no specific provisions for directing payment in lieu of the properties referred to in Section 3(1)(d). There is no specific provision for enforcing a direction for delivery of properties specifically. If a very literal interpretation were to be restored to, the mandate of Section 3(1)(d) of the Act can never be enforced. I have adverted to this only to show that a real, reasonable, meaningful and purposive interpretation has got to be adopted to make the provisions of the Act work effectively and achieve the intended result.

Section 3(3) of the Act mandates that the proceedings must be disposed of within a period of one month. More often than not, Courts with the infrastructural facilities which they are possessed to find themselves unable to comply with this mandate. The petition under Section 3 of the Act in this case is seen filed on 27.12.2002. The petition for conditional attachment is seen filed on 3.2.2003. The impugned order is

seen passed on 3.3.2003. It is transparently evident the compliance with the legislative mandate of disposal of the claim within one month has been found to be impossible in this case also. Even on the date of the impugned order the respondent has not entered appearance.

If the matter drags on for whatever reason of reluctant respondent would get sufficient time to dispose of his properties to frustrate the claim of his wife. It is no consolation for the wife that her former husband can be sent to jail if he does not pay the amount. She is interested not in sending him to prison, but only, in ensuring that she gets her legitimate dues. In these circumstances, if the husband were permitted to dispose off her properties during the pendency of return with the endorsement that the respondent has left and is not available for service. In these circumstances, this Court has proceeded to reckon proceeded to hear the learned Counsel for the petitioner.

We now come to the general principle of law that when substantive power is conferred on an authority to perform an act and achieve a result, it must be presumed that all incidental ancillary powers to make the initial conferment of the substantive power effective and efficient must be presumed to have been conferred. This general principle of law is too well recognized to require specific reference to any precedents. I shall advert only to one decision. The Supreme Court of India in *Savitri v. Govind Singh*, had clearly accepted this principle. Even though under the Cr.P.C. as it then stood there was no provision to direct the claim U/s.3 of the Act, that would certainly frustrate the effective relief which the claimant is entitled. Her cause cannot be left to suffer because the Court is not in a position to comply with the legislative mandate of disposing of the claim within one month, for whatever reasons of infrastructural inadequacy or otherwise.

Thus, there is a duty on the Court to ensure that effective relief is given to the woman. The Court is not able to dispose of the claim within one month. The final disposal may take some more time. If the respondent, as apprehended by the claimant, were to dispose of his properties before a final order is passed, that would effectively deny and deprive the woman of relief under Section 3 of the Act. In these circumstances, I am of the opinion that the learned Magistrate

> must have acted effectively assuming that powers have been conferred on him implied and by necessary intendment to meet the situation. The mandate is to ensure that the woman gets the amount which is her due. Anything done by the respondent which would frustrate the remedy has to be effectively prevented. The Code of Criminal Procedure does not bar conditional attachment of the property of the divorced husband, if available. What is not specifically barred and what is essential for effective grant of relief guaranteed under the statute can certainly be presumed to have been conferred impliedly and by necessary intendment."

As to how such a conditional order of attachment can be executed, there can be no problem. An appropriate warrant of conditional attachment can be issued to the District Collector who shall, in turn, effect the attachment in the manner in which attachment is effected of immovable property while recovering arrears of land revenue. The manner of execution of the conditional attachment order need not also hence pose any problem.

It follows from the above discussions that the impugned order does not warrant interference. I take the view that in an appropriate case the learned Magistrate must necessarily be held to be invested with the powers to order conditional attachment of property if security is not furnished for the amount to be specified by the learned Magistrate which is his judgment will be due from *prima facie* if the claim were allowed.

Petition When Lies

A right is conferred on a divorced Muslim Woman under this section to file a petition at any time before or after the expiry of iddat period.

The Legislature intent appears to be to ensure that a divorced woman is not left in the lurch during the period of iddat especially since the divorced woman is supposed to remain in seclusion. It does not stand to reason that the divorced woman should be asked to wait for the expiry of the iddat period and thereafter approach the Court seeking maintenance for that period. If such an interpretation is given it will defeat the very object and purpose of the statutory provision[1].

1. 2007 Cri. LJ 1633

2.12. Limitation

No limitation is prescribed under Section 3(2) of the Act to file a petition. The Patna High Court discussed the Law of Limitation in a case,[1] and laid that :

> "There is no saving clause in the Muslim Women (Protection of Rights on Divorce) Act according to which the earlier law existing on the subject was saved. Moreover the said Act has not repealed the relevant provisions of the Muslim Law. Under the aforesaid circumstances after coming into force of the said Act, the earlier law as contained in Muslim Law will cease to exist. Since in the said Act there is no provision for limitation it will follow that for filing a petition under Section 3(2) of the said Act no limitation is prescribed. As noticed above the limitation prescribed under Muslim Law has not as yet expired at the time when the said Act had come into force. Under these circumstances the period of limitation as prescribed under Muslim Law will cease to have any effect *vis-a-vis* the petition filed under Section 3(2) of the said Act inasmuch as the earlier law will be deemed to have been obliterated and the later law must always prevail.
>
> Further, the very same Court in the case of *Abdul Sathar v. Arifa Beevi*, held that a divorced woman is entitled to get back the Rolex Watch gifted by her paternal uncle since, it is given as consideration of his marriage with her and it is given in trust to him, the wife being the beneficiary, joint names of the revision petitioner and the respondent to be enjoyed by the family and not as a gift or separate property of the wife. Therefore, the properties acquired in the name of the revision petitioner exclusively and in the joint names of the revision petitioner and the respondent by utilizing the funds of the respondent will not assume the character of property given by the husband before, at the time or after the marriage to the revision petitioner so as to attract the provisions of Section 3(1)(d) of the Act as contended by the revision petitioner.
>
> What follows from the foregoing discussions is that the liability of the former husband to make reasonable and fair provision in favour of his divorced wife within the period of iddat is absolute. The quantum of reasonable and fair provision

1. AIR 2000 Pat. 326

has to be determed in accordance with the means of the former husband and the standard of living enjoyed by the divorced wife during the subsistence of the marriage. The fact that the divorced wife has got means for her livelihood or that she is in affluent circumstances will not absolve her former husband from his liability to pay reasonable and fair provision to her. The prime object of directing the former husband to make reasonable and fair provision in favour of his divorced wife is to save the divorced wife from destitution and penury and it is not intended to harass or harm the former husband or to enable divorced wife to obtain any unlawful gain, undue advantage or unjust enrichment from her husband on account of divorce. The liability cast upon the former husband is a just and equitable provisions in line with the Quranic injunctions. Therefore, if the former husband has given or provided sufficient property to the divorced wife during the subsistence of the marriage satisfying the requirements of the reasonable and fair provision as provided under Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, the divorced woman is not entitled to claim reasonable and fair provision from her husband over and above the properties already given to her by her former husband[1]."

Section 3(3) of the Act mandates that when an application is made under sub-section (2) by a divorced woman the Magistrate may, if he is satisfied that the divorced woman is entitled to the claim made by her, make an order within one month of the date of filing of the application directing her former husband to pay the amounts found liable to be paid by him. The proviso to Sec. 3(3) stipulates that if the Magistrate finds it impracticable to dispose of the application he may, for reasons to be recorded by him, dispose of the application after the said period. No reason for the delay in disposing of the petition filed by the respondent is stated in the order passed by the learned Magistrate. In the order passed by the revisional Court also nothing is stated about the delay in disposing of the application by the learned Magistrate.

The word may though generally connote as merely an enabling or permissive power, in certain context the word is used as a compellable duty especially when it refers to the power conferred on a Court or judicial authority. The principle of interpretation is well-settled by the decision of the Apex Court in *Ramji Missar v. State of Bihar*.

1. 2000 (2) Crimes 601

From the context the phrase Magistrate may make an order within one month of the date of filing of an application used in Section 3(3), it is clear that the word may be used to mean shall especially considering the fact that the proceedings under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act is a summary proceeding intended to achieve the object of the enactment of the Act to give immediate relief to divorced Muslim Woman to whom the reliefs are not provided by her former husband within the period of iddat. But merely because of the failure of the Magistrate to record the reasons for the delay in disposal of the application, the order passed by the Magistrate will not be rendered invalid or unsustainable. The failure, if any, on the part of the Magistrate to give reasons for the delay in disposal of the application within the time of one month as stipulated in Section 3(3) of the Act should not cause any harm or prejudice to the beneficiary of the Act in whose favour the order is passed by the Magistrate, though belatedly. Therefore this connection the petitioner is also not tenable.

It has to be remembered that for a proceeding under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act the provisions of the Code of Criminal Procedure are made applicable. Therefore, the formalities and requirements under the Cr.P.C. for the disposal of the summary proceedings are to be followed by the Magistrate in disposing the application under Section 3 of the Act which implies procedural delay in the disposal of the matter. In this case from the records of the trial Court and the order passed by the learned Magistrate, it is clear that the petitioner also contributed his share for the delay by the learned Magistrate. But it has to be divorced woman and disposal of the application filed under Section 3 of the Act within one month or at the earliest as the case may be, will be beneficial to both the divorced woman and her former husband and this sole solitary object of the enactment should not be lost sight of by the Courts."[1]

2.13. Restoration of petition dismissed in default

In exercise of power conferred by Section 6 of the Act, the Central Government has framed Rules namely: Muslim Women (Protection of

1. Majati Bibi

Rights on Divorce) Rules, 1986 (for short "the Rules") of which Rule 4 is relevant.

> Rule 4. Evidence - All evidence in the proceedings under the Act shall be taken in the presence of the respondent against whom an order for the payment of provision and maintenance, Mehr or dower or the delivery of property is proposed to be made or, when his personal attendance is dispensed with, in the presence of his pleader and shall be recorded in the manner specified for summary trials under the Code :
>
> Provided that if the Magistrate is satisfied that the respondent is wilfully avoiding service or wilfully neglecting to attend the Court, Magistrate may proceed to hear and determine the case *ex-parte* and any order so made may be set aside for good cause shown on application made within seven days from the date thereof subject to such terms as to payment of cost of the opposite party as the Magistrate may think just and proper.

The aforesaid Rule is part material with Section 126 of the Code with a little variation. Proviso to the Rule envisage the Magistrate may hear and determine the case *ex-parte* on being satisfied that the opposite party is either wilfully avoiding service or neglecting to attend the Court. Such *ex-parte* order, however, can be set aside in the event the opposite party makes an application within seven days thereof.

Showing good cause for non-appearance.

A similar provision has also been made in sub-section (2) of Section 126 of the Code for setting aside the *ex-parte* order on an application being filed within three months of passing of such order. It is, therefore, manifest that the Legislature has provided scope to the opposite party both under the Act and the Code to move the Court to have the *ex-parte* order set aside, but there is omission of a similar provision enabling the petitioner to seek for restoration of the case in the event it is dismissed for default. A married woman who is either deserted or divorced needs a roof over her head and food and clothing for sustenance. Therefore under both the statutes provisions are made to secure her much needed relief in order to prevent starvation and vagrancy. To achieve such object within a reasonable time power has been conferred upon the Magistrate to adjudicate the claim by adopting summary procedure. Sometimes a woman for the reasons beyond her control fails to attend the Court resulting dismissal of the case. In such a situation taking advantage of absence of any provision for restoration, if it is held that the Court lacks jurisdiction to restore the case, then the very object and purpose

of the Legislature would be frustrated. Needless to say, an Act being the will of the Legislature, the paramount rule of interpretation which overrides others is that statute is to be expounded 'according to the intent of them that made it'. Therefore if there is any lacuna in the statute, it obligates the Court to legislate judicially in order to give effect to the will of the Legislature. But, while doing so, the Court should bear in mind that it does not travel off it course in this context it is opposite to refer to what Lord *Denning*, an eminent jurist, said in the case of *Senfor Court Estate Ltd. v. Asher*[1] said : "When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written word so as to give 'force and life to the intention of the Legislature'. A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the textured of it, they would have strengthened it out ? He must then do as they would have done. A Judge must not alter the material of which the Act is woven but he can and should iron out the creases.

Similar question came for consideration before the Punjab and Haryana High Court in the case of *Smt. Kamala Devi v. Mehma Singh*[2], where the Court in Paragraph 7 of his judgment observed thus :

> "There is no specific provision in Chapter IX of the Cr.P.C. dealing with application for grant of maintenance to wives, children and parents to dismiss such applications for non-appearance of the petitioner. Since such application are not to be equated with criminal complaints which necessarily are to be dismissed for non-appearance of the complainant in view of Section 256 of the Cr.P.C. it is only in the exercise of inherent power of the Court that for non-appearance of the petitioner, application under Section 125 of the Code is dismissed. If that is so there is no reason why there should not be inherent power with the Court to restore such application."

To the same effect also in the view of the Calcutta High Court in the case of *Sk. Alauddin @ Alai Khan vs. Khadiza Bibi @ Mst. Khodeja Khatun*[3]. In the said case, application U/s.125 Cr.P.C. was dismissed for default of the opposite party. On her filing a petition for restoration, the Magistrate allowed the same and restored the case to file. The

1. (1949) 2 All ER 155
2. 1989 Cri. LJ 1866
3. 1991 Cri. L.J. 2035

correctness of the said order in the High Court by filing a revision. Following the decision of the Supreme Court in the case of *Mst. Jagir Kaur v. Jaswant Singh*[1], the Court held that a proceeding under Section 125 Cr.P.C. being civil in nature, the Magistrate can invoke inherent power to recall his earlier order and finally dispose of the proceeding.

In the case of *Abdul Waheed v. Hafeeza Begum*[2], a similar situation arose where petition for maintenance of the opposite parties was dismissed for default. They moved an application to recall/set aside the said order which was also dismissed. Feeling aggrieved they preferred revision and the learned Session Judge being of opinion that the order of dismissal was illegal set aside the same. The revisional order came to be challenged by the petitioner in the High Court. The Court while agreeing with the view of the learned Session Judge that the Magistrate had no power to dismiss the case observed:

> "The trial Court is not empowered to pass an order dismissing the application for default and much less the application for setting aside the default order cannot be entertained. It is obvious that the trial Court has no power to pass a default order. The revision has been filed before the Sessions Court against the order declining to set aside the *ex-parte* order and restore the same on file. The Magistrate has no power to pass default order or set aside such *ex-parte* order and the Sessions Court invoking the revisional jurisdiction cannot clothe such power with the Magistrate in the absence of provision to that effect in the Cr.P.C. Though, the revision petition before the Sessions Court is confined to the order declining to set aside the *ex-parte* order, the Sessions Court under the powers vested in revisional jurisdiction is justified in setting aside the original order dismissing the application for default. The Sessions Court has ample power under revisional jurisdiction to revise any illegal order passed by the subordinate Court and need not be fettered by the subject-matter in the revision petition.

2.14. Estoppel inapplicable

The Doctrine of Estoppel is inapplicable to the proceeding not in action.

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1. AIR 1963 SC 1521
2. 1987 Cri. L.J. 726

A petition under Section 3 of the Act which was earlier withdrawn by divorcee Muslim woman who later on submitted another application of same nature for similar relief. The second application cannot be dismissed on the ground of estoppels or by invoking principles of res judicata.[1]

2.15. Applicability of Section 3 after obtaining divorce under Dissolution of Muslim Marriage Act

Decree of Divorce obtained by the wife under the provisions of Dissolution of Muslim Marriage Act of 1939 is a legal divorce under Muslim law by virtue of statute. So it is clear that the ex-wife who had obtained divorce from her husband under provisions of the dissolution of Muslim Marriage Act of 1939 is entitled to the reasonable and fair provision of the Act under such a case it cannot be said that as the divorce is not the act of the husband and as the divorce was brought about by the instance of the Act under the Act of 1939, the decree of divorce does not amount to divorce by the husband under Muslim law.

Therefore the second limb of expression, "divorced woman" in Section 2 of the Act does not apply because, wife in the instant case was a divorced woman under Section 2(a) of the Act *i.e.*, she has obtained divorce from the husband in accordance with Muslim law.

2.16. Claim of wife against her second husband

A peculiar question was raised before the Kerala High Court in the case of *V. Bapputy @ Muhammed v. Shahida*, as to whether the wife who has remarried and who has already received reasonable and fair provision and maintenance from her 1st husband is entitled to claim reasonable and fair provision and maintenance again under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the 'Act') from the next husband who remarried and divorced her ? The Court answered the same as under :

> "So construed observations in the precedents that the quantification under Section 3(1)(a) of the Act must take into account the reality that the wife deserves to be supported till the date of her death or till the date of remarriage have

1. *Sayeed Khan v. Zaheda Begum*, AIR 2006 Bom. 39; *Sk. Nasiruddin v. Dular Bibi*, 1991 Cri. LJ 2039

got to be understood realistically. It is true that the amount to be paid is not the exact equivalent of the total amount which the divorced woman would have been entitled to receive if she continued to. The probable period for which she should live or would live unmarried will have to be realistically considered. In these circumstances, the quantum which the previous husband may have paid cannot ever be held to be sufficient to support the wife till her death as to render unsustainable the claim of the wife under Section 3(1)(a) of the Act from her subsequent husband who divorces her. Such a construction according to me, would be myopic and would be in derogation of the lofty idealism which prompted the Legislature to incorporate such stipulations in favour of the divorced Muslim women. The obligation to make reasonable and fair provision rests on the shoulders of every husband who divorces his wife, such liability of his does not vanish and is not obliterated by the mere fact that the previous husband had discharged his duty under Section 3 of the Act. In short, even though the probable period of remaining life or life without remarriage may have weighted with the persons/ Courts while making/fixing the fair and reasonable provision in respect of the prior divorces, such payments can never be held to be sufficient to justify and contention by the subsequent husbands for absolution or reduction of liability when they divorce the same Woman. Every husband at the time of divorce must independently make reasonable and fair provision. The provisions made by her prior husbands may enable the Court to ascertain her financial status at the time of marriage and divorce but cannot certainly deliver any advantage to the person who later marries and divorces her. It is not the law that the woman should be unable to maintain herself to claim the fair and reasonable provision under Section 3(1)(a) of the Act. Hence the fact that provision has been made at the time of the previous divorce would become irrelevant".

2.17. Applicability of Section 3 in case of Khula

A Muslim woman who has obtained Khula divorce is also entitled to invoke the provisions of this Act. Claims of such divorcees women were examined by the Courts in the cases of *Md. Shafi v. Nasreen Bano* and *M. Khairunnisa,*[1] and answered in affirmative.

1. 2001 Cri. LJ 1228

2.18. Whether order passed under Section 3(3) is an Interlocutory Order ?

Answering the question is whether an order passed under Section 3(3) of the Act 25 of 1986 is an interlocutory order or not and whether there is any bar under Section 392 Cr.PC, the Lucknow Bench of Allahabad High Court in the case of *Shafaat Ahmed v. Fahmida Sardar*,[1] ruled that "The fact that has not been said in the Act that order under Section 3 is revisable is of no consequence. A provision need not to be made in every Act and it is sufficient if it is provided in one Act. The Act provides that the order is to be passed by the Magistrate and the Criminal Proceure Code provides that the order of the Magistrate can be revised by the High Court. The Act does not exclude the application of the Criminal Procedure Code. So Criminal Procedure Code has to be given effect and the order passed by the Magistrate under Section 3 of the Act becomes revisable in view of the provisions of the Criminal Procedure Code.

When a Magistrate passes an order under sub-section (3) of Section 3 of the Act. The right and liabilities of wife and husband are finally decided by the Magistrate. Thus, the order will not be an interlocutory order and revision is maintainable.

Interpreting Section 3(2) and (3) Allahabad High Court speaking through a Single Judge in the case of *Muna Babu v. Shanno Begum*[2], held that "under Section 3(2) and (3) of the Act the Magistrate is empowered to entertain and dispose of an application moved by a divorced wife for payment of MEHER, maintenance allowance for iddat period and for return of properties given before, at the time and after the marriage to her. In view of this, the Magistrate cannot keep his hands off, merely on the plea of the husband that no divorce had taken place. Since, it was incumbent on the Magistrate to decide this matter, he had to dispose off the application moved by such a wife finally. If a husband denies that the divorce had not taken place, the Magistrate has to decide the question whether applicant was divorced wife or not. In case any party is aggrieved by any finding given by Magistrate in these proceedings on the question whether the divorce had taken place between the parties or not, he or she can file a regular suit. The findings recorded by Magistrate that the divorce had taken place between the parties is limited for the purposes of the said Act or for the purposes of disposing of the application moved by the wife under sub-section (3), (2) of Section 3 of the Act. Further, if a

1. 1990 Cri. LJ 1887
2. 1988 Cri. L.J. 1990

Court has been empowered to decide a matter, all questions which are incidental thereto or arise therefrom are connected therewith and are ancillary thereto, have to be decided for disposing of the *lis* finally. It is a cardinal principle of interpretation that the authority which is empowered to discharge certain functions, it has all the incidental or ancillary powers also. It follows that while disposing off the main *lis* between the parties if some incidental or ancillary questions arise which are necessary to be decided for the final disposal of the said *lis*, the Court is possessed of such powers to dispose of such incidental or ancillary matters

2.19. Whether Father-in-law is answerable to the claim under Section 3

In the case of *Maseruddin Sultana v. Mohd. Islam*,[1] the question as to the liability of father-in-law to return the jahez articles was answered holding that when the former wife to divorce and the father-in-law received jehez articles and both of them are in possession of the same and if he is able to establish the trial of the case that the petitioner's father-in-law is also in possession of articles then he is bound to return the same or value of it.

2.20. Execution of the Order

The Statements of Objects and Reasons and also the preamble clearly show that the Act had been passed for a limited purpose, namely, as to who would provide maintenance to a divorced Muslim woman during and after the period of iddat, the maintenance to children and also her entitlement to mahr or dower and the properties given to her by her relatives, friends, husband and husband's relatives. The scheme of the Act which extends only to 7 sections shows that the complete procedure for conducting the proceedings or for challenging the correctness of the order of the Magistrate have not been provided. Therefore, it cannot be held that the Act is a complete self-contained Code.

A bare perusal of the Act would show that it refers to a 'Magistrate' and to Code of Criminal Procedure, 1973, at several places. Section 2(c) of the Act provides that the 'Magistrate' means a Magistrate of the First Class exercising jurisdiction under the Code of Criminal Procedure, 1973 in the area where the divorced woman resides.

1. 2000 (1) ALT 410

Section 3(2) lays down 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 may make an application to a Magistrate for an order of payment of such provision and maintenance, mahr or dower or the delivery of the properties, as the case may be. Sub-section (3) of Section 3 lays down that the Magistrate on being satisfied about the facts stated in the application may make an order directing her former husband to pay the amount determined by him. Sub-section (4) of Section 3 lays down that 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 in the Code of Criminal Procedures, 1973 and may sentence the person for the whole or any part of the amount remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one year. Sub-section (4) empowers the Magistrate to make an order directing certain categories of relatives of the divorced woman who has not remarried and is not able to maintain herself to pay her such fair and reasonable maintenance as he may determine fit and proper.

Exercising power conferred by Section 6 of the Act, the Muslim Women (Protection of Rights on Divorce) Rules, 1986 have been made. Rule 2(b) provides that the Code means the Code of Criminal Procedure 1973. Sub-section (4) of Section 3 of the Act expressly provides for issuing a warrant for levying the amount of maintenance of mahr or dower due in the manner provided for levying the fines under the Code of Criminal Procedure, 1973 and confers power upon the Magistrate to 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 is made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code. Section 5 gives option to a divorced woman and her former husband whether they would prefer to be governed by the provisions of Sections 125 to 128 of the Code of Criminal Procedure. Rule 4 lays down that evidence in the proceedings under the Act shall be recorded in the manner specified for summary trials under the Code of Criminal Procedures.

Section 2(c) of the Act clearly lays down that a Magistrate means a Magistrate of the First Class exercising jurisdiction under the Code

of Criminal Procedure, 1973, in the area and where the divorced woman resides.

2.21. Revisional power

Section 6 of the Code of Criminal Procedure enumerates the classes of criminal Courts and they include Judicial Magistrate of the First Class Metropolitan Magistrate and the Judicial Magistrate of the Second Class. Section 12(3)(b), Cr.P.C. shows that a Chief Judicial Magistrate exercises general control over all Magistrates. Section 10(1), Cr.P.C. provides that all Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction. Sub-section (1) of Section 397 Cr.P.C. lays down that the High Court or any Sessions Judge may call for and examine the record of any proceedings before any inferior criminal Court constituted within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to regularity of proceedings of any such inferior Court. The explanation to this sub-section provides that all Magistrates, whether Executive or Judicial and whether exercising original or appellant jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purpose of Section 398. In view of Section 6 of Cr.P.C. all Judicial Magistrates (First Class or Second Class), Metropolitan Magistrates and Executive Magistrates are Criminal Courts. By virtue of the explanation to sub-section (1) of Section 397, Cr.P.C. all Magistrates shall be deemed to be inferior to the Sessions Judge. It, therefore, follows that all Magistrates are inferior of any finding, sentence or order passed by them or the regularity of any proceedings of such Magistrates can be examined by the High Court or the Sessions Judge under sub-section (1) of Section 397. The power conferred by sub-section (1) of Section 397, Cr.P.C. is in very wide terms.

The Allhabad High Court in the case of *Saman Ismail*[1] having overruled the decision reported in (96 JIC 30) laid down the ratio on the maintainability of criminal revision petition against the order passed under Section 3 of the Act thus "There is nothing to indicate that any order passed by a Magistrate under the Muslim Women (Protection of Rights on Divorce) Act, 1986 would not fall within the purview of sub-section (1) of Section 397, Cr.P.C. As mentioned earlier, the Legislature has not made any such provision in the Act which may indicate that any finality is attached to the orders passed by the

1. 2002 Cr. L.J. 3648

Magistrate. Therefore, the correctness, legality or propriety of any order passed or proceedings conducted by a Magistrate under the Act can be examined by the High Court or the Sessions Judge under sub-section (1) of Section 397 Cr.P.C. We are therefore of the opinion that the view taken in *Salim v. Judicial Magistrate Haridwar*,[1] that a revision does not lie against an order passed by a Magistrate under the Act does not lay down correct law.

The fact that it has not been said in the Act that the order is revisable, is of no consequence. A provision need not be made in every Act and it is sufficient if it is provided in one Act. The Act provides that the order is to be passed by the Magistrate and the Code of Criminal Procedure provides that the order of the Magistrate can be revised by the High Court. The Act does not exclude the application of the Code of Criminal Procedure. So, Code of Criminal Procedure has to be given effect and the order passed by the Magistrate under Section 3 of the Act becomes revisable in view of the provisions in the Code of Criminal Procedure.

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1. 1996 JIC 30

CHAPTER XII

ORDER FOR PAYMENT OF MAINTENANCE BY WAKF BOARD

Synopsis

Section 4 also being with the *non-obstante* laws, a reading of Section 4 of the Act would show that whatever might have been provided under Section 3 or in any other law for the time being in force, a divorced woman is entitled to file an application for grant of maintenance if she has not remarried after the expiry of the Iddat period and is not able to maintain herself after Iddat period. In other words, a divorced woman, even if she has received reasonable and fair provision and maintenance from her former husband, and if she has not re-married after the Iddat period, and is not able to maintain herself after the iddat period, she can file an application for

grant of maintenance and the Magistrate has to pass an order in accordance with the provisions contained in Section 4.

It is contemplated under Section 4 of the Act that a divorcee muslim woman can get maintenance from her prospective heirs as given in the Act as well as under Mohammedan Law and they are responsible to provide maintenance to her, and if they don't do so the claim must be against Wakf Board. But at the same time the question would arise whether the divorcee wife should first exhaust her remedy against her relatives and her prospective legal heirs or she can straight away take recourse of law against State Wakf Board ?

The Apex Court in the case of *Secretary, Tamil Nadu Wakf Board and another vs. Syed Fatima Nachi*,[1] held that : *"It is futile for a divorced woman seeking succour to run after relatives, be it her children, parents, relatives or other relatives, who are not possessed of means to offer her maintenance and in fighting litigations in succession against them, dragging them to courts of law in order to obtain negative orders justificatory, instead, she should think of the last resort of moving against the State Wakf Board. In our considered view, she would instead be entitled to plead and prove such relevant facts in one proceeding, as to the inability of her relations aforementioned, maintaining her and directing her claim against the State Wakf Board in the first instance. It is, however, open for the State Wakf Board to controvert that the relations mentioned in the provision, or some of them, have the means to pay maintenance to her. In that event the Magistrate would perfectly be justified in adding those relatives as parties to the litigation in order to determine as towards whom shall he direct his orders for payment of maintenance. In one and the same proceeding, one or more orders conceivabley can be passed in favour of the divorced woman, subject of course, to her not marrying and remaining unable to maintain herself."*

In the case of *Zamrud Begum vs. K.MD. Haneef*, the learned single judge of Andhra Pradesh High Court opined that *"it is clear from the said provisions that he can claim or invoke against her parents & children and if they are unable to pay, the obligation has now cost on the Wakf Board to award the divorced woman.* While interpreting the provisions of Section 4 the Kolkata High Court in the case of *Makiur Rahaman Khan and another vs. Mahila Bibi*,[2] following the judgement of Supreme

1. 1997 (1) ALD (Crl.) 50 (SC)
2. 2002 Cri.L.J 1751

Court reported in (2001 Cri.L.J. 4660) & (AIR 2001 SC 3932) held that: *"Section 4(1) of the 1986 Act contains the provision for maintenance to the divorcee woman from her children but it does not in face debar the divorced woman from invoking the provision of Section 125 of the Cr.P.C against her children. Even under the said Act the application of the provisions of Section 125 of the Cr.P.C has been contemplated and the Act has not specifically made any ouster of the application of Section 125 Cr.P.C. Section 5 of the Act has imposed one condition for the application of Sections 125 to 128 of Cr.P.C against former husband of the divorced Muslim woman but it is conspicuously silent as regards their application against others. The framework of the Act itself and the ratio decided show that the Act itself is not a substituted measure of Section 125 of the Cr.P.C but in addition thereto. This suggests that proceeding under Section 125 of Cr.P.C. against children of the mother is quite maintainable despite the pendency of the proceeding U/s's.3 & 4 of the Act against her husband. Thus, where the Muslim husband is incapable of maintaining his divorced wife who is incapable of maintaining herself and has not remarried, the provisions for maintenance from other sources have been contemplated and provided in the provisions to sub-section (1) of Section 4 of the Act and this is how the word "within" appearing in Clause (a), sub-section (3) of Section 3 of the Act may be kept within its natural and literate meaning."*

1. Liability of Wakf Board

The Wakf Board is creation of a statute under Article 26 of the Constitution of India which provides inter alia, " Every religious denomination or any Section thereof shall have the right to manage its own affairs in matters of religion, to own and acquire movable and immovable property and to administer such property in accordance with law. The right conferred under Article 26 is on a denomination or any Section thereof. A "denomination" has been defined in *Commissioner, Hindu Religious Endowments vs. Sri Lakshmindra Thirtha Swamiar of Shirur Mutt*[1]) (the Shirur Mutt Case) by the Supreme Court with reference to the meaning of the term in the Oxford Dictionary as "a collection of individuals, classed together under the same name; a religious sect or body having a common faith and organization and designated by a distinctive name." It was accordingly held that each one of the sects or sub-sects in a religion can be called a religious denomination as it is designated by a distinctive name in many cases that of its founder and has a common faith and common spiritual organization. In *Sardar Syedna Tahar Saifuddin Saheb vs. State*

1. AIR 1954 SC 282

of Bombay, AIR 1962 SC 853, *Ayyangar*, J., in his judgment at paragraph 54 observed that, "*the identity of a religious denomination consists in the identity of its doctrine, creeds and tenets which are intended to ensure the unity of the faith which is adherents profess; and the identity of the religious views are the bonds of the union which binds together as one community*".

There can be no dispute that the rights guaranteed by Articles 26 are available to a denomination. A State Wakf Board is a body established under Section 9 of the Wakf Act 29 of 1954. It is not the collection of individuals or a body having common faith and organization. It has been established for the purpose of carrying out the function of supervision and control over the Wakfs in the State. Its functions are delineated in Section 15 of the Wakf Act as the general Superintendent of all Wakfs in a State. The provision also specifies that it shall be the duty of the Board so as to exercise its powers as to ensure that the Wakfs under its superintendence are properly maintained, controlled and administered and the income thereof duly applied to the objects and for the purposes for which the Wakfs were created or intended. Sub-section (2) of the Section specifies some of the functions and powers of the Board without prejudice to the generality of the powers conferred by sub-section (1). The Act contains detailed provisions for the constitution of the Board, its composition, the removal of its members, and the procedure to be followed by it in relation to the discharge of its functions and duties.

Sub-section (2) of Section 9 also provides that the Wakf Board shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property and to transfer any such property subject to the conditions and restrictions as may be prescribed, and shall by the said name sue and be sued.

The Wakf Board is not a conglomeration of individuals. It is not even akin to a company where a number of individuals join together to constitute it. It is a statutory body, pure and simple. It is not a representative body of the Muslim community. It has no soul and no faith, except the faith of dutiful performance of its functions and duties under the Act.

It is well known that management of Wakf properties has since long been controlled by the State. Various laws have been enacted from time to time in various parts of the country by either the Central

Legislature or the State Legislatures for achieving this purpose. Wakf properties have thus been the subject of special protection by the State through the enactment of these laws with a view to see that they are properly preserved and that the income there from is not frittered, misutilised or diverted for purposes other than those authorized by the objects of the Wakf. It is power so exercised by the State that now stands vested in the Wakf Boards in each State, specially established for the purpose. What the Wakf Board does is to carry out functions which were hitherto being undertaken by the State. It is exercising a part of the State's functions and is an instrumentality of the State. The Wakf Board is a creature of the Wakf Act. It is has no existence otherwise. It stands or falls with the Wakf Act. It has to exercise those functions and powers which are vested in it under the provisions of the Wakf Act. It is not a collection of individuals, or a sect or body with a common faith which alone will make it a denomination for the purpose of Article 26. If it is not a denomination, it has no rights under Article 26, liable to be violated by Section 4(2) of the Act by casting the liability to make payment of maintenance to a destitute divorced woman. Article 26 is therefore out of operation so far as the Wakf Board is concerned.

So in the case of *Syed Fazal Pokia Thangal vs. Union of India*, AIR 1993 Ker. 308, it was held that, *"Section 4(2) does not direct the Wakf Board to contribute for making payment to any destitute wife. The Wakf Board has got its own finances as per the provisions of Section 46 and Section 47 of 95 and it from those funds, the money is to be paid".*

Section 46 of the Wakf Act requires the Mutawalli to pay to such contribution not exceeding 6 % of net Annum Income to its property.

Section 47 of the Wakf Act also authorizes the Wakf Board with the previous sanctions of State Government to borrow amount for the purpose of giving money.

The Court further held that *"All these amounts and also any amounts received by the Board by way of donations, benefactions or grants are pooled together into what is called the Wakf Fund. The Fund is utilized for exercising the powers conferred and performing the duties imposed, by the Wakf Act, as mentioned in sub-section (3) of Section 48. To these powers and duties, a further obligation has been cast by Parliament by Section 4(2) of the Act. It is thus clear that what is expended for maintenance under Section 4(2) is the Fund of the Wakf Board constituted as above. It is not contributed by the Wakfs by way of any charity, but by virtue of the statutory obligation cast on them by Section 46 of the Act."*

A study of case law vis a vis provision of Wakf Act, it can be said that the Wakf Fund into which the contributions made by the Wakfs get merged is the property of the Wakf Board to be utilized for the purposes laid down by Parliament. The diversion, if any, of the income of the Wakfs takes place, not by the direction contained in Section 4(2), but earlier, when the contribution are directed to be paid under Section 46, that is a contribution which the law enjoins the Wakfs to make. There is therefore no "circuitous" method adopted in procuring funds from the Wakfs for payment of the maintenance as alleged by the petitioner. As a statutory functionary created by the Wakf Act, the Wakf Board is bound to act by the laws of the realm, and comply with the obligations cast on it by law; regarding utilization of its funds and otherwise. If payment of maintenance in such cases is anathema to Wakf, equally the outgoings provided by sub-clauses (c) & (d) of sub-section (3) of Section 46 namely payment of salary and allowances to the Secretary and Staff of the Board, and of traveling allowances to the Chairman, Members, Secretary and staff of the Board should also be violative of Articles 25 and 26, which is plainly unacceptable. Since only the funds of the Wakf Board are utilized for payment of maintenance under Section 4(2) and not of the Wakfs, there is no substances in the challenge that Section 4(2) is violative of Articles 25 and 26. Section 4(2) is not a colourable place of legislation as alleged, going by the test laid down in *Gajapati Narayana Deo vs. State of Orissa*[1].

A divorced wife is entitled to claim maintenance under Section 4 of the Act in addition to what she might have received under Section 3 of the Act. The Kolkatta High Court in the case of *Abdul Rashid vs. Sultana Begum*,[2] held that *"such clause cannot be fairly interpreted to mean that it was open to the divorced wife to claim maintenance under Section 4 of the Act in addition to what she might have received under Section 3 of the Act. If such an interpretation is made, then it would go against the very scheme of the Act. Considering the provisions of the Act in all its bearing, it cannot but be held that the liability of the former husband to provide maintenance is limited for the period of Iddat and if thereafter she is unable to maintain herself, she has to make an application under Section 4 of the Act.*

2. Execution/Recovery of maintenance of money

After maintenance is awarded the executing Court is not the tooth less body when the order is not obeyed by the husband. The

1. AIR 1953 SC 375
2. 1992 Cri.L.J 76(1)

Guwhati High Court in the case of *Hazi Abdul Khaleque vs. Mustt. Samsun Nehar,*[1] held that :

> "Section 128 of Cr.P.C. mandates that a copy of the order of maintenance shall be given without any payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid, and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such, Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due."
>
> "It does not only provides for furnishing of copy of the order, it also provides that such order could be enforced by any Magistrate at any place where the person against whom it was made may be, which only means that any Magistrate, of the place where the person may be, may enforce the order on being satisfied about the identity of the parties and also that the dues had not been paid. As said before how was the due to be recovered *i.e*, the procedure was not provided".
>
> "Under Chapter XXXII, of Cr.P.C. of the code provides that "Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine." The order for payment of maintenance was an order under the Code for payment of money, for the recovery of which no method had been expressly provided. That the court ultimately held that under Section 431 of the Code, I think the maintenance money could be recovered, as if it were fine".

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1. 1991 Cri.L.J 1843

CHAPTER XIII

INTERPRETATION OF SECTIONS 5 AND 7

The provisions of Section 7 have been incorporated in the Act as transitional provisions to enable a Magistrate to deal with and dispose of pending petitions filed by a Muslim divorced Woman as on the date of enforcement of the Act.

It is specifically mentioned in this Act that notwithstanding anything contained in the code and subject to the provisions of Section 5 of this Act all such petitions should be disposed off by such magistrate in accordance with the provisions of this Act.

Section 5 of the Act provides that if a divorced Muslim 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 Cr.P.C and file such affidavit or declaration in the court hearing the application the Magistrate shall dispose of such application accordingly.

If no such affidavit or declaration is filed or if husband prefers to subject himself to the jurisdiction of the Magistrate and if wife alone

prefers to be governed by this Act what would be fate of the petitions filed by a divorced Muslim Woman which are pending as on the date of enactment of this Act ? Whether such petitions would be dismissed and the wife which is already forced to vagrancy would be asked to file a fresh petition under Section 3 of this Act and who will provide her maintenance to enable her to keep her body and soul together till the disposal of such petition and whether a husband would under no obligation to maintain his wife after pronouncing divorce ?

All such questions fell to the consideration of various High Courts and Apex Court of India in various cases. Some of the High Courts have taken a view that a Muslim divorced woman is not entitled to claim maintenance by way of filing a petition under Section 125 Cr.P.C and any such petition pending as on the date of enforcement of this Act before a Magistrate should be dealt with under this Act.

But some High Courts have taken divergent view following the dictum of *Sha Bano's* case and opined that a divorcee Muslim woman is entitled to proceed with her petition/s even after the advent of this Act and her vested right of maintenance is not affected.

Examining the provisions of Sections 125, 127 and 128 Cr.P.C the provisions of Section 7 of this Act the courts answered the question as to whether a divorced muslim wife would be entitled to claim maintenance even after the enactment of the Act.

A Full Bench of Andhra Pradesh High Court in the case of *Usman Khan Bahamani vs. Fatimmunisa*,[1] ruled that a divorced Muslim woman is not entitled for maintenance, as contemplated under Section 125, 127 and 128 Cr.P.C from her former husband beyond the period of iddat and that right of Muslim divorced woman to obtain maintenance is obliterated except for the period of iddat under Section 125 Cr.P.C after the advent of the Act.

In the case of *Patnam Vehedullah Khan vs. P. Ashia Khatoon*,[2] a learned single Judge of Andhra Pradesh High Court held that, "unless Section 5 of the Act is invoked provisions of Section 125 Cr.P.C cannot be made applicable to the claim of a Muslim divorced woman".

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1. AIR 1990 AP 225 (FB)
2. 2000 (1) ALD (Crl.) 488 (AP): 2000 (1) ALT (Crl.) 410 (AP)

In the case of *Syed Maqsood vs. State of Andhra Pradesh and another*,[1] a Division Bench of Andhra Pradesh High Court in a reference made by a single learned judge to the bench ruled that "a Muslim divorcee woman is not entitled to maintenance after iddat period.

Another Full Bench of Rajasthan High Court in the case of *Abid Ali vs. Mst. Raisa Begum*,[2] took a similar view by holding that a Muslim woman who was divorced prior to coming into force of the Act of 1986 and the order of maintenance passed in her favour cannot execute the same. If such a 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.

Per contra the Andhra Pradesh High Court in the case of *Shaik Raj Mohammed vs. Shaik Aunnisa Bi and another*,[3] took a view that the Act is as prospective in operation and does not invalidate the orders passed under Cr.P.C after the enactment of the Act of 1986.

But this judgment was distinguished by another learned judge of Andhra Pradesh High Court in the case of *Nazir Ahmed Ansari vs. Lateef Bi*,[4] holding that order passed under Section 125 Cr.P.C is inexecutable and that a muslim divorced woman is not entitled to claim maintenance after the advent of the Act of 1986. This view was supported in the case of *Kareem Saheb vs. Raheemunnisa*[5]. The judgment which was delivered in the case of *Shaik Raj Mohamad* (supra) was not overruled nor it was held bad in law. In fact the view taken by a single Judge of Andhra Pradesh High Court was in line with the view taken by a Division Bench of Calcutta High Court in *Shakila Praveen vs. Haider Ali*[6]. The Division Bench following several discussions and opined that : "*If different phrase used in Section 3(1)(a), 3(1)(b), 3(3) and Section 4 as well as Section 5 of the Act and 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.*

1. AIR 2003 AP 123
2. 1988 (1) Raj L.R.104
3. 1993 (1) LS 285
4. 1996 (1) ALD 132
5. 1997 (3) ALD 409
6. 2000 (1) C.L.J 08

Taking into consideration the objects and reasons for enacting the Muslim Women (Protection of Rights of Divorce) Act as well as preamble and the plain language of Section 3, it cannot be said the Muslim Women Act in any way adversely affects 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 wife under personal Law are abrogated, restricted or repealed. It is presumed that the Act is enacted with deliberation and full knowledge of existing law on the object. In view of the preamble, the Act is enacted to protect the rights of Muslim women who have been divorced by or have obtained divorce from their husbands. In simplest language the Parliament has stated that the Act is for protecting the rights of Muslim Women. It does not provide that it is enacted for taking away some rights which a Muslim Woman has having either under the personal Law or under the general law i.e., Sections 125 to 128 of the Cr.P.C.

By the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986, the order passed by Magistrate under Section 125 of Cr.P.C ordering Muslims husband to pay maintenance to his divorced wife would not be non est. There is no section in the Act which nullifies the orders passed by the Magistrate under Section 125 of the Cr.P.C. Further, once the order under Section 125 of the Cr.P.C., granting maintenance to the divorced woman is passed, then her rights are crystallized 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 Section 5 an option is given to the parties to be governed by the provisions of Sections 125 to 128 of the Cr.P.C. This section also indicate that the Parliament never intended to take away the vested right of Muslim divorced woman which was crystallized before the passing of the Act. There is no inconsistency between the provisions of the Act and the provisions of Sections 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."

In the case of *Araba Aheemadhia Abdulla vs. Arab Bail Molumuna Shiyadbhai*,[1] it was held that : "*A divorced Muslim Woman is entitled to maintenance after contemplating her future needs and the maintenance is not limited only upto Iddat period. The phrase used in Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 is "reasonable and fair provision and maintenance to be made and to be paid to her" by which the Parliament intended to see that the divorced woman gets sufficient means of livelihood after the divorce and does not become destitute.*"

1. AIR 1988 Guj. 141

The Division Bench of Rajasthan High Court in the case of *Ghulam Mohamad vs. Smt. Achuu*,[1] was also confronted with a similar question as to whether a divorced Muslim woman is entitled to maintenance after the iddat period in case if she is not remarried ?. The Division bench taking into consideration of Section 4 of the Act replied the question thus as under :

> "*Section 4 of the Act of 1986, a divorced woman is entitled to move an application for maintenance after the expiry of iddat period on two grounds, namely:*
>
> *(a) that she has not remarried; and*
>
> *(b) that she was unable to maintain herself*

Furthermore, wife in Section 125 of Cr.P.C includes divorced Muslim wife and benefits of Section 125 Cr.P.C extend to her so long as she has not remarried after divorce and she was unable to maintain herself. The statutory right available to her under Section 125 Cr.P.C is unaffected by the provisions of personal law applicable to her. Apart from this, the provisions of the Act of 1986 nowhere provide that the divorced wife is not entitled to the application under Section 125 Cr.P.C for maintenance."

In the case of *Kaka vs. Hassan Bano*,[2] a Full Bench of Punjab and Haryana High Court dealt with the prime question as to "whether the Act of 1986 has the effect of invaliding the order of Court of Competent Jurisdiction passed under Section 125 Cr.P.C. The Full Bench answered the said question thus *vide* its judgment which is reproduced below :

APPENDIX 'B'
JUDGMENT

> "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 some 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 Cr.P.C. render *inter se* parties, *i.e.*, whether these provisions divest parties of vested rights/benefits ?

1. 2004 (3) Crimes 631
2. 1998 (1) ALD (Crl.) 546 (FB) (P&H)

(ii) Whether the right 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, ever for the period subsequent 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 of the cases or otherwise ?

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 "de hor", 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 woman. Thus, the provisions of the 1986 Act are applicable to a limited class, that of Muslim divorced women alone.

Section 7 of the Act termed as transitional provisions 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.

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 retrospective 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 Sections 125 to 128 of the Code but 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 spelled out in these provisions.

It is a settled principle of law that the rights 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 implication. The Legislature by a clear language has to spell out such a consequence in 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 41 r/w 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.

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 Sections 125 to 128 of the 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 accumulated from final orders or decrees of the Court of competent jurisdiction.

At the very outset we would like to refer to recent judgment of the Supreme Court in the case S.*K.Bhagwat and others vs. The State of Mysore*, JT 1995 (6) SC 444, 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: 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 overrules 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 has tried to get out of the binding effect of the decision by restoring 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 overrule binding decisions of competent Courts against the State. 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 abrogate the binding decision of the High Court and has encroached upon the judicial power entrusted to the various authorities functioning under the relevant statutes and the Constitution. Such an exercise of legislative power cannot be countenanced. (emphasis supplied by us) In the light of the 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 retrospective 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 principle of interpretation of statute, which is accepted, is that it must be interpreted prospectively unless the language of the statue makes it retrospective. Before a statue can be given retrospective effect on the principle of necessary implication there have to be some good reasons and attendant circumstances which would justify such interpretation to the provisions of the Act. The statue 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 vs. State of Bihar*, AIR 1970 SC 1636).

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 judgments of a learned single judge of Patna High Court in the case of *Mohd. Yunus vs. Bibi Phenkani @ Tasrunnisa and another*, 1987 (2) Crimes 241, and learned single Judge of Bombay High Court in *Mahaboob Khan @ Babu vs. Praveen Banu and another*, (II) 1988 Divorce and Matrimonial Cases 233. 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 judgments. However, the learned counsel for the wife-respondent has relied upon a judgment of the Karnataka High Court in the case of *Abdul Khadeer vs. Razia Begum*, 1991 (1) RCR 524; a Division Bench judgment of the Gauhati High Court in the case of *Idris ali and etc. vs. Ramesh Khatun and etc.*, AIR 1989 Gau. 24 and judgment of Allahabad High Court in the case of *Faizuddin Khan vs. Additional Sessions Judge, Etah and others*, 1990 (3) RCR 534. 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 ineffective.

At this point it may be appropriate to make reference to the two judgments of this court in the case of *Major Rauf Ahmed vs. Kanwar Anjam Jamali*, 1991 (1) RCR 602 and *Smt. Hazran vs. Abdul Rehman*, 1989 (1) RCR 113. 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 with regard to enforcement of the order of maintenance 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 conclusion which I have reached, I may refer to *Mohd. Haji vs. Rukiya*, 1987 P. Andhra Pradesh 472, Kerala and *Arab Ahemadhia Abdulla and etc. vs. 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 Ahemadhia Abdulla and etc. vs. Arab Bali Mohmuna Saiyadbhai and others*, AIR 1988 Gujarat 141, the retrospectivity of the provisions of this Act was answered by the Court in the following words: "by the enactment of Muslim Woman (Protection of Rights on Divorce) Act, 1986, the orders passed by Magistrate under Section 125 of Cr.P.C ordering Muslim husband to pay maintenance to his divorced wife would not be non-est. There is no section in the Act which nullifies the orders passed by the Magistrate under Section 125 of the Cr.P.C. Further, once the order under Section 125 of the Cr.P.C. granting maintenance to the divorced woman is passed, then her rights are crystallized 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 of in the Act. under Section 5 an option is given to the parties to be governed by the provisions of Sections 125 to 128 of the Cr.P.C. This section also indicates that the Parliament never intended to take away the vested right of Muslim divorced woman which was crystallized before the passing of the Act. There is no inconsistency between the provisions of Act and the provisions of Sections 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."

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 vs. Pradeep Kumari and others*, JT (9) SC 644).

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 nullified on the commencement of this Act.

There are more reasons than 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 to 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 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. There 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 objects, the scope and effect of the provisions of the Act read in their correct perspective and context 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 noteworthy 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 had the effect of rendering the judgments of the Court ineffective directly or by necessary implication.

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 rigorous 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 commencement of the Act are not taken away by the provisions of the Act of 1986.

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 women 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 a divorced wife. However, with regard to the right of the divorced wife we would be answering the question in our subsequent discussion.

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 jeopardizing 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 common well and benefit of all.

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 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 consummated. Under the personal law the obligation to maintain the wife is not to be shared.

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 Nafqa, and it comprehends food cloths 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 maintenance of the wife and the children is a primary obligation. In view of the above observations and keeping in mind the social set-up regulated by command of law that we have to examine the provisions of this Act.

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, 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 though 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 debt against the husband which has priority over the right of all other persons to receive maintenance.

Where the Legislature intends to provide additional benefits of protection by specific language used in the Act to limit or circumvent and improvise such limitations, by implication upon such intention would neither be permissible nor proper. The purpose of such payments is to obviate destitution of the divorce and to provide with her with wherewithal to maintain herself. There must and has to be a rationale for limiting the application of provisions of Section 3 which we find to be none. In the case of *Bai Taheera vs. Ali Hussain Fizali*, AIR 1979 SC 326 the Court held that payment of illusory amounts by way of maintenance, 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 (object ?) can secure validity, if the Court has to pay true homage to the Constitution.

Coming to the judgments referred before us, firstly we will refer to the judgment of *Arab Ahemadhia Abudlla* (supra),

where the Gujarat High Court held as follows: "it cannot be said that the word "within" used in Section 3(i)(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 Sub-section (2) of Section 3 but nowhere the Parliament has provided that reasonable and fair provision and maintenance is limited only for the Iddat period or that it is to be paid only during the Iddat period and not beyond it "if different phrases used in Sections 3(1)(a), 3(1)(b), 3(3) and Section 4 as well 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 vs. Smt. Maqbul Bee and another*, 1993(1) RCC 89, 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 vs. Sufaira*, 1988 (2) Kerala Law times 94, 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 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 recognized in sub-clause (1) of clause (1) of Section 3 of the Act. This

liability is case 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 consortium, is in nature of a compensatory gift or a solatium to sustain the woman for her life after the divorce. In accordance with the principles of Islamic equity the said provision or compensation or support from the former husband is wife's right. The 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 vs. Sultana Begum*, 1992 Crl.L.J. 76 and the Rajasthan High Court in the case of *Abdul Hamid vs. Mst. Asia*, 1992 (2) All India Hindu Law reporter 475, have taken a view that maintenance payable under the provisions of the Act is restricted to the period of Iddat only.

Other ground that has been taken into consideration 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 statues. Both are legislated with a common intention to protect the right of maintenance of a given class. While the Act give 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 rights 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 hasn'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 reconcilable. There is no "a head-on clash" between these provisions. They must and have to be harmoniously construed to avoid repugnancy or frustration any of the provisions.

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. vs. Uma Shankar Saran*, AIR 1993 SC 122). 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.

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 no-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 fulfill his obligation of maintaining the wife. If he fails to discharge this obligation this becomes a cause for causing the default which gives cause of action to the wife.

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 an 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 woman. 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 judgment.

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.

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 & 4 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 vs. Awa Ummal Pathumma Beevi and another*, 1989 Crl.L.J 1224). 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 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.

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 now to answer the questions raised by us, above, as under: Question No.1: A final order passed by the Court of Competent jurisdiction, under Section 125 of the Code of Cr.P.C 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 do not invest the party vested with determined rights and benefits under Section 125 of the Code.

It is an accepted principle, that law is mootable. 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 guiding 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 it is an Utopian one.

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.

This question of applicability of Section 125 to 128 Cr.P.C to a divorced Muslim Woman in the light of the provisions was posed to a learned single judge of Andhra Pradesh High Court in the case of *Saleema Bee vs. Court of Judicial Magistrate of First Class, Peddapalli*, 1999 (2) ALD 106. The learned single Judge held thus:

"Thus, Section 3 of the Act declares that a divorced woman is entitled to reasonable and fair provision and maintenance to

be made and paid to her within the iddat period by her former husband and further declares that a divorced woman is also entitled to 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. Sub-section (2) of Section 3 confers a right upon the divorced woman to make an application to a Magistrate for an order for payment of such provision and maintenance or mahr or dower or delivery of properties in case where there is no fair provision is made for maintenance and also where the amount of mahr or dower due to the divorced wife has not been made or paid by the former husband. Sub-section (4) of Section 3 confers jurisdiction upon the Magistrate to levy fine under the Code and also for imposing sentence against such person, who refuses to pay or comply with the directions issued under sub-section (3) of Section 3 without sufficient cause. It is, thus, clear that the provisions of the Act are self-contained and provide for filing of an application before the Magistrate for realization of maintenance, mahr or dower and other properties and confers jurisdiction upon the Magistrate concerned to make an inquiry and pass appropriate order.

This Court in the case of *Haroon Rashid vs. Raqeeba Khatoon*, 1997 (1) Pat LJ R 278) (supra) is of the view that the Islamic Law does not provide anywhere that a divorced wife would not be entitled to maintenance beyond the period of Iddat. According to their Lordships, the provisions of the Code of Criminal Procedure created a statutory right to a Muslim divorced wife and she can still maintain an action claiming maintenance after the period of iddat under the provision of Section 125 of Cr.P.C. Their Lordships futher held that :- "the question as to whether Section 125 of the Code of Criminal Procedure applies to muslim women also is concluded by two decisions of the Supreme Court in the case of *Bai Tahira vs. Ali Hussain Firsoli Chothi*, reported in 1979 Cri.L.J 151: (AIR 1979 SC 362) and in *Fazludin vs. Khader Wali*, reported in AIR 1980 SC 1730: (1980 Cri.L.J 1249) in which it was held that the Muslim wife is entitled to get maintenance under Section 125 Cr.P.C. even after the expiry of iddat period. The latest Supreme Court decision in *Shah Bano's* case reported in AIR 1985 SC 945: (1985 Cri.L.J 875) is very important on the issue of maintenance of a muslim divorced wife in which it was held that Muslim husband is liable to provide maintenance for divorced wife who is unable to

maintain herself and that clause (b) of explanation of Section 125(1) Cr.P.C. which defines wife including a divorced muslim woman so long as she has not remarried."

In the result, the petitioner is not entitled to any relief and this application is dismissed with the observation/direction made above. Petition dismissed.

Another single Judge of Andhra Pradesh High Court while deciding a similar controversy regarding entitlement of a Muslim divorced women for maintenance after the advent of the Act in the case of *Muneer Hasan Khan vs. Fareeda Khatoon*,[1] held that: "The preamble of the Act sets forth that to protect the rights of Muslim women who have been divorced by, or have obtained divorce from their husbands and to provide maintenance to them the act has been passed. Under Section 2(a) of the Act, the expression "divorced woman" has been defined to mean a Muslim woman who was married according to Muslim law, and has been divorced by, or has obtained divorce from her husband in accordance with Muslim Law. Under Section 2(b) of the Act, "iddat period" has also been defined to mean, three menstrual courses after the date of divorce, if she is subject to menstruation; three lunar months after her divorce, if she is not subject to menstruation, and; if she is pregnant at the time of her divorce, the period between the divorce and the delivery of the child or the termination of her pregnancy whichever is earlier.

And held that regard to the facts and circumstances of the case and the principle of law discussed hereinabove I come to the following conclusion: (i) A divorced Muslim woman is entitled to and can claim maintenance only under the provision and in accordance with the procedure provided under Sections 3 and 4 of the Muslim Woman (Protection of Right on Divorce) Act; (ii) She is entitled to claim maintenance from her husband for and during the period of iddat and beside that she is also entitled to claim dower amount agreed at the time of marriage and other properties which were given to her by her relatives and friends at the time of marriage or thereafter. (iii) In case a divorced woman is not remarried and is not able to maintain herself after the expiry of iddat, she may bring an action claiming maintenance and she may be entitled to get maintenance in accordance with the procedure provided under Section 4 of the said Act. (iv) After the enactment of the aforesaid Act a divorced woman is not

1. 2003 (1) ALD (Crl.) 553

entitled to bring an action for the said remedy under Section 125 of the Code of Criminal Procedure."

The Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere the Parliament has provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

On this dispute of application of Sections 125 to 128 to a divorced Muslim wife, Bombay High Court has also expressed its view in the case of *Sirazuddin Ahmed Saheba Begum vs. Khadija Sidajamal Bagwan,*[1] by holding that the order of maintenance obtained by the wife is valid and can be executed.

Subscribing this view Gujarat High Court in the case of *A.A. Abdullah vs. A.B.Mohmuna Saiyadbhai,*[2] has clearly held that new Act does not take away the earlier order or decree passed by a Court under Section 125 Cr.P.C.

Similar view was also taken by Gauhati High Cout in the case of *Idris Ali vs. Ramesha Khatoon,*[3] and ruled that any order obtained under Section 125 Cr.P.C prior to the enactment of Act 25/86 is not taken away by the new Act.

Similar views was also rendered by Karnataka High Court and Andhra Pradesh High Court in the case of *M.A. Hameed vs. Razia Begum,*[4] and *Shaik Raj Mohmmad* (supra) and Punjab High Court in the case of *Smt. Hazran vs. Abdul Rahman*[5].

In all these decisions there is a clear pronouncement of law that the Act in question is prospective in operation and it does not take away or nullify the earlier order obtained by wife under Section 125 Cr.P.C.

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1. 1996 BCR (3) 756 = 1996 TLS 1304796
2. AIR 1988 Guj 141
3. AIR 1989 Gau 24
4. 1991 Cr.L.J 247
5. 1989 Cr.L.J 1519

A Division Bench of Bombay High Court in the case of *Farida Bano Shahaluddin vs. Shahalauddin*,[1] opined that order of maintenance passed prior to 19.5.1986 on which date Act 25 of 86 came into force, enforceable and that further the Act is not retrospective in operation.

But explaining Section 7 Karnataka High Court took a contrary view in the case of *Rukiya and another vs. Mohammed*,[2] held that Section 7 provides for transitional provisions, it states that all applications under Section 125 Cr.P.C or under Section 127 Cr.P.C pending before a Magistrate on the commencement of the Act of 86 shall not withstanding any thing contained in the Code and subject to the provisions of Section 5 of the Act of 1986 be disposed of in accordance with the provisions of the Act and that an application under Section 125 Cr.P.C by the divorced woman is not maintainable; she can also approach the Court for maintenance under the Act either under Section 3 or 4 as the case may be.

A similar view was taken by Patna High Court in the case of *Bibi Shahaz @ Munni vs. State of Bihar*,[3] holding that a divorced Muslim woman is entitled to and can claim maintenance also under the provision and in accordance with the procedure provided under Section 3 and 4 of the Act 25/86.

The procedure laid down under Section 125 of Cr.P.C is excluded from the operation of the Act in view of preponderance of judicial pronouncements of various High Courts. This view is also supported by various High Court as stated below :

Madhya Pradesh High Court subscribed to the view taken by Full Bench of Andhra Pradesh High Court in the case of *Usman Khan Bahmani* (supra) being in total agreement with the findings in the case reported in *Abdul Haq vs. Tasmin Talat*[4].

Patna High Court in the case of *Moin @ Moinuddin Mian vs. Amina Khatoon*, 1996 (1) DMC 494 also took the same view and held that a divorced Muslim wife is not entitled to claim maintenance invoking Section 125 Cr.P.C.

In the case of *M. Alavi vs. T.V. Saifa*,[5] it was held that Section 125(4)

1. 1993 (1) MLJ 252
2. 1997 Cr.L.J. 723
3. 1999 (1) ALD (Crl.) 161
4. 1998 Crimes (3) 365
5. AIR 1993 Kerala 21

itself has no application to a woman who has already been divorced. So expression of wife in Section 125(4) Cr.P.C does not cover divorced woman.

In the case of *Mst. Jameela vs. Alimuddin,*[1] a Division of bench of Rajasthan High Court Judge, interpreted Section 7 of the Act and held that, there is no saving clause as such in the Act of 1986 but Section 7 provides that every application under Section 125 or 127 Cr.P.C pending before the Magistrate on commencement of the Act of 1986 subject to the provisions of Section 5 be disposed of by the Magistrate in accordance with the provisions of this Act of 1986 since Section 5 provides that if both the parties declare in writing either jointly or separately, that they would prefer to be governed by the provisions of Sections 125 to 128 Cr.P.C and file such affidavit or declaration in court, the Magistrate shall dispose of such application accordingly.

There is no saving clause as stated above in Section 7 of the Act of 1986 which provides that the application pending under Section 125 or 127 Cr.P.C on the commencement of the Act of 1986, can be disposed of under the Act of 1986. After order under Section 125, a person in whose favour the order has been made under Section 125 Cr.P.C can approach the court for its enforcement under Section 125(3) or under Section 128 Cr.P.C. Section 7 provides for disposal of the application pending under Section 125 or 127, Cr.P.C that does not talk about Section 128 Cr.P.C. When the application is pending for maintenance and its enforcement, can be disposed of as per provisions of Section 7 of the Act of 1986, which includes the application pending under Section 125(3) Cr.P.C. On record, the impugned three applications were made under Section 125(3) Cr.P.C they were pending on commencement of the Act of 1986, therefore, they can only be dealt with as per provisions of this Act. When no joint declaration by the parties to prefer to be governed by the provisions of Sections 125 to 128 Cr.P.C, such applications will be disposed of as per the provisions of the Act of 1986.

Provisions of Section 7 of the Act was also explained by the High Court of Gauhati in the case of *Abdul Hamid vs. Mest Minara Begum,*[2] thus : Only question that needs consideration in the present revision petition is whether in view of divorce during the pendency of the proceeding the Opposite Party here-in can claim maintenance U/s.125

1. 1993 Cri.L.J 2815
2. 1992 Crimes (2) 576

Cr.P.C or whether her claim would be governed by the provisions of the Act.

A Division Bench of Gauhati High Court in *Idris Ali vs. Ramesha Kahtun*, considered as to whether provisions of the Act shall have an application when a divorced woman approaches the Court of a Magistrate for execution of final order already passed in her favour under Section 125 Cr.P.C. The learned single judge in the above case observed while making the reference that for this purpose it would be required to be seen whether Section 7 of the Act shall have application of the stage of execution of final order passed under Section 125 Cr.P.C.

The Division Bench considered all aspects of the matter under the Act and also provisions of Section 127 Cr.P.C and held, *inter-alia*, that prerequisite condition for application of Section 7 of the Act, which was absent in respect of those petitions. It was also held that Section 7 would apply only to those cases which were not finalized by the Magistrate under Section 125 or 127 Cr.P.C on the date the Act came into force and were still pending and such application had been moved by a divorced woman. It was also held that a muslim divorced women or her husband already granted orders could not be dismissed simply on the ground that the Act has come into force. It was made clear that under Section 127 Cr.P.C there are various provisions where in case of divorce, the husband and wife may approach the Magistrate for cancellation for order of maintenance already passed on proving of certain conditions which are laid down in the said section. According to the division bench that legislatures was very much concerned not to write off the maintenance of muslim divorced wives, which had already been granted maintenance earlier under Sections 125 and 127 Cr.P.C and therefore made it express that the Act would cover only cases filed after the Act came into force and those cases under Sections 125 and 127 Cr.P.C while they were pending. According to the division bench if any retrospective effect would be given to the Act, it would result in serious complications.

Thus the intention of the legislature is clear that all pending proceedings after the Act came into force on 19th May, 1986 filed by a divorced woman shall be disposed of in accordance with the provisions of the Act. In the above case, the problem was that at the time of filing the application under Section 125 Cr.P.C admittedly the Opposite party here-in was not a divorced woman and the divorce took place during the pendency of the proceeding.

The Calcutta High Court in the case of *S.K. Aliubakar vs. Obidunnisa,*[1] held that order of maintenance granted in favour of divorced Muslim woman under Section 125 Cr.P.C ceases to have effect on the commencement of the Act. Hence execution proceeding based on such order was quashed.

The High Court of Calcutta in the above case, followed a judgment which was rendered by the same High Court in the case reported in 89 Cr.L.R. (Cal) 197.

In the above case the dispute arose at the time of execution of the order. The court delivered that judgment cited above taking into consideration of the provisions of Sections 5 and 7 of the Act.

The provisions of Section 7 were also examined by Patna High Court in the case of *Md.Yunus vs. Bi Bi Phankani*, 1987 (2) Crimes 241 holding that the Act of 1986 has completely obliterated the right of such woman (divorcee) to get maintenance. If a divorced Muslim woman was divorced prior to coming into force of the Act in whose favour order of maintenance has been passed and has become final or is pending in revision or other Court being challenged by the husband is allowed to get maintenance it will be in complete contravention of the intention of the legislature and will amount to frustrate the very object of the Act for which it has been passed. The same view was taken by Andhra Pradesh High Court in the case of *Mahboob Basha*[2].

Children's Maintenance

In the decision in *Sk Mahaboob Basha's* case (supra) it was held that the transitional provision in Section 7 of the Act is not attracted in cases of children who have crossed the age of 2 years and cases of such children are governed by Section 125 Cr.P.C.

Maintenance petition filed by minors of more than 2 year old and parents has to be dealt with as per the provisions of Section 125 Cr.P.C but not under Section 7 of the Act as held in the *Yumb Rawthar* Case[3].

Following the ratio laid down in the decision reported in AIR 1989 Gau 24 (supra) a Single Judge of the same Court in the case of

1. 1992 Crl.L.J 2826
2. 1989 Cr.L.J 2295 (AP)
3. 1997 Cr.L.J 4313

Hazi Abdul Khalaque vs. Samsun Nehar,[1] held that: "The petitioner (husband) was liable to pay maintenance even after the Act 1986 had come into force because the order of maintenance was passed before the Act 86 came into force.

Karnataka High Court once again examined the application under Section 125 to 128 Cr.P.C to the maintenance of a Muslim divorced woman who had acquired vested right of maintenance before the Commencement of the Act and held that:

> The Act is prospective and not retrospective in operation. There is no provision in the Act taking away or impairing any vested right acquired by a divorced woman to claim maintenance under the existing general law or personal law. The Act does not create a law nor new obligation, does not impose a new duty and does not attach a new liability in respect of past transaction or considerations. It only specifies the rights of a divorced Muslim woman at the time of divorce and protects her interests. Therefore the provisions of the Act cannot defeat the vested rights acquired by the wife to recover maintenance from the husband under the order awarding maintenance dated 20-3-1985 *i.e*, long before the Act came into force. The wife had acquired a right to claim maintenance from the petitioner husband much prior to 19.5.1986, the date on which the Act came into force and that right had stood crystallized before 19-5-1986. The fact that the husband divorced the wife on 25-11-1986, *i.e.*, after coming into force the Act, does not alter the position in any material way because of the inclusive definition of the term "wife" in Clause (b) of the Explanation to Section 125(1) of the Code.

In the case of *Rukiya vs. Mohammad,*[2] a learned Single Judge opined that after the divorce a muslim woman cannot invoke Section 125 Cr.P.C but she has to approach the Court under Act of 1986. Even execution of the order of maintenance obtained 125 Cr.P.C prior to the enactment of the Act of 86 barred in view of Section 7 of the Act.

Bombay High Court took a contrary view by holding that the orders passed under Section 125 Cr.P.C prior to the enactment of the

1. 1991 Cr.L.J 1843
2. ILR 96 (Karn) 3254

Muslim Woman Act and not nullified by reason of coming into force of the Muslim Women Act. Such orders are binding on both the sides and can be executed under Section 128 Cr.P.C. The Muslim Women Act does not divert the divorced woman if the right to get maintenance under Section 125 Cr.P.C vested in her. If the very "talak" is disputed by the wife by alleging that the Talaq was not pronounced in in accordance with the guidelines given in *Shameem Ares Aris* case (supra) a petition under Section 125 Cr.P.C lies.

In the case of *M.A. Hai*, it was held that *"Section 7 cannot be invoked and in applicable while a Criminal Revision Petition filed against the order passed under Section 125 Cr.P.C is pending since Revision Petition has to be decided as per the provisions of Criminal Procedure Code (2002 (2) MLJ 195 followed in M.A.Hai vs. Saleha Khatoon, 2006 Mah.L.J (Cri) (2) 520".*

The controversy as to whether Section 7 overrides Section 125 Cr.P.C and as to whether Section 125 Cr.P.C cannot be invoked by a divorced Muslim Woman after enactment of the Act 25/86 was finally set at rest by the Apex Court of India. In the case of *Danail Latifi vs. Union of India*,[1] having ruled that a muslim husband is liable to provide reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well and his liability to pay maintenance to his divorced wife is not confined to iddat. The ratio laid down in *Danial Latifi* case was followed in the case of *Khatoonunnisa vs. State of U.P.*,[2] and held:

Subsequent to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short "the Act") as it was considered that the jurisdiction of the magistrate under Section 125 Cr.P.C can be invoked only when the condition precedent mentioned in Section 5 of the Act are complied with, in the case in hand, the magistrate came to a finding that there has been no divorce in the eye of law and as such, the magistrate has the jurisdiction to grant maintenance under Section 125 of the Cr.P.C.

The ruling of *Danial Latifi's* case was further followed in the case of *Iqbal Bano vs. The State of U.P.*[3] and it was further held that:

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1. (2001) 7 SCC 740
2. 2002 JT (7) 631 (SC)
3. (2007) 6 SCC 785

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

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

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

The fall-out of the above discussion is that ordinarily, a Muslim woman who comes 'within' the meaning of the term 'divorced woman' as defined in MW Act would not be entitled to claim maintenance by instituting a proceeding under Section 125 Cr.P.C. In short thus a Muslim woman who falls within the meaning of the term 'divorced woman' as defined in the MW Act has no right with the coming into force of the MW Act to institute or maintain an application under Section 125 Cr.P.C except when on the date of the first hearing of the application under Section 3(2) a divorced woman and her former husband in terms of Section 5 declare by affidavit or any other declaration in writing in such form as may be prescribed either jointly or separately that they would prefer to be governed by the provisions of Sections 125 to 128 Cr.P.C.

The maintenance under the Act is to be paid by the husband for the duration of the iddat and this obligation does not extend beyond the period of iddat. Once the relationship with the husband has come to an end with the expiry of the iddat period, the responsibility devolves upon the relatives of

> the divorcee. The Act follows Muslim personal law in determining which relatives are responsible under which circumstances. If there are no relatives or no relatives are able to support the divorce then the Court can order the State Wakf Boards to pay the maintenance."

The above observations, made in *Danail Latifi* (2001 Cri.L.J 4660) (supra), leave no room for doubt that the obligation of a Muslim husband to pay maintenance is confined to the period of iddat and once the period of iddat expires, the responsibility of providing maintenance falls on the relatives of the Muslim divorcee and when there is no relative or when there are relatives, but the relatives are not capable of supporting the divorcee, then the Court can order the State Wakf Board to pay the 'maintenance'. Is a Muslim divorced woman entitled to make application under Section 3 of the MW Act for direction to her former husband, who has dissolved the marriage by pronouncement of talaq and also paid 'maintenance' to her for the period of iddat to make 'provision' for her beyond the period of iddat and if so subject to what conditions, such a direction can be given ?

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

The question posed above necessarily requires one to determine the distinction, if any, between the words 'provision' and 'maintenance'. The word 'provision' according to Oxford Universal Dictionary (Third Edition), means the action of providing, seeing to things beforehand; the fact or condition of being made ready beforehand, something prepared or arranged in advance, a measure provided to meet a need. Similarly, according to Webster's Third new International Dictionary the word 'provision' means the act or process of providing the quality or state of being prepared beforehand, a measure taken before hand. On the other hand the word maintenance, according to Oxford Universal Dictionary (Third Edition) means the action of maintaining the state of fact of being maintained, means of sustention. The

Webster's Third new International Dictionary describes the word 'maintenance' to mean the act of providing means of support for someone, the action of preserving or supporting. The Supreme Court had the occasion to described the word 'provision' in *Metal Box Company vs. Workmen*, AIR 1969 SC 612, as an amount set aside, out of the profits and other surplus to provide for any known liability to which the amount cannot be determined with substantial accuracy. The word 'provision' thus means an act of providing something for future. In the context of Section 3(1)(a), it would obviously mean the amount necessary for the Muslim divorced woman to look after herself after the period of iddat. The provision may include the amount necessary for the divorced woman's food, residence, clothing, etc. Maintenance in the context of the MW Act signifies the act of maintaining or the means of sustenance.

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

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

to be paid 'within' the period of iddat, but the 'maintenance' so paid is for the period of iddat.

The impression that 'reasonable and fair provision' for his divorced wife be made by her former husband 'within' the period of iddat and not 'for' the period of iddat also receives support from the fact that Section 3(3) of the MW Act provides that where an application is made by a divorced woman against a defaulting husband, the Magistrate has to satisfy himself that the husband has failed to make a 'reasonable and fair provision' or has filed to pay 'maintenance' to the divorced wife 'within' the iddat period.

In support of the conclusion, which is reached above it is also worth pointing out that Section 4 of the MW Act, which begins with a *non-obstante* clause, states that if such a woman is unable to maintain herself after the iddat period, then the Magistrate may make an order directing such of her relatives as would be entitled to inherit her property on her death, according to muslim law to pay such 'reasonable and fair maintenance' to her as he may determine fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during the marriage and the means of such relatives. The 2nd proviso states that, if any of the relatives is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may on proof of such inability being furnished to him order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may appear to the Magistrate to have the means to paying the same in such proportions as the Magistrate may think fit to order. Sub-section (2) thereof further clarifies that if such a woman has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives, whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso of sub-section (1), the Magistrate may direct the State Wakf Board to pay such maintenance.

If one has to give a coherent meaning and an effective scheme to the MW Act as indicated above there can be no escape from the conclusion that making of a 'reasonable and fair provision' is the obligation of the husband alone, apart from of course making payment of maintenance for the period of iddat. If the husband is unable to provide necessary 'maintenance', the obligation to provide maintenance

falls on the relatives of the divorced woman and if the relatives are also incapable of providing 'maintenance' to such a divorced woman. The State Wakf Board has the ultimate responsibility to provide maintenance beyond the period of iddat. The scheme of the MW Act also shows that a Muslim husband has to make a 'reasonable and fair provision', which includes all the imperative necessities of his divorced wife such as her residence, food and clothing and if he is not capable of making such a 'provision', the divorced woman cannot be left high and dry. In order to protect her from vagrancy, the legislature makes her relatives, who may inherit her estate to provide her 'maintenance' and if they are also incapable of providing 'maintenance' to her the Wakf Board owes the responsibility to provide 'maintenance' to her.

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

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

The scheme of the MW Act as reflected by the provisions of Section 3 of the MW Act, shows that a Muslim divorced woman's right to provision and maintenance has been made subject to the means of the husband. This in turn enables a Muslim husband to avoid even during the period of iddat, his liability to pay maintenance

to his erstwhile wife after divorce. In short a Muslim husband who has no sufficient means may in a given case be absolved of his responsibility to provide maintenance to his divorced wife even for the period of iddat. Though sound unreal such is the impact of the scheme of the MW Act. Having noticed this aspect of the MW Act the Constitution Bench in *Daniel Latifi* (2001 Cri.L.J 4660) (supra), observed thus:

> "The Judicial enforceability of the Muslim divorced woman's right to provision and maintenance under Section 3(1)(a) of the Act has been subjected to the condition of the husband having sufficient means which, strictly speaking is contrary to the principles of Muslim law as the liability to pay maintenance during the iddat period is unconditional and cannot be circumscribed by the financial means of the husband. The purpose of the Act appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of iddat."

Let me now revert to the question as to whether a Muslim divorced woman is entitled to make an application under Section 3 of the MW Act for direction to her former husband who has dissolved the marriage by pronouncement of talaq and has also paid 'maintenance' to her for the period of iddat to make 'provision' for her beyond the period of iddat and if so subject to what conditions, such a direction can be given ? A dispassionate analysis of the entire scheme of the MW Act and particularly of Section 3(1)(a) shows that the obligation of the husband to make and pay within the iddat period, 'a reasonable and fair provision and maintenance' overrides all other laws for sub-section (1) of Section 3 commences with a non obstante clause. The words "to be made and paid to her within iddat period", which occur in Section 3(1)(a) indicate, observed the Constitution Bench in *Danial Latifi* (2001 Cri.L.J 4660) (supra), that 'a fair and reasonable provision' has to be 'made', while 'maintenance' has to be paid. A Muslim divorced woman is thus entitled to a fair and reasonable provision may include provision for her residence, food clothing, etc. This in turn shows that at the time of divorce a Muslim husband is required to contemplate the future needs of his wife and make arrangement in advance for meeting those needs. Thus the right to have 'a fair and reasonable provision' in her favour is a right enforceable only against the woman's former husband and not against others. To put it differently a Muslim divorced woman has in addition to her right to receive Mahr, the right to a reasonable and fair provision to be made in her favour by her former husband within the period of

iddat. The 'reasonable and fair provision' would mean that the former husband has to take into account the needs of his divorced wife, his own means and the standard of life, which his wife was enjoying during the subsistence of marriage.

What thus emerges is that Section 3 entitles to Muslim divorced woman to obtain from her former husband 'maintenance', 'provision' and 'mahr' and also recover from his possession her wedding presents and dowry. A minute and cautious reading of the provisions contained in Section 3 of the MW Act, indicate that the MW Act casts two distinct and separate obligations on the husband, namely (i) to make a "reasonable and fair provision" for his divorced wife; and (ii) to provide "maintenance" for her. The emphasis of this section is not on the nature or duration of any such "provision" or "maintenance", but on the time by which an arrangement for payment of provision and maintenance ought to be concluded namely, "within the iddat period". If the scheme of the MW Act were so read, as the MW Act ought to be read it becomes transparent holds the Constitution Bench in *Daniel Latifi's* (2001 Cri.L.J 4660) (supra), that the Act MW would exclude and does exclude a man who has already discharged both his obligations namely the obligation of making and paying 'reasonable and fair provisions' and 'maintenance' by paying these amounts, in a lump sum to his wife in addition to having paid his wife's mahr and restored her dowry as per Sections 3(1)(c) and 3(1)(d) of the MW Act. Such a man would have no further liability to provide post iddat period maintenance to his divorced wife.

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

> "36. while uploading the validity of the Act, we may sum up our conclusions: (1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such

> a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act. (2) Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the iddat period. (3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law for such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance. (4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India. "(Emphasis is supplied)

From what have been laid down by the Constitution Bench in *Danial Latifi* (2001 Cri.L.J 4660) (supra) there remains no room for doubt that though the responsibility of a Muslim divorced woman's former husband to pay 'maintenance' to her shall remain confined to the period of iddat, it does not completely absolve such a woman's former husband from the liability to make 'reasonable and fair provision' for her future. The 'provision' so made would obviously include her maintenance as well. This provision must be made by the former husband within the period of iddat and not thereafter. When the husband is unable to make provision for his divorced wife, responsibility to maintain her falls in terms of Section 4 on her relatives and on their inability to provide maintenance to her, responsibility to provide maintenance to her falls on the State Wakf Board. The scheme of the MW Act further makes it clear that notwithstanding the fact that it is the legal obligation of a Muslim divorced woman's husband to make a 'fair and reasonable provision' for her within the period of iddat, to her may in a given case be absolved of this responsibility if he is incapable of making such a provision and in such an event the liability to maintain such a divorced woman falls as indicated in Section 4 on her relatives and on their failure on the State Wakf Board which can in no circumstance, shrik its responsibility to maintain her, is it permissible for a Magistrate, while entertaining an application under Section 3(1)(a) to direct a Muslim divorced woman's former husband to give her a lump sump amount of money to enable her to maintain herself and if so under what circumstances and subject to what condition, such a direction can be given ?

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

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

While dealing with the question as to whether a Court, while in seisin of an application seeking maintenance under the MW Act direct a husband to pay maintenance per month to his divorced wife, it may also be pointed out in the light of the authoritative pronouncement in *Danial Latifi* (2001 Cri.L.J 4660) (supra), it becomes transparent that it is the legal obligation of the muslim husband to make reasonable and fair provision for the future of his divorced wife. When a Muslim husband has not made such a "provision" as the law obliges him to do, there is no impediment on thepart of a Magistrate, who is in seisin of an application made under Section 3 of the MW Act to direct the Muslim husband to make such a provision. However, when a Muslim husband is not in a position to make, at a time, payment of such an amount, which can be regarded as a 'fair and reasonable provision' and direct such a former husband to pay, in installments, the sum, which may be assessed by the Magistrate as the 'fair and reasonable provision'. Such installments may be monthly, half-yearly or annually. The 'fair and reasonable provision', which the MW Act envisages are really aimed at making such a 'provision', which would enable the divorced woman to maintain the standard of life, which she had been used to. The need for making of 'fair and reasonable provision' is really aimed at providing such a sum, which would enable the divorced woman to maintain herself beyond the period of iddat. Hence, in a given case, the Magistrate may have to ask if the husband has made a 'fair and reasonable provision' for the divorced woman. If such a 'provision' has not been made and the husband does not have sufficient means to make such a 'provision' at a time, as the law obliges him to do, there can be no impediment, on the part of the Magistrate to direct the husband to pay such sum of money either at a time or in installments which would amount to making of a 'reasonable and fair provision' to the divorced woman.

Turning to the question as to whether a Family Court has the jurisdiction to try applications to a Muslim divorced woman under Section 3 and/or 4 of the MW Act, it may be pointed out that this question was raised and formulated in *Danial Latifi* (2001 Cri.L.J 4660) (supra), but the Constitution bench has left the question open for decision by the Bench, where the question may be raised. While answering the question so posed it may be noted that the Preamble to the Family Courts Act, 1984 (in short, 'the F.C. Act') states that it is an Act to provide for the establishment of Family Courts with a view to promote conciliation in and secure speedy settlement of disputes relating to marriage and family affairs and for matter connected therewith. Thus, the preamble to the F.C.Act shows that the Act

aims at promoting conciliation in and expeditious settlement of disputes not only relating to marriage and family affairs but also other matters connected herewith. The question, however remains as to whether all disputes relating to marriage and family affairs and/or matters connected therewith can be dealt with by the Family Court or it is only those matters, which are either under the F.C.Act or under any other enactment made amenable to Family Courts. The Family Court, according to Section 2(d) of the F.C. Act means a Family Court established under Section 3 of the F.C. Act. Section 2(a) defines 'judge' to mean the judge or other judge of a Family Cout. Sub-section (2) of Section 3 says that the State Government after consultation with the High Court specify by notification the local limits of the area to which the jurisdiction of a Family Court shall extend and may at any time, increase, reduce or alter such limits. It is Section 7 contained in Chapter III of the F.C. Act which deals with the jurisdiction of the Family Courts.

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

What is important to note now is that all the proceedings, set out in the Explanation to Section 7, pertain to disputes relating to marriage and family affairs. It is Section 7(2) which defines jurisdiction of the Family Court by bringing within its jurisdiction, suits or proceedings other than what have been mentioned in clauses (a) to (g) to Section 7. Sub-section (2) of Section 7 is therefore of immense importance. This sub-section states that a Family Court shall also have the jurisdiction, which is exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 and such other jurist as may be conferred on it by any other enactment.

A careful reading of sub-section (2) of Section 7 makes it clear that other than suits or proceedings, which are enlisted in clauses (a) to (g) of the Explanation to sub-section (1) of Section 7, the Family Court can exercise only such jurisdiction, which is exercisable by a Magistrate of the First Class under Chapter IX of the Code of Criminal Procedure, 1973 (in short, 'the Code). The Family Court, thus, cannot

exercise jurisdiction beyond those, which are conferred on it as indicated hereinbefore. Section 8 excludes the jurisdiction of other Courts in respect of matters, which the Family Courts have to deal with under the F.C.Act. Section 8(a) states that no District Court or any subordinate Civil Court, referred to in sub-section (1) of Section 7, shall in relation to such area have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section.

A patient scrutiny of the scheme of the F.C.Act clearly reveals that though, besides the disputes relating to marriage and family affairs, this Act deals with other matters connected therewith, it cannot exercise jurisdiction beyond those, which Section 7 confers on it. A careful reading of Section 7 shows that the Family Court can deal with suits and proceedings, which are enlisted under clauses (a) to (g) to the Explanation appended to sub-section (1) of Section 7. Section 7 further indicates that but for the fact that a Family Court has been specifically empowered to exercise the very same jurisdiction, which is exercisable by a Magistrate under Chapter IX relating to order for maintenance or wife, children and parents of the Code, the Family Court could not have exercised the power even under Chapter IX of the Code. The fall-out of Section 8 is that when a Family Court is established no other court can exercise jurisdiction within the territorial jurisdiction of the Family Court in respect of matters, which are amenable to the jurisdiction of the Family Court.

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

What is now of significance to note is that Section 2(c) of the MW Act defines a Magistrate of the First Class exercising jurisdiction under the Code in the area, where the divorced woman within the meaning of the MW Act, resides. An application under Section 3 and/or 4 of the MW Act, seeking Mehar or various reliefs incorporated therein or restoration of properties must be made under the MW Act

to a Magistrate of the First Class, who exercises jurisdiction under the Code. Though Section 7(2)(a) of the F.C.Act states that the Family Court shall also have jurisdiction, which is exercisable by a Magistrate of the First Class under Chapter IX of the Code, yet in view of the fact that a Muslim divorced woman cannot apply for maintenance under Chapter IX of the Code except by way of an agreement as indicated in Section 5 of the MW Act, the question of Muslim divorced woman making an application under Chapter IX of the Code before a Family Court does not arise at all. Section 7(b) makes it clear that Family Court shall have such other powers as may be conferred on it by any other enactment. Since no other enactment confers jurisdiction on the Family Court to try applications under the MW Act, a Family Court cannot be held to have jurisdiction to deal with the applications made under the MW Act. Though a Family Court has the jurisdiction, which is exercisable by a Magistrate of First Class under Chapter IX of the Code (which relates to order for maintenance of wife children and parents), the fact remains that an application made under Section 3 or 4 of the MW Act is not covered by Chapter IX of the Code. Consequently a Family Court cannot exercise jurisdiction in respect of matters, which are amenable to the jurisdiction of the Magistrate of First Class under the MW Act."

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

the MW Act suggesting that the Family Courts have the jurisdiction to entertain applications arising U/s's.3 and/or 4 of the MW Act.

As to whether a father, who is, otherwise capable of maintaining his daughter, who is unmarried, but major, liable to pay maintenance to such a daughter under Section 125 Cr.P.C ? This question stands squarely covered by the decision of the Apex Court in *Noor Saba Khatoon vs. Mohd. Quasim*,[1] wherein the Court having thoroughly discussed the scope of the MW Act, Code of Criminal Procedure and the Muslim Personal Law with regard to liability of a Muslim man to maintain his unmarried but major daughter, concluded thus:

> "10. Thus, both under the personal law and the statutory law (Section 125 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 absolute notwithstanding the fact that the minor children are living with the divorced wife. 11. Thus, our answer to the question posed in the earlier part of the opinion is that the children of Muslim parents are entitled to claim maintenance under Section 125 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 the divorcee wife's right to claim maintenance for maintaining the infant child/children in her custody for a period of two years from the date of birth of the child concerned under Section 3(1)(b) of the 1986 Act. In other words Section 3(1)(b) of the 1986 Act does not in any way affect the rights of the minor children of divorced Muslim parents to claim majority or are able to maintain themselves or in the case of females till they are married." (Emphasis is added)

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

Contrary to the view taken by the High Court of Gauhati in the case of *Md.Siddiq* (supra) another Single Judge of Rajasthan High Court

1. 1997 SCC 233: 1997 Cri.L.J 3972

in the case of *Gulam Mohammad vs. Achhu,*[1] followed the ratio laid by Supreme Court in *Danial Latifi* case and held as under:

> "In this petition the main contention of the learned counsel for the non-applicant is that since divorce had taken place between the applicant and non-applicant, therefore, the applicant wife is not entitled to maintenance. He has placed reliance on the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the Act of 1986) and submitted that the applicant wife is entitled to maintenance upto the period of Iddat and after Iddat period, she is not entitled to maintenance.
>
> I have heard the learned counsel for the non-applicant and have gone through the record of the case.
>
> In my considered opinion the above argument of the learned counsel for the non-applicant cannot be appreciated at all because even under Section 4 of the Act of 1986, a divorced woman is entitled to move an application for maintenance after the expiry of iddat period on two grounds, namely; (a) that she has not remarried; and (b) that she was unable to maintain herself."

Rajasthan High Court in the same case further held that "Section 125 Cr.P.C included divorced Muslim wife and benefits of Section 125 Cr.P.C extend to her so long as she has not remarried after divorce and she was unable to maintain herself.

Apart from this, the provisions of the Act of 1986 nowhere provide that the divorced wife is not entitled to file application under Section 125 Cr.P.C for maintenance.

Apart from the above when the non-applicant husband has remarried, therefore living separately from him is also justified on the part of the applicant wife. From the point of view also the applicant can claim maintenance living separately from her husband non-applicant."

So far as the rights of children of Muslim parents to claim maintenance is concerned it can be said that they are not affected by the provisions of the Act of 1986. Thus both under the personal law

1. 2004 (3) Crimes 631

and the statutory law (Section 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 absolute, notwithstanding the fact that the minor children are living with the divorced wife. For that reliance can be placed on the decision of the Hon'ble Supreme Court in Noor *Saba Khatoon vs. Mohd. Quasim*.

Therefore there can be no dispute on the point that in case of children the husband who has divorced his wife and children are living with the divorced wife is under an obligation to maintain his minor children till they attain majority and in case of females till they get married.

After enforcement of the Act 25/86 an order passed awarding maintenace to a divorced Muslim women under Section 125 Cr.P.C. can be executed as held in the case of *Kamaluddin vs. Rasias Begum*[1].

The Supreme Court once again reiterated the ratio laid down in *Danial Latifi* case in the case of *Sahara Shamim vs. Maqsood Ansari*,[2] holding that a divorced Muslim wife is entitled to maintenance not merely till iddat period but for the entire life unless she remarries.

A Single Judge of Bombay High Court in the case of *Wajid Khan vs. Mohsina Bi*,[3] again took a similar view as taken by the courts that a divorced Muslim woman is not entitled for maintenance after the Act 25/86 came into force and held that:

Once we come to the conclusion that talaqnama is valid, the divorced Muslim wife is not entitled to any maintenance under Section 125, Chapter IX Criminal Procedure Code. The law is no longer res integra on this issue and the Full Bench judgment of this Court in *Karim A.R. Shaikh vs. Shenaz Karim Shaikh* (supra) has categorically answered the reference by laying down that after the commencement of the said Act, Muslim divorced wife cannot apply for maintenance under the provisions of Chapter IX of Criminal Procedure Code and it is only under Section 5 of the said Act that by agreement husband and divorced wife can approach Magistrate under Chapter IX Cr.P.C. The entire scheme of the said Act has been

1. 2000 Cri.L.J.4410
2. (2004) 9 SCC 616
3. 2001 (3) MLJ 880

examined by the Full Bench for coming to the said conclusion. Therefore, from the date of talaq, the application for maintenance under Section 125 Cr.P.C would not be maintained.

Contrary to the view taken by the Supreme Court in *Danial Latifi's* case, the High Court of Patna in the case of *Moin vs. Amma Khatoon*,[1] held that liability of Muslim husband to pay maintenance and fair provision and maintenance is limited or for and during the period of iddat. In the case of Mumataz Begum (v) Mehboob Khan Usman Khan Pathan (99 Gujarat law Report (1) 609). The Gujarat High Court held that a divorce Muslim women is entitled to claim maintenance after divorce under Section 125 Cr.P.C if she is unable to maintain herself.

The view taken by Gujarat High Court is in line with the view of Supreme Court in the case of Danial Latifi and held that Muslim Women Act, 1986 does not take away the rights which the Muslim women was having either under the personal law or under the general law to Section 125 to 128 Cr.P.C. In other words the Muslim woman even after the talaq could claim maintenance from her former husband either under the provisions of Section 125 to 128 Cr.P.C under Section 3(2) of the Act of 86 and a petition filed by a divorced woman under Section 3(2) of the Act could be disposed of by the court by following the provisions of Sections 125 to 128. The Gujarat High Court once again took a similar view regarding Muslim woman is entitled or not to maintenance after the divorce in the case of *Kulsum Bem Adam Bhai vs. Noor Mohamad Piu Bhai*,[2] and held that:

"The facts undisputed are : the petitioner No.1 and respondent No.1 were married in the year 1980 according to Muslim Law and were divorced in the year 1989, according to Muslim Shariyat. The petitioners No.2 & 3 are the children born during the said wedlock.

The question is whether after introduction of the Act the petitioner No.1 had a right to claim maintenance under Section 125 Cr.P.C. The learned Additional Sessions Judge has held that unless both the parties *i.e.*, the divorced husband and the wife agree to subject themselves to Section 125 Cr.P.C such application would not be maintainable. I am afraid, this is not the correct interpretation of Section 5 of the Act. Section 3 of the Act provides for, *inter alia*, a reasonable and fair provision and maintenance to be made and to be

1. 1996 (1) DMC 494
2. 2000 (TLS) 204977

paid to a divorced muslim woman. Sub-section 2 thereof reads as under:- "3. Mahr or other properties of Muslim woman to be given to her at the time of divorce – (1) (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 in Clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorized by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be. "Section 5 of the Act reads as under: 5. Option to be governed by the provisions of Sections 125 to 128 of Act 2 of 1974: if, on the date of the first hearing of the application under sub-section (2) of Section 3, a divorced 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, 1973 (2 of 1974) and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose such application accordingly".

In my view the language of Section 5 is clear and simple and requires to be given its natural meaning. The said section applies to the applications made under sub-section (2) of Section 3 referred to hereinabove *i.e.*, in the event an application is made to the Magistrate under sub-section (2) of Section 3 of the Act for reasonable provision for maintenance or for the amount of Mahr or Dower or for delivery of any property referred to in clause (d) of sub-section (1) of Section 3, the parties to the application *i.e.*, the divorced woman and her former husband may choose to be governed by the provisions of Sections 125 to 128 Cr.P.C. In other words, even though the application is one under the Act, the parties thereto have an option to be governed by Sections 125 to 128 Cr.P.C. The said section in my view does not oust the jurisdiction of the Magistrate to entertain applications under Section 125 Cr.P.C made by a divorced muslim woman. The act is one specifically enacted for protecting the rights of divorced muslim woman. However, such women are not deprived of the right to maintenance they had already had under Section 125 Cr.P.C which is general provision applicable to all persons to whom Cr.P.C should apply. The purpose of the Act is to confer a right to maintenance and certain other rights upon a divorced muslim woman; irrespective of the personal law by which she is governed but, at the same time, the Act is not supposed to deprive such woman of the existing right to maintenance under Section 125 Cr.P.C.

The decision of the Supreme Court is *Noor Saba Khatoon vs. Mohd. Quasim,*[1] relates to the claim of the muslim children from their father under Section 125 of the Code. There are certain observations which throw light upon the question whether a divorced muslim wife is entitled to claim maintenance under this provision of the Code even after passing of the Act. It has been observed that the Act was passed as a sequel to the judgment in *Mohd. Ahmed Khan vs. Shah Bano Begum*.[2] From a plain reading of Section 3 of the Act it is manifest that a reasonable and fair provision has to be made for payment of maintenance to the muslim wife during the period of iddat by her former husband. The *non-obstante* clause in Section 3 restricts and confines the right of a divorced muslim woman to claim or receive maintenance for herself.

In *Abdul Rashid vs. Mst. Farida,*[3] it has been held that the moment a Muslim wife is divorced, provisions of the Act would come into play and her application would be governed by the provisions of the Act for the period after the date of the divorce. It has also been held in this case that a muslim husband is liable to maintain his wife during the period of iddat and not thereafter. In the case of *Peer Mohd. vs. Hasinabee*[4]. It was held that it has been held that a divorce granted at the revisional stage would not affect the order of maintenance under Section 125(1) of the Code. That is true. But under this provision, maintenance allowance can be claimed upto the date of divorce only. A few other cases have been cited on behalf of the petitioners but in those cases the question that has arisen in the present case did not come up for consideration. It is unnecessary to cite those cases".

Madhya Pradesh High Court in the case of *Munni Mubarik*[5], has also distinguished the judgment pronounced by Supreme Court in the case of *Danial Latifi* (supra) and held that:

> "Having heard learned counsel for the parties and after going through the record as well as the judgments rendered by the Supreme Court (*Danial Latifis* case supra) as well as by this Court in *Julekha Bits* case (supra), this Court is of the view that under Section 125 of the Code of Criminal Procedure, a divorced Muslim-wife cannot claim maintenance beyond the

1. AIR 1997 SC 3280: 1997 Cri.L.J 3972
2. AIR 1985 SC 945: (1985 Cri.L.J 875)
3. 1994 MPLJ 583: (1994 Cri.L.J 2336)
4. 1995 Jab LJ 110
5. 2002 (2) Crimes 435

Iddat priod or till her marriage. In the judgment of *Danial Latifis* case (supra), the question of validity of Sections 3(1)(a) & 4 of Muslim women (Protection of Rights in Divorce) Act, 1986 was involved and while upholding the validity of the Act the Supreme Court in para 36 ruled as follows: 1. A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act. 2. Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the iddat period. 3. A divorced Muslim woman who has not remarried and who is notable to maintain 1999 (2) MPLJ 64 herself after the iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim Law from such divorced woman including her children and parents. If any of the relatives unable to pay maintenance the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance. 4. The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India".

In the present case right from the beginning the application was under Section 125 of the Code of Criminal Procedure. Under this general provision of the Code, divorced Muslim Woman/wife cannot seek and granted maintenance beyond Iddat period or till her remarriage. This view is also clear from the judgment of this Court in *Julekha Bi's* case (surpa). Therefore, the petition under Section 482 of the Code of Criminal Procedure by the applicant/wife *Munni @ Mubarik* is devoid of any substance hence, it is dismissed accordingly. However, if so advised, she may file an application for grant of maintenance under Sections 3 and 4 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 for grant of maintenance beyond Iddat period or till her remarriage. Petition dismissed.

The Divergent views of different High Courts regarding entitlement of a Muslim divorced wife under Section 125 Cr.P.C after the enactment of Act 25/86 were examined by the High Court of Gujarat in the case of *Sahinda Abdulla Nathalwala vs. The State*.[1] The learned judge

1. 2001 Gujarat Law Reporter 1646

ultimately concluded that a divorced Muslim wife is entitled for maintenance even after divorce under Section 125 Cr.P.C. The findings and reasonings of the said Court are as under:

> "There is no Section in the Act which nullifies the orders passed by the Magistrate under Section 125 Cr.P.C. It is further held that once the order under Section 125 of Cr.P.C granting maintenance to the divorced woman is passed then the rights are crystallized 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. By Section 5 of the Act an option is given to the parties to be governed by the provisions of Sec's.125 to 128 of the Cr.P.C. This Section also indicates that the Parliament never intended to take away the vested right of Muslim divorced woman which was crystallized before the passing of the Act. It is further held that 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."

In this case High Court referred to a case of *Bibi Sultan Saiyad Abed Saiyad vs. Mahammadali Nakiali Haider Mirza*[1]. In that Full Bench decision, the learned single judge (Coram: *V.H.Bhairavia* J) had referred Special Criminal Application No.83 of 1989 to a Larger Bench on the ground that there are two different views prevailing on the same legal question. While passing the final order, the learned single judge has referred case of *A.A.Abdulla vs. A.B.Mohumuna Saiyadbhai,*[2] (supra) and also a case of *Usmankhan* (supra). The learned single Judge, while passing an order has referred the matter of the Larger Bench on the ground that in view of conflicting decisions, the matter be referred to a Larger Bench.

The Gujarat High Court in its Full Bench decision has held that the learned single judge is bound to follow the decisions of another single judge on the principles of judicial comity, propriety and decorum, as he exercises co-ordinate jurisdiction. If he does not agree with the previous decision, he can refer the matter to a division Bench. It is also held in that Full Bench decision that the decision of Full Bench of another High Court, in the instant case Andhra Pradesh High Court would not be binding decision on the learned Judge of this Court and at the most it has a persuasive value.

1. Spl. Crl. A No.83 of 1989 dated 3.4.1998
2. AIR 1988 Guj. 141: 1988 (1) GLR 452

This Court has examined aforesaid two decisions on the point as to whether provisions with regard to maintenance under Section 125 of Cr.P.C will be applicable to a divorced woman or whether provision under the Act will be applicable for maintenance. Mr.*Raval* is not in a position to persuade this Court for not following the decision of this Court *i.e.*, decision rendered in (*A.A.Abdulla*) AIR 1988 Guj. 141 (supra). I find no other reason to differ from the views expressed by this Court (Coram: *M.B.Shah* J) in aforesaid Gujarat High Court decision. When this Court has given a clear finding, in spite of the fact that there are provisions in the Act for divorced woman, the divorced woman is entitled to maintenance under Section 125 of Cr.P.C. It may be noted that this case of Gujarat High Court, has been referred to in Andhra Pradesh High Court decision but Andhra Pradesh High Court has taken a dissented (sic) view and that Court has come to a conclusion that divorced Muslim wife cannot claim maintenance under Section 125 of Cr.PC after passing of 1986 Act. The reasons assigned by the Andhra Pradesh High Court in that decision are not acceptable on the ground that there is no provision in the Act in which it is so said that provisions of Cr.P.C will not be applicable to divorced muslim woman. Under the circumstances the arguments of Mr.*Raval* cannot be accepted and his contentions are required to be rejected.

The High Court of Patna held that divorced Muslim women is not entitled for maintenance after the Act 86 came into force in the case of *Abdul Mannan vs. Saira Khatoon*.

According to Muslim Law to any such reasonable and fair maintenance to her as he may determine fit and proper. In case she has no relative then a direction may be issued to the Wakf Board as provided under Sub-section (2) of Section 4 of the Wakf Act, 1954. Section 7 of the Act provides that if any application by a divorced woman under Section 125 or under Section 127 of the Code is pending before a Magistrate on the commencement of the Act, then such application shall be disposed of in accordance with the provisions of the Code. Section 5 of the Act provides that if the parties, namely, the former husband and the divorced woman by an affidavit or any other declaration in writing would agree that their case are to be considered under the provisions of Sec's.125 to 128 of the Code and not under the provisions of the Act, then the Magistrate will dispose of the application under the provisions of the Code.

Reading of the aforesaid provisions shows that the said Act has been enacted with a view to provide maintenance to the divorced

wife during the Iddat period by her former husband and after the Iddat period by her relatives as would be entitled to inherit her property on her death and in case of absence of such relatives then a direction has to be issued to the Wakf Board to pay maintenance to such divorced women.

The oldest Code in Section 536 contained a provision for maintenance of wife and children in case of neglect or refusal by the husband or father. Section 488 of 1898 code also obtained the same provision. There was no provision for maintenance to the parents and the divorced woman. The 1973 Code contained a provision under Section 125 for maintenance to the divorced woman and parents also apart from the wife and children as provided under the earlier Codes.

The provisions of the Act as stated above clearly show that after coming into force of the said Act, the application of Section 125 of the Code has been excluded unless both the parties to the dispute, namely, the former husband and the divorced woman agree that their cases are to be disposed of under the provisions of Section 125 of the Code. This question has been considered by this Court as well as by other High Courts and the consistent view is that the divorced Muslim woman is not entitled to claim maintenance under Section 125 of the Code and her claim of maintenance has to be determined under the provisions of the Act. Reference in this connection may be made to a learned Single Judge judgment of this Court in the case of *Md. Yunus vs. Bibi Phenkani @ Tasrun Nisa*,[1] and an unreported Division Bench judgment of this Court in the case of *Md. Sajjad Ahmad vs. State of Bihar and others*,[2] in which one of us (*Nagendra Rai*, J) was a party. A same view has been taken by a Full Bench of the Andhra Pradesh High Court in the case of *Usman Khan Bahamni vs. Fathimunissa Begum and others*,[3] and by a Division Bench of the Bombay High Court in the case of *Smt. Jaitunbi Mubarak Shaikh vs. Mubarak Fakruddin Shaikh*[4].

Thus it is held that after coming into force of the Act a divorced Muslim woman is not entitled to claim maintenance under the provisions of Section 125 of the Code as her right has to be determined in terms of the provisions of the Act.

1. 1987 (2) Crimes 241
2. Crl. Revision No.64 of 1994, dated 14.5.1999
3. AIR 1990 AP 225
4. 1999 Crl. LJ 3846

It was further held that the next question for consideration is as to whether in view of the said finding, the application filed by the opposite parties is maintainable or not ? The story of divorce as set up by husband-petitioner has not been accepted by the learned Magistrate. According to the learned Counsel for the petitioner, even if the story of divorce has not been accepted the divorce will become effective from the date of assertion of such fact in the written statement or in the show cause. In support of the assertion he relied upon the judgments rendered in *Wahab Ali vs. Qamro Bi and others*,[1]; *Chandbi vs. Badasha*,[2]; *Sheikh Jalil vs. Bibi Sarfunisw*,[3]; *Muzaffar Alam vs. Qamrun Nissa*,[4]; *Mohammad Ali vs. Fareedunnisa Begum*,[5]; and *Smt. Jaitunbi Mubarak Shaikh* case (supra). In these cases it has been held that even if the plea of divorce as propounded/asserted by the husband in the show-cause or written statement from a date earlier to the filing of the written statement or show-cause is not proved, the assertion in the written statement or in the show-cause itself operates as on expression of divorce by the husband and operates as from that moment".

> "We are in agreement with the view taken in the aforesaid cases and accordingly hold that even if the story of divorce as propounded or asserted in the show-cause or in the written statement is not proved, the same will operate from the date of filing of such written statement or show-cause. In such a case, the claim for maintenance under Section 125 of the Code would be maintainable prior to the filing of the written statement or show-cause asserting divorce and thereafter the case has to be disposed of in terms of the provisions of the Act as for a period after that date, no order of maintenance can be passed against the former husband at the instance of the divorced Muslim woman under Section 125 of the Code".

The High Court of Calcutta in the case of *Shakila Parveen vs. Haider Ali @ Haider* ruled that the divorced Muslim women is entitled for maintenance under Section 125 Cr.P.C. The court further observed that, "The provision of sub-section (3) of Section 127 Cr.P.C was also interpreted by a Division Bench of Allahabad High Court in the case of *Smt. Hamidan vs. Mohd. Rafiq*,[6] wherein it was held that: "according

1. AIR (38) 1951 Hyderabad 117
2. AIR 1961 Bom. 121
3. 1976 PLJR 365
4. 1990 BBCJ 505
5. AIR 1970 AP 298
6. 1994 Cri.L.J 348

to the provisions of Section 125(3)(c) the right to receive maintenance allowance cannot be restricted to the period of Iddat only in the case of a divorced woman.

Again the same provision was also interpreted in the case of *Arab Ahemadhia Abdulla and etc. vs. Arab Bail Mohmuna Saiyadbhai and others*,[1] wherein it has been held 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 Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 is "reasonable and fair provision and maintenance to be made and to be paid to her" by which 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 not to be thrown on the streets without a roof over her head and without any means of sustaining herself and her children. The word 'provision' itself indicates that something is provided in advance of meeting some needs. This means that at the time of giving divorce the Muslim husband is required to visualize or contemplate the extent of the future needs and make preparatory arrangement in advance for meeting the same. May be that provision can be made that every month a particular amount be paid to the wife; may be that residential accommodation for her can be provided; may be that some property be reserved for her so that she can purchase article for livelihood. Reasonable and fair provision may include provision for her residence, provision for her food, provision for her clothes and other articles. The husband may visualize and provide for residential accommodation till her remarriage. That means a provision for residential accommodation is made. Apart from the residential accommodation for clothes, food and also for other articles some fixed amount may be paid or he may agree to pay it by installments. That would also be a provision. Therefore, the provision itself contemplates future needs of divorced woman. If the husband is rich enough he may provide separate residential accommodation and that can be said to be a provision for residential accommodation. Therefore, it cannot be said that under Section 3(1)(a) divorced woman is entitled to provision and maintenance only for iddat period. It cannot be said that the word "within" used in Section 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

1. AIR 1988 Gujarat 141

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 nowhere the Parliament has provided that reasonable and fair provision and maintenance is limited only for the iddat period or that it is to be paid only during the iddat period and not beyond it. If different phrase used in Sections 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 relatives or Wakf Board in case of necessity. Taking into consideration the objects and reasons for enacting the Muslim Women (Protection of Rights of Divorce) Act as well as the Preamble and the plain language to Section 3 it cannot be said that Muslim woman Act in any way adversely affects 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 wife under Personal Law are abrogated, restricted or repealed. It is presumed that the Act is enacted with deliberation and full knowledge of existing law on the object. In view of the Preamble the Act is enacted to protect the rights of Muslim Woman who have been divorced by or have obtained divorce from their husbands. In simplest language the Parliament has stated that the Act is for protecting the rights of Muslim Women. It does not provide that it is enacted for taking away some rights which a Muslim woman was having either under Personal Law or under the general law, *i.e.*, Section 125 to 128 of the Cr.P.C. By the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986, the order passed by Magistrate under Section 125 of Cr.P.C ordering Muslim husband to pay maintenance to his divorced wife would not be non-ext. There is no section in the Act which nullifies the orders passed by the Magistrate under Section 125 of the Cr.P.C. Further, once the order under Section 125 of the Cr.P.C granting maintenance to the divorced woman is passed then her rights are crystallized 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 Section 5 an option is given to the parties to be governed by the provision of Section 125 to 128 of the Cr.P.C. This section also indicate that the Parliament never intended to take away the vested right of Muslim divorced woman which was crystallized before the passing of the Act. There is no inconsistency between the provisions of Act and the provisions of Muslim Women Act grant more relief to the divorced woman depending upon the financial position of her former husband".

On a careful consideration of the principle decided in the above judgment it was held that the expression "during iddat period" should not be strictly construed only during that period. But it should be extended till a Mohammedan divorced female enters remarriage.

In case if the husband even after divorce fails to pay iddat period maintenance and provide fair provision to his divorcee wife within iddat period or fails to comply with the provisions of the Act of 86, a divorce wife is not helpless nor she can be thrown on road. She can as well approach the concerned Magistrate for maintenance by invoking Section 125 Cr.P.C as held in the cases of *A.A.Abdullah vs. Mohmunnsaiyadbhai,*[1] and *Mumtam Ben vs. Habeb Khan*[2].

A divergent view was echoed by a Division Bench of Calcutta High Court in *Abdul Sattar vs. Shahani Bibi*[3]. In which case it was held that an order of maintenance obtained under Section 125 Cr.P.C will cease after the Act 86 came into force. This decision was followed in *Kauser Ali's* case[4].

In view of explanation (b) to sub-section (1) of Section 125 Cr.P.C maintenance allowance is admissible to a divorcee Muslim woman who has not remarried. The provisions of Section 125 Cr.P.C as inconsistence with the Act 25/86 can be said to have suffered implied repealed[5].

In the light of the discussion so far made the following three questions arose in the case of *Nagoor Mohammed vs. M. Roashan Jahan*[6].

(1) Whether a divorced Muslim woman can file a maintenance petition under Section 125 to 128 Cr.P.C.

(2) Whether a divorced Mohammedan wife can initiate maintenance proceedings under Section 125 Cr.P.C after the advent of Act 25/88.

(3) Whether a divorced Mohammedan woman can enforce maintenance order granted prior to coming into force the Act of 86.

1. AIR 1988 Guj 141
2. 1999 (1) Guj L.R. 609
3. 1989 Calcutta Cri. Law Reporter 197
4. 2001-DMC-1-350
5. 1988 Cri.L.J 752.
6. 2001 (4) Kant LJ 216

The Karnataka High Court having surveyed case law answered the question as follows:

Section 7 of the Act is a transitional provision of governing the pending proceedings under Sections 125 to 127 Cr.P.C. The act is prospective and there is nothing to indicate in the act that it is retrospective in nature. The jurisdiction of the Magistrate under Section 125 or 127 Cr.P.C is not ousted where a wife approaches him for grant of maintenance provided the husband has no objection to pass such an order provided he files an affidavit or declaration in the court hearing the application. Section 5 of the act makes it clear that the intention of the husband to subject himself to the jurisdiction of the Magistrate in deciding the application filed under Sections 125 to 128 of the Cr.P.C only upon his filing an affidavit or declaration in the court in writing and not others. Where an application is made under Section 125 of the Cr.P.C by a divorced woman or where a plea is taken by the husband that the petitioner is a divorced wife and on proof of such divorce, the magistrate cannot proceed under Section 125 or 127 in granting the maintenance except as provided under Sections 3 and 4 of the Act. It is the limitation introduced under the Act for the court to pass orders under Section 125 of the Cr.P.C. therefore, a divorced mohammadan wife cannot maintain a petition under Section 125 of the Cr.P.C except under the Provisions of Section 5 of the Act. She is not entitled for maintenance as of right under Section 125 of the Cr.P.C. in view of the limitations introduced under the Act of 1986.

Insofar as the enforcement of maintenance order under Section 125 of the Cr.P.C made prior to the coming into force of this Act, this Court in *Mohammed Jahir vs. Smt. Nazrath Fatima* held tha the orders which were passed after the amendment will be bound by the Provisions of Sections 3, 4, 5 and 7 of the Act of 1986 and the order passed by the learned Magistrate on 27.3.1987 after the amendment which came into force of 19.5.1986 is without application of mind with respect to the Central Amendment Act 25 of 1986 and is contrary to the Provisions of Central Amendment Act 25 of 1986.

However, Allahabad High Court in *Mohammed Yameed vs. State of Uttar Pradesh*, while considering the scope of Sections 3, 4 and 7 held as follows: "on a combined reading of the Provisions contained in Sections 3, 4 and 7 of the muslim women (Protection of rights on divorce) Act, 1986, it transpires beyond doubt that a divorced muslim woman cannot maintain her application under Section 125 of the Cr.PC or under Section 127 of the Cr.PC or even get execution of the

order under Section 128 of the Cr.PC it is necessary to go into the question whether Muslim Women's Act is retrospective or prospective in its operation, the reason being that once a married muslim woman assumes the character of a divorced woman, the provisions of Cr.P.C will apply only to the extent permissible under Section 4 of the Muslim Women's Act. This may result in hardship but then in the purpose of the law must be carried to its logical end. Once this is so, a muslim divorced woman loses her right to enforce an order passed even prior to the enforcement of the Act because of the non obstante clause used in Section 3 and in Section 7 of the Act. Under the circumstances the opposite party Smt. *Latifan* could not claim execution of the Section 125 maintenance order of the magistrate dated 18.7.1985 under the provisions of the Cr.P.C. by moving an execution application under Section 128 of the Cr.P.C on 24.1.1990 when the Muslim Women's Act had begun to operate. Justice *Navadgi*, as he then was in *Abdul Khader's* case, supra, expressed contrary view. At para 34 of his judgment, it is held that if the provisions contained in the Act, keeping in mind the preamble are examined, applying the test stated above it cannot but be held that the Act is prospective. There is no provision in the Act taking away or impairing any vested right acquired by a divorced woman to claim maintenance under the existing general law or personal law. The Act does not create a new obligation, does not impose a new duty and does not attach a new duty and does not attach a new liability in respect of past transactions or considerations. It only specifies the rights of a divorced muslim woman at the time of divorce and protects her interests. At para 56 it is held as follows: "there is no Section in the Act which renders an order passed by a magistrate under Section 125 void. The non obstante clause with which Section 3 begins, supersedes the existing law relating and relevant to clause with which Section 4 begins shows that the provisions contained in Section 4 override the provisions contained in Section 3(1) or in any other law for the time being in force in respect of the subject dealt by it."

Following the view expressed in *Abdul Khader's* case and *Mohammed Jahir's* case supra, the Court ultimately concluded and laid down the proposition of law holding the rights vested under Section 125 of the Cr.P.C is not taken away by the new Act and in the absence of any Provisions under the new Act creating a bar for enforcement of the order passed under Section 125 of the Cr.P.C. before coming into force of this Act, and a Mohammadan Wife who obtained an order of maintenance under Section 125 of the Cr.P.C is entitled to enforce the said order of maintenance.

Insofar as pending petitions filed under Section 125 of the Cr.P.C is concerned, the parties are governed by Section 7 of the Act. In so far as pending petitions filed under Section 125 of the Cr.P.C as on the date of coming into force of the Act of 1986, Section 7 of the act governs the proceedings. This is subject to the Provisions of Section 5 of the Act. It may be clarified that Sections 5 to 7 of the Act are applicable to the pending proceedings only if the husband is able to prove that the petitioner is a divorced wife and that he is not prepared himself to the jurisdiction of the said Magistrate. The jurisdiction of the magistrate is ousted if anyone of the parties to the proceedings after coming into force of the act opts out of the jurisdiction. Consideration of such an application for maintenance under Section 125 of the Cr.P.C after coming into force of the Act shall be in accordance with the provisions of Sections 3 and 4 of the said Act.

Commenting on the provisions of Sections 125, 127 & 128 of the Cr.P.C and applicability of Section 7 of the Act 1986, the Gauhati High Court in *Idris Ali vs. Ramesha Khatun*, has held as follows: "the prerequisite condition for application of Section 7 of the act of 1986 is that an application under Section 125 and 127 of the Cr.P.C must be pending before the Magistrate on the commencement of the Act of 1986. Act of 1986 and the Provisions thereof would cover only the cases filed after the new Act came into force and those cases under Sections 125 and 127 which are pending. If any retrospective effect would be given to the Act of 1986, it would result in serious complications. The Legislature in its wisdom never contemplated a situation where divorced muslim women would not be given benefit which they had already acquired under the law which was in force earlier and which had been implemented under Sections 125 to 127 of the Cr.P.C. and became final. It must be noticed that in Section 7 of the Act of 1986 word "Magistrate" has been used twice and as such the Magistrate should act in accordance with the provisions of this Act which means that even the High Court in revision, if it is pending on the date of commencement of Act cannot deprive muslim woman of their rights of maintenance under Sections 125 and 127 which had been allowed by the Magistrate earlier and which had become final to the extent. Further, if a divorced muslim woman approaches the court of a Magistrate for execution of final order already passed under Sections 125 and 127 of the Cr.P.C., earlier to the Act of 1986 then she will have a right to get the order executed under Section 128 of the Cr.P.C. which section has been excluded from Section 7 of the Act of 1986, and Section 7 of the Act of 1986 would not take away that right. In other words,

Section 7 would apply only to those cases which are not finalized by the Magistrate under Section 125 or 127 of the Cr.P.C. On the date when the new Act of 1986 came into force and are still pending and such application had been moved by a divorced woman. A muslim divorced woman or her husband cannot move before a Magistrate for cancellation of order of maintenance already granted simply on the ground that the new Act of 1986 has come into force."

Thus the Court considered the judgment rendered b the Gauhati High Court supports the view taken by Justice *Navadgi* (as he then was), in *Abdul Khader's* case (supra), on which I have already expressed my affirmation of law laid down therein.

The Gujarat High Court in *Arab Ahemadhia Abdulla vs. Arab Bail Mohmuna Saiyadbhai and others*, expressed a similar opinion in the following word: "by the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986, the orders passed by Magistrate under Section 125 of the Cr.P.C ordering muslim husband to pay maintenance to his divorced wife would not be non est. There is no Section in the Act which nullifies the orders passed by the Magistrate under Section 125 of the Cr.P.C. Further once the order under Section 125 Cr.P.C granting maintenance to the divorced woman is passed, then her rights are crystallized 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 Section 5 an option is given to the parties to be governed by the Provisions of Sections 125 to 128 of the Cr.P.C this Section also indicates that the Parliament never intended to take away the vested right of muslim divorced woman which was crystallized before the passing of the act. There is no inconsistency between the provisions of Act and the Provisions of Sections 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." Therefore, the maintenance petition under Section 125 of the Cr.P.C filed prior to coming into force of the Act is quite maintainable and an order passed in the said petition prior to coming into force of the new Act is enforceable. But, in view of the provisions of Section 7 of the Act, all pending proceedings initiated under Section 125 of the Cr.P.C are governed by the provisions of the Act of 1986.

Therefore the following emerges from the discussion made supra:
(A) A petition under Section 125 of the Cr.P.C by a muslim divorced

woman is perfectly maintainable subject to the provisions of Section 5 of the act of 1986. If the husband of a muslim divorced woman refuses to subject himself to the jurisdiction of the magistrate, magistrate is competent to grant maintenance to divorced muslim woman under the provision of the Act of 1986. (B) If the maintenance petition under Section 125 to 128 Cr.P.C initiated prior to the coming into force of the Act was pending before, the Magistrate on the date of coming into force of the Act of 1986, it has to be disposed of by such magistrate in accordance with the provisions of Act 25 of 1986. (C) The petition to enforce the maintenance order granted prior to the coming into force of the Act is perfectly maintainable as her rights are crystallized and she gets vested right to recover maintenance from her former husband.

Surprisingly and to the utter shock to the Muslim Community, the Hon'ble Apex Court has once again, nullified the effect of the enactment of the Act 25 of 86 by way of holding that a divorcee is also entitled for maintenance, in the case of *Shabana* as reported in 2010 (1) ALD (Crl.) 599 (SC) [See Appendix 'C'].

It was constantly ruled by several High Court and the Apex Court, the right to claim maintenance conferes on the divorcee wife is not restricted to the period of Iddat and that it was in another words describes as fair provision which includes maintenance that it should be paid within iddat period.

[Author's Note.—The another shocking aspect of this judgement is that the Muslim Community, its leaders guides, persons claiming themselves to be the champions of the muslim cause have all maintained unexplained silence and did not react as against the ruling of the Supreme Court, which infact has defeated the purpose of enactment of the Act. All India Personal Law Board, which styles itself as protector of Muslim Personal Law in India has also not raised its little finger as against the ruling.

This kind of silence on the part of muslim community and its leaders would speak volumes.

The author suggests that in case, we cannot put the clock back by way of getting the *Shabana's* judgement reversed, set aside or modified, it would be better on the part of the Muslims to resolve their disputes concerning their personal laws under Section 5 of Arbitration Act. This would save the community from burdening themselves with court expenses *etc.*, and on the other hand, there will be no interference in their personal laws at any time in future. Thus, they can save and follow their personal laws effectively.]

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CHAPTER XIV

MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) RULES, 1986

[G.S.R. 776(E) dated 19th May 1986, Published in Gazette of India (Extra) Part II Section 3(i) dated 19.5.1986]

1. Short title and commencement.—(1) These rules may be called the Muslim Women (Protection of Rights on Divorce) Rules, 1986.

(2) They shall come into force at once.

2. Definitions.—In these rules, unless the context otherwise requires,—

(a) "*Act*" means the Muslim Women (Protection of Rights on Divorce) Act, 1986 (25 of 1986);

(b) "*Code*" means the Code of the Criminal Procedure, 1973 (2 of 1974); and

(c) "*Form*" means the form annexed to these rules.

3. Service of summons.—(1) Every summons issued by a Magistrate on an application made under the Act shall be in writing,

in duplicate signed by the Magistrate or by such other officer as he may, from time to time, direct, and shall bear the seal of the Court.

(2) Every such summons shall be accompanied by a true copy of the application.

(3) Every summons issued under sub-rule (1) shall specify the day of the first hearing of the application which shall not be later than seven days from the date on which the summons is issued.

(4) Every summons shall be served by a police officer or by an officer of the Court issuing it.

(5) The summons shall, if practicable, be served personally on the respondent by delivering or tendering to him of the duplicates of the summons.

(6) Every respondent on whom the summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of other duplicate.

(7) Where the respondent cannot, by the exercise of due diligence, be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family residing with him, and the person with whom the summons is so left shall if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

(8) If the service cannot, by the exercise of due diligence, be effected as provided in sub-rule (6), or sub-rule (7), the Serving Officer shall affix one the duplicates of the summons to some conspicuous part of the house of homestead in which the respondent ordinarily resides; and thereupon the Court, after making such inquiries as it thinks fit may either declare that the summons has been duly served or order fresh summons in such a manner as it considers, proper.

(9) When a Court desires that a summons issued by it shall be served at any place outside its local jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within whose local jurisdiction the respondent resides, or is to be there served.

(10) When a summons issued by a Court is served outside its local jurisdiction and in any case when an officer who served the summons is not present at the hearing of the case, an affidavit

purporting to be made before a Magistrate that such summons has been served and a duplicate of summons purporting to be endorsed in the manner provided by sub-rule (6) or sub-rule (7) by the person to whom it was delivered or tendered or with whom it was left shall be admissible in evidence and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

(11) The affidavit mentioned in sub-rule (10) may be attached to the duplicates of the summons and returned to the Court.

4. Evidence.—All evidence in the proceedings under the Act shall be taken in the presence of the respondent against whom an order for the payment of provision and maintenance, *Mahr* or power of the delivery of property is proposed to be made or, when his personal attendance is dispenses with, in the presence of his pleader, and shall be recorded in the manner specified for summary trials under the Code:

Provided that if the Magistrate is satisfied that the respondent is wilfully avoiding service or wilfully neglecting to attend the Court, Magistrate may proceed to hear and determine the case *ex parte* and any order so made may be set aside for good cause shown on application made within seven days from the date thereof subject to such terms as to payment of cost to the opposite party as the Magistrate may think just and proper.

5. Power to postpone or adjourn proceedings.—In every application under the Act, the proceedings shall be held as expeditiously as possible and in particular, when the examination of witness has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined unless the Court finds adjournment of the same beyond the following day to be necessary for reasons to be recorded.

6. Costs.—The Court in dealing with the applications under the Act shall have power to make such order as to costs as may be just.

7. Affidavit under Section 5.—An affidavit filed under Section 5 of the Act shall be in Form 'A'.

8. Declaration under Section 5.—A declaration in writing filed under Section 5 shall be in Form 'B'.

FORM 'A'

Form of Affidavit

(See Rule 7)

I/we ……..son/wife of ..... aged ….. years, resident of……....hereby state on oath as follows.—

1. That I/we have informed myself/ourselves of the provisions of Section 5 of the Muslim Women (Protection of Rights on Divorce) Act 1986 and of the provisions of Sections 125 to 128 of the Code of Criminal Procedure, 1973.

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

3. That contents of the above affidavit are true.

Deponent/Deponents.

Signed and verified at …… this the …… day..... 19....

Deponent/Deponents.

FORM 'B'

Form of Declaration

(See Rule 8)

I/we …….. son/wife of ……. aged ……. years, resident of …… and …… son/wife of…… aged…….. years, resident of ……. Hereby declare as follows:—

1. That I/we have informed myself/ourself of the provisions of Section 5 of the Muslim Women (Protection of Rights of Divorce) Act, 1986 and of the provisions of Sections 125 to 128 of the Code of Criminal Procedure 1973.

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

3. That the contents of the above declaration are true.

Deponent/Deponents.

Signed and verified at …… this the …… day..... 19....

Deponent/Deponents.

———————

APPENDIX 'C'

Judgment in the case of Shabana v. Imran Khan, 2010 (1) ALD (Crl.) 599 (SC)

The basic and foremost question that arises for consideration is whether a Muslim divorced wife would be entitled to receive the amount of maintenance from her divorced husband under Section 125 of the Cr.P.C. and, if yes, then through which forum.

Section 4 of Muslim Act reads as under :

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

needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in his order:

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

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

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

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

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

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

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

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

"7. *Jurisdiction.*—(1) Subject to the other provisions of this Act, a Family Court shall—

(a) have and exercise all the jurisdiction exercisable by any district Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate civil Court for the area to which the jurisdiction of the Family Court extends.

Explanation.—The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely :—

(a) … … …

(b) … … …

(c) … … …

(d) … … …

(e) … … …

(f) a suit or proceeding for maintenance;

(g) … … …"

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

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

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

Thus, from the abovementioned provisions it is quite discernible that a Family Court established under the Family Court shall exclusively have jurisdiction to adjudicate upon the applications filed under Section 125 of Cr.P.C.

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

In our opinion, the point stands settled by judgment of this Court reported in titled *Danial Latifi and another v. Union of India*, 2001 (6) ALD 63 (SC) = 2001 (2) ALD (Crl.) 787 (SC) = (2001) 7 SCC 740, pronounced by a Constitution Bench of this Court. Paras 30, 31 and 32 thereof fully establish the said right of the appellant. The said paragraphs are reproduced hereinunder :

"30. A comparison of these provisions with Section 125 Cr.PC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive

them of their right, loses its significance. The object and scope of Section 125 Cr.PC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.

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

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

mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality."

Judgment of this Court reported in *Iqbal Bano v. State of U.P. and another*, 2007 (2) ALD (Crl.) 455 (SC) = (2007) 6 SCC 785, whereby the provisions contained in Section 125 of the Cr.P.C. have been aptly considered and the relevant potion of the order passed in *Iqbal Bano's* case (supra), reads as under :

"10. Proceedings under Section 125 Cr.P.C. are civil in nature. Even if the Court noticed that there was a divorced woman in the case in question, it was open to it to treat it as a petition under the Act considering the beneficial nature of the legislation. Proceedings under Section 125 Cr.P.C. and claims made under the Act are tried by the same Court. In *Vijay Kumar Prasad v. State of Bihar*, 2004 (1) ALD (Crl.) 736 (SC) = (2004) 5 SCC 196, it was held that proceedings under Section 125 Cr.P.C. are civil in nature. It was noted as follows : (SCC p.200, Para 14).

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

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

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

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

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

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

As a necessary consequence thereof, the matter is remanded to the family Court at Gwalior for its disposal on merits at an early date, in accordance with law. The respondent shall bear the cost of litigation of the appellant. Counsel's fees Rs.5,000/-.

Consequently, the appeal stands allowed to the extent indicated above."

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CONCLUSION

A detail study of the Act of 1986 would lead us to conclude that the main object of the Act was to undo the *Shah Bano's* case. The verdict of *Shah Bano's* case would compel a husband to pay maintenance to his divorced wife till she remarries or dies. All India Muslim Personal Law Board and other political and non-political organisations strongly protested against this verdict contending that the Apex Court has hazarded interpretation of an unfamiliar arabic language in relation to religious tenets and such a course was not safe.

It seems the Act (under our study) was enacted just to mislead the Muslims to secure their political support. On one hand Shariat Application Act of 1937 is still alive in the books of Statutes and on the other hand there has been planned attempt to disparage its provision so as to make way for Common Civil Code. If such an attempt becomes successful then the Muslims of India will not be in a position to follow their own religious mandates and they will be away from their own religion. It is for the Muslim community to decide as to how they would protect their Sharia Law. Silence on their part would be deterimental to their interest.