CHHATTISGARH STATE JUDICIAL ACADEMY, BILASPUR

//MEMO//

No.....842/CSJA/Div.Seminar/2022 Bilaspur, dated 21.10.2022

To,

The District & Sessions Judge,
Ambikapur/Surajpur/Jashpur/Korea and Ramanuj-Rganj.

Subject: Regarding Divisional Judicial Seminar for all Judicial Officers posted in Surguja Division (Distt. Ambikapur/Surajpur/Jashpur/Korea and Ramanuj-Rganj) scheduled to be held on **19/11/2022** (Saturday) at **Ambikapur**.

On the subject cited above, it is to inform you that as per approved Calendar of Academy for the year 2022-23, a Divisional Judicial Seminar for all Judicial Officers including Family Court Judges and Judges posted on deputation in Surguja Division ((Distt.Ambikapur/Surajpur/Jashpur/Korea and Ramanuj-Rganj) will be organized on 19/11/2022 at Ambikapur (Venue is to be selected by District & Sessions Judge, Surguja at Ambikapur) on the following topics:

"1.Law regarding Identification of Person/Property. (For Surajpur District)

2. Effective use of Provisions of Plea Bargaining & Probation of Offenders Act. (For Korea District)

3. Law regarding Bail in the light of Judgment of Hon'ble Supreme Court in Suo Moto WP (Crl) No. 4/2021 in Re:Polity Strategy for grant of Bail. (For Ambikapur District)

4. Trial of Person with an unsound mind: Procedure & Provisions. (For Jashpur District)

5. Opinion of Handwriting expert:Procedure & Admissibility. (For Ramanujganj District)"

It is, therefore, requested to nominate all Judicial Officers (Excluding Judicial Officers engaged in urgent work/remand duty) for the above said Seminar. It is further requested to you to inform all the Judges posted in Family Court as well as posted on deputation in your district to attend the Judicial Seminar on scheduled date and time. They may be

directed to report on **19th November, 2022 (Saturday) at 10.30 am** at the place selected by District & Sessions Judge, Surguja at Ambikapur. They may further be directed to observe the dress code strictly as is prescribed by the High Court.

As directed, it is further requested to kindly inform all Judges of your establishments that :

(i) The topic mentioned above is being given to the participating Districts for preparation of papers to be presented on their behalf.

(ii) The District and Sessions Judges, Ambikapur/Surajpur/Jashpur/Korea and Ramanuj-Rganj may select a team of three Judicial Officers across the ranks and two of them would present and read the papers in English.

(iii) Each District is allotted 20 minutes time for presentation and 10 minutes extra time for interaction session.

(iv) Each District shall ensure that the soft copy of presentation is supplied to CSJA before the Seminar **latest by 14/11/2022** so that the same may be placed before Hon'ble Chairman and other Committee Members. They shall also ensure that six numbers of hard copies of the presentation are supplied to CSJA within seven days after Seminar.

(v) The minute to minute programme of the Seminal shall be prepared by the District Judge, Raipur and be sent to CSJA, Bilaspur prior to the date of organization of the Seminar.

19/10/2022

(Sushma Sawant)
DIRECTOR

Endt. No.843/CSJA/Div.Seminar/2022, Bilaspur, dated 21.10.2022

Copy to:

1. S.O. to Registrar General, High Court of CG, Bilaspur for information.

2. CPC for directing the In-charge, NIC for uploading the memo on the official website of CSJA.

3. All the Judicial Officers posted in Surguja Division (Distt. Ambikapur/Surajpur/Jashpur/Korea and Ramanuj-Rganj) including Family Court Judges and Judges posted on Deputation with a request that they shall remain present at the place selected by District & Sessions Judge, Raipur on **19/11/2022 by 10.30 a.m. positively in the prescribed uniform** and attend the Seminar. They may further be directed to observe the dress code strictly as is prescribed by the High Court.

19/10/2022

(Sushma Sawant)
DIRECTOR

Jurisdiction of Family Court : Laws Relating to Maintenance. Execution of Maintenance cases. Adoption Procedure. Understanding Counselling, requirement of settlements.

S.No.	Particulars of the Case Law	Brief	Relevant Paragraphs	Page Number
Jurisdiction of Family Court				
01.	Shamima farooqui v. Shahid khan (2015) 5 SCC 705	The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation An application for grant of maintenance has to be disposed of at the earliest. The family courts, It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied.	9-14, 20,21	1

02.	Balram Yadav v. Fulmaniya Yadav, (2016) 13 SCC 308	: Under Section 7(1) Explanation (b), a Suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is within the exclusive jurisdiction of the Family Court, since under Section 8, all those jurisdictions covered under Section 7 are excluded from the purview of the jurisdiction of the Civil Courts. In case, there is a dispute on the matrimonial status of any person, a declaration in that regard has to be sought only before the Family Court. It makes no difference as to whether it is an affirmative relief or a negative relief.	7,8	14
MAINTAINANCE				
01.	Rahasa Pandiani (Dead) By Lrs. v. Gokulananda Panda (1987) AIR 1987 SC 962	The appellant's petition under Section 125 of the Cr.P.C. would be maintainable before the Family Court as long as appellant does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C. cannot be restricted for the iddat period only. The object and scope of Section 125 CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners.	30,31,32	18
02.	Danial Latifi & Anr Vs	reasonable and fair provisions	20, 27-33	25

	Union Of India (2001) 7 SCC 740	include provision for the future of the divorced wife (including maintenance) and it does not confine itself to the iddat period only.		
03.	Savitaben Somabhai Bhatiya Vs State Of Gujarat And Ors (2005) 3 SCC 636	Legislature considered it necessary to include within the scope of the provision an illegitimate child but it has not done so with respect to woman not lawfully married. However, desirable it may be, as contended by learned counsel for the appellant to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected in Section 125 of the Code, there is no scope for enlarging its scope by introducing any artificial definition to include woman not lawfully married in the expression 'wife'. There is no inconsistence between sec 125 crpc and s.18 of Hindu Adoption and Maintenance Act	8,15,18,20,21	52
04.	Chaturbhuj Vs Sita Bai (2008) 2 SCC 316	The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase "unable to maintain herself " in the instant case would mean that means available	6-8	61

		to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow. Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children. wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself " does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 Cr.P.C.		
05.	Shabana Bano Vs Imran Khan (2010) 1 SCC 666	Even under the Act, the parties agreed that the provisions of Section 125 CrPC would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provision for maintenance and, therefore, what could be earlier granted by a Magistrate under Section 125 CrPC would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional. The appellant's petition under Section 125 of the Cr.P.C. would be maintainable before the	15-21	66

		Family Court as long as appellant does not remarry. The amount of maintenance to be awarded under Section 125 of the Cr.P.C. cannot be restricted for the iddat period only.		
06	Manoj Yadav Vs. Pushpa @ Kiran Yadav (2010) 15 SCC 287	Maximum Maintenance prescribed by state Government no longer valid in view of Art. 254(1), apart from being violation of article 14 and 21 of constitution.	3-6	74
07.	Lalita Toppo Vs State of Jharkhand and Another (2019) 13 SCC 796	Act or Omission defining domestic violence is broad enough to include all aggrieved person including not legally wedded wife and those not entitle to maintenance under sec 125 CrPC.	3,4	76
08.	Rajesh Vs. Neha (2021) 2 SCC 324	Simultaneous proceedings and re-adjudication of issue of maintenance considering distinct scope of different statutes is permissible A wife can make a claim for maintenance under different statutes - There is no bar to seek maintenance both under the DV Act and S. 125 CrPC, or under HMA The mere fact that two proceedings were initiated by a party, would not imply that one would have to be adjourned sine die There is a distinction in the scope and power exercised by the Magistrate under S. 125 CrPC and the DV Act - An order	50 to 61 128	79

		passed in a maintenance proceedings would not debar re-adjudication of the issue of maintenance in any other proceeding Proceedings under S. 125 CrPC are summary in nature, and are intended to provide a speedy remedy to the wife - Any order passed under S. 125 CrPC by compromise or otherwise would not foreclose the remedy under S. 18 of the HAMA-Maintenance granted to an aggrieved person under the DV Act, would be in addition to an order of maintenance under S. 125 CrPC, or under the HMA While deciding quantum of maintenance in subsequent proceeding, civil court/Family Court shall take into account maintenance awarded in any previously instituted proceeding, and determine the maintenance payable to the claimant If Magistrate awards any further amount over and above the maintenance already awarded in other proceedings, he has to record reasons in writing for the same- Magistrate cannot ignore maintenance awarded in other legal proceedings Hindu Adoptions and Maintenance Act, 1956-S. 18 Criminal Procedure Code, 1973, S. 125		
ADOPTION PROCEDURE				
01.	Laxmikant Pandey Vs.	Malpractices and trafficking in	2-8	147

	Union of India AIR 1984 SC 469	children in connection with adoption of Indian children by foreigners living aboard. Direction laying down principals and norms to be followed in cases of such adoption given in detail		
02.	Shabnam Hashmi Vs. Union of India (2014) 4 SC 1	Guidelines to enable and facilitate adoption of children by persons irrespective of religion, caste, creed etc. Muslims can adopt a child with full rights as natural parents under provisions of sec 41 of Juvenile Justice (Care and Protection of children) Act 2000	13,16	184

(2015) 5 Supreme Court Cases 705

(BEFORE DIPAK MISRA AND PRAFULLA C. PANT, JJ.)

SHAMIMA FAROOQUI . . Appellant;

Versus

SHAHID KHAN . . Respondent.

Criminal Appeals Nos. 564-65 of 2015†, decided on April 6, 2015

A. **Family and Personal Laws — Family Courts Act, 1984 — Ss. 7(1) Expln. (f) and 7(2)(a) — Maintenance — Family Court can grant maintenance allowance to divorced Muslim woman under S. 125 CrPC — Criminal Procedure Code, 1973 — S. 125(1) Expln. (b) — Reiterated, applicable to divorced Muslim woman**

B. **Criminal Procedure Code, 1973 — Ss. 125(2) & (1) second proviso — Speedy disposal of application for maintenance essential — Belated disposal without grant of interim maintenance not justified — Court's approach — In case of delay caused by dilatory tactics adopted by parties, court should endeavour to curtail such designed procrastination of proceedings — On its own part, court should avoid lethargy and apathy and adopt a proactive approach which should be instilled by judicial academies functioning under High Court — Maintenance granted from date of application in 1998 till passing of order of maintenance in 2012, without any grant of interim maintenance, not justified — Family Courts Act, 1984, S. 7**

C. **Criminal Procedure Code, 1973 — S. 125 — Maintenance allowance to wife — Wife has absolute right of maintenance — Husband not absolved from his obligation to provide maintenance merely on his plea of financial constrains, so long as he is healthy, able-bodied and capable of earning for his own support**

D. **Criminal Procedure Code, 1973 — S. 125 — Maintenance allowance to wife — Quantum — Principle of sustenance — Sustenance does not mean bare survival and it gains more weightage when children are also with wife — Quantum should be adequate so as to enable wife to live with dignity, similar to standard with which she would have lived in her matrimonial home — In this context status and strata become relevant — Retirement of husband from service cannot be sole consideration for High Court for further reduction of a nominal amount of maintenance awarded by Family Court — Constitution of India — Art. 21 — Family and Personal Laws — Maintenance — Quantum — Right to live with dignity**

E. **Criminal Procedure Code, 1973 — Ss. 401 and 125 — Revisional jurisdiction of High Court — Non-application of mind — Findings of lower court neither perverse nor erroneous but instead based on proper**

† Arising out of SLPs (Crl.) Nos. 6380-81 of 2014. From the Judgments and Orders dated 17-9-2013 and 26-3-2014 of the High Court of Judicature of Allahabad in Crl. Revision No. 134 of 2012 and CMA No. 106544 of 2013 in Crl. Revision No. 134 of 2012

appreciation of evidence on record and endeavour to do substantial justice — Interference of High Court therewith, only because it would have arrived at a different or another conclusion, held, reflects non-application of mind and not sustainable

The appellant filed an application under Section 125 CrPC in 1998 alleging that she married the respondent in 1992 but during her stay in matrimonial home, she was subjected to continuous harassment for having not met the husband's demand for a car and that in due course, on coming to know about the respondent husband's illicit relationship with another woman when she asked about the affair she was assaulted. As the situation gradually worsened and being deserted and ill-treated and suffering from fear psychosis, it became unbearable for her to stay at the matrimonial home, her parents came and took her back to the parental home. The appellant, therefore, sought grant of maintenance @ Rs 4000 p.m. on the basis that her husband was working on the post of Nayak in the Army and getting a salary of Rs 10,000 approximately apart from other perks.

The Family Court before which the proceedings commenced, did not accept the primary objection as regards the maintainability of the application under Section 125 CrPC on the ground of the applicant being a Muslim woman and came to hold that even after the divorce the application of the wife under Section 125 CrPC was maintainable in the Family Court. The Family Court found that the husband had divorced the applicant appellant in 1997, that on being ill-treated at her matrimonial home, she had come back and stayed with her parents, that the husband had not made any provision for grant of maintenance; that the wife did not have any source of income to support her and that as the husband was getting at the time of disposal of the application as per the salary certificate Rs 17,654 she would be entitled to a sum of Rs 2500 as monthly maintenance allowance from the date of submission of the application till the date of judgment and thereafter Rs 4000 p.m. from the date of judgment till the date of remarriage.

The respondent husband filed a revision before the High Court which held that the Family Court had not ascribed any reason for grant of maintenance from the date of the application, yet when the case for maintenance filed in the year 1998 was decided on 17-2-2012 and there was no order for interim maintenance, the grant of Rs 2500 as monthly maintenance from the date of application was neither illegal nor excessive. The High Court took note of the fact that the husband had retired on 1-4-2012 and consequently reduced the maintenance allowance to Rs 2000 from 1-4-2012 till remarriage of the appellant. The High Court therefore, modified the order of the Family Court accordingly.

Allowing the appellant wife's appeal, the Supreme Court

Held :

Section 125 CrPC has been rightly held by the Family Court to be applicable to a Muslim woman who has been divorced. (Para 9)

Shamim Bano v. *Asraf Khan*, (2014) 12 SCC 636 : (2014) 5 SCC (Civ) 145 : (2014) 5 SCC (Cri) 162; *Danial Latifi* v. *Union of India*, (2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266; *Khatoon Nisa* v. *State of U.P.*, (2014) 12 SCC 646 : (2014) 5 SCC (Civ) 155 : (2014) 5 SCC (Cri) 170; *Shabana Bano* v. *Imran Khan*, (2010) 1 SCC 666 : (2010) 1 SCC (Civ) 216 : (2010) 1 SCC (Cri) 873, *followed*

In the present case, it is disturbing that though the application for grant of maintenance was filed in the year 1998, it was not decided till 17-2-2012. It is also shocking to note that there was no order for grant of interim maintenance. (Para 11)

An application for grant of maintenance has to be disposed of at the earliest. When an application for grant of maintenance is filed by the wife the delay in disposal of the application, to say the least, is an unacceptable situation. It is, in fact, a distressing phenomenon. These litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. (Paras 11 and 13)

It occurs either due to the uncontrolled design of the parties or the lethargy and apathy shown by the Judges who man the Family Courts. As far as the first aspect is concerned, it is the duty of the courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the court. As regards the second facet, the Family Courts, which have been established to deal with the matrimonial disputes, which include application under Section 125 CrPC, have become absolutely apathetic to the same. It is the duty of the court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands "still" on some unknown bank of the river. There has to be a proactive approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. (Paras 13 and 11)

Bhuwan Mohan Singh v. *Meena*, (2015) 6 SCC 353; *K.A. Abdul Jaleel* v. *T.A. Shahida*, (2003) 4 SCC 166 : 2003 SCC (Cri) 810, *followed*

The obligation of the husband is on a higher pedestal when the question of maintenance of wife and children arises. When the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort. Sometimes her faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her the misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm, for she cannot be allowed to resign to destiny. Therefore, the lawful imposition for grant of maintenance allowance. Grant of maintenance to wife has been perceived as a measure of social justice. An order under Section 125 CrPC can be passed if a person despite having sufficient means neglects or refuses to maintain the wife. Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able-bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right. Thus, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning. (Paras 14, 16, 17 and 19)

Jasbir Kaur Sehgal v. *District Judge, Dehradun*, (1997) 7 SCC 7; *Chaturbhuj* v. *Sita Bai*, (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356, *relied on*

Chander Parkash Bodh Raj v. *Shila Rani Chander Prakash*, 1968 SCC OnLine Del 52 : AIR 1968 Del 174, *approved*

Capt. Ramesh Chander Kaushal v. *Veena Kaushal*, (1978) 4 SCC 70 : 1978 SCC (Cri) 508; *Savitaben Somabhai Bhatiya* v. *State of Gujarat*, (2005) 3 SCC 636 : 2005 SCC (Cri) 787, *cited*

The inherent and fundamental principle behind Section 125 CrPC is for amelioration of the financial state of affairs as well as mental agony and anguish that a woman suffers when she is compelled to leave her matrimonial home. The statute commands that there has to be some acceptable arrangements so that she can sustain herself. The principle of sustenance gets more heightened when the children are with her. Be it clarified that sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125 CrPC, it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar. (Para 14)

In the present case, the High Court has shown immense sympathy to the husband by reducing the amount of maintenance after his retirement. The High Court, without indicating any reason, has reduced the amount of maintenance from Rs 4000 to Rs 2000. In today's world, it is extremely difficult to conceive that a woman of her status would be in a position to manage within Rs 2000 per month. It has been asserted on behalf of the appellant that the respondent had taken voluntary retirement after the judgment dated 17-2-2012 with the purpose of escaping the liability to pay the maintenance amount as directed to the appellant wife; that the last-drawn salary of the respondent taken into account by the Family Judge was Rs 17,564 as per salary slip of May 2009 and after deduction of AFPP Fund and AGI, the salary of the respondent was Rs 12,564 and hence, even on the basis of the last basic pay (i.e. Rs 9830) of the respondent the total pension would come to Rs 14,611 and if 40% of commutation is taken into account then the pension of the respondent amounts to Rs 11,535; and that the respondent, in addition to his pension, had received encashment of commutation to the extent of 40% i.e. Rs 3,84,500 and other retiral dues i.e. AFPP, AFGI, gratuity and leave encashment to the tune of Rs 16,01,455. The aforesaid aspects have gone uncontroverted as the respondent husband has not appeared and contested the matter. Therefore, the assertions can be accepted. (Paras 14, 20 and 21)

The High Court has become oblivious of the fact that she has to stay on her own. The order of the Family Judge is not manifestly perverse. There is nothing perceptible which would show that order is a sanctuary of errors. In fact, when the order is based on proper appreciation of evidence on record, no Revisional Court should have interfered with the reason on the base that it would have arrived at a different or another conclusion. When substantial justice has been done, there was no reason to interfere. There may be a shelter over her head in the parental house, but other real expenses cannot be ignored. Solely because the husband had retired, there was no justification to reduce the maintenance by 50%. It is not a huge fortune that was showered on the wife that it deserved

reduction. It only reflects the non-application of mind and, therefore, it is not possible to sustain the said order. Hence, the order of the Family Judge is restored. (Para 20)

Shahid Khan v. *Shamima Farooqui*, Criminal Revision No. 134 of 2012, order dated 17-9-2013 (All), *reversed*

Anita Rani v. *Rakeshpal Singh*, (1991) 2 Crimes 725 (All); *Dharmendra Kumar Gupta* v. *Chandra Prabha Devi*, 1990 SCC OnLine All 275 : 1990 Cri LJ 1884; *Rakesh Kumar Dikshit* v. *Jayanti Devi*, 1999 SCC OnLine All 531 : (1999) 39 ACC 4 : (1999) 2 JIC 323 (ACC); *Ashutosh Tripathi* v. *State of U.P.*, 1999 SCC OnLine All 641 : (1999) 39 ACC 434 : (1999) 2 JIC 763; *Paras Nath Kurmi* v. *Sessions Judge, Mau*, 1997 SCC OnLine All 1083 : 1998 All LJ 77 : (1999) 2 JIC 522; *Sartaj* v. *State of U.P.*, (2000) 2 JIC 967 (All), *referred to*

R-D/54684/CVR

Advocates who appeared in this case :

Dr J.N. Dubey, Senior Advocate (Anurag Dubey, Ms Anu Sawhney, Meenesh Dubey and S.R. Setia, Advocates) for the Appellant.

Chronological list of cases cited ***on page(s)***

1. (2015) 6 SCC 353, *Bhuwan Mohan Singh* v. *Meena* 713*e-f*
2. (2014) 12 SCC 646 : (2014) 5 SCC (Civ) 155 : (2014) 5 SCC (Cri) 170, *Khatoon Nisa* v. *State of U.P.* 712*d*, 713*a*
3. (2014) 12 SCC 636 : (2014) 5 SCC (Civ) 145 : (2014) 5 SCC (Cri) 162, *Shamim Bano* v. *Asraf Khan* 712*c-d*, 712*d*
4. Criminal Revision No. 134 of 2012, order dated 17-9-2013 (All), *Shahid Khan* v. *Shamima Farooqui* **(reversed)** 711*f*
5. (2010) 1 SCC 666 : (2010) 1 SCC (Civ) 216 : (2010) 1 SCC (Cri) 873, *Shabana Bano* v. *Imran Khan* 712*f-g*
6. (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356, *Chaturbhuj* v. *Sita Bai* 716*a*
7. (2005) 3 SCC 636 : 2005 SCC (Cri) 787, *Savitaben Somabhai Bhatiya* v. *State of Gujarat* 716*c*
8. (2003) 4 SCC 166 : 2003 SCC (Cri) 810, *K.A. Abdul Jaleel* v. *T.A. Shahida* 713*f-g*
9. (2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266, *Danial Latifi* v. *Union of India* 712*d*, 712*e-f*, 712*f-g*
10. (2000) 2 JIC 967 (All), *Sartaj* v. *State of U.P.* 711*f*
11. 1999 SCC OnLine All 641 : (1999) 39 ACC 434 : (1999) 2 JIC 763, *Ashutosh Tripathi* v. *State of U.P.* 711*f*
12. 1999 SCC OnLine All 531 : (1999) 39 ACC 4 : (1999) 2 JIC 323 (ACC), *Rakesh Kumar Dikshit* v. *Jayanti Devi* 711*f*
13. (1997) 7 SCC 7, *Jasbir Kaur Sehgal* v. *District Judge, Dehradun* 715*f*
14. 1997 SCC OnLine All 1083 : 1998 All LJ 77 : (1999) 2 JIC 522, *Paras Nath Kurmi* v. *Sessions Judge, Mau* 711*f*
15. (1991) 2 Crimes 725 (All), *Anita Rani* v. *Rakeshpal Singh* 711*e-f*
16. 1990 SCC OnLine All 275 : 1990 Cri LJ 1884, *Dharmendra Kumar Gupta* v. *Chandra Prabha Devi* 711*e-f*
17. (1978) 4 SCC 70 : 1978 SCC (Cri) 508, *Capt. Ramesh Chander Kaushal* v. *Veena Kaushal* 716*a-b*
18. 1968 SCC OnLine Del 52 : AIR 1968 Del 174, *Chander Parkash Bodh Raj* v. *Shila Rani Chander Prakash* 716*d*

The Judgment of the Court was delivered by

DIPAK MISRA, J.— Leave granted. When centuries old obstructions are removed, age-old shackles are either burnt or lose their force, the chains get rusted, and the human endowments and virtues are not indifferently treated and emphasis is laid on "free identity" and not on "annexed identity", and the women of today can gracefully and boldly assert their legal rights and refuse to be tied down to the obscurant conservatism, and further determined to ostracise the "principle of commodity", and the "barter system" to devoutly engage themselves in learning, criticising and professing certain principles with committed sensibility and participating in all pertinent and concerned issues, there is no warrant or justification or need to pave the innovative multi-avenues which the law does not countenance or give its stamp of approval. Chivalry, a perverse sense of human egotism, and clutching of feudal megalomaniacal ideas or for that matter, any kind of condescending attitude have no room. They are bound to be sent to the ancient woods, and in the new horizon people should proclaim their own ideas and authority. They should be able to say that they are the persons of the modern age and they have the ideas of today's "Bharat". Any other idea floated or any song sung in the invocation of male chauvinism is the proposition of an alien, a total stranger—an outsider. That is the truth in essentiality.

2. The facts which are requisite to be stated for adjudication of these appeals are that the appellant filed an application under Section 125 of the Code of Criminal Procedure (CrPC) contending, inter alia, that she married Shahid Khan, the respondent herein, on 26-4-1992 and during her stay at the matrimonial home she was prohibited from talking to others, and the husband not only demanded a car from the family but also started harassing her. A time came when he sent her to the parental home where she was compelled to stay for almost three months. The indifferent husband did not come to take her back to the matrimonial home, but she returned with the fond and firm hope that the bond of wedlock would be sustained and cemented with love and peace but as the misfortune would have it, the demand for the vehicle continued and the harassment was used as a weapon for fulfilment of the demand. In due course she came to learn that the husband had illicit relationship with another woman and he wanted to marry her. Usual to sense of human curiosity and wife's right when she asked him she was assaulted. The situation gradually worsened and it became unbearable for her to stay at the matrimonial home. At that juncture, she sought help of her parents who came and took her to the parental home at Lucknow where she availed treatment. Being deserted and ill-treated and, in a way, suffering from fear psychosis she took shelter in the house of her parents and when all her hopes got shattered for reunion, she filed an application for grant of maintenance @ Rs 4000 per month on the foundation that the husband was working on the post of Nayak in the Army and getting a salary of Rs 10,000 approximately apart from other perks.

3. The application for grant of maintenance was resisted with immense vigour by the husband disputing all the averments pertaining to demand of dowry and harassment and further alleging that he had already given divorce to her on 18-6-1997 and has also paid the mehar to her.

4. A reply was filed to the same by the wife asserting that she had neither the knowledge of divorce nor had she received an amount of mehar.

5. During the proceeding before the learned Family Judge the appellant wife examined herself and another, and the respondent husband examined four witnesses, including himself. The learned Family Judge, Family Court, Lucknow while dealing with the application forming the subject-matter of Criminal Case No. 1120 of 1998 did not accept the primary objection as regards the maintainability under Section 125 CrPC as the applicant was a Muslim woman and came to hold even after the divorce the application of the wife under Section 125 CrPC was maintainable in the Family Court. Thereafter, the learned Family Judge appreciating the evidence brought on record came to opine that the marriage between the parties had taken place on 26-4-1992; that the husband had given divorce on 18-6-1997; that she was ill-treated at her matrimonial home; and that she had come back to her parental house and was staying there; that the husband had not made any provision for grant of maintenance; that the wife did not have any source of income to support her, and the plea advanced by the husband that she had means to sustain her had not been proved; that as the husband was getting at the time of disposal of the application as per the salary certificate Rs 17,654 and accordingly directed that a sum of Rs 2500 should be paid as monthly maintenance allowance from the date of submission of the application till the date of judgment and thereafter Rs 4000 per month from the date of judgment till the date of remarriage.

6. The aforesaid order passed by the learned Family Judge came to be assailed before the High Court in criminal revision wherein, the High Court after adumbrating the facts referred to the decisions in *Anita Rani* v. *Rakeshpal Singh*[1], *Dharmendra Kumar Gupta* v. *Chandra Prabha Devi*[2], *Rakesh Kumar Dikshit* v. *Jayanti Devi*[3], *Ashutosh Tripathi* v. *State of U.P.*[4], *Paras Nath Kurmi* v. *Sessions Judge, Mau*[5] and *Sartaj* v. *State of U.P.*[6] and came to hold[7] that though the learned Principal Judge, Family Court had not ascribed any reason for grant of maintenance from the date of the application, yet when the case for maintenance was filed in the year 1998 decided on 17-2-2012 and there was no order for interim maintenance, the grant of Rs 2500 as monthly maintenance from the date of application was neither illegal nor excessive. The High Court took note of the fact that the husband

1 (1991) 2 Crimes 725 (All)
2 1990 SCC OnLine All 275 : 1990 Cri LJ 1884
3 1999 SCC OnLine All 531 : (1999) 39 ACC 4 : (1999) 2 JIC 323 (ACC)
4 1999 SCC OnLine All 641 : (1999) 39 ACC 434 : (1999) 2 JIC 763
5 1997 SCC OnLine All 1083 : 1998 All LJ 77 : (1999) 2 JIC 522
6 (2000) 2 JIC 967 (All)
7 *Shahid Khan* v. *Shamima Farooqui*, Criminal Revision No. 134 of 2012, order dated 17-9-2013 (All)

had retired on 1-4-2012 and consequently reduced the maintenance allowance to Rs 2000 from 1-4-2012 till remarriage of the appellant herein. Being of this view the learned Single Judge modified the order passed by the Family Court. Hence, the present appeal by special leave, at the instance of the wife.

7. We have heard Dr J.N. Dubey, learned Senior Counsel for the appellant. Despite service of notice, none has appeared for the respondent.

8. It is submitted by Dr Dubey, learned Senior Counsel that Section 125 CrPC is applicable to the Muslim women and the Family Court has jurisdiction to decide the issue. It is urged by him that the High Court has fallen into error by opining that the grant of maintenance @ Rs 4000 per month is excessive and hence, it should be reduced to Rs 2000 per month from the date of retirement of the husband i.e. 1-4-2012 till her remarriage. It is also contended that the High Court failed to appreciate the plight of the appellant and reduced the amount and hence, the impugned order is not supportable in law.

9. First of all, we intend to deal with the applicability of Section 125 CrPC to a Muslim woman who has been divorced. In *Shamim Bano* v. *Asraf Khan*[8], this Court after referring to the Constitution Bench decisions in *Danial Latifi* v. *Union of India*[9] and *Khatoon Nisa* v. *State of U.P.*[10] had opined as follows: (*Shamim Bano case*[8], SCC p. 644, paras 13-14)

> "*13*. The aforesaid principle clearly lays down that even after an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in Section 125 of the Code. We may note that while taking note of the factual score to the effect that the plea of divorce was not accepted by the Magistrate which was upheld by the High Court, the Constitution Bench[9] opined that as the Magistrate could exercise power under Section 125 of the Code for grant of maintenance in favour of a divorced Muslim woman under the Act, the order did not warrant any interference. Thus, the emphasis was laid on the retention of the power by the Magistrate under Section 125 of the Code and the effect of ultimate consequence.
>
> *14*. Slightly recently, in *Shabana Bano* v. *Imran Khan*[11], a two-Judge Bench, placing reliance on *Danial Latifi*[9], has ruled that: (*Shabana Bano case*[11], SCC p. 672, para 21)
>
> > '*21*. The appellant's petition under Section 125 CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125 CrPC cannot be restricted for the *iddat* period only.'

8 (2014) 12 SCC 636 : (2014) 5 SCC (Civ) 145 : (2014) 5 SCC (Cri) 162
9 (2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266
10 (2014) 12 SCC 646 : (2014) 5 SCC (Civ) 155 : (2014) 5 SCC (Cri) 170
11 (2010) 1 SCC 666 : (2010) 1 SCC (Civ) 216 : (2010) 1 SCC (Cri) 873

Though the aforesaid decision was rendered interpreting Section 7 of the Family Courts Act, 1984, yet the principle stated therein would be applicable, for the same is in consonance with the principle stated by the Constitution Bench in *Khatoon Nisa*[10]."

In view of the aforesaid dictum, there can be no shadow of doubt that Section 125 CrPC has been rightly held to be applicable by the learned Family Judge.

10. On a perusal of the order passed by the Family Court, it is manifest that it has taken note of the fact that the salary of the husband was Rs 17,654 in May 2009. It had fixed Rs 2500 as monthly maintenance from the date of submission of the application till the date of order i.e. 17-2-2012 and from the date of order, @ Rs 4000 per month till the date of remarriage. The High Court has opined that while granting maintenance from the date of the application, judicial discretion has to be appropriately exercised, for the High Court has noted that the grant of maintenance @ Rs 2500 per month from the date of application till the date of the order, did not call for modification.

11. The aforesaid finding of the High Court, affirming the view of the learned Family Judge is absolutely correct. But what is disturbing is that though the application for grant of maintenance was filed in the year 1998, it was not decided till 17-2-2012. It is also shocking to note that there was no order for grant of interim maintenance. It needs no special emphasis to state that when an application for grant of maintenance is filed by the wife the delay in disposal of the application, to say the least, is an unacceptable situation. It is, in fact, a distressing phenomenon. An application for grant of maintenance has to be disposed of at the earliest. The Family Courts, which have been established to deal with the matrimonial disputes, which include application under Section 125 CrPC, have become absolutely apathetic to the same.

12. The concern and anguish that was expressed by this Court in *Bhuwan Mohan Singh* v. *Meena*[12], is to the following effect: (SCC paras 12-13)

"*12*. The Family Courts have been established for adopting and facilitating the conciliation procedure and to deal with family disputes in a speedy and expeditious manner. A three-Judge Bench in *K.A. Abdul Jaleel* v. *T.A. Shahida*[13], while highlighting on the purpose of bringing in the Family Courts Act by the legislature, opined thus: (SCC p. 170, para 10)

'*10*. The Family Courts Act was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matters connected therewith.'

13. The purpose of highlighting this aspect is that in the case at hand the proceeding before the Family Court was conducted without being

10 *Khatoon Nisa* v. *State of U.P.*, (2014) 12 SCC 646 : (2014) 5 SCC (Civ) 155 : (2014) 5 SCC (Cri) 170

12 (2015) 6 SCC 353 : AIR 2014 SC 2875

13 (2003) 4 SCC 166 : 2003 SCC (Cri) 810

alive to the Objects and Reasons of the Act and the spirit of the provisions under Section 125 of the Code. It is unfortunate that the case continued for nine years before the Family Court. It has come to the notice of the Court that on certain occasions the Family Courts have been granting adjournments in a routine manner as a consequence of which both the parties suffer or, on certain occasions, the wife becomes the worst victim. When such a situation occurs, the purpose of the law gets totally atrophied. *The Family Judge is expected to be sensitive to the issues, for he is dealing with extremely delicate and sensitive issues pertaining to the marriage and issues ancillary thereto. When we say this, we do not mean that the Family Courts should show undue haste or impatience, but there is a distinction between impatience and to be wisely anxious and conscious about dealing with a situation. A Family Court Judge should remember that the procrastination is the greatest assassin of the lis before it. It not only gives rise to more family problems but also gradually builds unthinkable and Everestine bitterness.* It leads to the cold refrigeration of the hidden feelings, if still left. The delineation of the lis by the Family Judge must reveal the awareness and balance. Dilatory tactics by any of the parties has to be sternly dealt with, for the Family Court Judge has to be alive to the fact that the lis before him pertains to emotional fragmentation and delay can feed it to grow. We hope and trust that the Family Court Judges shall remain alert to this and decide the matters as expeditiously as possible keeping in view the Objects and Reasons of the Act and the scheme of various provisions pertaining to grant of maintenance, divorce, custody of child, property disputes, etc." (emphasis supplied)

13. When the aforesaid anguish was expressed, the predicament was not expected to be removed with any kind of magic. However, the fact remains, these litigations can really corrode the human relationship not only today but will also have the impact for years to come and has the potentiality to take a toll on the society. It occurs either due to the uncontrolled design of the parties or the lethargy and apathy shown by the Judges who man the Family Courts. As far as the first aspect is concerned, it is the duty of the courts to curtail them. There need not be hurry but procrastination should not be manifest, reflecting the attitude of the court. As regards the second facet, it is the duty of the court to have the complete control over the proceeding and not permit the lis to swim the unpredictable grand river of time without knowing when shall it land on the shores or take shelter in a corner tree that stands "still" on some unknown bank of the river. It cannot allow it to sing the song of the brook. "Men may come and men may go, but I go on forever." This would be the greatest tragedy that can happen to the adjudicating system which is required to deal with most sensitive matters between the man and wife or other family members relating to matrimonial and domestic affairs. There has to be a proactive approach in this regard and the said approach should be instilled in the Family Court Judges by the Judicial Academies functioning under the High Courts. For the present, we say no more.

14. Coming to the reduction of quantum by the High Court, it is noticed that the High Court has shown immense sympathy to the husband by reducing the amount after his retirement. It has come on record that the husband was getting a monthly salary of Rs 17,654. The High Court, without indicating any reason, has reduced the monthly maintenance allowance to Rs 2000. In today's world, it is extremely difficult to conceive that a woman of her status would be in a position to manage within Rs 2000 per month. It can never be forgotten that the inherent and fundamental principle behind Section 125 CrPC is for amelioration of the financial state of affairs as well as mental agony and anguish that a woman suffers when she is compelled to leave her matrimonial home. The statute commands that there have to be some acceptable arrangements so that she can sustain herself. The principle of sustenance gets more heightened when the children are with her. Be it clarified that sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125 CrPC, it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar. There can be no shadow of doubt that an order under Section 125 CrPC can be passed if a person despite having sufficient means neglects or refuses to maintain the wife. Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able-bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right.

15. While determining the quantum of maintenance, this Court in *Jasbir Kaur Sehgal* v. *District Judge, Dehradun*[14] has held as follows: (SCC p. 12, para 8)

> "*8.* ... The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate."

14 (1997) 7 SCC 7

16. Grant of maintenance to wife has been perceived as a measure of social justice by this Court. In *Chaturbhuj* v. *Sita Bai*[15], it has been ruled that: (SCC p. 320, para 6)

> "*6.* … Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in *Capt. Ramesh Chander Kaushal* v. *Veena Kaushal*[16] falls within the constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in *Savitaben Somabhai Bhatiya* v. *State of Gujarat*[17]."

17. This being the position in law, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning.

18. In this context, we may profitably quote a passage from the judgment rendered by the High Court of Delhi in *Chander Parkash Bodh Raj* v. *Shila Rani Chander Prakash*[18] wherein it has been opined thus: (SCC OnLine Del para 7)

> *7.* … an able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodied person to show to the Court cogent grounds for holding that he is unable, for reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. When the husband does not disclose to the Court the exact amount of his income, the presumption will be easily permissible against him.

19. From the aforesaid enunciation of law it is limpid that the obligation of the husband is on a higher pedestal when the question of maintenance of wife and children arises. When the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort. Sometimes her faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her the misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm, for she cannot be allowed to resign to destiny. Therefore, the lawful imposition for grant of maintenance allowance.

15 (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356
16 (1978) 4 SCC 70 : 1978 SCC (Cri) 508
17 (2005) 3 SCC 636 : 2005 SCC (Cri) 787
18 1968 SCC OnLine Del 52 : AIR 1968 Del 174

20. In the instant case, as is seen, the High Court has reduced the amount of maintenance from Rs 4000 to Rs 2000. As is manifest, the High Court has become oblivious of the fact that she has to stay on her own. Needless to say, the order of the learned Family Judge is not manifestly perverse. There is nothing perceptible which would show that order is a sanctuary of errors. In fact, when the order is based on proper appreciation of evidence on record, no Revisional Court should have interfered with the reason on the base that it would have arrived at a different or another conclusion. When substantial justice has been done, there was no reason to interfere. There may be a shelter over her head in the parental house, but other real expenses cannot be ignored. Solely because the husband had retired, there was no justification to reduce the maintenance by 50%. It is not a huge fortune that was showered on the wife that it deserved reduction. It only reflects the non-application of mind and, therefore, we are unable to sustain the said order.

21. Having stated the principle, we would have proceeded to record our consequential conclusion. But, a significant one, we cannot be oblivious of the asseverations made by the appellant. It has been asserted that the respondent had taken voluntary retirement after the judgment dated 17-2-2012 with the purpose of escaping the liability to pay the maintenance amount as directed to the petitioner; that the last-drawn salary of the respondent taken into account by the learned Family Judge was Rs 17,564 as per salary slip of May 2009 and after deduction of AFPP Fund and AGI, the salary of the respondent was Rs 12,564 and hence, even on the basis of the last basic pay (i.e. Rs 9830) of the respondent the total pension would come to Rs 14,611 and if 40% of commutation is taken into account then the pension of the respondent amounts to Rs 11,535; and that the respondent, in addition to his pension, had received encashment of commutation to the extent of 40% i.e. Rs 3,84,500 and other retiral dues i.e. AFPP, AFGI, gratuity and leave encashment to the tune of Rs 16,01,455. The aforesaid aspects have gone uncontroverted as the respondent husband has not appeared and contested the matter. Therefore, we are disposed to accept the assertions. This exposition of facts further impels us to set aside the order of the High Court.

22. Consequently, the appeals are allowed, the orders passed by the High Court are set aside and that of the Family Court is restored. There shall be no order as to costs.

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(2016) 13 Supreme Court Cases 308

(BEFORE KURIAN JOSEPH AND ROHINTON FALI NARIMAN, JJ.)

BALRAM YADAV .. Appellant;

Versus

FULMANIYA YADAV .. Respondent.

Civil Appeal No. 4500 of 2016†, decided on April 27, 2016

Family and Personal Laws — Family Courts Act, 1984 — Ss. 7(1) Expln. (b), 8 & 20 — Jurisdiction of Family Court — Scope of — Declaration as to validity of both marriage and matrimonial status of a person — Suit or proceeding as to, held, is within the exclusive jurisdiction of Family Court in view of the provisions contained in Ss. 7(1) Expln. (b), 8 and 20 of the Family Courts Act

— Thus, where there is a dispute on matrimonial status of any person, a declaration in that regard has to be sought only before Family Court irrespective of whether said declaration is affirmative or negative in nature — Consequently, in present case, Family Court had jurisdiction to entertain civil suit filed by appellant seeking declaration to the effect that respondent was not his legally married wife — High Court erred in taking a contrary view opining that a negative declaration was outside the jurisdiction of Family Court — Civil Procedure Code, 1908, S. 9 — Specific Relief Act, 1963 — S. 34 — Evidence Act, 1872 — S. 41 — Family and Personal Laws — Marriage, Divorce, Other Unions and Children — Marital Status, Determination/Proof/Presumption of — Competent court to determine

Allowing the appeal, the Supreme Court

Held :

Under Section 7(1) Explanation (*b*) of the Family Courts Act, 1984, a suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is within the exclusive jurisdiction of the Family Court, since under Section 8 of the said Act, all those jurisdictions covered under Section 7 are excluded from the purview of the jurisdiction of the civil courts. In case, there is a dispute on the matrimonial status of any person, a declaration in that regard has to be sought only before the Family Court. It makes no difference as to whether it is an affirmative relief or a negative relief. What is important is the declaration regarding the matrimonial status. Section 20 of the Family Courts Act also endorses the above view, since the said Act has an overriding effect on other laws. Consequently, the impugned judgment of the High Court is set aside. The matter is remitted to the High Court to be decided on merits. (Paras 7 and 8)

W-D/56957/SV

Advocates who appeared in this case :
Dr Rajesh Pandey, B.N. Patel and Nitin Bhardwaj, Advocates, for the Appellant;
Apoorva Tripathi and Ms Manju Sharma Jetley, Advocates, for the Respondent.

† Arising out of SLP (C) No. 8076 of 2015. From the Judgment and Order dated 14-1-2015 of the High Court of Chhattisgarh at Bilaspur in First Appeal No. 12 of 2014

The Judgment of the Court was delivered by

KURIAN JOSEPH, J.— Leave granted. The appellant instituted a civil suit before the Family Court, Ambikapur, Sarguja, Chhattisgarh seeking a declaration to the effect that the respondent is not his legally married wife. By judgment dated 28-12-2013, the civil suit was decreed declaring that the respondent was not the appellant's legally married wife.

2. The respondent, being aggrieved, moved the High Court of Chhattisgarh. The High Court, as per the impugned order dated 14-1-2015, allowed the appeal holding that the Family Court lacked jurisdiction to deal with the matter. According to the High Court, a negative declaration was outside the jurisdiction of the Family Court.

3. Heard the learned counsel for the parties.

4. Section 7 of the Family Courts Act, 1984 (for short "the Act") deals with the jurisdiction of the Family Courts, which reads as follows:

"**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*) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(*b*) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(*c*) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(*d*) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(*e*) a suit or proceeding for a declaration as to the legitimacy of any person;

(*f*) a suit or proceeding for maintenance;

(*g*) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

(*a*) the jurisdiction 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 (2 of 1974); and

(*b*) such other jurisdiction as may be conferred on it by any other enactment."

5. Section 8 of the Act deals with the exclusion of jurisdiction, which reads as follows:

"**8.** ***Exclusion of jurisdiction and pending proceedings.***—Where a Family Court has been established for any area—

(*a*) 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;

(*b*) no magistrate shall, in relation to such area, have or exercise any jurisdiction or power under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(*c*) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of Section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)—

(*i*) which is pending immediately before the establishment of such Family Court before any District Court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and

(*ii*) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established,

shall stand transferred to such Family Court on the date on which it is established."

6. Section 20 of the Family Courts Act, 1984 provides for overriding effect of the Act on other laws or instruments having the effect of law. The said section reads as follows:

"**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."

7. Under Section 7(1) Explanation (*b*), a suit or a proceeding for a declaration as to the validity of both marriage and matrimonial status of a person is within the exclusive jurisdiction of the Family Court, since under Section 8, all those jurisdictions covered under Section 7 are excluded from the purview of the jurisdiction of the civil courts. In case, there is a dispute on the matrimonial status of any person, a declaration in that regard has to be sought only before the Family Court. It makes no difference as to whether it

is an affirmative relief or a negative relief. What is important is the declaration regarding the matrimonial status. Section 20 also endorses the view which we have taken, since the Family Courts Act, 1984, has an overriding effect on other laws.

8. In view of the above, the appeal is allowed. The impugned judgment of the High Court is set aside. The matter is remitted to the High Court to be decided on merits. We request the High Court to hear the appeal afresh and dispose it of expeditiously, preferably within a period of six months. No costs.

decree-holder bank has to proceed against the mortgaged property first and then proceed against the guarantor. Since the High Court was not told that such steps were taken, we do not think we will be justified in holding that the High Court was in error in making the direction which is under challenge before us. The appeal, under these circumstances. has therefore to be dismissed.

5. However, we are told by the appellant's counsel that the bank had taken steps against the mortgaged property and also against the principal debtor. We find in clause (H) of the statement of facts in the SLP the following statement :

> The petitioners say that they made an application for sale of the mortgage property but there was no offer for purchase of the mortgage property. The petitioners also filed an execution application against the respondent for execution of the said decree by committing the respondent to civil prison. Respondent 1 filed a revision application being Civil Revision Application No. 1472 of 1979 against the order of the Court of District Munsiff, Gajapatinagaram dated February 17, 1979 passed in Execution Application No. 45 of 1978 filed by the petitioners.

6. From this it is evident that the decree-holder had proceeded against the mortgaged property and also against the principal debtor. If this is correct, execution against the guarantor was maintainable. In view of this disclosure, we remand the matter to the High Court giving opportunity to the appellant to plead this case before the High Court and seek execution of the decree against the respondent with liberty to the respondent to dispute the correctness of this statement. The High Court will dispose of the matter in accordance with law. No order as to costs.

(1987) 2 Supreme Court Cases 338

(BEFORE M. P. THAKKAR AND B. C. RAY, JJ.)

RAHASA PANDIANI (DEAD) BY LRS. AND OTHERS .. Appellants ;

Versus

GOKULANANDA PANDA AND OTHERS .. Respondents.

Civil Appeal No. 2058 of 1973†,
decided on February 19, 1987

Hindu Law — Adoption — Proof of — Oral evidence — Court's approach indicated — Suspicious circumstances must be satisfactorily

†From the Judgment and Order dated August 3, 1973 of the Orissa High Court in A.H.O No. 25 of 1972

explained — Burden of proof on person claiming adoption — Held, on facts, burden not discharged — Adoption claimed not genuine

Held :

An adoption would divert the normal and natural course of succession. Therefore the court has to be extremely alert and vigilant to guard against being ensnared by schemers who indulge in unscrupulous practices out of their lust for property. If there are any suspicious circumstances, just as the propounder of the Will is obliged to dispel the cloud of suspicion, the burden is on one who claims to have been adopted to dispel the same beyond reasonable doubt. In the case of an adoption which is claimed on the basis of oral evidence and is not supported by a registered document or any other evidence of a clinching nature, if there exist suspicious circumstances, the same must be explained to the satisfaction of the conscience of the court by the party contending that there was such an adoption. (Para 4)

Kishori Lal v. Chaltibai, 1959 Supp 1 SCR 698 : AIR 1959 SC 504, relied on

Sootrugun v. Sabitra, (1834) 2 Knapp 287 ; Diwakar Rao v. Chandanlal Rao, 1916 ILR 44 Cal 201 (PC) ; Kishorilal v. Chunilal, (1908) 36 IA 9 ; Lal Kunwar v. Charanji Lal, (1909) 37 IA 1 and Padamlal v. Fakira Debya, AIR 1931 PC 84 : 35 CWN 465 : 60 MLJ 619 : 131 IC 758, cited

In the present case the first respondent claimed that he had been adopted by the first appellant in 1956. The appellant had earlier resorted to an adoption in 1942. That she had done by a registered deed. So also the natural father of the appellant had given his eldest son in adoption by a registered document. Thus they were fully aware of the importance of having adoption evidenced by a registered document in order to avoid any future controversy. And yet there was no registered document to evidence the alleged adoption in 1956. This was a very significant circumstance which creates a serious doubt about the genuineness of the claim of adoption. Besides, there were other suspicious circumstances such as the name of the respondent was not changed even after the alleged adoption ; no reliable evidence had been adduced to show that the respondent had started living with the appellant since 1956 till the dispute arose ; persons stated to have been present at the time of the adoption ceremony had not been examined before the court, nor any explanation offered for their non-examination ; the priest who had performed the adoption ceremony had also not been examined, so also none of the near relatives or prominent persons of the village had been examined ; it was not even suggested to the appellant that the giving and taking ceremony had taken place, nor was it suggested to her that a particular person had acted as priest. These circumstances create doubt on the genuineness of the alleged adoption. No importance could be attached to an alleged inscription made in Puri temple as there was nothing to show that it was an authentic inscription made in order to evidence the adoption at the instance of the appellant. The respondent thus failed to establish that the alleged adoption had really taken place. (Para 5)

Appeal allowed R-M/7833/C

Advocates who appeared in this case :

Chella Sitaramaiah, Senior Advocate (C. S. S. Rao, Advocate, with him), for the Appellants ;

B. P. Maheshwari and R. S. Rana, Advocates, for the Respondents.

The Judgment of the Court was delivered by

THAKKAR, J.—Whether or not an adoption had taken place way back in 1956 is the controversy at the centre of the stage.

2. One Rahasa Pandiani (original defendant 1), widow of Lakshminarayana Panda had adopted one Gangapani, the son of the sister of her deceased husband in 1942 by a registered document. The said Gangapani died in 1953. Respondent 1 Gokulananda Panda (original plaintiff) instituted the suit giving rise to the present appeal. He was a minor at the material time and the suit was instituted through his natural father and maternal uncle seeking a declaration that he was adopted as a son by defendant 1 Rahasa on March 22, 1956. The suit was instituted because she had alienated some of the properties in favour of appellants 2 to 8 and had made a Will in favour of the deity bequeathing the rest of the properties on the premise that there was no such adoption and she was free to deal with the properties of her deceased husband. Defendant 1 resisted the suit and firmly denied that she had taken Gokulananda Panda in adoption as alleged. The trial court on an appreciation of evidence disbelieved the version of the plaintiff and dismissed the suit on taking the view that the plaintiff had failed to establish that any such adoption had taken place. A learned Single Judge of the High Court reversed the findings recorded by the trial court and decreed the suit holding that the plaintiff had established that such an adoption had indeed taken place. The defendants preferred a Letters Patent appeal to a Division Bench of the High Court, but it was dismissed in limine. Thereupon original defendant 1 Rahasa Pandiani approached this Court by way of the present appeal by special leave. She having died during the pendency of the present appeal, the estate is now represented by her legal heirs whose names have brought on record pursuant to the order of this Court on January 25, 1982.

3. Learned counsel for parties have taken us through the judgments of the trial court and the High Court. We have given our close and anxious consideration to the oral evidence as also the attendant circumstances. On taking an overall view of the matter we are satisfied that the trial court was right in reaching the conclusion that the plaintiff had failed to prove that the alleged adoption had really taken place. In our opinion, the High Court failed to attach due importance to a host of significant circumstances which indicate that the version regarding adoption does not inspire confidence. There

is hardly any evidence worth the name on which a finding in favour of the plaintiff that such an adoption had taken place could be rested.

4. Before we advert to the relevant circumstances we consider it appropriate to advert to a note of caution sounded by this Court as early as in 1958 in *Kishori Lal* v. *Chaltibai*[1]. We can do no better than to quote the relevant passage from the judgment of Kapur, J.:

> As an adoption results in changing the course of succession, depriving wives and daughters of their rights and transferring properties to comparative strangers or more remote relations it is necessary that the evidence to support it should be such that it is free from all suspicion of fraud and so consistent and probable as to leave no occasion for doubting its truth. Failure to produce accounts, in circumstances such as have been proved in the present case, would be a very suspicious circumstance. The importance of accounts was emphasised by the Privy Council in *Sootrugun* v. *Sabitra*[2] ; in *Diwakar Rao* v. *Chandanlal Rao*[3] ; in *Kishorilal* v. *Chunilal*[4] ; in *Lal Kunwar* v. *Charanji Lal*[5] and in *Padamlal* v. *Fakira Debya*[6].

When the plaintiff relies on oral evidence in support of the claim that he was adopted by the adoptive father in accordance with the Hindu rites, and it is not supported by any registered document to establish that such an adoption had really and as a matter of fact taken place, the court has to act with a great deal of caution and circumspection. Be it realized that setting up a spurious adoption is not less frequent than concocting a spurious Will, and equally, if not more difficult to unmask. And the court has to be extremely alert and vigilant to guard against being ensnared by schemers who indulge in unscrupulous practices out of their lust for property. If there are any suspicious circumstances, just as the propounder of the will is obliged to dispel the cloud of suspicion, the burden is on one who claims to have been adopted to dispel the same beyond reasonable doubt. In the case of an adoption which is not supported by a registered document or any other evidence of a clinching nature if there exist suspicious circumstances, the same must be explained to the satisfaction of the conscience of the court by the party contending that there was such an adoption. Such is the position as an adoption would divert the normal and natural course of succession. Experience of life shows that just as there have been spurious claims

1. 1959 Supp 1 SCR 698 : AIR 1959 SC 504
2. (1834) 2 Knapp 287
3. 1916 ILR 44 Cal 201 (PC)
4. (1908) 36 IA 9
5. (1909) 37 IA 1, 7
6. AIR 1931 PC 84 : 35 CWN 465 : 60 MLJ 619 : 131 IC 758

about execution of a Will, there have been spurious claims about adoption having taken place. And the court has therefore to be aware of the risk involved in upholding the claim of adoption if there are circumstances which arouse the suspicion of the court and the conscience of the court is not satisfied that the evidence preferred to support such an adoption is beyond reproach.

5. In the present case a very significant circumstance which creates a serious doubt about the genuineness of the claim of adoption has come to light. Syamosundar, the natural father of the plaintiff had given his eldest son Narasinga in adoption to Hira, the widow of Godavari in 1942 by a registered document. So also when defendant Rahasa had adopted her husband's sister's son Gangapani in 1942 it was by a registered document. Admittedly, therefore, Rahasa, the alleged adoptive mother, had resorted to adoption by a registered document as early as in 1942 and she was aware of the importance of the adoption being evidenced by a registered document. So also Syamosundar, the father of plaintiff Gokul was fully aware of the importance of having adoption evidenced by a registered document in order to avoid any future controversy. He had been a party to the adoption of his eldest son Narasinga by a registered document in 1942. And yet there is no registered document to evidence the alleged adoption of Gokul by Rahasa in 1956 (it is alleged that the adoption took place on March 22, 1956). The evidence of Syamosundar shows that even at the time of the alleged adoption of Gokul he was aware about the importance of having the adoption made by a registered document. His evidence furthermore shows that he had discussed the matter about execution of a registered deed of adoption with Rahasa but according to him Rahasa had put it off. The trial court disbelieved this version. Rahasa herself stated on oath that no such adoption had taken place. It was not even suggested to her in her cross-examination that there was any talk about the adoption being evidenced by a registered document. There was no reason to disbelieve Rahasa. If Rahasa had really adopted Gokul having felt the need for doing so there would have been no occasion on her part to be reluctant to execute a registered document as was done by herself earlier when she adopted Gangapani in 1942. So also Syamosundar who was giving his natural son in adoption would have in the normal course of things insisted upon the adoption being evidenced by a registered document, he himself having resorted to this mode way back in 1942 when his eldest son Narasinga was given in adoption. According to the plaintiff his age was about 11 years at the time when the adoption took place and he left the school in order to live with and look after his adoptive mother after some time. Syamosundar in his evidence has clearly admitted that the name of Gokul's

father was not changed after the adoption. He subsequently gave the explanation that the name was not changed because after some time Gokul left the school. Anyway this circumstance also creates a doubt about the genuineness of the adoption as alleged by the plaintiff. Another circumstance which creates a serious doubt in our mind is that no reliable evidence has been adduced to show that Gokul had started living with Rahasa since 1956 till the dispute arose in 1962. If the version of adoption had been true and the evidence of Syamosundar and Gokul that Gokul had started living with his adoptive mother Rahasa was true, Gokul would have lived with his adoptive mother from the age of 11 till the age of 17. At least, one neighbour could have been found to prove that Gokul was living with Rahasa. No such evidence has been adduced. On the other hand, Rahasa says that adoption never took place and Gokul never came to live with her. The whole purpose of the adoption presumably was to have someone to look after her in her old age (she was about 61 at the time when the alleged adoption took place in 1956). Under the circumstances, absence of satisfactory evidence to show that the adoption had been acted upon and the absence of subsequent conduct supporting the version of adoption are circumstances which create serious doubts. Yet another very important circumstance which has not been accorded sufficient importance is that Syamosundar and Ram Krishna Sabat, the maternal uncle of Gokul who acted as next friend when the suit was instituted, had in terms mentioned the names of three respectable persons as having remained present at the adoption ceremony at the time of adoption. None of these three persons was examined. No explanation has been offered as to why these three persons who admittedly were present according to the plaintiff, and whose names were mentioned in the plaint, were not examined. The trial court rightly drew the inference that if they had been examined, they would not have supported the plaintiff. What is more the priest who is supposed to have performed the adoption ceremony has also not been examined. A convenient explanation has been found by naming a person who was dead. This is another suspicious circumstance. So also, none of the near relatives or prominent persons of the village have been examined to show that such an adoption had taken place. It was not even suggested to defendant Rahasa that the giving and taking ceremony had taken place. Nor was it suggested to her that a particular person had acted as priest. In this state of evidence the trial court rightly dismissed the suit. The High Court attached little or no importance to this catena of significant circumstances and reversed the findings recorded by the trial court by the simplistic method of accepting the evidence adduced by plaintiff without analyzing or testing it on the touchstone of probabilities. In fact, the finding of the High Court can be said to be a finding which is

not supported by any evidence worth the name. Too much importance was attached to an alleged inscription made in the Puri temple. There was no reliable evidence to establish that the said inscription was made at the instance of defendant Rahasa. No temple records were forthcoming. There was nothing to show that it was an authentic inscription made in order to evidence the adoption at the instance of Rahasa. In any case, the dark clouds of suspicious circumstances have not been dispelled by the plaintiff. Taking an overall and cumulative view of all the relevant circumstances we are not at all satisfied that the plaintiff has established that such an adoption had really taken place. Under the circumstances, we allow the appeal, set aside the judgment and decree of the High Court and restore the judgment and decree passed by the trial court. There will be no order as to costs throughout.

(1987) 2 Supreme Court Cases 344

(BEFORE V. KHALID AND G. L. OZA, JJ.)

Civil Appeal No. 15 of 1974

KEWAL RAM .. Appellant ;

Versus

SMT. RAM LUBHAI AND OTHERS .. Respondents.

With

Civil Appeal No. 1875 of 1974

SMT. RAM LUBHAI .. Appellant ;

Versus

KEWAL RAM AND OTHERS .. Respondents.

Civil Appeals Nos. 15 and 1875 of 1974†,
decided on March 26, 1987

Civil Procedure Code, 1908 — Order 9, Rule 13 — Setting aside ex parte decree — Decree based on right of pre-emption passed ex parte against two of the three parties without serving notice on them — In appeal also no notice served on them — Held, their application under Rule 13 for setting aside the ex parte decree must succeed — Decree against the party who had been served with the notice would stand

Civil Procedure Code, 1908 — Sections 96 and 97 — Trial court's decree merges with appellate decree

Held :

When a decree of the trial court is either confirmed, modified or

†From the Judgment and Order dated January 24, 1973 of the Punjab and Haryana High Court in Civil Revision No. 147 of 1972

termination of the proceedings before the arbitrators, pendente lite and after decree. This Court in *Renusagar case*[6] held that award of such interest after the Interest Act, 1978 is permissible, however, on the facts of the case the High Court not having given a direction to the payment of interest pendente lite did not modify that part of the order.

17. We do not find that it is appropriate to modify the award made by the arbitrators or the decree passed pursuant to it as no exceptional circumstances arise. The fact that there is fluctuation in the exchange rate is no reason for us to interfere with the same.

18. The appellant having failed on all points, we dismiss this appeal, however, with no order as to costs.

(2001) 7 Supreme Court Cases 740

(BEFORE G.B. PATTANAIK, S. RAJENDRA BABU, D.P. MOHAPATRA, DORAISWAMY RAJU AND SHIVARAJ V. PATIL, JJ.)

DANIAL LATIFI AND ANOTHER .. Petitioners;

Versus

UNION OF INDIA .. Respondent.

Writ Petitions (C) No. 868 of 1996 with Nos. 996, 1001, 1055, 1062, 1236, 1259, 1281 of 1986, TCs (C) Nos. 22 of 1987, 86, 68 of 1988, 276-77 of 1987, Crl. A. No. 702 of 1990, SLPs (Crl.) Nos. 655 of 1988, 596-97 of 1992, WP (C) No. 12273 of 1984, SLP (Crl.) No. 2513 of 1994, Crl. As. Nos. 508, 843 of 1995, 102-03 of 1989, 292 of 1990 and SLPs (Crl.) Nos. 2165 of 1996, 3786 and 2462 of 1999†,
decided on September 28, 2001

A. **Muslim Women (Protection of Rights on Divorce) Act, 1986 — Held, valid on basis of construction bringing it within constitutional principles — "Reasonable and fair provision and maintenance" under S. 3(1)(a) is not limited for the iddat period; it extends for the entire life of divorced wife, unless she remarries — Clarified that the emphasis in the section is not on the nature or duration of such "provision" or "maintenance", but rather on the time "within" which the arrangement for their payment should be finalised and executed — To construe provisions of the Act as less beneficial than provisions of Chapter IX CrPC and hold husband liable to pay maintenance only for the iddat period would result in unreasonable discrimination against divorced Muslim women and would render the Act violative of Arts. 14, 15 and 21 — Petitions challenging validity of Act dismissed — Interpretation of Statutes — Basic rules — Determination of legislative intent — Applied — Constitution of India — Arts. 14 and 15 — Held, not violated by Muslim Women (Protection of Rights on Divorce) Act, 1986 as interpreted by Supreme Court**

† Under Article 32 of the Constitution of India

B. **Interpretation of Statutes — Construction of words and phrases — Held, words cannot be construed contrary to their meaning**

C. **Muslim Women (Protection of Rights on Divorce) Act, 1986 — Ss. 3(1)(a), 3(3)(a) and 4 — Right to "a reasonable and fair provision", referred to only in S. 3, held, is a right enforceable only against the divorced woman's former husband and is in addition to what he is obliged to pay as "maintenance" — The word "provision" indicates that something is provided in advance for meeting certain needs — Therefore, held, at the time of divorce Muslim husband is required to contemplate the future needs of his ex-wife and make arrangements in advance to meet those needs**

D. **Muslim Women (Protection of Rights on Divorce) Act, 1986 — Ss. 3(1)(a) and 3(3)(a) — Reasonable and fair provision — Held, would be worked out with reference to the needs of the divorced woman, the means of the husband and the standard of life enjoyed during subsistence of the marriage — Further held, there is no reason why such provision cannot take the form of regular payment of alimony**

E. **Constitution of India — Art. 14 — Arts. 14 and 15 — Held, there is no discrimination where State provides for a particular group (divorced Muslim women in this case) a scheme for maintenance and prevention of vagrancy which is equally or more beneficial than that provided in the earlier general law then prevailing (S. 125 CrPC, 1973 in this case) — Contention that as a result of the Muslim Women (Protection of Rights on Divorce) Act, 1986 petitioners had lost their right to maintenance, held, is no longer of significance in view of the interpretation placed by the Supreme Court on the Act — Criminal Procedure Code, 1973, S. 125 — Scheme of, replaced by another under a later statute for divorced Muslim women — Constitutionality**

F. **Muslim Law — Divorce and Maintenance — Rights of divorced women — Held, for finding out what the rights of such women are, the starting point is the *Shah Bano case* (1985) 2 SCC 556, not the original texts or any other material — It is not open to the court to re-examine the position any longer because a Constitution Bench of the Supreme Court has declared the law after considering relevant Suras (241-42 of Ch. II) of Holy Quran and other relevant material — Further held, the Muslim Women (Protection of Rights on Divorce) Act, 1986 actually codifies the law as stated in *Shah Bano case* — Interpretation of Statutes — External aids — Statement of Objects and Reasons — Where different from language of the Act, held, will not be of much materiality — Constitution of India, Art. 141 — Precedents — Interpretation placed on religious text by an earlier Constitution Bench, held, binding**

G. **Muslim Law — Divorce and Maintenance — Held, it is difficult to perceive that Muslim law would pass on the responsibility of providing monetary compensation to a divorced woman to persons unconnected with the matrimonial life, such as the heirs likely to inherit her property or the Wakf Boards — Monetary compensation is anyway a small solace in relation to the loss a divorced woman undergoes as a direct consequence of the divorce and is universally recognised by persons belonging to all religions as an aspect of basic human rights, gender and social justice — Solution should be adjudged on considerations other than religion or**

religious faith or beliefs or national, sectarian, racial or communal constraints

The petitioners challenged the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986, under which Section 125 of the Criminal Procedure Code, providing for maintenance to wives, including divorced women, by their former husbands, was made inapplicable to divorced Muslim women. The petitioners primarily submitted that (*i*) Section 125 CrPC, was enacted as a matter of public policy, in order to provide a quick summary remedy to persons unable to maintain themselves; that the provision reflected the moral stance of the law and ought not to have been entangled with religion and religion-based personal laws; (*ii*) Section 125 CrPC also furthers the concept of social justice embodied in Article 21 of the Constitution of India; hence excluding divorced Muslim women from its protection is a discrimination against them; (*iii*) The inevitable effect of the Act is to nullify the law declared by the Supreme Court in *Shah Bano case* [(1985) 2 SCC 556], which is most improper; (*iv*) the Act is un-Islamic and also has the potential to suffocate Muslim women and to undermine the basic secular character of the Constitution; (*v*) the Act is violative of Articles 14 and 21.

On behalf of the Union of India, it was submitted that the need for giving effect to a community's personal law was a legitimate basis for discrimination. If the legislature can apply a particular provision as a matter of policy, it can also withdraw such application and substitute another in its place. The policy of Section 125 CrPC, is not to create a right of maintenance beyond the purview of personal law. The Act has been enacted to overcome the ratio of the *Shah Bano* decision.

On behalf of the All India Muslim Personal Law Board it was submitted that the object of the Act was to undo the effect of *Shah Bano case*; in that case the Supreme Court had attempted the hazardous task of interpreting an unfamiliar language connected to religious tenets, which was not a safe course to pursue; that the term "mata" had been wrongly interpreted in *Shah Bano case*. The purpose of the Act was to avoid vagrancy, but at the same time it aimed to prevent the husband from being penalised; that the terms "maintenance" and "provision" as used in Section 3(1)(*a*) had the same meaning; that provisions of Section 4 of the Act were adequate for taking care of any possibility of vagrancy; that according to the Muslim social ethos a divorced Muslim woman was not at all dependent on her former husband because society provided a wider safety net. The Islamic Shariat Board presented more detailed submissions regarding the term "mata" and as to why the views of certain Muslim authors, proposing that Muslim law obliges a man to pay maintenance to his former wife beyond the iddat period, ought not to be accepted.

The Supreme Court decided to consider only the question of the constitutional validity of the Act and upholding the same

Held :

In interpreting the provisions where matrimonial relationship is involved, the social conditions prevalent in society have to be considered. In Indian 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. Indian 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 all her 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, there can be no answer to the question as to how a woman can be compensated so far as emotional fracture or loss of investment is concerned. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the Wakf Boards. Such an approach appears to 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. (Para 20)

The purpose of the Muslim Women (Protection of Rights on Divorce) Act, 1986 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. However a careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. 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 contention that the expression "within" in Section 3(1)(*a*) should be read as "during" or "for" cannot be accepted 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 Section 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. (Paras 27 and 28)

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 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 Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations: (*1*) to make a "reasonable and fair provision" for his divorced wife; and (*2*) to provide "maintenance" for her. The emphasis of this section is not on the nature or duration of any such "provision" or "maintenance", but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, "within the iddat period". If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both "reasonable and fair provision" and "maintenance" by paying these amounts in a lump sum to his wife, in addition to having paid his wife's mahr and restored her dowry as per Sections 3(1)(*c*) and 3(1)(*d*) of the Act. (Para 29)

The precise 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 provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are "a reasonable and fair provision and maintenance to be made and paid" as provided under Section 3(1)(*a*) of the Act and these expressions cover different things, firstly, by the use of two different verbs — "to be made and paid to her within the iddat period" it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4 of the Act, which empowers the Magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to "provision". Obviously, the right to have "a fair and reasonable provision" in her favour is a right enforceable only against the woman's former husband, and in addition to what he is obliged to pay as "maintenance". (Para 29)

Mohd. Ahmed Khan v. *Shah Bano Begum*, (1985) 2 SCC 556 : 1985 SCC (Cri) 245, *explained*

The contention of the respondents 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, 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 rationale contained therein. (Para 29)

A comparison of Sections 3(1)(*a*) and 3(3) with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so

to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by the Supreme Court herein than the one provided under the Code of Criminal Procedure deprives them of their right, loses its significance. (Para 30)

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

As on the date the Act came into force the law applicable to Muslim divorced women was as declared by this Court in *Shah Bano case*, so to find out the personal law of Muslims with regard to divorced women's rights, the starting point should be *Shah Bano case* and not the original texts or any other material — all the more so when varying versions as to the authenticity of the source are shown to exist. That declaration was made after considering *The Holy Quran*, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-42 of Chapter II of *The Holy Quran* and other relevant textual material, it is not open to the court to now to re-examine that position and delve into a research to reach another conclusion. (Para 32)

Mohd. Ahmed Khan v. *Shah Bano Begum*, (1985) 2 SCC 556 : 1985 SCC (Cri) 245, *followed*

Bai Tahira v. *Ali Hussain Fidaalli Chothia*, (1979) 2 SCC 316 : 1979 SCC (Cri) 473; *Fuzlunbi* v. *K. Khader Vali*, (1980) 4 SCC 125 : 1980 SCC (Cri) 916, *affirmed by implication*

All that needs to be therefore considered is whether in the Act specific deviation has been made from the personal laws as declared by the Supreme Court in *Shah Bano case* without mutilating its underlying ratio. So considered, the Muslim Women (Protection of Rights on Divorce) Act actually and in reality codifies what was stated in *Shah Bano case*. (Para 32)

On behalf of the respondent Union of India it was contended that what has been stated in the objects and reasons in the Bill leading to the Act is a fact and that it should be presumed to be correct. After analysis of the facts and the law in *Shah Bano case* and their impact on the Act, it is held that if the language of the Act is as stated herein, the mere fact that the legislature took note of certain facts in enacting the law will not be of much materiality. (Para 32)

In *Shah Bano case* the Supreme Court has clearly explained the rationale behind Section 125 CrPC to make provision for maintenance to be paid to a divorced Muslim wife and this is clearly to avoid vagrancy or destitution on the part of a Muslim woman. (Para 33)

Mohd. Ahmed Khan v. *Shah Bano Begum*, (1985) 2 SCC 556 : 1985 SCC (Cri) 245, *explained*

The concept of "right to life and personal liberty" guaranteed under Article 21 of the Constitution would include the "right to live with dignity". (Para 33)

Olga Tellis v. *Bombay Municipal Corpn.*, (1985) 3 SCC 545; *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248, *relied on*

Before the passing of the impugned Act, a Muslim woman who was divorced by her husband was granted a right to maintenance from her husband under the provisions of Section 125 CrPC until she may 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 a reasonable and fair substitute of the provisions of Section 125 CrPC. Such deprivation of the divorced Muslim women of their right to maintenance from their former husbands under the beneficial provisions of the Code of Criminal Procedure which are otherwise available to all other women in India cannot be stated to have been effected by a reasonable, right, just and fair law and, if these provisions are less beneficial than the provisions of Chapter IX of the Code of Criminal Procedure, a divorced Muslim woman has obviously been unreasonably discriminated against and deprived 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. (Para 33)

If 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. The latter interpretation should be accepted and, therefore, the interpretation placed herein 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. (Para 33)

The effect of various interpretations placed on Suras 241 and 242 of Chapter II of *The Holy Quran* has been referred to in *Shah Bano case*. *Shah Bano case* clearly enunciated what the present law would be. It made a distinction between the provisions to be made and the maintenance to be paid. It was noticed that the maintenance is payable only 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 the Supreme Court interpreted the various texts and held so. If that is the legal position, it is not possible to state that any other position is possible nor can the court 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* in relation to a divorced Muslim woman getting something by way of maintenance in the nature of mata has indeed statutorily recognised that view by making provision under the Act not only for the purpose of the "maintenance" but also for

"provision". When these two expressions have been used by the enactment, it obviously means that the legislature did not intend to obliterate the meaning attributed to these two expressions by the Supreme Court in *Shah Bano case*. Therefore, the contentions advanced on behalf of the parties to the contrary cannot be sustained. (Paras 33 and 34)

Mohd. Ahmed Khan v. *Shah Bano Begum*, (1985) 2 SCC 556 : 1985 SCC (Cri) 245, *affirmed*

Arab Ahemadhia Abdulla v. *Arab Bail Mohmuna Saiyadbhai*, AIR 1988 Guj 141 : (1988) 1 Guj LH 294; *Ali* v. *Sufaira*, (1988) 3 Crimes 147 (Ker); *K. Kunhammed Haji* v. *K. Amina*, 1995 Cri LJ 3371 (Ker); *K. Zunaideen* v. *Ameena Begum*, (1998) 2 DMC 468 (Mad); *Karim Abdul Rehman Shaikh* v. *Shehnaz Karim Shaikh*, 2000 Cri LJ 3560 (Bom) (FB); *Jaitunbi Mubarak Shaikh* v. *Mubarak Fakruddin Shaikh*, (1999) 3 Mah LJ 694; *Kaka* v. *Hassan Bano*, (1998) 2 DMC 85 (P&H) (FB), *approved*

Aga Mahomed Jaffer Bindaneem v. *Koolsom Bee Bee*, (1896-97) 24 IA 196 : ILR 25 Cal 9 (PC), *referred to*

Usman Khan Bahamani v. *Fathimunnisa Begum*, 1990 Cri LJ 1364 : AIR 1990 AP 225 (FB); *Abdul Rashid* v. *Sultana Begum*, 1992 Cri LJ 76 (Cal); *Abdul Haq* v. *Yasmin Talat*, 1998 Cri LJ 3433 (MP); *Mohd. Marahim* v. *Raiza Begum*, (1993) 1 DMC 60, *overruled*

To conclude:

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

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

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

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

[**Ed.** : In view of the above, the effect on the following High Court judgments seems to be: *Shaik Dada Saheb* v. *Shaik Mastan Bee*, 1995 Cri LJ 696 (AP); *Nazir Ahmad Ansari* v. *Lateef Bi*, 1996 Cri LJ 1548 (AP) : (1996) 2 Crimes 388 (AP); *Noorunnisha* v. *Maqsood Ahmad*, 1994 Cri LJ 3129 (MP), *impliedly overruled*

Md. Tajuddin v. *Quamarunnisa Begum*, 1989 Cri LJ 2285 (AP), *approved by implication*]

H. **Muslim Women (Protection of Rights on Divorce) Act, 1986 — Applicability — Held, is not applicable to deserted or separated Muslim women or to a Muslim woman whose marriage was solemnised under Special Marriage Act, 1954 or whose marriage was dissolved either under Indian Divorce Act, 1869 or Special Marriage Act, 1954 (Para 26)**

A-M/Z/24576/CR

Advocates who appeared in this case :

Harish N. Salve, Solicitor-General, Ms Indira Jaising, Y.H. Muchhala, N.N. Goswami, A.M. Singhvi, Senior Advocates (Ms Sona Khan, in-person in W.P. (C) No. 868 of 1986, Ms K. Hingorani, N.H. Hingorani, Aman Hingorani, Ms Priya Hingorani, Ms Kamini Jaiswal, Ms Anitha Shenoy, Sanjoy Ghose, Ms Anuja Mirchandani, Ms Malini Poduval, Ms Lansinglu Rongmei, Surya Kant, Ms Sona Kha, K.M.K. Nair, S.C. Patel, Rajesh Prasad Singh, Petitioner in-person for T.C. (C) No. 22 of 1987, Gopal Singh, Sushil Kr. Jain, A. Mishra, Ms Anjali Doshi, Ms Rani Chhabra, Bhaskar Y. Kulkarni, K.C. Dua, E.M.S. Anam, A.K. Sanghi, Badar D. Ahmed Parijat Sinha, Anees Ahmed, Shakeel Ahmed, Mushtaq Ahmed, Ms Lily Isabel Thomas, Ranjit Kumar, Ms Binu Tamta, A.A. Khan, C.V. Subba Rao, Ms Indra Sawhney, W.S.A. Quadri, Amitesh Kumar, Ms Sushma Suri, B.K. Prasad, V.B. Joshi, M. Mohsin Israily, T.N. Singh, Ms Sueshta Bagga, Surya Kant, Respondent in-Person in W.P. (C) No. 12273 of 1984, C.N. Sreekumar, Ajit Pudussery, Ms K. Sarda Devi, T.C. Sharma, Rajiv Sharma, Ms Neelam Sharma, N.R. Choudhury, J.P. Pandey, Som Nath Mukherjee, Avijit Bhattacharjee, Ms Aparna Bhat, Rakesh Prasad, Syed Saif Mahmood, P.C. Sen, S.M. Jadhav, Gaurav Jain and Ms Abha Jain, Advocates, with them) for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. 2000 Cri LJ 3560 (Bom) (FB), *Karim Abdul Rehman Shaikh* v. *Shehnaz Karim Shaikh* 765*a*
2. (1999) 3 Mah LJ 694, *Jaitunbi Mubarak Shaikh* v. *Mubarak Fakruddin Shaikh* 765*a*
3. (1998) 2 DMC 468 (Mad), *K. Zunaideen* v. *Ameena Begum* 765*a*
4. (1998) 2 DMC 85 (P&H) (FB), *Kaka* v. *Hassan Bano* 765*c*
5. 1998 Cri LJ 3433 (MP), *Abdul Haq* v. *Yasmin Talat* 765*d-e*
6. 1995 Cri LJ 3371 (Ker), *K. Kunhammed Haji* v. *K. Amina* 765*a*
7. (1993) 1 DMC 60, *Mohd. Marahim* v. *Raiza Begum* 765*d-e*
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9. 1990 Cri LJ 1364 : AIR 1990 AP 225 (FB), *Usman Khan Bahamani* v. *Fathimunnisa Begum* 765*d-e*
10. AIR 1988 Guj 141 : (1988) 1 Guj LH 294, *Arab Ahemadhia Abdulla* v. *Arab Bail Mohmuna Saiyadbhai* 765*a*
11. (1988) 3 Crimes 147 (Ker), *Ali* v. *Sufaira* 765*a*
12. (1985) 3 SCC 545, *Olga Tellis* v. *Bombay Municipal Corpn.* 763*d*
13. (1985) 2 SCC 556 : 1985 SCC (Cri) 245, *Mohd. Ahmed Khan* v. *Shah Bano Begum* 749*a*, 750*f-g*, 751*f-g*, 751*h*, 753*a*, 753*g*, 753*h*, 754*g-h*, 755*d-e*, 756*f-g*, 761*d*, 761*g*, 761*g-h*, 762*b-c*, 762*f*, 762*f-g*, 762*h*, 763*a*, 763*a-b*, 763*b*, 764*e*, 764*f-g*, 764*g-h*
14. (1980) 4 SCC 125 : 1980 SCC (Cri) 916, *Fuzlunbi* v. *K. Khader Vali* 752*a-b*
15. (1979) 2 SCC 316 : 1979 SCC (Cri) 473, *Bai Tahira* v. *Ali Hussain Fidaalli Chothia* 752*a-b*
16. (1978) 1 SCC 248, *Maneka Gandhi* v. *Union of India* 763*d-e*
17. (1896-97) 24 IA 196 : ILR 25 Cal 9 (PC), *Aga Mahomed Jaffer Bindaneem* v. *Koolsom Bee Bee* 754*a*

The Judgment of the Court was delivered by

RAJENDRA BABU, J.— 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.

2. The facts in *Mohd. Ahmed Khan* v. *Shah Bano Begum*[1] are as follows:

The husband appealed against the judgment of the Madhya Pradesh High Court directing him to pay to his divorced wife Rs 179 per month, enhancing the paltry sum of Rs 25 per month originally granted by the Magistrate. The parties had been married for 43 years before the ill and elderly wife had been thrown out of her husband's residence. For about two years the husband paid maintenance to his wife at the rate of Rs 200 per month. When these payments ceased she petitioned under Section 125 CrPC. The husband immediately dissolved the marriage by pronouncing a triple talaq. He paid Rs 3000 as deferred mahr and a further sum to cover arrears of maintenance and maintenance for the iddat period and he sought thereafter to have the petition dismissed on the ground that she had received the amount due to her on divorce under the Muslim law applicable to the parties. The important feature of the case was that the wife had managed the matrimonial home for more than 40 years and had borne and reared five children and was incapable of taking up any career or independently supporting herself at that late stage of her life — remarriage was an impossibility in that case. The husband, a successful Advocate with an approximate income of Rs 5000 per month provided Rs 200 per month to the divorced wife, who had shared his life for half a century and mothered his five children and was in desperate need of money to survive.

3. Thus, the principal question for consideration before this Court was the interpretation of Section 127(3)(*b*) CrPC that where a Muslim woman had been divorced by her husband and paid her mahr, would it indemnify the husband from his obligation under the provisions of Section 125 CrPC. 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 a conflict between the terms of the Code and the rights and obligations of the individuals, the former would prevail. This Court pointed out that mahr is more closely connected with marriage than with divorce though mahr or a significant portion of it, is usually payable at the time the marriage is dissolved, whether by death or divorce. This fact is relevant in the context of Section 125 CrPC even if it is not relevant in the context of Section 127(3)(*b*) CrPC. Therefore, this Court held that it is a sum payable on divorce within the meaning of Section 127(3)(*b*) CrPC and held that mahr is such a sum which cannot ipso facto absolve the husband's liability under the Act.

4. It was next considered whether the amount of mahr constitutes a reasonable alternative to the maintenance order. If mahr is not such a sum, it cannot absolve the husband from the rigour of Section 127(3)(*b*) CrPC but even in that case, mahr 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

1 (1985) 2 SCC 556 : 1985 SCC (Cri) 245

former husbands under Section 125 CrPC and such applications were not barred under Section 127(3)(*b*) CrPC. The husband had based his entire case on the claim to be excluded from the operation of Section 125 CrPC on the ground that Muslim law exempted him from any responsibility for his divorced wife beyond payment of any mahr due to her and an amount to cover maintenance during the iddat period and Section 127(3)(*b*) CrPC conferred statutory recognition on this principle. Several Muslim organisations, 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 Section 127(3)(*b*) CrPC 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 mahr 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.

5. There was a big uproar thereafter and Parliament enacted the Act perhaps, with the intention of making the decision in *Shah Bano case*[1] ineffective.

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

> "The Supreme Court, in *Mohd. Ahmed Khan* v. *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 Section 125 of the Code of Criminal Procedure, 1973. The Court held that it would be incorrect and unjust to extend the above principle of Muslim law to 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 to Section 125 of the Code of Criminal Procedure.

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

> (*a*) a Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period of iddat by her former husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extended to a period of two years from the dates of birth of the children. She will also be entitled to mahr or dower and all the properties given to her by her relatives, friends, husband and the husband's relatives. If the above benefits are not given to her at the time of divorce, she is entitled to apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of mahr or dower or the delivery of the properties;
>
> (*b*) where a Muslim divorced woman is unable to maintain herself after the period of iddat, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim law in the proportions in which they would inherit her property. If any one of such relatives is unable to pay his or her share on the ground of his or her not having the means to pay, the Magistrate would direct the other relatives who have sufficient means to pay the shares of these relatives also. But where, a divorced woman has no relatives or such relatives or any one of them has not enough means to pay the maintenance or the other relatives who have been asked to pay the shares of the defaulting relatives also do not have the means to pay the shares of the defaulting relatives the Magistrate would order the State Wakf Board to pay the maintenance ordered by him or the shares of the relatives who are unable to pay."

7. 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*[1] held that Muslim law limits the husband's liability to provide for maintenance of the divorced wife to the period of iddat, but it does not contemplate or countenance the situation envisaged by Section 125 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.

8. As held in *Shah Bano case*[1] 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 Section 125 CrPC. Thus it is was held that there is no conflict between the provisions of Section 125 CrPC 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* v. *Ali Hussain Fidaalli Chothia*[2] and *Fuzlunbi* v. *K. Khader Vali*[3].

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

1. Muslim marriage is a contract and an element of consideration is necessary by way of mahr or dower and absence of consideration will discharge the marriage. On the other hand, Section 125 CrPC 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 Section 125 CrPC is part of the Code of Criminal Procedure and not a civil law, which defines and governs rights and obligations of the parties belonging to a particular religion like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Section 125 CrPC, 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 Section 125 CrPC is to offset or to meet a situation where a divorced wife is likely to be led into destitution or vagrancy. Section 125 CrPC 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 Section 125 CrPC 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 country, this discrimination further leads to a monstrous proposition of nullifying a law declared by this Court in

2 (1979) 2 SCC 316 : 1979 SCC (Cri) 473
3 (1980) 4 SCC 125 : 1980 SCC (Cri) 916

Shah Bano case[1]. 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 Section 125 CrPC is to avoid vagrancy, the remedy thereunder cannot be denied to Muslim women.

5. The Act is un-Islamic, unconstitutional and it has the potential of suffocating the Muslim women 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 Section 125 CrPC and consequently, the present Act must be held to be discriminatory and violative of Article 14 of the Constitution; that excluding the application of Section 125 CrPC is violative of Articles 14 and 21 of the Constitution; that the conferment of power on the Magistrate under sub-section (2) of Section 3 and Section 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 under Section 125 CrPC and such deprivement would make the Act unconstitutional, as there is no nexus to deprive a Muslim woman from availing of the remedies available under Section 125 CrPC, notwithstanding the fact that the conditions precedent for availing of the said remedies are satisfied.

10. 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. Under Section 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 that it cannot be for life but would only be for the period of iddat and when that 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 dehors 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 Section 125 CrPC 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 Section 125 CrPC so as to exclude them and apply personal law and the policy of Section 125 CrPC is not to create a right of maintenance dehors the personal law. He further submitted that in *Shah Bano case*[1] 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 Section 3(1)(*a*) is not in discord with the personal law.

11. 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*[1]. 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* v. *Koolsom Bee Bee*[4] particularly in relation to Suras 241 and 242, Chapter II, *The Holy Quran*. He submitted that in interpreting Section 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 penalise the husband but to avoid vagrancy and in this context Section 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 a 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 1957 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 the Muslim personal law and also meet a situation of vagrancy of a Muslim divorced wife even when there is a denial of the remedy provided under Section 125 CrPC 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 law and justice.

12. 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 penalise the husband; that the impugned Act resolves all issues, bearing in mind the personal law of the Muslim community and the fact that the benefits of Section 125 CrPC 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.

13. On behalf of the All-India Muslim Personal 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*[1] 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

4 (1896-97) 24 IA 196 : ILR 25 Cal 9 (PC)

expression would only include the right of residence of a Muslim divorced wife during the iddat period and also during the extended period under Section 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 Abul 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-Zahbi;

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 Haqqi Affendi;

9. Al Muhalla by Ibne Hazm (Arabic);

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

14. On the basis of the aforementioned textbooks, it is contended that the view taken in *Shah Bano case*[1] on the expression "mata" is not correct and the whole object of the enactment has been to nullify the effect of *Shah Bano case*[1] so as to exclude the application of the provision of Section 125 CrPC, however, giving recognition to the personal law as stated in Sections 3 and 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.

15. 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 an 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 are they 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 mahr 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 mahr was not stipulated and deals with obligatory rights of maintenance for observing the iddat period or for breastfeeding 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.

16. 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 Section 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 insofar as her former husband is concerned for the purpose of her survival after the iddat period. Such relief is neither available under Section 125 CrPC nor is it properly compensated by the provision made in Section 4 of the Act. He contended that the remedy provided under Section 4 of the 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 so 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 touchstone 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 Section 5 of the Act makes the availability and applicability of the remedy as provided by Section 125 CrPC 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 Section 3 of the post-iddat period and, therefore, submitted that this provision will have to be held unconstitutional.

17. This Court in *Shah Bano case*[1] 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 Section 125 CrPC 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 Section 125 CrPC. This decision having imposed obligations as

to the liability of the Muslim husband to pay maintenance to his divorced wife, Parliament endorsed by the Act the right of a Muslim woman to be paid maintenance at the time of divorce and to protect her rights.

18. 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 the 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 decide the issues under the Act?

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

19. 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 by respective Benches of this Court either in appeal or special leave petitions or writ petitions.

20. In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated, both economically and socially and women are assigned, invariably, a 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 a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the Wakf Boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the

pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question.

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

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

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

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

22. Sections 3 and 4 of the Act are the principal sections, which are under attack before us. Section 3 opens up with a non obstante clause overriding all other laws and provides that a divorced woman shall be entitled to—

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

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

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

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

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

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

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

26. A reading of the Act will indicate that it codifies and regulates the obligations due to a Muslim woman divorcee by putting them outside the scope of Section 125 CrPC as the "divorced woman" has been defined as "Muslim woman who was married according to Muslim law and has been divorced by or has obtained divorce from her husband in accordance with the Muslim law". But the Act does not apply to a Muslim woman whose marriage is solemnised either under the Indian Special Marriage Act, 1954 or a Muslim woman whose marriage was dissolved either under the Indian Divorce Act, 1869 or the Indian Special Marriage Act, 1954. The Act does not apply to the deserted and separated Muslim wives. The maintenance under the Act is to be paid by the husband for the duration of the iddat period

and this obligation does not extend beyond the period of iddat. Once the relationship with the husband has come to an end with the expiry of the iddat period, the responsibility devolves upon the relatives of the divorcee. The Act follows Muslim personal law in determining which relatives are responsible under which circumstances. If there are no relatives, or no relatives are able to support the divorcee, then the court can order the State Wakf Boards to pay the maintenance.

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

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

29. 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 or properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations: (*1*) to make a "reasonable and fair provision" for his divorced wife; and (*2*) to provide "maintenance" for her. The emphasis of this section is not on the nature or duration of any such "provision" or "maintenance", but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, "within the iddat period". If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both "reasonable and fair provision" and "maintenance" by paying these amounts in a lump sum to his wife, in addition to having paid his wife's mahr and restored her dowry as per Sections 3(1)(*c*) and 3(1)(*d*) of the Act. Precisely, the point that arose for consideration in *Shah Bano case*[1] 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 provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are "a reasonable and fair provision and maintenance to be made and paid" as provided under Section 3(1)(*a*) of the Act and these expressions cover different things, firstly, by the use of two different verbs — "to be made and paid to her within the iddat period" it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4 of the Act, which empowers the Magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to "provision". Obviously, the right to have "a fair and reasonable provision" in her favour is a right enforceable only against the 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*[1] dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether "mata" was rendered "maintenance" or "provision", there could be no pretence that the husband in *Shah Bano case*[1] 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 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*[1], actually codifies the very rationale contained therein.

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

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

32. As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in *Shah Bano case*[1]. 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*[1] 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 241-42 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*[1] 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 case*[1]. 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 that we should presume to be correct. We have analysed the facts and the 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.

33. In *Shah Bano case*[1] this Court has clearly explained as to the rationale behind Section 125 CrPC to make provision for maintenance to be paid to a divorced Muslim wife and this is clearly to avoid vagrancy or destitution on the part of a Muslim woman. The contention put forth on behalf of the Muslim organisations who are interveners before us is that under the Act, vagrancy or destitution is sought to be avoided but not by punishing the erring husband, if at all, but by providing for maintenance through others. If for any reason the interpretation placed by us on the language of Sections 3(1)(*a*) and 4 of the Act is not acceptable, we will have to examine the effect of the provisions as they stand, that is, a Muslim woman will not be entitled to maintenance from her husband after the period of iddat once the talaq is pronounced and, if at all, thereafter maintenance could only be recovered from the various persons mentioned in Section 4 or from the Wakf Board. This Court in *Olga Tellis* v. *Bombay Municipal Corpn.*[5] and *Maneka Gandhi* v. *Union of India*[6] held that the concept of "right to life and personal liberty" guaranteed under Article 21 of the Constitution would include the "right to live with dignity". Before the Act, a Muslim woman who was divorced by her husband was granted a right to maintenance from her husband under the provisions of Section 125 CrPC until she may 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 Section 125 CrPC. Such deprivation of the divorced Muslim women of their right to maintenance from their former husbands under the beneficial provisions of the Code of Criminal Procedure which are otherwise available to all other women in India cannot be stated to have been effected by a reasonable, right, just and fair law and, if these provisions are less beneficial than the provisions of Chapter IX of the Code of Criminal Procedure, a divorced Muslim woman has obviously been unreasonably discriminated and got out of the protection of the provisions of the general law as indicated under the Code which are available to Hindu, Buddhist, Jain, Parsi or

5 (1985) 3 SCC 545
6 (1978) 1 SCC 248

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.

34. The learned counsel appearing for the Muslim organisations contended after referring to various passages from the textbooks 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 that too by way of charity or kindness on the part of her former husband and not as a result of her right flowing to the divorced wife. The effect of various interpretations placed on Suras 241 and 242 of Chapter II of *The Holy Quran* has been referred to in *Shah Bano case*[1]. *Shah Bano case*[1] 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 that any other position is possible nor are we to start on a clean slate after having forgotten the historical background of the enactment. The enactment though purports to overcome the view expressed in *Shah Bano case*[1] in relation to a divorced Muslim woman getting something by way of maintenance in the nature of mata is indeed statutorily recognised by making provision under the Act for the purpose of the "maintenance" but also for "provision". When these two expressions have been used by the enactment, which obviously means that the legislature did not intend to obliterate the meaning attributed to these two expressions by this Court in *Shah Bano case*[1]. Therefore, we are of the view that the contentions advanced on behalf of the parties to the contrary cannot be sustained.

35. In *Arab Ahemadhia Abdulla* v. *Arab Bail Mohmuna Saiyadbhai*[7], *Ali* v. *Sufaira*[8], *K. Kunhammed Haji* v. *K. Amina*[9], *K. Zunaideen* v. *Ameena Begum*[10], *Karim Abdul Rehman Shaikh* v. *Shehnaz Karim Shaikh*[11] and *Jaitunbi Mubarak Shaikh* v. *Mubarak Fakruddin Shaikh*[12] while interpreting the provision of Sections 3(1)(*a*) and 4 of the Act, it is held that a divorced Muslim woman is entitled to a fair and reasonable provision for her future being made by her former husband which must include maintenance for the future extending beyond the iddat period. It was held that the liability of the former husband to make a reasonable and fair provision under Section 3(1)(*a*) of the Act is not restricted only for the period of iddat but that a divorced Muslim woman is entitled to a reasonable and fair provision for her future being made by her former husband and also to maintenance being paid to her for the iddat period. A lot of emphasis was laid on the words "made" and "paid" and were construed to mean not only to make provision for the iddat period but also to make a reasonable and fair provision for her future. A Full Bench of the Punjab and Haryana High Court in *Kaka* v. *Hassan Bano*[13] has taken the view that under Section 3(1)(*a*) of the Act a divorced Muslim woman can claim maintenance which is not restricted to 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* v. *Fathimunnisa Begum*[14], *Abdul Rashid* v. *Sultana Begum*[15], *Abdul Haq* v. *Yasmin Talat*[16] and *Mohd. Marahim* v. *Raiza Begum*[17]. Thus preponderance of judicial opinion is in favour of what we have concluded in the interpretation of Section 3 of the Act. The decisions of the High Courts referred to herein that are contrary to our decision stand overruled.

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

(*1*) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending

7 AIR 1988 Guj 141 : (1988) 1 Guj LH 294
8 (1988) 3 Crimes 147 (Ker)
9 1995 Cri LJ 3371 (Ker)
10 (1998) 2 DMC 468 (Mad)
11 2000 Cri LJ 3560 (Bom) (FB)
12 (1999) 3 Mah LJ 694
13 (1998) 2 DMC 85 (P&H) (FB)
14 1990 Cri LJ 1364 : AIR 1990 AP 225 (FB)
15 1992 Cri LJ 76 (Cal)
16 1998 Cri LJ 3433 (MP)
17 (1993) 1 DMC 60

beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(*a*) of the Act.

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

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

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

37. In the result, Writ Petitions Nos. 868, 996, 1001, 1055, 1062, 1236, 1259 and 1281 of 1986 challenging the validity of the provisions of the Act are dismissed.

38. All other matters where there are other questions raised, the same shall stand relegated for consideration by appropriate Benches of this Court.

END OF THE VOLUME

4. Having regard to the entire facts and circumstances of the case, we consider it appropriate to dispose of the special leave petition with the direction to the petitioner to move an application before the High Court for expunging the remarks by which he feels aggrieved. If such an application is filed, the High Court will decide the same in accordance with law, without being influenced in any manner by any observation made in the present order.

(2005) 3 Supreme Court Cases 636

(BEFORE ARIJIT PASAYAT AND S.H. KAPADIA, JJ.)

SAVITABEN SOMABHAI BHATIYA . . Appellant;

Versus

STATE OF GUJARAT AND OTHERS . . Respondents.

Criminal Appeal No. 399 of 2005†, decided on March 10, 2005

A. **Criminal Procedure Code, 1973 — S. 125 — Order for maintenance of wives, children and parents — "Wife" — Meaning of — Held, expression "wife" as per S. 125 refers to only legally married wife (Paras 8 and 18)**

B. **Criminal Procedure Code, 1973 — S. 125 — Maintenance — Claim of, by second wife — Second marriage invalid — Effect — Held, marriage of a woman in accordance with Hindu rites with a man having a living spouse is a complete nullity in the eye of the law — Such woman is therefore not entitled to the benefit of S. 125 CrPC or the Hindu Marriage Act, 1955 — Scope of S. 125 cannot be enlarged by introducing any artificial definition to include a woman not lawfully married in the expression "wife" — Evidence showing that the respondent husband was having a living spouse at the time of alleged marriage with the appellant claimant — Thus, marriage with appellant was void — Appellant not entitled to maintenance — Plea that appellant was not informed about the respondent's earlier marriage when she married him, was of no avail — Principle of estoppel cannot be pressed into service to defeat the provision of S. 125 — Doctrines — Doctrine of estoppel — Hindu Marriage Act, 1955 — Ss. 11, 24 & 25 — Hindu Adoptions and Maintenance Act, 1956 — S. 18 — Woman not legally married not entitled to maintenance (Paras 8, 15, 18, 20, 17 and 21)**

Yamunabai Anantrao Adhav v. *Anantrao Shivram Adhav*, (1988) 1 SCC 530 : 1988 SCC (Cri) 182 : AIR 1988 SC 644; *Vimala (K.)* v. *Veeraswamy (K.)*, (1991) 2 SCC 375 : 1991 SCC (Cri) 442, *relied on*

C. **Criminal Procedure Code, 1973 — S. 125 — Maintenance — Claim of, by wife — Adjudication upon — Relevance of personal law by which parties concerned are governed — Extent of — Held, provisions of S. 125 are applicable and enforceable whatever may be the personal law of the parties — But, S. 125 requires the claimant taking benefit under sub-section (1)(a) thereof to establish that she is the wife of the person concerned and the said issue can be decided only by reference to the law applicable to the parties — Hence, personal law is relevant for deciding the validity of the marriage and therefore cannot be altogether excluded from consideration — Thus, issue whether the section is attracted or not cannot be answered**

† Arising out of SLP (Crl.) No. 4688 of 2004. From the Judgment and Order dated 25-2-2002 of the Gujarat High Court in Crl. A. No. 568 of 2001

except by reference to the appropriate law governing the parties — Once the right under S. 125 is established by proof of necessary conditions mentioned therein, it cannot be defeated by further reference to the personal law (Paras 9 and 15)

Nanak Chand v. *Chandra Kishore Aggarwal*, (1969) 3 SCC 802 : 1970 SCC (Cri) 127 : AIR 1970 SC 446; *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav*, (1988) 1 SCC 530 : 1988 SCC (Cri) 182 : AIR 1988 SC 644, *relied on*

D. **Criminal Procedure Code, 1973 — S. 125 — Maintenance — Claim of, by wife — Validity of marriage — Determination of — Standard of proof required for — Law in respect of — *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit*, (1999) 7 SCC 675, reiterated — Evidence Act, 1872, Ss. 103, 102, 50 & 3 (Para 13)**

Dwarika Prasad Satpathy v. *Bidyut Prava Dixit*, (1999) 7 SCC 675 : 1999 SCC (Cri) 1345 : AIR 1999 SC 3348, *followed*

E. **Hindu Marriage Act, 1955 — Ss. 5(i) and 11 — Marriage in contravention of S. 5(i) — Subsistence of an earlier marriage at the time of solemnising the second marriage — Proof of — Held, when a plea of subsisting marriage is raised by the respondent husband it has to be satisfactorily proved by tendering evidence — On facts, earlier marriage of respondent husband was established — Hence, his second marriage with appellant who was claiming maintenance under S. 125 CrPC was void — Evidence Act, 1872, S. 3 — Criminal Procedure Code, 1973, S. 125 (Paras 19, 20 and 15)**

Vimala (K.) v. *Veeraswamy (K.)*, (1991) 2 SCC 375 : 1991 SCC (Cri) 442, *relied on*

F. **Criminal Procedure Code, 1973 — S. 125 (as amended by Act 50 of 2001) — Maintenance to child — Quantum of — Adequacy of — Question as to — High Court enhancing quantum from Rs 350 to Rs 500 — No dispute raised regarding enhancement and in fact there was a concession to the prayer for enhancement before the High Court — By amendment of S. 125 in 2001 the maximum limit regarding grant of maintenance prescribed at Rs 500, omitted — Considering the peculiar facts of the case, amount of maintenance enhanced to Rs 850 with effect from the date of judgment of the Supreme Court — Criminal Procedure Code (Amendment) Act, 2001, S. 2 (Paras 22 and 23)**

G. **Criminal Procedure Code, 1973 — S. 125 — Maintenance to child — Claim of — Full and final settlement of claim — Maintenance claimed for her child by a woman (appellant) whose marriage with alleged husband (Respondent 2) was void — Respondent 2 agreeing to pay a lump sum amount to settle the dispute — Supreme Court directing him to pay a sum of Rs 2 lakhs to appellant within 4 months by way of bank draft in the name of child — Further direction that the said amount be kept in a fixed deposit with monthly interest payment facility till the child attains majority — Till the said deposit is made, the quantum of maintenance fixed by the Supreme Court i.e. Rs 850 directed to be paid (Para 24)**

H. **Criminal Procedure Code, 1973 — S. 125 — Maintenance — Claim as to enhancement of — Amendment in claim petition in respect of — Necessity — Submission made by respondent that there was no amendment made to the claim petition seeking enhancement — Rejection of, by Supreme Court holding that the said plea was too technical — Practice and Procedure — Technical plea (Para 23)**

I. **Criminal Procedure Code, 1973 — S. 125 — Provision under — Object of — Approach while construction of said provision — Interpretation of Statutes — Particular statutes or provisions — Social welfare legislation — Provision under S. 125 CrPC, 1973 — Constitution of India, Arts. 15(3) & 39**

Held :

Section 125 CrPC is enacted for social justice and specially to protect women and children as also old and infirm poor parents and falls within the constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution. The provision gives effect to the natural and fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintain themselves. (Para 9)

The sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause — the cause of the derelicts. (Para 14)

Captain Ramesh Chander Kaushal v. *Veena Kaushal*, (1978) 4 SCC 70 : 1978 SCC (Cri) 508 : AIR 1978 SC 1807, *relied on*

J. **Criminal Procedure Code, 1973 — S. 125 — Comparison between S. 125 CrPC and S. 18, Hindu Adoptions and Maintenance Act — Held, there is no inconsistency between S. 125 and the provisions in the 1956 Act — The scope of the two laws is different — Hindu Adoptions and Maintenance Act, 1956, S. 18 (Para 10)**

K. **Criminal Procedure Code, 1973 — S. 125 — Order for maintenance of wives, children and parents — Word "children" — Connotation of — Held, includes an illegitimate child (Para 18)**

W-P-M/TZ/31513/CR

Advocates who appeared in this case :

S.C. Patel, Advocate (SCLSC), for the Appellant;

H.A. Raichura, Ms H.A. Raichura, Himinder Lal, Ms Hemantika Wahi and Mayur Shah, Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (1999) 7 SCC 675 : 1999 SCC (Cri) 1345 : AIR 1999 SC 3348, *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit* 641*e-f*
2. (1991) 2 SCC 375 : 1991 SCC (Cri) 442, *Vimala (K.)* v. *Veeraswamy (K.)* 643*b-c*
3. (1988) 1 SCC 530 : 1988 SCC (Cri) 182 : AIR 1988 SC 644, *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav* 640*g-h*, 642*c*, 642*h*
4. (1978) 4 SCC 70 : 1978 SCC (Cri) 508 : AIR 1978 SC 1807, *Captain Ramesh Chander Kaushal* v. *Veena Kaushal* 642*c*
5. (1969) 3 SCC 802 : 1970 SCC (Cri) 127 : AIR 1970 SC 446, *Nanak Chand* v. *Chandra Kishore Aggarwal* 640*g*

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J.— Leave granted.

2. A brief reference to the factual position would suffice because essentially the dispute has to be adjudicated with reference to scope and ambit of Section 125 of the Code of Criminal Procedure, 1973 (in short "the Code").

3. The case at hand according to the appellant is a classic example of the inadequacies of law in protecting a woman who unwittingly entered into relationship with a married man.

4. Factual position as projected by the appellant is as follows:

The appellant claims that she was married to Respondent 2 sometime in 1994 according to the customary rites and rituals of their caste. Though initially, Respondent 2 treated her nicely, thereafter he started ill-treating her and she was subjected to mental and physical torture. On enquiry about the reason for such a sudden change in his behaviour, the appellant came to know that Respondent 2 had developed illicit relationship with a lady named Veenaben. During the period the appellant stayed with the respondent, she became pregnant and subsequently, a child was born. As Respondent 2 neglected the appellant and the child born, an application in terms of Section 125 of the Code was filed claiming maintenance. The application was filed before the learned Judicial Magistrate, First Class (hereinafter referred to as "the JMFC"), Himmatnagar. Respondent 2 opposed the application by filing written statements taking the stand that the appellant was not his legally married wife and the child (Respondent 3) was not his son. He also denied having developed illicit relationship with Veenaben. He claimed that actually she was married to him more than 22 years back and two children were born. Their son Hament had died in a road accident in July 1990. In the claim petition, name of Veenaben was mentioned as the legal heir and in the voters' list, ration card and provident fund records, Veenaben was shown as the wife of Respondent 2. On 23-6-1998 learned JMFC allowed the claim petition and granted maintenance. A criminal revision was filed by Respondent 2 before learned Additional Sessions Judge, Sabarkatha, District Himmatnagar, who by his order dated 26-11-1998 set aside the judgment dated 23-6-1998 as passed by the learned JMFC and remanded the matter to the trial court for adjudication afresh after affording an opportunity to Respondent 2 to cross-examine the witnesses of the appellant. By order dated 31-7-1999, learned JMFC after considering the matter afresh awarded maintenance to both the appellant and the child.

5. Criminal Revision Application No. 65 of 1995 was filed by Respondent 2 against the order dated 31-7-1999. By order dated 12-7-2001, learned Additional District Judge, Sabarkatha dismissed the application. Respondent 2 filed Special Criminal Application No. 568 of 2001 before the Gujarat High Court which by the impugned order held that the appellant was not the legally wedded wife of Respondent 2. Reliance was placed on documents filed by Respondent 2 to conclude that before the alleged date of marriage between the appellant and Respondent 2, the latter was already married to Veenaben with reference to the documents produced. However, maintenance granted to the child (Respondent 3) was maintained and amount as awarded to him i.e. Rs 350 was enhanced to Rs 500. A direction was also given to pay the enhanced amount from the date of order of the learned JMFC i.e. 31-7-1999.

6. In support of the appeal, learned counsel for the appellant submitted that the High Court has taken a too technical view in the matter. Strict proof about a valid marriage is not the sine qua non for getting maintenance under Section 125 of the Code. The documents produced by Respondent 2 to substantiate the plea of earlier marriage with Veenaben should not have been given primacy over the clinching evidence adduced by the appellant to show that she was unaware of the alleged marriage. Since Respondent 2 is guilty of fraud and misrepresentation, the equity should not weigh in his favour. Law is intended to protect destitute and harassed women and rigid interpretation given to the word "wife" goes against the legislative intent. In any event, nothing has been shown by Respondent 2 to show that there is any customary bar for a second marriage. Customs outweigh enacted law. That being the position, the order passed by the learned JMFC should be restored. It was residually submitted that when the amount was claimed as maintenance there was statutory limitation prescribed at Rs 500 which has been done away with by omitting the words of limitation so far as the amount is concerned by amendment in 2001 to CrPC. Therefore, taking into account the high cost of living the quantum of maintenance should be enhanced for the child.

7. In response, learned counsel for Respondent 2 submitted that law is fairly well settled regarding the definition of the expression "wife" and there is no scope for giving an extended meaning to include a woman who is not legally married.

8. There may be substance in the plea of learned counsel for the appellant that law operates harshly against the woman who unwittingly gets into relationship with a married man and Section 125 of the Code does not give protection to such woman. This may be an inadequacy in law, which only the legislature can undo. But as the position in law stands presently there is no escape from the conclusion that the expression "wife" as per Section 125 of the Code refers to only legally married wife.

9. The provision is enacted for social justice and specially to protect women and children as also old and infirm poor parents and falls within the constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution. The provision gives effect to the natural and fundamental duty of a man to maintain his wife, children and parents so long as they are unable to maintain themselves. Its provisions are applicable and enforceable whatever may be the personal law by which the persons concerned are governed. (See *Nanak Chand* v. *Chandra Kishore Aggarwal*[1].) But the personal law of the parties is relevant for deciding the validity of the marriage and therefore cannot be altogether excluded from consideration. (See *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav*[2].)

10. There is no inconsistency between Section 125 of the Code and the provisions in the Hindu Adoptions and Maintenance Act, 1956 (in short "the Adoption Act"). The scope of the two laws is different.

1 (1969) 3 SCC 802 : 1970 SCC (Cri) 127 : AIR 1970 SC 446
2 (1988) 1 SCC 530 : 1988 SCC (Cri) 182 : AIR 1988 SC 644

11. Section 125 of the Code at the point of time when the petition for maintenance was filed reads as follows:

"125. (1) If any person having sufficient means neglects or refuses to maintain—

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

(*b*) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(*c*) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(*d*) his father or mother, unable to maintain himself or herself,

a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (*b*) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Explanation.—For the purposes of this Chapter,—

(*a*) 'minor' means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is deemed not to have attained his majority;

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

12. By the Code of Criminal Procedure (Amendment) Act, 2001 (Central Act 50 of 2001) the words "not exceeding five hundred rupees in the whole" have been omitted w.e.f. 24-9-2001.

13. In *Dwarika Prasad Satpathy* v. *Bidyut Prava Dixit*[3] it was held that the validity of the marriage for the purpose of summary proceedings under Section 125 of the Code is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of marriage in such proceedings is not as strict as is required in a trial of offence under Section 494 of the Indian Penal Code, 1860 (in short "IPC"). If the claimant in proceedings under Section 125 succeeds in showing that she and the respondent have lived together as husband and wife, the court has to presume that they are legally wedded spouses, and in such a situation one who denies the marital status can rebut the presumption. Once it is admitted that the marriage procedure was followed then it is not necessary to further probe as to whether the said procedure was complete as per Hindu rites, in the proceedings under Section 125 of the Code. It is to be noted that when the respondent does not dispute the paternity of the child and accepts the fact that marriage ceremony was performed though not legally perfect, it would hardly lie in his mouth to contend in proceedings under Section 125 of the Code that

3 (1999) 7 SCC 675 : 1999 SCC (Cri) 1345 : AIR 1999 SC 3348

there was no valid marriage as essential rites were not performed at the time of the said marriage. The provision under Section 125 cannot be utilised for defeating the rights conferred by the legislature on the destitute women, children or parents who are victims of social environment. The provision is a measure of social justice and as noted above, specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution.

14. The sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause — the cause of the derelicts. (See *Captain Ramesh Chander Kaushal* v. *Veena Kaushal*[4].)

15. In *Yamunabai case*[2] it was held that the expression "wife" used in Section 125 of the Code should be interpreted to mean only a legally wedded wife. The word "wife" is not defined in the Code except indicating in the Explanation to Section 125 its inclusive character so as to cover a divorcee. A woman cannot be a divorcee unless there was a marriage in the eye of the law preceding that status. The expression must therefore be given the meaning in which it is understood in law applicable to the parties. The marriage of a woman in accordance with Hindu rites with a man having a living spouse is a complete nullity in the eye of the law and she is therefore not entitled to the benefit of Section 125 of the Code or the Hindu Marriage Act, 1955 (in short "the Marriage Act"). Marriage with a person having a living spouse is null and void and not voidable. However, the attempt to exclude altogether the personal law applicable to the parties from consideration is improper. Section 125 of the Code has been enacted in the interest of a wife and one who intends to take benefit under sub-section (1)(*a*) has to establish the necessary condition, namely, that she is the wife of the person concerned. The issue can be decided only by a reference to the law applicable to the parties. It is only where an applicant establishes such status or relationship with reference to the personal law that an application for maintenance can be maintained. Once the right under the provision in Section 125 of the Code is established by proof of necessary conditions mentioned therein, it cannot be defeated by further reference to the personal law. The issue whether the section is attracted or not cannot be answered except by reference to the appropriate law governing the parties.

16. But it does not further the case of the appellant in the instant case. Even if it is accepted as stated by learned counsel for the appellant that the husband was treating her as his wife it is really inconsequential. It is the intention of the legislature which is relevant and not the attitude of the party.

17. In *Yamunabai case*[2] plea similar to the one advanced in the present case that the appellant was not informed about the respondent's earlier

4 (1978) 4 SCC 70 : 1978 SCC (Cri) 508 : AIR 1978 SC 1807

marriage when she married him was held to be of no avail. The principle of estoppel cannot be pressed into service to defeat the provision of Section 125 of the Code.

18. It may be noted at this juncture that the legislature considered it necessary to include within the scope of the provision an illegitimate child but it has not done so with respect to a woman not lawfully married. However desirable it may be, as contended by learned counsel for the appellant to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected in Section 125 of the Code, there is no scope for enlarging its scope by introducing any artificial definition to include a woman not lawfully married in the expression "wife".

19. As noted by this Court in *Vimala (K.)* v. *Veeraswamy (K.)*[5] when a plea of subsisting marriage is raised by the respondent husband it has to be satisfactorily proved by tendering evidence to substantiate that he was already married.

20. In the instant case the evidence on record has been found sufficient by the courts below by recording findings of fact that earlier marriage of the respondent was established.

21. In that view of the matter, the application so far as claim of maintenance of the wife is concerned stands dismissed.

22. That brings us to the other question relating to adequacy of the quantum of maintenance awarded to the child. It is not in dispute that when the claim petition was filed, Rs 500 was claimed as maintenance as that was the maximum amount which could have been granted because of the unamended Section 125. But presently, there is no such limitation in view of the amendment as referred to above.

23. Learned counsel for Respondent 2 submitted that there was no amendment made to the claim petition seeking enhancement. We find that this is a too technical plea. As a matter of fact, Section 127 of the Code permits increase in the quantum. The application for maintenance was filed on 1-9-1995. The order granting maintenance was passed by the learned JMFC on 31-7-1999. The High Court enhanced the quantum awarded to the child from Rs 350 to Rs 500 with effect from the order passed by learned JMFC. No dispute has been raised regarding enhancement and in fact there was a concession to the prayer for enhancement before the High Court as recorded in the impugned judgment. Considering the peculiar facts of the case, we feel that the amount of maintenance to the child can be enhanced to Rs 850 with effect from today.

24. Learned counsel for Respondent 2 has submitted that as a humanitarian gesture, Respondent 2 agrees to pay a lump sum amount to settle the dispute. In case Respondent 2 pays a sum of rupees two lakhs only within a period of four months to the appellant, the same shall be in full and final settlement of the claim of Respondent 3 for maintenance. While fixing the quantum we have taken note of the likely return as interest in case it is invested in fixed deposit in a nationalised bank, and the likely increase in the

5 (1991) 2 SCC 375 : 1991 SCC (Cri) 442

quantum of maintenance till Respondent 3 attains majority. Till deposit is made, the quantum fixed by this order shall be paid. If Respondent 2 wants to make lump sum payment in terms of this order, the amount shall be paid by bank draft in the name of Respondent 3 with the appellant as mother guardian. The amount shall be kept in a fixed deposit with monthly interest payment facility till Respondent 3 attains majority.

25. The appeal is accordingly disposed of.

(2005) 3 Supreme Court Cases 644

(BEFORE S.N. VARIAVA, DR. AR. LAKSHMANAN AND S.H. KAPADIA, JJ.)

COMMISSIONER OF CENTRAL EXCISE, VADODARA . . Appellant;

Versus

MARIGOLD PAINTS (P) LTD., ANAND, GUJARAT . . Respondent.

Civil Appeals No. 5948 of 1999 with No. 4934 of 1999,
decided on March 10, 2005

A. **Excise — Valuation — Packing material — Secondary packing — Cardboard box used to pack paint tins — Value of such cardboard box if includible in the assessable value of paints — CEGAT's holding against the Revenue, upheld — Central Excise Act, 1944, S. 4(4)(d)(i) (Para 2)**

Geep Industrial Syndicate Ltd. v. *Union of India*, (2005) 3 SCC 483 : (1992) 61 ELT 328 (SC); *CCE* v. *Ponds India Ltd.*, (1989) 4 SCC 759 : 1990 SCC (Tax) 144 : (1989) 44 ELT 185, *followed*

B. **Excise — Appeal to Supreme Court — Pleadings/New plea — Valuation of paints — Trade discount if not deductible — Such a plea not having been taken in the appeals, disallowed to be raised at this stage in the present appeals — Central Excise Act, 1944, S. 35-L(b) — New plea (Para 4)**

Appeals dismissed H-M/31572/C

Chronological list of cases cited ***on page(s)***

1. (2005) 3 SCC 483 : (1992) 61 ELT 328 (SC), *Geep Industrial Syndicate Ltd.* v. *Union of India* 644*h*
2. (1989) 4 SCC 759 : 1990 SCC (Tax) 144 : (1989) 44 ELT 185, *CCE* v. *Ponds India Ltd.* 645*a*

ORDER

1. Civil Appeal No. 5948 of 1999 is against the judgment dated 11-11-1998 and Civil Appeal No. 4934 of 1999 is against the judgment dated 15-4-1999 passed by the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT).

2. The question is whether the value of secondary packing i.e. cardboard box, used to pack paint tins, is to be included in the assessable value of the goods, namely, paints. In our view, this case is fully covered by the principles laid down in the cases of *Geep Industrial Syndicate Ltd.* v. *Union of India*[1]

1 (2005) 3 SCC 483 : (1992) 61 ELT 328 (SC)

(2008) 2 Supreme Court Cases 316

(BEFORE DR. ARIJIT PASAYAT AND AFTAB ALAM, JJ.)

CHATURBHUJ .. Appellant;

Versus

SITA BAI .. Respondent.

Criminal Appeal No. 1627 of 2007†, decided on November 27, 2007

A. **Criminal Procedure Code, 1973 — S. 125 — Maintenance — Claim of, by deserted wife — Requisites for maintaining proceedings — Held, burden in the first place is upon wife to show that means of her husband are sufficient — Also, an inseparable condition has to be established that wife is unable to maintain herself — These two conditions, held, are in addition to the requirement that husband must have neglected or refused to maintain his wife — In the instant case, there was no dispute that appellant husband had requisite means — He had placed material to show that respondent wife was earning some income — Held, that was not sufficient to rule out application of S. 125 as it had to be established that with the amount she earned she was able to maintain herself — Herein, the trial court, the Revisional Court and the High Court had analysed evidence and held that respondent wife was unable to maintain herself — Conclusions, held, are essentially factual and are not perverse — Hence, there is no scope for interference (Paras 7 and 9)**

B. **Criminal Procedure Code, 1973 — S. 125 — Maintenance — Claim of, by wife — Requisite for maintaining proceedings — Condition to establish that wife unable to maintain herself — Basis of and test required, considered — Words and Phrases — "Unable to maintain herself" — Meaning of, clarified**

Where the wife was surviving by begging, it would not amount to her ability to maintain herself. It can also be not said that the wife has been capable of earning but she was not making an effort to earn. Whether the deserted wife was unable to maintain herself, has to be decided on the basis of the material placed on record. Where the personal income of the wife is insufficient she can claim maintenance under Section 125 CrPC. The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. The wife should be in a position to maintain a standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 CrPC. (Para 8)

Bhagwan Dutt v. *Kamla Devi*, (1975) 2 SCC 386 : 1975 SCC (Cri) 563 : AIR 1975 SC 83, *relied on*

C. **Criminal Procedure Code, 1973 — S. 125 — Maintenance proceedings — Object of — Held, is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support — Words and Phrases — "Unable to maintain herself" — Meaning of — Means inability of wife to maintain herself in the way she was used to in the place of her husband**

† Arising out of SLP (Crl.) No. 4379 of 2006. From the Judgment and Order dated 31-3-2006 of the High Court of Madhya Pradesh, Bench at Indore in Misc. Crl. Case No. 1385 of 2006

The respondent wife had filed an application before the trial court under Section 125 CrPC claiming maintenance from the appellant husband. The appellant and the respondent had entered into marital knot about four decades back and for more than two decades they were living separately. In the application it was claimed that she was unemployed and unable to maintain herself.

Considering the evidence on record, the trial court found that the respondent applicant had no sufficient means to maintain herself and hence direction to pay her Rs 1500 p.m. was given. Revision filed thereagainst was dismissed. Application was filed by the appellant in the High Court under Section 482 CrPC. The High Court noticed that the conclusions had been arrived at on appreciation of evidence and, therefore, there was no scope for any interference. Hence the present appeal.

Dismissing the appeal, the Supreme Court

Held :

The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase "unable to maintain herself" in the instant case would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow. (Para 6)

D. **Criminal Procedure Code, 1973 — S. 125 — Maintenance proceedings — Scope and effect under — Held, S. 125 is a measure of social justice specially enacted to protect women and children and falls within constitutional sweep of Art. 15(3) reinforced by Art. 39 — Object is to prevent vagrancy and destitution — It provides a speedy remedy for supply of food, clothing and shelter to the deserted wife — It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves — Constitution of India, Arts. 15(3) and 39 (Para 6)**

Captain Ramesh Chander Kaushal v. *Veena Kaushal*, (1978) 4 SCC 70 : 1978 SCC (Cri) 508 : AIR 1978 SC 1807; *Savitaben Somabhai Bhatiya* v. *State of Gujarat*, (2005) 3 SCC 636 : 2005 SCC (Cri) 787 : (2005) 2 Supreme 503, *relied on*

Y-M/AK/36996/CR

Advocates who appeared in this case :
Shashindra Tripathi, Ms Sharad Tripathi and Debasis Misra, Advocates, for the Appellant;
Shashi Bhushan Kumar, Advocate, for the Respondent.

Chronological list of cases cited ***on page(s)***

1. (2005) 3 SCC 636 : 2005 SCC (Cri) 787 : (2005) 2 Supreme 503, *Savitaben Somabhai Bhatiya* v. *State of Gujarat* 320*b-c*
2. (1978) 4 SCC 70 : 1978 SCC (Cri) 508 : AIR 1978 SC 1807, *Captain Ramesh Chander Kaushal* v. *Veena Kaushal* 320*a-b*
3. (1975) 2 SCC 386 : 1975 SCC (Cri) 563 : AIR 1975 SC 83, *Bhagwan Dutt* v. *Kamla Devi* 320*f*

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J.— Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Madhya Pradesh High Court, Indore Bench, dismissing the

revision petition filed by the appellant in terms of Section 482 of the Code of Criminal Procedure, 1973 (in short "CrPC"). The challenge before the High Court was to the order passed by the learned Judicial Magistrate, First Class, Neemuch, M.P. as affirmed by the learned Additional Sessions Judge, Neemuch, M.P.

3. The respondent had filed an application under Section 125 CrPC claiming maintenance from the appellant. Undisputedly, the appellant and the respondent had entered into marital knot about four decades back and for more than two decades they were living separately. In the application it was claimed that she was unemployed and unable to maintain herself. The appellant had retired from the post of Assistant Director of Agriculture and was getting about Rs 8000 as pension and a similar amount as house rent. Besides this, he was lending money to people on interest. The respondent claimed Rs 10,000 as maintenance. The stand of the appellant was that the applicant was living in the house constructed by the present appellant who had purchased 7 bighas of land in Ratlam in the name of the applicant. She let out the house on rent and since 1979 was residing with one of their sons. The applicant sold the agricultural land on 13-3-2003. The sale proceeds were still with the applicant. The appellant was getting pension of about Rs 5700 p.m. and was not getting any house rent regularly. He was getting 2-3 thousand rupees per month. The plea that the appellant had married another lady was denied. It was further submitted that the applicant at the relevant point of time was staying in the house of the appellant and electricity and water dues were being paid by him. The applicant can maintain herself from the money received from the sale of agricultural land and rent. Considering the evidence on record, the trial court found that the respondent applicant did not have sufficient means to maintain herself.

4. Revision petition was filed by the present appellant. Challenge was to the direction to pay Rs 1500 p.m. by the trial court. The stand that the applicant was able to maintain herself from her income was reiterated. The Revisional Court analysed the evidence and held that the appellant's monthly income was more than Rs 10,000 and the amount received as rent by the respondent claimant was not sufficient to maintain herself. The revision was accordingly dismissed. The matter was further carried before the High Court by filing an application in terms of Section 482 CrPC. The High Court noticed that the conclusions have been arrived at on appreciation of evidence and, therefore, there is no scope for any interference.

5. Section 125 CrPC reads as follows:

> "125. *Order of maintenance of wives, children and parents.*—(1) If any person having sufficient means neglects or refuses to maintain—
>
> (*a*) his wife, unable to maintain herself, or
>
> (*b*) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
>
> (*c*) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
>
> (*d*) his father or mother, unable to maintain himself or herself,

a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in Clause (*b*) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

b *Explanation*.—For the purposes of this Chapter,—

(*a*) 'minor' means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority;

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

c (2) Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying d fines, and may sentence such person, for the whole, or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount e due under this section unless application be made to the court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

f *Explanation*.—If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without g any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

h **6.** The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have

a moral claim to support. The phrase "unable to maintain herself" in the instant case would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow. Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in *Captain Ramesh Chander Kaushal* v. *Veena Kaushal*[1] falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in *Savitaben Somabhai Bhatiya* v. *State of Gujarat*[2].

7. Under the law the burden is placed in the first place upon the wife to show that the means of her husband are sufficient. In the instant case there is no dispute that the appellant has the requisite means. But there is an inseparable condition which has also to be satisfied that the wife was unable to maintain herself. These two conditions are in addition to the requirement that the husband must have neglected or refused to maintain his wife. It has to be established that the wife was unable to maintain herself. The appellant has placed material to show that the respondent wife was earning some income. That is not sufficient to rule out application of Section 125 CrPC. It has to be established that with the amount she earned the respondent wife was able to maintain herself.

8. In an illustrative case where the wife was surviving by begging, it would not amount to her ability to maintain herself. It can also be not said that the wife has been capable of earning but she was not making an effort to earn. Whether the deserted wife was unable to maintain herself, has to be decided on the basis of the material placed on record. Where the personal income of the wife is insufficient she can claim maintenance under Section 125 CrPC. The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. In *Bhagwan Dutt* v. *Kamla Devi*[3] it was observed that the wife should be in a position to maintain a standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 CrPC.

9. In the instant case the trial court, the Revisional Court and the High Court have analysed the evidence and held that the respondent wife was unable to maintain herself. The conclusions are essentially factual and they are not perverse. That being so there is no scope for interference in this appeal which is dismissed.

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1 (1978) 4 SCC 70 : 1978 SCC (Cri) 508 : AIR 1978 SC 1807
2 (2005) 3 SCC 636 : 2005 SCC (Cri) 787 : (2005) 2 Supreme 503
3 (1975) 2 SCC 386 : 1975 SCC (Cri) 563 : AIR 1975 SC 83

(2010) 1 Supreme Court Cases 666

(BEFORE B. SUDERSHAN REDDY AND DEEPAK VERMA, JJ.)

SHABANA BANO .. Appellant;

Versus

IMRAN KHAN .. Respondent.

Criminal Appeal No. 2309 of 2009†, decided on December 4, 2009

A. **Family Courts Act, 1984 — S. 7(1) Expln. (f), Ss. 20, 3 and 2(d) — Divorced Muslim wife's maintenance petition against ex-husband filed under S. 125 CrPC before Family Court — Maintainability and temporal extent of maintenance — Such application till the applicant does not remarry, held, maintainable irrespective of absence of any application under S. 5 of Muslim Women (Protection of Rights on Divorce) Act, 1986 — Her entitlement to maintenance continues even in post-*iddat* period as long as she does not remarry — Hence, orders of courts below restricting the maintenance amount to *iddat* period set aside and matter remanded for disposal in accordance with law — Criminal Procedure Code, 1973 — S. 125 — Muslim Women (Protection of Rights on Divorce) Act, 1986 — Ss. 3, 4 and 5 — Muslim Law — Maintenance — Constitution of India — Art. 136 — Practice and Procedure — Remand — When warranted**
(Paras 14 to 16 and 21 to 24)

B. **Family Courts Act, 1984 — Ss. 7(1)(a), (b) & Expln. (f), Ss. 20, 3 and 2(d) — Jurisdiction of Family Court — Held, it has exclusive jurisdiction to adjudicate upon applications under S. 125 CrPC — Criminal Procedure Code, 1973 — S. 125** **(Paras 14 to 16)**

C. **Criminal Procedure Code, 1973 — S. 125 — Nature and interpretation of — Held, it is beneficial legislation — Hence, its benefit must accrue even to divorced Muslim wife — Interpretation of Statutes — Particular statutes or provisions — Beneficent or beneficial legislation**
(Para 23)

Danial Latifi v. *Union of India*, (2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266; *Iqbal Bano* v. *State of U.P.*, (2007) 6 SCC 785 : (2007) 3 SCC (Cri) 258, *followed*

Mohd. Ahmed Khan v. *Shah Bano Begum*, (1985) 2 SCC 556 : 1985 SCC (Cri) 245; *Vijay Kumar Prasad* v. *State of Bihar*, (2004) 5 SCC 196 : 2004 SCC (Cri) 1576, *cited*

D. **Family Courts Act, 1984 — Preamble and Prefatory Note — Statement of Objects and Reasons — Objects of the Act, restated — The Act, inter alia, seeks to exclusively provide within jurisdiction of Family Courts the matters relating to maintenance, including proceedings under Ch. IX CrPC — Criminal Procedure Code, 1973 — Ch. IX (Ss. 125 to 128)**
(Para 13)

E. **Constitution of India — Art. 136 — Costs — Quantified at Rs 5000 — Civil Procedure Code, 1908 — S. 35 — Practice and Procedure — Costs**
(Para 24)

Appeal partly allowed H-D/A/44334/CR

† Arising out of SLP (Crl.) No. 717 of 2009. From the Judgment and Order dated 26-9-2008 of the High Court of Judicature at Jabalpur Bench at Gwalior in Crl. Revision Case No. 285 of 2008

Advocates who appeared in this case :
D. Mahesh Babu, Advocate, for the Appellant;
S.K. Dubey, Senior Advocate (Rajesh, Dharam Singh and Yogesh Tiwari, Advocates) for the Respondent.

Chronological list of cases cited ***on page(s)***

1. (2007) 6 SCC 785 : (2007) 3 SCC (Cri) 258, *Iqbal Bano* v. *State of U.P.* 672*a*, 672*g*
2. (2004) 5 SCC 196 : 2004 SCC (Cri) 1576, *Vijay Kumar Prasad* v. *State of Bihar* 672*b-c*
3. (2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266, *Danial Latifi* v. *Union of India* 670*g*, 672*g*
4. (1985) 2 SCC 556 : 1985 SCC (Cri) 245, *Mohd. Ahmed Khan* v. *Shah Bano Begum* 671*d*, 671*d-e*, 671*f*, 671*f-g*, 671*g*

The Judgment of the Court was delivered by

DEEPAK VERMA, J.— Leave granted. The appellant Shabana Bano was married to the respondent Imran Khan according to Muslim rites in Gwalior on 26-11-2001. According to the appellant, at the time of marriage, necessary household goods to be used by the couple were given. However, despite this, the respondent husband and his family members treated the appellant with cruelty and continued to demand more dowry. After some time, the appellant became pregnant and was taken to her parents' house by the respondent. The respondent threatened the appellant that in case his demand of dowry is not met by the appellant's parents, then she would not be taken back to her matrimonial home even after delivery.

2. The appellant delivered a child in her parental home. Since even after delivery, the respondent did not think it proper to discharge his responsibility by taking her back, she was constrained to file a petition under Section 125 of the Code of Criminal Procedure (for short "CrPC") against the respondent in the Court of Family Judge, Gwalior. It was averred by the appellant that the respondent has been earning a sum of Rs 12,000 per month by doing some private work and she had no money to maintain herself and her new-born child. Thus, she claimed a sum of Rs 3000 per month from the respondent towards maintenance.

3. On notice being issued to the respondent, he denied all the contents of the petition filed by the appellant under Section 125 CrPC except admitting his marriage with the appellant. Preliminary objections were raised by the respondent that the appellant has already been divorced on 20-8-2004 in accordance with Muslim Law. Thus, under the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as "the Muslim Act"), the appellant is not entitled to any maintenance after the divorce and after the expiry of the *iddat* period. It was also contended by him that the appellant herself is earning Rs 6000 per month by giving private tuitions and is not dependent on the income of the respondent, thus, she is not entitled to any maintenance.

4. It was also contended by the respondent that the appellant had gone to her parental home on her own free will and accord, after taking all the jewellery and a sum of Rs 1000 and despite notice being sent, she has not

returned to her matrimonial home. Thus, for all these reasons, she is not entitled to receive any amount of maintenance.

5. The Family Court was pleased to frame issues and the parties went to trial. After considering the matter from all angles, the learned Judge of the Family Court partly allowed the appellant's application as under:

> "(*1*) The respondent shall pay Rs 2000 per month as maintenance allowance to the petitioner from 26-4-2004, date of institution of the petition to the date of divorce i.e. 20-8-2004 and thereafter from 20-8-2004 to the period of *iddat*.
>
> (*2*) The respondent will bear costs of the suit of himself as well as of the petitioner."

Thus, the claim of the appellant was allowed to the extent of Rs 2000 per month towards maintenance from the date of institution of the petition till the date of divorce i.e. 20-8-2004 and further from the said date till the expiry of *iddat* period but the amount of maintenance thereafter was denied.

6. The appellant was, therefore, constrained to carry the matter further by filing Criminal Revision No. 285 of 2008 before the Gwalior Bench of the High Court of Madhya Pradesh. The said criminal revision came to be disposed of by the learned Single Judge on 26-9-2008 and the order of the Family Court has substantially been upheld and consequently, the appellant's revision has been dismissed. It is this order and the order passed by the Family Court which are the subject-matter of challenge in this appeal by grant of special leave.

7. At the outset, learned counsel for the appellant contended that the learned Single Judge has gravely erred in dismissing the appellant's revision on misconception of law on the ground that after divorce of a Muslim wife, a petition under Section 125 CrPC would not be maintainable. It was also contended that the learned Single Judge proceeded on wrong assumption in dismissing the appellant's revision claiming maintenance under Section 125 CrPC. It was also argued that both the courts below completely lost sight of the provisions of Section 7(1)(*f*) of the Family Courts Act, 1984 (hereinafter referred to as "the Family Act").

8. On the other hand, Shri S.K. Dubey, learned Senior Counsel for the respondent contended that no illegality or perversity can be found in the order passed by the learned Single Judge and the same calls for no interference. It was also contended that the appeal being devoid of any merit and substance, deserves to be dismissed.

9. In the light of the aforesaid contentions, we have heard the learned counsel for the parties and perused the records.

10. 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 CrPC and, if yes, then through which forum.

11. Section 4 of the 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 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, 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."

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

13. The Family Act was enacted w.e.f. 14-9-1984 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, emphasising 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 CrPC.

14. Section 7 appearing in Chapter III of the Family Act deals with jurisdiction. The 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*)-(*e*) * * *

(*f*) a suit or proceeding for maintenance;

(*g*) * * *"

15. 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."

A 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.

16. Thus, from the abovementioned provisions it is quite discernible that a Family Court established under the Family Act shall exclusively have jurisdiction to adjudicate upon the applications filed under Section 125 CrPC.

17. 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 the matter stands finally settled but the 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.

18. In our opinion, the point stands settled by the judgment of this Court in *Danial Latifi* v. *Union of India*[1] pronounced by a Constitution Bench of this Court. Paras 30, 31 and 32 thereof fully establish the said right of the appellant. The said paras are reproduced hereinunder: (SCC pp. 762-63)

"*30.* A comparison of these provisions with Section 125 CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those

1 (2001) 7 SCC 740 : (2007) 3 SCC (Cri) 266

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

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

32. As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in *Mohd. Ahmed Khan* v. *Shah Bano Begum*[2]. 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*[2] 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 241-42 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*[2] 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 case*[2]. 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 that we should presume to be correct. We have analysed the facts and the law in *Shah Bano case*[2] 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."

2 (1985) 2 SCC 556 : 1985 SCC (Cri) 245

19. The judgment of this Court in *Iqbal Bano* v. *State of U.P.*[3] whereby the provisions contained in Section 125 CrPC have been aptly considered and the relevant portion of the order passed in *Iqbal Bano case*[3] reads as under: (SCC p. 791, para 10)

> "*10.* Proceedings under Section 125 CrPC 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 CrPC and claims made under the Act are tried by the same court. In *Vijay Kumar Prasad* v. *State of Bihar*[4] it was held that proceedings under Section 125 CrPC 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.' "

20. 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.

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

22. The learned Single Judge appeared to be little confused with regard to different provisions of the Muslim Act, the Family Act and CrPC and thus was wholly unjustified in rejecting the appellant's revision.

23. Cumulative reading of the relevant portions of the judgments of this Court in *Danial Latifi*[1] and *Iqbal Bano*[3] 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.

3 (2007) 6 SCC 785 : (2007) 3 SCC (Cri) 258
4 (2004) 5 SCC 196 : 2004 SCC (Cri) 1576

24. 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 CrPC 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 costs of litigation of the appellant. Counsel's fees Rs 5000.

25. Consequently, the appeal stands allowed to the extent indicated above.

(2010) 1 Supreme Court Cases 673

(BEFORE TARUN CHATTERJEE AND AFTAB ALAM, JJ.)

BHARAT SANCHAR NIGAM LIMITED
AND ANOTHER .. Appellants;

Versus

DHANURDHAR CHAMPATIRAY .. Respondent.

Civil Appeals No. 8230 of 2009† with Nos. 8231 of 2009‡, 8232 of 2009††, 8233 of 2009†‡ and 8234 of 2009‡†, decided on December 11, 2009

A. **Arbitration and Conciliation Act, 1996 — Ss. 11(6) & (5) — Failure of a party to appoint arbitrator as per the appointment procedure within 30 days from receipt of request from other party to do so — Right of said party to appoint arbitrator subsequent thereto — Does not automatically cease after expiry of period of 30 days but continues till the application under S. 11(6) is filed by the other party — 30 days' limitation cannot be invoked as mandatory period under S. 11(6) (Paras 7 to 10)**

Punj Lloyd Ltd. v. *Petronet MHB Ltd.*, (2006) 2 SCC 638; *Datar Switchgears Ltd.* v. *Tata Finance Ltd.*, (2000) 8 SCC 151; *Ace Pipeline Contracts (P) Ltd.* v. *Bharat Petroleum Corpn. Ltd.*, (2007) 5 SCC 304, *followed*

B. **Arbitration and Conciliation Act, 1996 — Ss. 11(6) & (8) — Appointment of arbitrator by court under S. 11(6) — Matters to be considered — Obligation to give due regard to the twin requirements of S. 11(8) i.e. the qualifications required of arbitrator by the agreement concerned and other considerations necessary to secure the appointment of an independent and impartial arbitrator — Law laid down by Supreme Court in *Patel Engg. Co. Ltd. case*, (2008) 10 SCC 240 in relation to, applied — Since before appointing arbitrator under S. 11(6), High Court had failed to take into consideration the effect of S. 11(8), matter remitted to High Court for deciding application under S. 11(6) afresh keeping in view the decision made in *Patel Engg. Co. Ltd. case* (Paras 14 to 16)**

† Arising out of SLP (C) No. 8218 of 2007. From the Judgment and Order dated 5-1-2007 of the High Court of Orissa at Cuttack in Arbitration Petition No. 11 of 2005

‡ Arising out of SLP (C) No. 8222 of 2007

†† Arising out of SLP (C) No. 8224 of 2007

†‡ Arising out of SLP (C) No. 8226 of 2007

‡† Arising out of SLP (C) No. 8234 of 2007

(2010) 15 Supreme Court Cases 287

(BEFORE MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.)

MANOJ YADAV .. Petitioner;

Versus

PUSHPA ALIAS KIRAN YADAV .. Respondent.

SLP (Crl.) No. 6568 of 2009†, decided on November 23, 2010

Criminal Procedure Code, 1973 — S. 125 — Maintenance — Maximum limit fixed by different States by respective State amendments prior to enactment of Criminal Procedure Code (Amendment) Act, 2001 by Parliament by which words "not exceeding five hundred rupees in the whole" in S. 125(1) were deleted w.e.f. 24-9-2001 — Held, prima facie, in view of 2001 Amendment, maximum maintenance prescribed by State Legislatures was no longer valid in view of Art. 254(1), apart from being violative of Arts. 14 and 21 of the Constitution — Notices issued to States of M.P., Maharashtra, Rajasthan, Tripura and U.P. who may file counter-affidavits within four weeks — Constitution of India — Arts. 21 and 14 — Family and Personal Laws — Maintenance — Quantum of, that may be awarded under S. 125 CrPC

Manoj Yadav v. *Pushpa*, (2010) 15 SCC 289, *modified*

R-D/47010/SRV

Advocates who appeared in this case :

Ms Kamini Jaiswal (Amicus Curiae), Jay Prakash Pandey and Nikilesh Ramachandran, Advocates, for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. (2010) 15 SCC 289, *Manoj Yadav* v. *Pushpa* 287*e*

ORDER

1. Yesterday (22-11-2010[1]) we had passed an order in this case, but subsequently Ms Kamini Jaiswal, whom we had requested to be amicus curiae in this case, informed us that the above order requires some modification. We agree with this submission, and accordingly we are modifying the order passed yesterday.

2. It appears that in the original Criminal Procedure Code of 1973 the maximum maintenance which could be granted by the Magistrate under Section 125(1) CrPC was Rs 500 per month. Subsequently by the Criminal Procedure Code (Amendment) Act of 2001 enacted by Parliament the words "not exceeding five hundred rupees in the whole" in Section 125(1) were deleted w.e.f. 24-9-2001.

3. In the Statement of Objects and Reasons to the Act of 2001 it was stated:

> "2. The ceiling of rupees five hundred per month for maintenance allowance was prescribed in the year 1955 in Section 488 of the Code of

† From the Judgment and Order dated 23-1-2009 of the High Court of Madhya Pradesh at Jabalpur, Bench at Gwalior in Crl. Revision No. 12 of 2008

1 *Manoj Yadav* v. *Pushpa*, (2010) 15 SCC 289

Criminal Procedure, 1898. A ceiling of rupees five hundred was prescribed in Section 125 of the Code of Criminal Procedure, 1973 on the lines of Section 488 of the Code of Criminal Procedure, 1898 which has since been repealed. In view of the cost of living index constantly rising, retention of a maximum ceiling is not justified. If a ceiling is prescribed and retained, it would require periodic revision taking into account the inflation and rise in the cost of living as well as amendment of provisions of the Act from time to time. This would necessarily be time consuming. Accordingly, it is also proposed to amend Section 125 and make consequential changes in Section 127 of the Code of Criminal Procedure, 1973 to remove the ceiling of maintenance allowance."

4. Prior to the 2001 Amendment of the Code of Criminal Procedure by Parliament many State Legislatures had passed State amendments to Section 125(1) of the Code of Criminal Procedure enhancing the maximum maintenance which could be granted from Rs 500 per month to a higher figure. Obviously it was felt by those State Legislatures that Rs 500 per month is not sufficient. Hence these State amendments were made for the benefit of the women because at that time the 2001 Amendment had not been enacted by Parliament, and there was a maximum limit of Rs 500 per month in Section 125(1) for grant as maintenance.

5. The States which had made these State amendments prior to the 2001 Amendment enhancing the maintenance from Rs 500 per month to a higher figure are the States of Madhya Pradesh, Maharashtra, Rajasthan, Tripura and Uttar Pradesh.

6. We are prima facie of the opinion that in view of the 2001 Amendment to the Code of Criminal Procedure by Parliament, the maximum maintenance prescribed by the abovementioned State Legislatures are no longer valid in view of Article 254(1) of the Constitution, apart from being unconstitutional now as being violative of Articles 14 and 21 of the Constitution as we have indicated in our order passed yesterday. However, this is only our prima facie opinion and subject to the final order passed in this case.

7. Issue notice to the State Governments of Madhya Pradesh, Maharashtra, Rajasthan, Tripura and Uttar Pradesh, who may file counter-affidavit within four weeks from today. The case has been listed for final disposal on 11-1-2011 and we reiterate that date.

8. However, since the counsel for the abovementioned State Governments are not present in the Court today, list this case again tomorrow before us showing the names of counsel for the State Governments of Madhya Pradesh, Maharashtra, Rajasthan, Tripura and Uttar Pradesh.

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(2019) 13 Supreme Court Cases 796

(BEFORE RANJAN GOGOI, C.J. AND UDAY U. LALIT AND K.M. JOSEPH, JJ.)

LALITA TOPPO .. Appellant;

Versus

STATE OF JHARKHAND AND ANOTHER .. Respondents.

Criminal Appeal No. 1656 of 2015, decided on October 30, 2018

Crimes Against Women and Children — Protection of Women from Domestic Violence Act, 2005 — S. 3 — Aggrieved persons entitled to protection of DVC Act and reliefs to which entitled thereunder — Definition of — As defined within definition of domestic violence — Held, act or omission defining domestic violence is broad enough to include all "aggrieved persons" including a not legally wedded wife and, those not entitled to maintenance under S. 125 CrPC

— Appellant would have an efficacious remedy to seek maintenance under provisions of DVC Act, 2005 and economic abuse also constitutes domestic violence and has been defined by Expln. I(iv) to S. 3 of DVC Act, 2005 — In fact, under provisions of DVC Act, 2005 victim i.e. estranged wife or live-in partner would be entitled to more relief than what is contemplated under S. 125 of CrPC, namely, to a shared household also

— Questions referred in referral order were formulated on basis of *Yamunabai Anantrao Adhav*, (1988) 1 SCC 530 and *Savitaben Somabhai Bhatiya*, (2005) 3 SCC 636 rendered prior to coming into force of DVC Act, 2005 — Questions referred would not require any answer and answer declined — Appellant left with remedy of approaching appropriate forum under DVC Act, 2005, if so advised — If appellant moves appropriate forum under DVC Act, 2005, said forum to decide matter as expeditiously as possible — Criminal Procedure Code, 1973 — Ss. 125 and 395 — Family and Personal Laws — Marriage, Divorce, Other Unions and Children — De facto marriage/Common law marriage/Presumed Marriage/Live-in-Relationship/Premarital Sex — Protection under DVC Act, 2005 — Availability of (Paras 3 and 4)

Yamunabai Anantrao Adhav v. *Anantrao Shivram Adhav*, (1988) 1 SCC 530 : 1988 SCC (Cri) 182; *Savitaben Somabhai Bhatiya* v. *State of Gujarat*, (2005) 3 SCC 636 : 2005 SCC (Cri) 787, *held to have been statutorily superseded*

SB-D/61630/SVR

Advocates who appeared in this case :

Kaushik Poddar (Advocate-on-Record), Kumar Ranjan, Gautam Singh and Ms Isha Singh, Advocates, for the Appellant;

Jayesh Gaurav, Gopal Prasad (Advocate-on-Record), Shikhil Suri and Shiv Kr. Suri (Advocate-on-Record), Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2005) 3 SCC 636 : 2005 SCC (Cri) 787, *Savitaben Somabhai Bhatiya* v. *State of Gujarat* 798*a*
2. (1988) 1 SCC 530 : 1988 SCC (Cri) 182, *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav* 798*a*

ORDER

1. The appellant before us would have an efficacious remedy to seek maintenance under the provisions of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as "DVC Act, 2005") even assuming that she is not the legally wedded wife and, therefore, not entitled to maintenance under Section 125 of the Code of Criminal Procedure, 1973. This is because of the provisions contained in Section 3(*a*) of the DVC Act, 2005 which defines the term "domestic violence" in the following terms:

> "**3.** ***Definition of domestic violence***.— For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—
>
> (*a*) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or"

2. What would be significant to note is that economic abuse also constitutes domestic violence and economic abuse has been defined by Explanation I(*iv*) to Section 3 of the DVC Act, 2005 to mean:

> "(***iv***) "**economic abuse**" includes—
>
> (*a*) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance;
>
> (*b*) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her stridhan or any other property jointly or separately held by the aggrieved person; and
>
> (*c*) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household."

3. In fact, under the provisions of the DVC Act, 2005 the victim i.e. estranged wife or live-in partner would be entitled to more relief than what is contemplated under Section 125 of the Code of Criminal Procedure, 1973, namely, to a shared household also.

4. The questions referred to us by the Referral Order were formulated on the basis of the decisions of this Court rendered in *Yamunabai Anantrao Adhav* v. *Anantrao Shivram Adhav*[1] and *Savitaben Somabhai Bhatiya* v. *State of Gujarat*[2] which were rendered prior to the coming into force of the DVC Act, 2005. In view of what has been stated hereinbefore, it is, therefore, our considered view that the questions referred would not require any answer. We, therefore, decline to answer the said questions. The appellant is left with the remedy of approaching the appropriate forum under the provisions of the DVC Act, 2005, if so advised. If in the event the appellant moves the appropriate forum under the provisions of the DVC Act, 2005, we would request the said forum to decide the matter as expeditiously as possible.

5. The appeal is disposed of in the above terms.

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1 (1988) 1 SCC 530 : 1988 SCC (Cri) 182
2 (2005) 3 SCC 636 : 2005 SCC (Cri) 787

(2021) 2 Supreme Court Cases 324

2J

(BEFORE INDU MALHOTRA AND R. SUBHASH REDDY, JJ.)

RAJNESH . . Appellant;

Versus

NEHA AND ANOTHER . . Respondents.

Criminal Appeal No. 730 of 2020†, decided on November 4, 2020

A. **Constitution of India — Preamble and Arts. 39, 15(3) and 142 — Maintenance to wife, children and parents — Overlapping statutes — Remedy of maintenance in both secular laws and personal laws — Objective and manner of interpretation — Held, there is a need for framing guidelines under Art. 142 of the Constitution laying down uniform and consistent standards and for ensuring timely disposal of applications seeking maintenance under all the applicable statutes — Directions issued accordingly (*see* Shortnotes *B* to *I*) — Rationale for, explained**

— ***Conflicting orders resulting from overlapping jurisdiction*** — Simultaneous operation of statutes would lead to multiplicity of proceedings and conflicting orders — This process requires to be streamlined so that the respondent husband is not obligated to comply with successive orders of maintenance passed under different enactments

— ***No inconsistency though different statutes have distinct objectives*** — There is no inconsistency between CrPC and the Hindu Adoptions and Maintenance Act, 1956 (HAMA) and both can stand together — Though there are different enactments providing for maintenance, each enactment provides an independent and distinct remedy framed with a specific object and purpose — Provision of maintenance in secular laws like the Special Marriage Act, 1954 (SMA), S. 125 CrPC and the Protection of Women from Domestic Violence Act, 2005 (the DV Act), are irrespective of religious community to which they belong and apart from other remedies provided in personal laws like dissolution of marriage or restitution of conjugal rights, etc.

— ***Constitutional objective*** — Remedy of maintenance is a measure of social justice as envisaged under the Constitution to prevent wives and children from falling into destitution and vagrancy — Preamble and Arts. 39 and 15(3) of the Constitution envisage social justice and positive State action for the empowerment of women and children (Paras 12 to 18, 37, 38, 4, 5 and 127)

Ramesh Chander Kaushal v. *Veena Kaushal*, (1978) 4 SCC 70 : 1978 SCC (Cri) 508; *Nanak Chand* v. *Chandra Kishore Aggarwal*, (1969) 3 SCC 802 : 1970 SCC (Cri) 127; *Chaturbhuj* v. *Sita Bai*, (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356; *Bhuwan Mohan Singh* v. *Meena*, (2015) 6 SCC 353 : (2015) 3 SCC (Civ) 321 : (2015) 4 SCC (Cri) 200, *relied on*

Ram Singh v. *State*, 1962 SCC OnLine All 191 : AIR 1963 All 355; *Mahabir Agarwalla* v. *Gita Roy*, (1962) 2 Cri LJ 528 (Cal); *Nalini Ranjan Chakravarty* v. *Kiran Rani Chakravarty*, 1964 SCC OnLine Pat 160 : AIR 1965 Pat 442, *cited*

† Arising out of SLP (Crl.) No. 9503 of 2018. Arising from the Judgment and Order in *Rajnesh* v. *Neha*, 2018 SCC OnLine Bom 2181 [Bombay High Court, Nagpur Bench, WP (Crl.) No. 875 of 2015, dt. 14-8-2018]

B. **Family and Personal Laws — Maintenance proceedings — Overlapping jurisdictions under various statutes — Rights and duties of litigants, and approach and duty of court while re-adjudicating and varying previous orders passed under different statutes — Clarified, and necessary directions issued**

— ***Simultaneous proceedings and re-adjudication of issue of maintenance considering distinct scope of different statutes is permissible*** — A wife can make a claim for maintenance under different statutes — There is no bar to seek maintenance both under the DV Act and S. 125 CrPC, or under HMA — The mere fact that two proceedings were initiated by a party, would not imply that one would have to be adjourned sine die — There is a distinction in the scope and power exercised by the Magistrate under S. 125 CrPC and the DV Act — An order passed in a maintenance proceedings would not debar re-adjudication of the issue of maintenance in any other proceeding — Proceedings under S. 125 CrPC are summary in nature, and are intended to provide a speedy remedy to the wife — Any order passed under S. 125 CrPC by compromise or otherwise would not foreclose the remedy under S. 18 of the HAMA — Maintenance granted to an aggrieved person under the DV Act, would be in addition to an order of maintenance under S. 125 CrPC, or under the HMA (Paras 50 to 61)

— ***Disclosure as to award of maintenance in any other proceeding mandatory*** — If maintenance is awarded to the wife in a previously instituted proceeding, she is under a legal obligation to disclose the same in a subsequent proceeding for maintenance, which may be filed under another enactment — For instance while granting relief under DV Act, the Magistrate has to consider if any similar relief has been obtained by aggrieved person — The applicant shall disclose the previous maintenance proceeding, and the orders passed therein (Paras 54 and 128.2)

— ***Modification or variation of previous order*** — If the order passed in the previous proceeding requires any modification or variation, the party would be required to move the court concerned in the previous proceeding — So, for instance once an order for permanent alimony under HMA is passed, same could be modified by the same court by exercising its power under S. 25(2) of the HMA and an application under S. 125 CrPC would be treated as an application under S. 25(2) of the HMA and be disposed of accordingly (Paras 61, 57 and 128.3)

— ***Adjustment or set-off, permissible*** — Though the wife can simultaneously claim maintenance under the different enactments, it would be inequitable to direct husband to pay the maintenance awarded in each of the said proceedings, independent of the relief granted in a previous proceeding — Adjustment is permissible and the adjustment can be allowed of the lower amount against the higher amount — The court would take into consideration the maintenance already awarded in the previous proceeding, and grant an adjustment or set-off of the said amount (Paras 54, 60 and 128.1)

— While deciding quantum of maintenance in subsequent proceeding, civil court/Family Court shall take into account maintenance awarded in any previously instituted proceeding, and determine the maintenance payable to the claimant — If Magistrate awards any further amount over and above the maintenance already awarded in other proceedings, he has to record reasons in writing for the same — Magistrate cannot ignore maintenance awarded in other legal proceedings — Hindu Adoptions and Maintenance Act, 1956 — S. 18 — Criminal Procedure Code, 1973, S. 125 (Paras 50 to 61, 128.2 and 128.3)

Held :

Issue of overlapping jurisdiction

The following directions are issued in exercise of powers under Article 142 of the Constitution: To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings, it has become necessary to issue directions in this regard, so that there is uniformity in the practice followed by the Family Courts/District Courts/Magistrate Courts throughout the country. It is directed that:

(*i*) Where successive claims for maintenance are made by a party under different statutes, the court would consider an adjustment or set-off, of the amount awarded in the previous proceeding(s), while determining whether any further amount is to be awarded in the subsequent proceeding.

(*ii*) It is made mandatory for the applicant to disclose the previous proceeding and the orders passed therein, in the subsequent proceeding.

(*iii*) If the order passed in the previous proceeding(s) requires any modification or variation, it would be required to be done in the same proceeding. (Paras 50 to 61 and 128 to 128.3)

Chand Dhawan v. *Jawaharlal Dhawan*, (1993) 3 SCC 406 : 1993 SCC (Cri) 915; *Rakesh Malhotra* v. *Krishna Malhotra*, 2020 SCC OnLine SC 239; *Nagendrappa Natikar* v. *Neelamma*, (2014) 14 SCC 452 : (2015) 1 SCC (Civ) 346 : (2015) 1 SCC (Cri) 407; *Sudeep Chaudhary* v. *Radha Chaudhary*, (1997) 11 SCC 286 : 1998 SCC (Cri) 160, *relied on*

Panditrao Chimaji Kalure v. *Gayabai Panditrao Kalure*, 2001 SCC OnLine Bom 165 : (2002) 2 Mah LJ 53; *Vishal* v. *Aparna*, 2018 SCC OnLine Bom 1207; *R.D.* v. *B.D.*, 2019 SCC OnLine Del 9526; *Tanushree* v. *A.S. Moorthy*, 2018 SCC OnLine Del 7074, *approved*

Ashok Singh Pal v. *Manjulata*, 2008 SCC OnLine MP 18 : AIR 2008 MP 139; *Mohan Swaroop Chauhan* v. *Mohini*, 2015 SCC OnLine MP 7427 : (2016) 2 MP LJ 179; *Sujit Adhikari* v. *Tulika Adhikari*, 2017 SCC OnLine Cal 15484 : (2018) 2 CHN 129; *Chandra Mohan Das* v. *Tapati Das*, 2015 SCC OnLine Cal 9554, *overruled*

C. **Family and Personal Laws — Maintenance proceedings under various statutes, including interim maintenance proceedings — Objective assessment and expeditious disposal of applications — Directions and clarifications issued with respect to manner in which responsible pleadings are to be made and particulars to be provided, including affidavits of disclosure of assets and liabilities as per Enclosures I, II and III appended with this judgment; availability of marriage counsellors; for expeditious disposal of the applications; and incidental and related issues**

— ***Streamlining the procedure of pleadings during interim maintenance is necessary*** — Parties often submit scanty materials, incorrect details, supress vital information and conceal actual income — Applications for maintenance remain pending for several years because of docket pressure, adjournments and enormous time taken for completion of pleadings at interim stage itself, etc.

— ***Marriage counsellors*** — Given the large and growing percentage of matrimonial litigation, a professional Marriage Counsellor must be made available in every Family Court — If the endeavour for settlement of disputes is unsuccessful, the Family Court would proceed with the matter on merits

— ***Concise application*** — Application claiming maintenance must be a concise application accompanied with an affidavit of disclosure of assets as per annexed in Enclosures I, II and III of the judgment — The court in its discretion may issue necessary directions for modification of format of affidavit if exigencies require or more information is required

— ***Affidavit of disclosure of assets and liabilities*** — The Affidavit of Disclosure of Assets and Liabilities annexed as Enclosures I, II and III of the judgment, as may be applicable, shall be filed by both parties in all maintenance proceedings, including pending proceedings before the Family Court/District Court/Magistrates Court concerned, as the case may be, throughout the country — It must be filed to enable court to make an objective assessment of the quantum of interim maintenance — Such affidavit should be filed within a maximum period of four weeks — The courts may not grant more than two opportunities for submission of such affidavit

— ***Reply-affidavit*** — If the respondent delays in filing the reply with the affidavit, and seeks more than two adjournments for this purpose, the court may consider exercising the power to strike off the defence of the respondent, if the conduct is found to be wilful and contumacious in delaying the proceedings — On the failure to file the affidavit within the prescribed time, the Family Court may proceed to decide the application for maintenance on basis of the affidavit filed by the applicant and the pleadings on record

— ***Disputes with regard to affidavit*** — Aggrieved party may seek permission of the court to serve interrogatories, and seek production of relevant documents from the opposite party under Or. 11 CPC — On filing of the affidavit, the court may invoke the provisions of Or. 10 CPC or S. 165 or S. 106 of the Evidence Act, 1872, if it considers it necessary to do so

— ***Amended/supplementary affidavit*** — If during the course of proceedings, there is a change in the financial status of any party, or there is a change of any relevant circumstances, or if some new information comes to light, the party may submit an amended/supplementary affidavit, which would be considered by the court at the time of final determination

— ***Responsible pleadings should be filed*** — If false statements and misrepresentations are made, the court may consider initiation of proceeding under S. 340 CrPC, and for contempt of court

— ***Exemption from filing affidavit*** — In case the parties belong to the economically weaker sections (EWS), or are living below the poverty line (BPL), or are casual labourers, the requirement of filing the affidavit would be dispensed with

— ***Reasoned order within six months of affidavit*** — Family Court/District Court/Magistrate's Court concerned must make an endeavour to decide the IA for interim maintenance by a reasoned order, within a period of four to six months at the latest, after the Affidavits of Disclosure have been filed before the court — Evidence Act, 1872 — Ss. 165 and 106 — Civil Procedure Code, 1908 — S. 11 and Or. 10 — Criminal Procedure Code, 1973, S. 340 (Paras 62 to 72 and 129)

Held :

Keeping in mind the need for a uniform format of Affidavit of Disclosure of Assets and Liabilities to be filed in maintenance proceedings, this Court considers it necessary to frame guidelines in exercise of our powers under Article 136 read with Article 142 of the Constitution:

(*a*) The Affidavit of Disclosure of Assets and Liabilities annexed at Enclosures I, II and III of this judgment, as may be applicable, shall be filed by the parties in all maintenance proceedings, including pending proceedings before the Family Court/District Court/Magistrate's Court concerned, as the case may be, throughout the country;

(*b*) The applicant making the claim for maintenance will be required to file a concise application accompanied with the Affidavit of Disclosure of Assets;

(*c*) The respondent must submit the reply along with the Affidavit of Disclosure within a maximum period of four weeks. The courts may not grant more than two opportunities for submission of the Affidavit of Disclosure of Assets and Liabilities to the respondent. If the respondent delays in filing the reply with the affidavit, and seeks more than two adjournments for this purpose, the court may consider exercising the power to strike off the defence of the respondent, if the conduct is found to be wilful and contumacious in delaying the proceedings. On the failure to file the affidavit within the prescribed time, the Family Court may proceed to decide the application for maintenance on basis of the affidavit filed by the applicant and the pleadings on record;

(*d*) The above format may be modified by the court concerned, if the exigencies of a case require the same. It would be left to the judicial discretion of the court concerned to issue necessary directions in this regard.

(*e*) If apart from the information contained in the Affidavits of Disclosure, any further information is required, the court concerned may pass appropriate orders in respect thereof.

(*f*) If there is any dispute with respect to the declaration made in the Affidavit of Disclosure, the aggrieved party may seek permission of the court to serve interrogatories, and seek production of relevant documents from the opposite party under Order 11 CPC. On filing of the affidavit, the court may invoke the provisions of Order 10 CPC or Section 165 of the Evidence Act, 1872, if it considers it necessary to do so. The income of one party is often not

within the knowledge of the other spouse. The court may invoke Section 106 of the Evidence Act, 1872 if necessary, since the income, assets and liabilities of the spouse are within the personal knowledge of the party concerned.

(*g*) If during the course of proceedings, there is a change in the financial status of any party, or there is a change of any relevant circumstances, or if some new information comes to light, the party may submit an amended/ supplementary affidavit, which would be considered by the court at the time of final determination.

(*h*) The pleadings made in the applications for maintenance and replies filed should be responsible pleadings; if false statements and misrepresentations are made, the court may consider initiation of proceeding under Section 340 CrPC, and for contempt of court.

(*i*) In case the parties belong to the economically weaker sections ("EWS"), or are living below the poverty line ("BPL"), or are casual labourers, the requirement of filing the affidavit would be dispensed with.

(*j*) The Family Court/District Court/Magistrate's Court concerned must make an endeavour to decide the IA for interim maintenance by a reasoned order, within a period of four to six months at the latest, after the Affidavits of Disclosure have been filed before the court.

(*k*) A professional Marriage Counsellor must be made available in every Family Court. (Para 72)

The above directions are issued in exercise of powers under Article 142 of the Constitution: The Affidavit of Disclosure of Assets and Liabilities annexed as Enclosures I, II and III of this judgment, as may be applicable, shall be filed by both parties in all maintenance proceedings, including pending proceedings before the Family Court/District Court/Magistrates Court concerned, as the case may be, throughout the country. (Paras 62 to 72 and 129)

Kaushalya v. *Mukesh Jain*, (2020) 17 SCC 822 : 2019 SCC OnLine SC 1915, *relied on*

Puneet Kaur v. *Inderjit Singh Sawhney*, 2011 SCC OnLine Del 3841 : ILR (2012) 1 Del 73; *Kusum Sharma* v. *Mahinder Kumar Sharma*, 2014 SCC OnLine Del 7627; *Kusum Sharma* v. *Mahinder Kumar Sharma*, 2015 SCC OnLine Del 6793; *Kusum Sharma* v. *Mahinder Kumar Sharma*, 2017 SCC OnLine Del 11796; *Kusum Sharma* v. *Mahinder Kumar Sharma*, 2017 SCC OnLine Del 12534; *Kusum Sharma* v. *Mahinder Kumar Sharma*, 2020 SCC OnLine Del 931, *considered*

Rajnesh v. *Neha*, 2019 SCC OnLine SC 1918, *referred to*

D. **Family and Personal Laws — Determination of permanent alimony — Factors to be considered, including provision for adequate child support — Enumerated (non-exhaustively)**

— Duration of marriage — Duration of the marriage is a relevant factor for determining whether permanent alimony has to be paid or not — In contemporary society, where several marriages do not last for a reasonable length of time, it may be inequitable to direct the contesting spouse to pay permanent alimony to the applicant for the rest of her life

— Parties may lead oral and documentary evidence with respect to income, expenditure, standard of living, etc. before the court concerned, for fixing the permanent alimony payable to the spouse

— ***Marriage expenses of children*** — Provision for grant of reasonable expenses for the marriage of children must be made at the time of determining permanent alimony, where the custody is with the wife — The expenses would be determined by taking into account the financial position of the husband and the customs of the family

— ***Trust funds/investments*** — If there are any trust funds/investments created by any spouse/grandparents in favour of the children, this would also be taken into consideration while deciding the final child support (Paras 73 to 76)

Held :

Parties may lead oral and documentary evidence with respect to income, expenditure, standard of living, etc. before the court concerned, for fixing the permanent alimony payable to the spouse. (Para 73)

In contemporary society, where several marriages do not last for a reasonable length of time, it may be inequitable to direct the contesting spouse to pay permanent alimony to the applicant for the rest of her life. The duration of the marriage would be a relevant factor to be taken into consideration for determining the permanent alimony to be paid. (Para 74)

Provision for grant of reasonable expenses for the marriage of children must be made at the time of determining permanent alimony, where the custody is with the wife. The expenses would be determined by taking into account the financial position of the husband and the customs of the family. (Para 75)

If there are any trust funds/investments created by any spouse/grandparents in favour of the children, this would also be taken into consideration while deciding the final child support. (Para 76)

E. **Family and Personal Laws — Quantum of maintenance — Determination of — Factors and criteria, enumerated — Clarified that factors and criteria enumerated are not exhaustive and the court concerned may exercise its discretion to consider any other factor(s) which may be necessary or of relevance in the facts and circumstances of a case**

— ***Balance — There is no straitjacket formula for fixing quantum of maintenance — A careful and just balance must be drawn between all relevant factors — The maintenance amount awarded must be reasonable and realistic, and avoid either of the two extremes i.e. maintenance awarded to the wife should neither be so extravagant which becomes oppressive and unbearable for the respondent, nor should it be so meagre that it drives the wife to penury*** — The sufficiency of the quantum has to be adjudged so that the wife is able to maintain herself with reasonable comfort — Sustenance does not mean, and cannot be allowed to mean mere survival — The object behind right to maintenance is to ensure that the dependent spouse is not reduced to destitution or vagrancy on account of the failure of the marriage, and not as a punishment to the other spouse — S. 23 of the HAMA provides statutory guidance with respect to the criteria for determining the quantum of maintenance (Paras 77 to 82, 90.1 and 130)

— Financial status and reasonable needs of applicant — It is no answer to a claim of maintenance that the wife is educated and could support herself — The court must take into consideration the status of the parties and the capacity of the spouse to pay for her or his support — No doubt it is relevant as to whether the applicant is educated and professionally qualified and has independent source of income or not — But the court has to see whether the income is sufficient to enable her to maintain the same standard of living as she was accustomed to in her matrimonial home [S. 20(2) of the DV Act] — The provisions for food, clothing, shelter, education, medical attendance and treatment, etc. of the applicant are relevant factors for determining maintenance (Paras 78 to 83)

— Age of parties and employability and reasons why wife sacrificed her employment opportunities, are relevant — The court should find out whether the applicant was employed prior to her marriage and/or was working during the subsistence of the marriage or was required to sacrifice her employment opportunities for nurturing the family, child rearing, and looking after adult members of the family — This is of particular relevance in contemporary society, given the highly competitive industry standards, the separated wife would be required to undergo fresh training to acquire marketable skills and retrain herself to secure a job in the paid workforce to rehabilitate herself — With advancement of age, it would be difficult for a dependent wife to get an easy entry into the workforce after a break of several years (Paras 86 and 79)

— Duration of marriage — In a marriage of long duration, where parties have endured the relationship for several years, it would be a relevant factor to be taken into consideration (Para 86)

— Reasonable costs of litigation for a non-working wife should be considered by the court — The non-applicant has to defray the cost of litigation (Paras 79 and 83)

— Financial status and liabilities of non-applicant and higher obligation of husband — The obligation of the husband to provide maintenance stands on a higher pedestal than the wife — If the wife is earning, it cannot operate as a bar from being awarded maintenance by the husband — Plea that the husband does not possess any source of income ipso facto does not absolve him of his moral duty to maintain his wife if he is able-bodied and has educational qualifications — The onus is on the husband to establish with necessary material that there are sufficient grounds to show that he is unable to maintain the family, and discharge his legal obligations for reasons beyond his control — If the husband does not disclose the exact amount of his income, an adverse inference may be drawn by the court — The financial capacity of the husband, his actual income, reasonable expenses for his own maintenance, and dependent family members whom he is obliged to maintain under the law, liabilities if any, would be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid — The court must have due regard to the standard of living of the husband, as well as the spiralling inflation rates and high costs of living (Paras 80 to 83 and 90 to 90.5)

— ***Right to residence*** — The Magistrate may pass a residence order inter alia directing the respondent to secure the same level of alternate accommodation for the aggrieved woman as enjoyed by her in the "shared household" — S. 2(s) r/w Ss. 17 and 19 of the DV Act entitles a woman to the right of residence in a shared household, irrespective of her having any legal interest in the same (*see* Shortnote *M* on meaning of "shared household") (Paras 87 to 89)

— ***Maintenance of minor children*** — Living expenses of the child would include expenses for food, clothing, residence, medical expenses, education of children — Extra coaching classes or any other vocational training courses to complement the basic education must be factored in, while awarding child support — It should be a reasonable amount to be awarded for extracurricular/coaching classes, and not an overly extravagant amount which may be claimed (Para 91)

— ***Educational expenses of children*** — Education expenses of the children must be normally borne by the father — If the wife is working and earning sufficiently, the expenses may be shared proportionately between the parties (Para 92)

— ***Serious disability or ill health*** — Serious disability or ill health of a spouse, child/children from the marriage/dependent relative who require constant care and recurrent expenditure, would also be a relevant consideration while quantifying maintenance (Para 93)

— ***What is not relevant — The financial position of parents of wife is not material for determining the quantum of maintenance*** — Crimes Against Women and Children — Protection of Women from Domestic Violence Act, 2005, Ss. 20(2) and 2(s) r/w Ss. 17 and 19 (Paras 77 to 93 and 130)

Held :

Criteria for determining quantum of maintenance — No straitjacket formula

The objective of granting interim/permanent alimony is to ensure that the dependent spouse is not reduced to destitution or vagrancy on account of the failure of the marriage, and not as a punishment to the other spouse. There is no straitjacket formula for fixing the quantum of maintenance to be awarded. (Para 77)

The factors which would weigh with the court inter alia are the status of the parties; reasonable needs of the wife and dependent children; whether the applicant is educated and professionally qualified; whether the applicant has any independent source of income; whether the income is sufficient to enable her to maintain the same standard of living as she was accustomed to in her matrimonial home; whether the applicant was employed prior to her marriage; whether she was working during the subsistence of the marriage; whether the wife was required to sacrifice her employment opportunities for nurturing the family, child rearing, and looking after adult members of the family; reasonable costs of litigation for a non-working wife. (Para 78)

Jasbir Kaur Sehgal v. *District Judge, Dehradun*, (1997) 7 SCC 7; *Vinny Parmvir Parmar* v. *Parmvir Parmar*, (2011) 13 SCC 112 : (2012) 3 SCC (Civ) 290, *relied on*

The financial position of the parents of the applicant wife would not be material while determining the quantum of maintenance. An order of interim maintenance is conditional on the circumstance that the wife or husband who makes a claim has no independent income sufficient for her or his support. It is no answer to a claim of maintenance that the wife is educated and could support herself. The court must take into consideration the status of the parties and the capacity of the spouse to pay for her or his support. Maintenance is dependent upon factual situations; the court should mould the claim for maintenance based on various factors brought before it. (Para 79)

Manish Jain v. *Akanksha Jain*, (2017) 15 SCC 801 : (2018) 2 SCC (Civ) 712, *relied on*

On the other hand, the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance, and dependent family members whom he is obliged to maintain under the law, liabilities if any, would be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid. The court must have due regard to the standard of living of the husband, as well as the spiralling inflation rates and high costs of living. The plea of the husband that he does not possess any source of income ipso facto does not absolve him of his moral duty to maintain his wife if he is able-bodied and has educational qualifications. (Para 80)

Reema Salkan v. *Sumer Singh Salkan*, (2019) 12 SCC 303 : (2018) 5 SCC (Civ) 596 : (2019) 4 SCC (Cri) 339, *relied on*

A careful and just balance must be drawn between all relevant factors. The test for determination of maintenance in matrimonial disputes depends on the financial status of the respondent, and the standard of living that the applicant was accustomed to in her matrimonial home. The maintenance amount awarded must be reasonable and realistic, and avoid either of the two extremes i.e. maintenance awarded to the wife should neither be so extravagant which becomes oppressive and unbearable for the respondent, nor should it be so meagre that it drives the wife to penury. The sufficiency of the quantum has to be adjudged so that the wife is able to maintain herself with reasonable comfort. (Para 81)

Chaturbhuj v. *Sita Bai*, (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356, *relied on*

Section 23 of the HAMA provides statutory guidance with respect to the criteria for determining the quantum of maintenance. Section 23(2) of the HAMA provides the following factors which may be taken into consideration: (*i*) position and status of the parties, (*ii*) reasonable wants of the claimant, (*iii*) if the petitioner/claimant is living separately, the justification for the same, (*iv*) value of the claimant's property and any income derived from such property, (*v*) income from claimant's own earning or from any other source. (Para 82)

Section 20(2) of the DV Act provides that the monetary relief granted to the aggrieved woman and/or the children must be adequate, fair, reasonable, and consistent with the standard of living to which the aggrieved woman was accustomed to in her matrimonial home. (Para 83)

Factors for determining maintenance

The following factors have been laid down for determining maintenance:

1. Status of the parties.
2. Reasonable wants of the claimant.
3. The independent income and property of the claimant.
4. The number of persons, the non-applicant has to maintain.

5. The amount should aid the applicant to live in a similar lifestyle as he/she enjoyed in the matrimonial home.

6. Non-applicant's liabilities, if any.

7. Provisions for food, clothing, shelter, education, medical attendance and treatment, etc. of the applicant.

8. Payment capacity of the non-applicant.

9. Some guesswork is not ruled out while estimating the income of the non-applicant when all the sources or correct sources are not disclosed.

10. The non-applicant to defray the cost of litigation.

11. The amount awarded under Section 125 CrPC is adjustable against the amount awarded under Section 24 of the Act. (Para 84)

Bharat Hegde v. *Saroj Hegde*, 2007 SCC OnLine Del 622, *approved*

Apart from the aforesaid factors enumerated hereinabove, certain additional factors would also be relevant for determining the quantum of maintenance payable: (Para 85)

(a) Age and employment of parties

In a marriage of long duration, where parties have endured the relationship for several years, it would be a relevant factor to be taken into consideration. On termination of the relationship, if the wife is educated and professionally qualified, but had to give up her employment opportunities to look after the needs of the family being the primary caregiver to the minor children, and the elder members of the family, this factor would be required to be given due importance. This is of particular relevance in contemporary society, given the highly competitive industry standards, the separated wife would be required to undergo fresh training to acquire marketable skills and retrain herself to secure a job in the paid workforce to rehabilitate herself. With advancement of age, it would be difficult for a dependent wife to get an easy entry into the workforce after a break of several years. (Para 86)

(b) Right to residence — Shared household

Section 19(1)(*f*) of the DV Act provides that the Magistrate may pass a residence order inter alia directing the respondent to secure the same level of alternate accommodation for the aggrieved woman as enjoyed by her in the shared household. While passing such an order, the Magistrate may direct the respondent to pay the rent and other payments, having regard to the financial needs and resources of the parties. (Para 89)

Section 2(*s*) read with Sections 17 and 19 of the DV Act entitles a woman to the right of residence in a shared household, irrespective of her having any legal interest in the same. There is no requirement of law that the husband should be a member of the joint family, or that the household must belong to the joint family, in which he or the aggrieved woman has any right, title or interest. The shared household may not necessarily be owned or tenanted by the husband singly or jointly. (Paras 87 and 88)

Satish Chander Ahuja v. *Sneha Ahuja*, (2021) 1 SCC 414, *relied on*

(c) Where wife is earning some income — Obligation of husband to provide maintenance is higher

The obligation of the husband to provide maintenance stands on a higher pedestal than the wife. Thus, the courts have held that if the wife is earning, it cannot operate as a bar from being awarded maintenance by the husband. In fact, furthermore, merely because the wife is capable of earning, it would not be a sufficient ground to reduce the maintenance awarded by the Family Court. The court has to determine whether the income of the wife is sufficient to enable her to maintain herself in accordance with the lifestyle of her husband in the matrimonial home. Sustenance does not mean, and cannot be allowed to mean mere survival. (Paras 90 to 90.5)

(d) Presumption — Adverse inference against husband when permissible

An able-bodied husband must be presumed to be capable of earning sufficient money to maintain his wife and children, and cannot contend that he is not in a position to earn sufficiently to maintain his family. The onus is on the husband to establish with necessary material that there are sufficient grounds to show that he is unable to maintain the family, and discharge his legal obligations for reasons beyond his control. If the husband does not disclose the exact amount of his income, an adverse inference may be drawn by the court. (Para 90.4)

Shamima Farooqui v. *Shahid Khan*, (2015) 5 SCC 705 : (2015) 3 SCC (Civ) 274 : (2015) 2 SCC (Cri) 785; *Chaturbhuj* v. *Sita Bai*, (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356; *Shailja* v. *Khobbanna*, (2018) 12 SCC 199 : (2018) 5 SCC (Civ) 308, *relied on*

Sunita Kachwaha v. *Anil Kachwaha*, (2014) 16 SCC 715 : (2015) 3 SCC (Civ) 753 : (2015) 3 SCC (Cri) 589, *affirmed*

P. Suresh v. *S. Deepa*, 2016 SCC OnLine Kar 8848 : 2016 Cri LJ 4794 (Kar); *Sanjay Damodar Kale* v. *Kalyani Sanjay Kale*, 2020 SCC OnLine Bom 694; *Vipul Lakhanpal* v. *Pooja Sharma*, 2015 SCC OnLine HP 1252 : 2015 Cri LJ 3451; *Chander Parkash* v. *Shila Rani*, 1968 SCC OnLine Del 52 : AIR 1968 Del 174, *approved*

(e) Maintenance of minor children

The living expenses of the child would include expenses for food, clothing, residence, medical expenses, education of children. Extra coaching classes or any other vocational training courses to complement the basic education must be factored in, while awarding child support. Albeit, it should be a reasonable amount to be awarded for extracurricular/coaching classes, and not an overly extravagant amount which may be claimed. (Para 91)

Education expenses of the children must be normally borne by the father. If the wife is working and earning sufficiently, the expenses may be shared proportionately between the parties. (Para 92)

(f) Serious disability or ill health

Serious disability or ill health of a spouse, child/children from the marriage/ dependent relative who require constant care and recurrent expenditure, would also be a relevant consideration while quantifying maintenance. (Para 93)

The following directions are issued in exercise of powers under Article 142 of the Constitution: For determining the quantum of maintenance payable to an

applicant, the court shall take into account the criteria enumerated in Part B-III (contained in paras 77 to 93, and also set out above) of the judgment. The factors are however not exhaustive, and the court concerned may exercise its discretion to consider any other factor(s) which may be necessary or of relevance in the facts and circumstances of a case. (Para 130)

F. **Family and Personal Laws — Date from which maintenance is to be awarded — Held, date of filing of application must always be regarded as the starting point for grant of maintenance — Further, held, even though a judicial discretion is conferred upon court to grant maintenance either from the date of application or from the date of the order in S. 125(2) CrPC, it would be appropriate to grant maintenance from the date of application in all cases, including S. 125 CrPC — Rationale for, explained**

— ***Significant delay in disposal in applications for interim maintenance*** — The period during which the maintenance proceedings remained pending is not within the control of the applicant — Therefore, it would be in the interest of justice and fair play that maintenance is awarded from date of application — Where a litigation is prolonged, either on account of the conduct of the opposite party, or due to the heavy docket in courts, or for unavoidable reasons, it would be unjust and contrary to the object of the provision, to provide maintenance from the date of the order (Paras 97, 109 and 110 and 113)

— ***Social justice objective of maintenance should not be defeated*** — While dealing with the application of a destitute wife or hapless children or parents, the court is dealing with the marginalised sections of the society — Therefore, it becomes the bounden duty of the courts to advance the cause of the social justice — Financial constraints of a dependent spouse hampers their capacity to be effectively represented before the court — When legislature has provided summary, quick and comparatively inexpensive remedy, maintenance should be awarded from date of application to prevent a dependant from being reduced to destitution and vagrancy (Paras 96, 97, 111 and 112)

— ***Absence of uniform regime*** — There is a vast variance in the practice adopted by the Family Courts in the country, with respect to the date from which maintenance must be awarded — There is no provision in the HMA or the DV Act as to date from which maintenance is to be awarded — S. 125(2) CrPC is the only statutory provision which provides that the Magistrate may award maintenance either from the date of the order, or from the date of application — It has therefore become necessary to issue directions to bring about uniformity and consistency in the orders passed by all courts, by directing that maintenance be awarded from the date on which the application was made before the court concerned — Criminal Procedure Code, 1973, S. 125(2) (Paras 94 to 113 and 131)

G. **Criminal Procedure Code, 1973 — S. 125 — Date from which maintenance is to be awarded — From date of filing application — Held, even though a judicial discretion is conferred upon the court to grant maintenance either from the date of application or from the date of the order in S. 125(2)**

CrPC, it would be appropriate to grant maintenance from the date of application in all cases, including S. 125 CrPC (Para 109)

Held :

Date from which maintenance to be awarded

There is no provision in the HMA with respect to the date from which an order of maintenance may be made effective. Similarly, Section 12 of the DV Act does not provide the date from which the maintenance is to be awarded. Section 125(2) CrPC is the only statutory provision which provides that the Magistrate may award maintenance either from the date of the order, or from the date of application. (Para 94)

K. Sivaram v. *K. Mangalamba*, 1989 SCC OnLine AP 60 : (1989) 1 AP LJ 604, *referred to*

In the absence of a uniform regime, there is a vast variance in the practice adopted by the Family Courts in the country, with respect to the date from which maintenance must be awarded. The divergent views taken by the Family Courts are: *first*, from the date on which the application for maintenance was filed; *second*, the date of the order granting maintenance; *third*, the date on which the summons was served upon the respondent. (Paras 95 and 108)

Maintenance has to be awarded from date of application

The view that maintenance ought to be granted from the date when the application was made, is based on the rationale that the primary object of maintenance laws is to protect a deserted wife and dependent children from destitution and vagrancy. If maintenance is not paid from the date of application, the party seeking maintenance would be deprived of sustenance, owing to the time taken for disposal of the application, which often runs into several years. (Para 96)

The legislature intended to provide a summary, quick and comparatively inexpensive remedy to the neglected person. Where a litigation is prolonged, either on account of the conduct of the opposite party, or due to the heavy docket in courts, or for unavoidable reasons, it would be unjust and contrary to the object of the provision, to provide maintenance from the date of the order. (Para 97)

Susmita Mohanty v. *Rabindra Nath Sahu*, (1996) 1 OLR 361, *approved*

Even though the decision to award maintenance either from the date of application, or from the date of order, was within the discretion of the court, it would be appropriate to grant maintenance from the date of application. (Para 98)

Kanhu Charan Jena v. *Nirmala Jena*, 2000 SCC OnLine Ori 217 : 2001 Cri LJ 879; *Arun Kumar Nayak* v. *Urmila Jena*, 2010 SCC OnLine Ori 30 : (2010) 93 AIC 726; *Krishna* v. *Dharam Raj*, 1991 SCC OnLine MP 6, *approved*

The law governing payment of maintenance under Section 125 CrPC from the date of application, was extended to HAMA. The Court held that the date of application should always be regarded as the starting point for payment of maintenance. (Para 100)

Ganga Prasad Srivastava v. *Addl. District Judge, Gonda*, 2019 SCC OnLine All 5428; *Lavlesh Shukla* v. *Rukmani*, 2019 SCC OnLine Del 11709, *approved*

There are divergent views of different High Courts on the date from which maintenance must be awarded. Even though a judicial discretion is conferred upon the court to grant maintenance either from the date of application or from the date of the order in Section 125(2) CrPC, it would be appropriate to grant maintenance

from the date of application in all cases, including Section 125 CrPC. In the practical working of the provisions relating to maintenance, there is significant delay in disposal of the applications for interim maintenance for years on end. It would therefore be in the interests of justice and fair play that maintenance is awarded from the date of the application. (Para 109)

The entitlement of maintenance should not be left to the uncertain date of disposal of the case. The enormous delay in disposal of proceedings justifies the award of maintenance from the date of application. The delay in adjudication was not only against human rights, but also against the basic embodiment of dignity of an individual. The delay in the conduct of the proceedings would require grant of maintenance to date back to the date of application. (Para 110)

Shail Kumari Devi v. *Krishan Bhagwan Pathak*, (2008) 9 SCC 632 : (2008) 3 SCC (Cri) 839; *Bhuwan Mohan Singh* v. *Meena*, (2015) 6 SCC 353 : (2015) 3 SCC (Civ) 321 : (2015) 4 SCC (Cri) 200, *followed*

The rationale of granting maintenance from the date of application finds its roots in the object of enacting maintenance legislations, so as to enable the wife to overcome the financial crunch which occurs on separation from the husband. Financial constraints of a dependent spouse hampers their capacity to be effectively represented before the court. In order to prevent a dependant from being reduced to destitution, it is necessary that maintenance is awarded from the date on which the application for maintenance is filed before the court concerned. (Para 111)

While dealing with the application of a destitute wife or hapless children or parents under this provision, the court is dealing with the marginalised sections of the society. The purpose is to achieve "social justice" which is the constitutional vision, enshrined in the Preamble of the Constitution. Therefore, it becomes the bounden duty of the courts to advance the cause of the social justice. While giving interpretation to a particular provision, the court is supposed to bridge the gap between the law and society. (Para 112)

Badshah v. *Urmila Badshah Godse*, (2014) 1 SCC 188 : (2014) 1 SCC (Civ) 51, *followed*

It has therefore become necessary to issue directions to bring about uniformity and consistency in the orders passed by all courts, by directing that maintenance be awarded from the date on which the application was made before the court concerned. The right to claim maintenance must date back to the date of filing the application, since the period during which the maintenance proceedings remained pending is not within the control of the applicant. (Para 113)

Bina Devi v. *State of U.P.*, 2010 SCC OnLine All 236 : (2010) 69 ACC 19; *Amit Verma* v. *Sangeeta Verma*, 2020 SCC OnLine MP 2657; *S. Radhakumari* v. *K.M.K. Nair*, 1982 SCC OnLine Ker 51 : AIR 1983 Ker 139; *Samir Kr. Banerjee* v. *Sujata Banerjee*, 1965 SCC OnLine Cal 196; *Gouri Das* v. *Pradyumna Kumar Das*, (1986) 2 OLR 44; *Kalpana Das* v. *Sarat Kumar Das*, 2009 SCC OnLine Ori 21 : AIR 2009 Ori 133, *overruled*

The following directions are issued in exercise of powers under Article 142 of the Constitution: It is made clear that maintenance in all cases will be awarded from the date of filing the application for maintenance, as held in Part B-IV of the judgment (contained in paras 94 to 113 of the judgment, and set out above). (Para 131)

H. **Family and Personal Laws — Enforcement of orders of maintenance — Object behind timely enforcement and manner of enforcement — Law clarified**

— Object behind timely enforcement — Very object of social welfare legislation would be defeated if orders of maintenance are not enforced in timely manner

— Manner of enforcement — An order or decree of maintenance may be enforced under S. 28-A of the HMA, 1955; S. 20(6) of the DV Act; and S. 128 CrPC, as may be applicable — The order of maintenance may be enforced as a money decree of a civil court as per the provisions of CPC, more particularly Ss. 51, 55, 58 and 60 r/w Or. 21 — It can be recovered in the manner as provided for fines and the Magistrate may award sentence of imprisonment for a term which may extend to one month, or until payment, whichever is earlier [S. 125(3) CrPC]

— Criminal Procedure Code, 1973 — Ss. 125 to 128 — Civil Procedure Code, 1908 — Ss. 51, 55, 58 and 60 r/w Or. 21 — Hindu Marriage Act, 1955 — S. 28-A — Crimes Against Women and Children — Protection of Women from Domestic Violence Act, 2005, S. 20(6) (Paras 114, 117, 125 and 132)

Held :

Enforcement of orders of maintenance

Enforcement of the order of maintenance is the most challenging issue, which is encountered by the applicants. If maintenance is not paid in a timely manner, it defeats the very object of the social welfare legislation. Execution petitions usually remain pending for months, if not years, which completely nullifies the object of the law. (Para 114)

Sushila Viresh Chhadva v. *Viresh Nagshi Chhadva*, 1995 SCC OnLine Bom 315 : AIR 1996 Bom 94, *approved*

An application for execution of an order of maintenance can be filed under the following provisions:

(*a*) Section 28-A of the Hindu Marriage Act, 1955 read with Section 18 of the Family Courts Act, 1984 and Order 21 Rule 94 CPC for executing an order passed under Section 24 of the Hindu Marriage Act (before the Family Court);

(*b*) Section 20(6) of the DV Act (before the Judicial Magistrate); and

(*c*) Section 128 CrPC before the Magistrate's Court. (Para 115)

Section 18 of the Family Courts Act, 1984 provides that orders passed by the Family Court shall be executable in accordance with CPC/CrPC. (Para 116)

Section 125(3) CrPC provides that if the party against whom the order of maintenance is passed fails to comply with the order of maintenance, the same shall be recovered in the manner as provided for fines, and the Magistrate may award sentence of imprisonment for a term which may extend to one month, or until payment, whichever is earlier. (Para 117)

Decree of maintenance may be enforced like a decree of a civil court

The order or decree of maintenance may be enforced like a decree of a civil court, through the provisions which are available for enforcing a money decree, including civil detention, attachment of property, etc. as provided by various provisions of CPC, more particularly Sections 51, 55, 58, 60 read with Order 21 CPC. (Para 125)

The following directions are issued in exercise of powers under Article 142 of the Constitution: For enforcement/execution of orders of maintenance, it is directed that an order or decree of maintenance may be enforced under Section 28-A of

the HMA, 1955; Section 20(6) of the DV Act; and Section 128 CrPC, as may be applicable. The order of maintenance may be enforced as a money decree of a civil court as per the provisions of CPC, more particularly Sections 51, 55, 58, 60 read with Order 21. (Para 132)

I. **Family and Personal Laws — Maintenance and Financial Provision/ Alimony/Palimony — Striking off the defence — When permissible — Principles summarised — Held, striking off the defence of the respondent is an order which ought to be passed in the last resort, if the courts find default to be wilful and contumacious, particularly to a dependent unemployed wife, and minor children — Contempt proceedings for wilful disobedience may be initiated before the appropriate court — Criminal Procedure Code, 1973, S. 125 (Paras 118 to 126)**

Kaushalya v. *Mukesh Jain*, (2020) 17 SCC 822 : 2019 SCC OnLine SC 1915, *partly affirmed* and *partly limited*

Rani v. *Parkash Singh*, 1996 SCC OnLine P&H 52 : AIR 1996 P&H 175; *Mohinder Verma* v. *Sapna*, 2014 SCC OnLine P&H 25147; *Satish Kumar* v. *Meena*, 2001 SCC OnLine Del 817 : (2001) 60 DRJ 246; *Santosh Sehgal* v. *Murari Lal Sehgal*, 2006 SCC OnLine Del 585 : AIR 2007 Del 210, *clarified* and *partly approved* and *partly limited*

Gurvinder Singh v. *Murti*, 1990 SCC OnLine P&H 35; *Venkateshwar Dwivedi* v. *Ruchi Dwivedi*, 2017 SCC OnLine MP 2065; *Ravindra Kumar* v. *Renuka*, 2009 SCC OnLine Kar 481; *Davis* v. *Thomas*, 2007 SCC OnLine Ker 358 : ILR (2007) 4 Ker 389; *Sakeer Hussain T.P.* v. *Naseera*, 2016 SCC OnLine Ker 23592 : ILR (2016) 4 Ker 917, *overruled*

J. **Criminal Procedure Code, 1973 — S. 125 — S. 125 CrPC vis-à-vis S. 3(b) of the HAMA — Distinction of rights under — Purpose and object of S. 125 CrPC is to provide immediate relief to the wife and children in a summary proceeding, whereas under S. 20 r/w S. 3(b) of the HAMA, a much larger right is contemplated, which requires determination by a civil court — (*see also* Shortnote *B* on how relief under overlapping jurisdictions for grant of maintenance under various statutes is to be given) — Hindu Adoptions and Maintenance Act, 1956, S. 3(b) (Paras 30 to 35)**

Abhilasha v. *Parkash*, 2020 SCC OnLine SC 736; *Bhagwan Dutt* v. *Kamla Devi*, (1975) 2 SCC 386 : 1975 SCC (Cri) 563, *relied on*

K. **Family and Personal Laws — Maintenance and Financial Provision/ Alimony/Palimony — Live-in relationship — Presumption of marriage — Strict proof of marriage should not be a precondition for grant of maintenance under S. 125 CrPC — Evidence regarding a man and woman living together for a reasonably long period should be sufficient to draw the presumption of marriage — Criminal Procedure Code, 1973, S. 125 (Paras 39 and 40)**

Chanmuniya v. *Virendra Kumar Singh Kushwaha*, (2011) 1 SCC 141 : (2011) 1 SCC (Civ) 53 : (2011) 2 SCC (Cri) 666; *Kamala* v. *M.R. Mohan Kumar*, (2019) 11 SCC 491 : (2019) 4 SCC (Civ) 732 : (2019) 4 SCC (Cri) 242, *relied on*

Malimath Committee Report on Reforms of Criminal Justice System published in 2003, *referred to*

L. **Crimes Against Women and Children — Protection of Women from Domestic Violence Act, 2005 — Ss. 2(a), (f), (q), 3 and 17(2) — "Domestic relationship" in S. 2(f) of the DV Act — Expression "a relationship in the**

nature of marriage" or live-in relationship akin to de facto marriage or common law marriage — When can a relationship fall within the expression "a relationship in the nature of marriage" under S. 2(f) of the DV Act — Guidelines though not exhaustive, reiterated (Paras 43 and 44)

D. Velusamy v. *D. Patchaiammal*, (2010) 10 SCC 469 : (2010) 4 SCC (Civ) 223 : (2011) 1 SCC (Cri) 59; *Indra Sarma* v. *V.K.V. Sarma*, (2013) 15 SCC 755 : (2014) 5 SCC (Civ) 440 : (2014) 6 SCC (Cri) 593, *relied on*

M. **Crimes Against Women and Children — Protection of Women from Domestic Violence Act, 2005 — S. 2(s) and Ss. 17, 19 and 12 — Definition of "shared household" in S. 2(s) — Meaning of — Law summarised**

— Legal interest in shared household not relevant — An aggrieved woman's right to residence in a "shared household" is irrespective of her having any legal interest in the same — A shared household under S. 2(s) need not be owned singly by the husband — It may or may not be jointly owned or taken on rent by the husband — The intention of the parties and the nature of living, including the nature of the household, must be considered, to determine as to whether the parties intended to treat the premises as a "shared household" or not (Para 47)

— The "shared household" is the household which is the dwelling place of the aggrieved person in present time — It does not mean all the houses where the aggrieved person has lived in a domestic relationship along with the relatives of the husband — There will be a number of shared households, which was never contemplated by the legislative scheme — Mere fleeting or casual living at different places would not make it a shared household (Para 47)

— Balance required, especially when right is claimed against parents-in-law — The right to residence under S. 19 is, not an indefeasible right, especially when a daughter-in-law is claiming a right against aged parents-in-law — While granting relief under S. 12 of the DV Act, or in any civil proceeding, the court has to balance the rights between the aggrieved woman and the parents-in-law (Para 47)

— Right of residence is in addition to maintenance under S. 125 CrPC (Para 48)

Satish Chander Ahuja v. *Sneha Ahuja*, (2021) 1 SCC 414, *followed*
S.R. Batra v. *Taruna Batra*, (2007) 3 SCC 169 : (2007) 2 SCC (Cri) 56, *held, overruled*

N. **Crimes Against Women and Children — Protection of Women from Domestic Violence Act, 2005 — Ss. 2(a), (f) & (q) — Definitions of "aggrieved person" in S. 2(a), "domestic relationship" in S. 2(f) and "respondent" in S. 2(q) — Principles reiterated — Definition of "respondent" in S. 2(q) is gender neutral (Paras 41 and 42)**

Hiral P. Harsora v. *Kusum Narottamdas Harsora*, (2016) 10 SCC 165 : (2017) 1 SCC (Civ) 468 : (2017) 1 SCC (Cri) 1, *relied on*

O. **Crimes Against Women and Children — Protection of Women from Domestic Violence Act, 2005 — Ss. 22 and 23 — Claim for compensation and damages by aggrieved party for acts of domestic violence perpetrated by respondent — Ex parte orders — Scope of — Held, such ex parte orders can be granted by Magistrate if he is satisfied from the application and affidavit of aggrieved party that such domestic violence was committed or continuing or is likely to be committed by the respondent (Para 49)**

P. **Family and Personal Laws — Maintenance Pendente Lite/Interim Maintenance — Expeditious payment and adjudication — Expeditious payment of interim maintenance which was delayed by more than seven years, directed — Expeditious adjudication of substantive application under S. 125 CrPC, directed as proceedings pending for more than seven years — Challenge to order of interim maintenance by husband, rejected — Interim maintenance awarded by courts below for wife and son, affirmed — Criminal Procedure Code, 1973, S. 125 (Paras 9 to 11)**

Q. **Family and Personal Laws — Maintenance Pendente Lite/Interim Maintenance — Appeal by husband — In the appeal filed by the husband, prayer of wife for enhancement of interim maintenance for son, held, not maintainable — Liberty, however, given to wife to agitate/move Family Court for claiming said relief — Criminal Procedure Code, 1973, S. 125 (Paras 9.1 to 9.4)**

Rajnesh v. *Neha*, 2018 SCC OnLine Bom 2181, *affirmed*

Rajnesh v. *Neha*, 2018 SCC OnLine SC 3641; *Rajnesh* v. *Neha*, 2019 SCC OnLine SC 1916; *Rajnesh* v. *Neha*, 2019 SCC OnLine SC 1917; *Rajnesh* v. *Neha*, 2019 SCC OnLine SC 1918; *Rajnesh* v. *Neha*, 2020 SCC OnLine SC 940; *Rajnesh* v. *Neha*, 2020 SCC OnLine SC 941; *Rajnesh* v. *Neha*, 2020 SCC OnLine SC 942, *referred to*

R. **Family and Personal Laws — Hindu Law — Adoption, Maintenance and Financial Provision — Maintenance/Financial Provision — Generally — Right to maintenance under HAMA and HMA — Distinctions and interplay — Explained — Hindu Marriage Act, 1955 — Ss. 24 and 25 — Hindu Adoptions and Maintenance Act, 1956, Ss. 18 and 19 (Paras 27 to 29)**

S. **Family and Personal Laws — Maintenance and Financial Provision/ Alimony/Palimony — Maintenance to Wife, Children and Parents under Sections 125-128 CrPC — Quantum of maintenance — There is no ceiling on maintenance amount under Section 125 CrPC after 2001 Amendment — Introduction of express powers to grant interim maintenance — Criminal Procedure Code, 1973, S. 125 (Para 35)**

SS-D/66655/CVR

Advocates who appeared in this case :

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3. 2020 SCC OnLine MP 2657, *Amit Verma* v. *Sangeeta Verma* **(overruled)** 377*f-g*
4. 2020 SCC OnLine SC 942, *Rajnesh* v. *Neha* 347*a*
5. 2020 SCC OnLine SC 941, *Rajnesh* v. *Neha* 346*f*
6. 2020 SCC OnLine SC 940, *Rajnesh* v. *Neha* 346*d-e*
7. 2020 SCC OnLine Del 931, *Kusum Sharma* v. *Mahinder Kumar Sharma* 368*f*
8. 2020 SCC OnLine SC 736, *Abhilasha* v. *Parkash* 354*g-h*
9. 2020 SCC OnLine Bom 694, *Sanjay Damodar Kale* v. *Kalyani Sanjay Kale* 374*f-g*
10. 2020 SCC OnLine SC 239, *Rakesh Malhotra* v. *Krishna Malhotra* 366*a*
11. (2019) 12 SCC 303 : (2018) 5 SCC (Civ) 596 : (2019) 4 SCC (Cri) 339, *Reema Salkan* v. *Sumer Singh Salkan* 372*b*
12. (2019) 11 SCC 491 : (2019) 4 SCC (Civ) 732 : (2019) 4 SCC (Cri) 242, *Kamala* v. *M.R. Mohan Kumar* 359*b-c*
13. 2019 SCC OnLine Del 11709, *Lavlesh Shukla* v. *Rukmani* 377*b*
14. 2019 SCC OnLine Del 9526, *R.D.* v. *B.D.* 364*f*

15. 2019 SCC OnLine All 5428, *Ganga Prasad Srivastava* v. *Addl. District Judge, Gonda* 376*f-g*
16. 2019 SCC OnLine SC 1918, *Rajnesh* v. *Neha* 346*c-d*, 368*g*
17. 2019 SCC OnLine SC 1917, *Rajnesh* v. *Neha* 345*g*
18. 2019 SCC OnLine SC 1916, *Rajnesh* v. *Neha* 345*f-g*
19. (2018) 12 SCC 199 : (2018) 5 SCC (Civ) 308, *Shailja* v. *Khobbanna* 374*d*
20. 2018 SCC OnLine Del 7074, *Tanushree* v. *A.S. Moorthy* 365*d-e*
21. 2018 SCC OnLine SC 3641, *Rajnesh* v. *Neha* 345*f*
22. 2018 SCC OnLine Bom 2181, *Rajnesh* v. *Neha* 345*e-f*, 345*f*, 348*a*
23. 2018 SCC OnLine Bom 1207, *Vishal* v. *Aparna* 363*g*, 364*c-d*
24. (2017) 15 SCC 801 : (2018) 2 SCC (Civ) 712, *Manish Jain* v. *Akanksha Jain* 371*f*
25. 2017 SCC OnLine Cal 15484 : (2018) 2 CHN 129, *Sujit Adhikari* v. *Tulika Adhikari* **(overruled)** 363*e*
26. 2017 SCC OnLine Del 12534, *Kusum Sharma* v. *Mahinder Kumar Sharma* 368*e*
27. 2017 SCC OnLine Del 11796, *Kusum Sharma* v. *Mahinder Kumar Sharma* 368*d-e*
28. 2017 SCC OnLine MP 2065, *Venkateshwar Dwivedi* v. *Ruchi Dwivedi* **(overruled)** 383*a*
29. (2016) 10 SCC 165 : (2017) 1 SCC (Civ) 468 : (2017) 1 SCC (Cri) 1, *Hiral P. Harsora* v. *Kusum Narottamdas Harsora* 359*e*
30. 2016 SCC OnLine Ker 23592 : ILR (2016) 4 Ker 917, *Sakeer Hussain T.P.* v. *Naseera* **(overruled)** 383*b*
31. 2016 SCC OnLine Kar 8848 : 2016 Cri LJ 4794 (Kar), *P. Suresh* v. *S. Deepa* 374*d*
32. (2015) 6 SCC 353 : (2015) 3 SCC (Civ) 321 : (2015) 4 SCC (Cri) 200, *Bhuwan Mohan Singh* v. *Meena* 358*d-e*, 379*b*
33. (2015) 5 SCC 705 : (2015) 3 SCC (Civ) 274 : (2015) 2 SCC (Cri) 785, *Shamima Farooqui* v. *Shahid Khan* 375*b*
34. 2015 SCC OnLine Cal 9554, *Chandra Mohan Das* v. *Tapati Das* **(overruled)** 363*e-f*
35. 2015 SCC OnLine MP 7427 : (2016) 2 MP LJ 179, *Mohan Swaroop Chauhan* v. *Mohini* **(overruled)** 363*e*
36. 2015 SCC OnLine Del 6793, *Kusum Sharma* v. *Mahinder Kumar Sharma* 368*d*
37. 2015 SCC OnLine HP 1252 : 2015 Cri LJ 3451, *Vipul Lakhanpal* v. *Pooja Sharma* 374*e*
38. (2014) 16 SCC 715 : (2015) 3 SCC (Civ) 753 : (2015) 3 SCC (Cri) 589, *Sunita Kachwaha* v. *Anil Kachwaha* 374*e-f*, 374*f-g*
39. (2014) 14 SCC 452 : (2015) 1 SCC (Civ) 346 : (2015) 1 SCC (Cri) 407, *Nagendrappa Natikar* v. *Neelamma* 366*d*
40. (2014) 1 SCC 188 : (2014) 1 SCC (Civ) 51, *Badshah* v. *Urmila Badshah Godse* 379*d-e*
41. 2014 SCC OnLine P&H 25147, *Mohinder Verma* v. *Sapna* **(partly limited)** 381*a-b*
42. 2014 SCC OnLine Del 7627, *Kusum Sharma* v. *Mahinder Kumar Sharma* 368*c-d*
43. (2013) 15 SCC 755 : (2014) 5 SCC (Civ) 440 : (2014) 6 SCC (Cri) 593, *Indra Sarma* v. *V.K.V. Sarma* 360*c*
44. (2011) 13 SCC 112 : (2012) 3 SCC (Civ) 290, *Vinny Parmvir Parmar* v. *Parmvir Parmar* 371*f*
45. (2011) 1 SCC 141 : (2011) 1 SCC (Civ) 53 : (2011) 2 SCC (Cri) 666, *Chanmuniya* v. *Virendra Kumar Singh Kushwaha* 358*f-g*
46. 2011 SCC OnLine Del 3841 : ILR (2012) 1 Del 73, *Puneet Kaur* v. *Inderjit Singh Sawhney* 368*c-d*
47. (2010) 10 SCC 469 : (2010) 4 SCC (Civ) 223 : (2011) 1 SCC (Cri) 59, *D. Velusamy* v. *D. Patchaiammal* 360*a*
48. 2010 SCC OnLine All 236 : (2010) 69 ACC 19, *Bina Devi* v. *State of U.P.* **(overruled)** 377*e-f*

49. 2010 SCC OnLine Ori 30 : (2010) 93 AIC 726, *Arun Kumar Nayak* v. *Urmila Jena* 376*d*
50. 2009 SCC OnLine Kar 481, *Ravindra Kumar* v. *Renuka* **(overruled)** 383*a*
51. 2009 SCC OnLine Ori 21 : AIR 2009 Ori 133, *Kalpana Das* v. *Sarat Kumar Das* **(overruled)** 378*c-d*
52. (2008) 9 SCC 632 : (2008) 3 SCC (Cri) 839, *Shail Kumari Devi* v. *Krishan Bhagwan Pathak* 379*a-b*
53. (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356, *Chaturbhuj* v. *Sita Bai* 358*c-d*, 372*b-c*, 374*e*
54. 2008 SCC OnLine MP 18 : AIR 2008 MP 139, *Ashok Singh Pal* v. *Manjulata* **(overruled)** 363*c-d*
55. (2007) 3 SCC 169 : (2007) 2 SCC (Cri) 56, *S.R. Batra* v. *Taruna Batra* **(held, overruled)** 361*a*, 361*a-b*, 361*b-c*
56. 2007 SCC OnLine Del 622, *Bharat Hegde* v. *Saroj Hegde* 372*f*
57. 2007 SCC OnLine Ker 358 : ILR (2007) 4 Ker 389, *Davis* v. *Thomas* **(overruled)** 383*b*
58. 2006 SCC OnLine Del 585 : AIR 2007 Del 210, *Santosh Sehgal* v. *Murari Lal Sehgal* **(partly limited)** 382*a*, 382*a-b*
59. 2001 SCC OnLine Del 817 : (2001) 60 DRJ 246, *Satish Kumar* v. *Meena* **(partly limited)** 381*g-h*, 382*c-d*
60. 2001 SCC OnLine Bom 165 : (2002) 2 Mah LJ 53, *Panditrao Chimaji Kalure* v. *Gayabai Panditrao Kalure* 353*e-f*
61. 2000 SCC OnLine Ori 217 : 2001 Cri LJ 879, *Kanhu Charan Jena* v. *Nirmala Jena* 376*c*
62. (1997) 11 SCC 286 : 1998 SCC (Cri) 160, *Sudeep Chaudhary* v. *Radha Chaudhary* 366*e-f*
63. (1997) 7 SCC 7, *Jasbir Kaur Sehgal* v. *District Judge, Dehradun* 371*f*
64. 1996 SCC OnLine P&H 52 : AIR 1996 P&H 175, *Rani* v. *Parkash Singh* **(partly limited)** 380*g-h*, 382*b*, 382*c*
65. (1996) 1 OLR 361, *Susmita Mohanty* v. *Rabindra Nath Sahu* 376*b*
66. 1995 SCC OnLine Bom 315 : AIR 1996 Bom 94, *Sushila Viresh Chhadva* v. *Viresh Nagshi Chhadva* 380*b*
67. (1993) 3 SCC 406 : 1993 SCC (Cri) 915, *Chand Dhawan* v. *Jawaharlal Dhawan* 353*f-g*
68. 1991 SCC OnLine MP 6, *Krishna* v. *Dharam Raj* 376*d-e*
69. 1990 SCC OnLine P&H 35, *Gurvinder Singh* v. *Murti* **(overruled)** 382*e-f*
70. 1989 SCC OnLine AP 60 : (1989) 1 AP LJ 604, *K. Sivaram* v. *K. Mangalamba* 375*f-g*
71. (1986) 2 OLR 44, *Gouri Das* v. *Pradyumna Kumar Das* **(overruled)** 378*b*
72. 1982 SCC OnLine Ker 51 : AIR 1983 Ker 139, *S. Radhakumari* v. *K.M.K. Nair* **(overruled)** 378*a*
73. (1978) 4 SCC 70 : 1978 SCC (Cri) 508, *Ramesh Chander Kaushal* v. *Veena Kaushal* 349*a*
74. (1975) 2 SCC 386 : 1975 SCC (Cri) 563, *Bhagwan Dutt* v. *Kamla Devi* 356*c*
75. (1969) 3 SCC 802 : 1970 SCC (Cri) 127, *Nanak Chand* v. *Chandra Kishore Aggarwal* 349*e-f*
76. 1968 SCC OnLine Del 52 : AIR 1968 Del 174, *Chander Parkash* v. *Shila Rani* 375*a*, 375*b-c*
77. 1965 SCC OnLine Cal 196, *Samir Kr. Banerjee* v. *Sujata Banerjee* **(overruled)** 378*a-b*
78. 1964 SCC OnLine Pat 160 : AIR 1965 Pat 442, *Nalini Ranjan Chakravarty* v. *Kiran Rani Chakravarty* 350*a*
79. (1962) 2 Cri LJ 528 (Cal), *Mahabir Agarwalla* v. *Gita Roy* 350*a*
80. 1962 SCC OnLine All 191 : AIR 1963 All 355, *Ram Singh* v. *State* 349*g-h*

The Judgment of the Court was delivered by

INDU MALHOTRA, J.—

a

INDEX

b

PART A

c *Order passed in Criminal Appeal No. 730 of 2020*

1. Leave granted. The present criminal appeal arises out of an application for interim maintenance filed in a petition under Section 125 CrPC by the respondent wife and minor son. Respondent 1 wife left the matrimonial home in January 2013, shortly after the birth of the son — Respondent 2. On 2-9-2013, the wife filed an application for interim maintenance under
d Section 125 CrPC on behalf of herself and the minor son. The Family Court vide a detailed order dated 24-8-2015 awarded interim maintenance of Rs 15,000 per month to Respondent 1 wife from 1-9-2013; and Rs 5000 per month as interim maintenance for Respondent 2 son from 1-9-2013 to 31-8-2015; and @ Rs 10,000 per month from 1-9-2015 onwards till further orders were passed in the main petition.

e **2.** The appellant husband challenged the order of the Family Court vide Criminal Writ Petition No. 875 of 2015 filed before the Bombay High Court, Nagpur Bench. The High Court dismissed the writ petition vide order dated 14-8-2018[1], and affirmed the judgment passed by the Family Court.

3. The present appeal has been filed to impugn the order dated 14-8-2018[1].
f This Court issued notice[2] to the wife and directed the appellant husband to file his income tax returns and assessment orders for the period from 2005-2006 till date. He was also directed to place a photocopy of his passport on record. By a further order dated 11-9-2019[3], the appellant husband was directed to make payment of the arrears of Rs 2,00,000 towards interim maintenance to the wife; and a further amount of Rs 3,00,000, which was due and payable to the wife
g towards arrears of maintenance, as per his own admission. By a subsequent order dated 14-10-2019[4], it was recorded that only a part of the arrears had been paid. A final opportunity was granted to the appellant husband to make payment of the balance amount by 30-11-2019, failing which, the Court would

1 *Rajnesh* v. *Neha*, 2018 SCC OnLine Bom 2181
h 2 *Rajnesh* v. *Neha*, 2018 SCC OnLine SC 3641
3 *Rajnesh* v. *Neha*, 2019 SCC OnLine SC 1916
4 *Rajnesh* v. *Neha*, 2019 SCC OnLine SC 1917

proceed under the Contempt of Courts Act for wilful disobedience of the orders passed by this Court.

4. In the backdrop of the facts of this case, we considered it fit to frame guidelines on certain aspects pertaining to the payment of maintenance in matrimonial matters. There are different statutes providing for making an application for grant of maintenance/interim maintenance, if any person having sufficient means neglects, or refuses to maintain his wife, children, parents. The different enactments provide an independent and distinct remedy framed with a specific object and purpose. In spite of time-frames being prescribed by various statutes for disposal of interim applications, we have noticed, in practice that in a vast majority of cases, the applications are not disposed of within the time-frame prescribed. To address various issues which arise for consideration in applications for grant of maintenance/interim maintenance, it is necessary to frame guidelines to ensure that there is uniformity and consistency in deciding the same. To seek assistance on these issues, we have appointed Ms Anitha Shenoy and Mr Gopal Sankaranarayanan, Senior Advocates as Amici Curiae, who have graciously accepted to assist this Court.

5. By a further order dated 17-12-2019[5], the appellant was directed to pay an amount of Rs 1,45,000 to Respondent 1 wife within a period of 45 days. On the issue of framing guidelines, the National Legal Services Authority was directed to elicit responses from the State Legal Services Authorities of various States.

6. By a subsequent order dated 5-8-2020[6], it was recorded that an affidavit of compliance had been filed on 4-8-2020 by the appellant husband, wherein it was stated that arrears of Rs 1,45,000 till 11-9-2019 had been paid by him in January 2020. However, he had made no further payment to the wife thereafter. With respect to the amount of Rs 10,000 p.m. payable for the minor son, the order had been complied with till July 2020. A statement was made by the counsel for the appellant that he was not disputing the payment of maintenance for his son, and would continue to pay the same. A direction was issued by this Court to pay the entire arrears of maintenance to the wife @ Rs 15,000 p.m. as fixed by the Family Court, and continue to pay the said amount during the pendency of proceedings.

7. By the order dated 25-8-2020[7], it was noted that the appellant had filed an affidavit dated 23-8-2020 wherein he had admitted and acknowledged that an amount of Rs 5,00,000 was pending towards arrears of maintenance to Respondent 1 wife. The appellant was directed to pay 50% of the arrears within a period of 4 weeks to Respondent 1, failing which, he was directed to remain present before the Court on the next date of hearing. The counsel for the husband placed on record a chart of various proceedings pending between the parties. Taking note of the aforesaid facts, we considered it appropriate to refer the matter for mediation by Mr Shridhar Purohit, Advocate, a well-known

5 *Rajnesh* v. *Neha*, 2019 SCC OnLine SC 1918
6 *Rajnesh* v. *Neha*, 2020 SCC OnLine SC 940
7 *Rajnesh* v. *Neha*, 2020 SCC OnLine SC 941

Mediator in Nagpur, to resolve all disputes pending between the parties, and arrive at an overall settlement.

8. On 8-10-2020[8], we were informed that the mediation had failed. The husband appeared before the Court, and made an oral statement that he did not have the financial means to comply with the order of maintenance payable to Respondent 1 wife, and had to borrow loans from his father to pay the same. He however stated that he had paid the maintenance awarded to the son, and would continue to do so without demur. Both parties addressed arguments and filed their written submissions.

9. We have heard the counsel for the parties, and perused the written submissions filed on their behalf.

9.1. The husband has inter alia submitted that he was presently unemployed, and was not in a position to pay maintenance to Respondent 1 wife. He stated that he did not own any immovable property, and had only one operational bank account. The husband declined to pay any further amount towards the maintenance of his wife. It was further submitted that the Family Court had erroneously relied upon the income tax returns of 2006, while determining the maintenance payable in 2013. He further submitted that he was exploring new business projects, which would enable him to be in a better position to sustain his family.

9.2. The wife has inter alia submitted that the amount of Rs 10,000 awarded for the son was granted when he was 2½ years old in 2015. The said amount was now highly inadequate to meet the expenses of a growing child, who is 7½ years old, and is a school-going boy. It was further submitted that the admission fee for the current academic year 2020-2021 had not yet been paid. If the fee was not paid within time, the school would discontinue sending the link for online classes. She submitted that she was being overburdened by the growing expenses, with no support from the husband.

9.3. With respect to the contention of the husband that he had no income, she submitted that the husband had made investments in real estate projects, and other businesses, which he was concealing from the Court, and diverting the income to his parents. It has also been alleged that the appellant had retained illegal possession of her *streedhan*, which he was refusing to return. Despite orders being passed by this Court, and in the proceedings under the DV Act, he was deliberately not complying with the same. In these circumstances, it was submitted that there was a major trust deficit, and there was no prospect for reconciliation.

9.4. With respect to the issue of enhancement of maintenance for the son, the respondent is at liberty to move the Family Court for the said relief. We cannot grant this relief in the present appeal, as it has been filed by the husband.

10. In the facts and circumstances of the case, we order and direct that:

10.1. (*a*) The judgment and order dated 24-8-2015 passed by the Family Court, Nagpur, affirmed by the Bombay High Court, Nagpur Bench vide order

8 *Rajnesh* v. *Neha*, 2020 SCC OnLine SC 942

dated 14-8-2018[1] for payment of interim maintenance @ Rs 15,000 p.m. to Respondent 1 wife, and Rs 10,000 p.m. to Respondent 2 son, is hereby affirmed by this Court.

10.2. (*b*) The husband is directed to pay the entire arrears of maintenance @ Rs 15,000 p.m., within a period of 12 weeks from the date of this judgment, and continue to comply with this order during the pendency of the proceedings under Section 125 CrPC before the Family Court.

10.3. (*c*) If the appellant husband fails to comply with the aforesaid directions of this Court, it would be open to the respondents to have the order enforced under Section 128 CrPC, and take recourse to all other remedies which are available in accordance with law.

10.4. (*d*) The proceedings for payment of interim maintenance under Section 125 CrPC have been pending between the parties for a period of over 7 years now. We deem it appropriate that the Family Court decides the substantive application under Section 125 CrPC in Petition No. E-443/2013 finally, in light of the directions/guidelines issued in the present judgment, within a period of 6 months from the date of this judgment.

11. The Registry is directed to forward a complete copy of the pleadings, along with the written submissions filed by the parties, and the record of the proceedings in the present criminal appeal, to the Family Court, Nagpur. The present criminal appeal is disposed of accordingly.

PART B

12. Given the backdrop of the facts of the present case, which reveal that the application for interim maintenance under Section 125 CrPC has remained pending before the courts for seven years now, and the difficulties encountered in the enforcement of orders passed by the courts, as the wife was constrained to move successive applications for enforcement from time to time, we deem it appropriate to frame guidelines on the issue of maintenance, which would cover overlapping jurisdiction under different enactments for payment of maintenance, payment of interim maintenance, the criteria for determining the quantum of maintenance, the date from which maintenance is to be awarded, and enforcement of orders of maintenance.

Guidelines/Directions on maintenance

13. Maintenance laws have been enacted as a measure of social justice to provide recourse to dependent wives and children for their financial support, so as to prevent them from falling into destitution and vagrancy. Article 15(3) of the Constitution of India provides that:

> "**15. (3)** Nothing in this article shall prevent the State from making any special provision for women and children."

Article 15(3) reinforced by Article 39 of the Constitution of India, which envisages a positive role for the State in fostering change towards the empowerment of women, led to the enactment of various legislations from time to time.

1 *Rajnesh* v. *Neha*, 2018 SCC OnLine Bom 2181

14. Krishna Iyer, J. in his judgment in *Ramesh Chander Kaushal* v. *Veena Kaushal*[9] held that the object of maintenance laws is: (SCC p. 74, para 9)

> "*9*. This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advances the cause — the cause of the derelicts."

15. The legislations which have been framed on the issue of maintenance are the Special Marriage Act, 1954 ("SMA"), Section 125 of the Criminal Procedure Code, 1973; and the Protection of Women from Domestic Violence Act, 2005 ("the DV Act") which provide a statutory remedy to women, irrespective of the religious community to which they belong, apart from the personal laws applicable to various religious communities.

I. ***Issue of Overlapping Jurisdiction***

16. Maintenance may be claimed under one or more of the aforementioned statutes, since each of these enactments provides an independent and distinct remedy framed with a specific object and purpose. For instance, a Hindu wife may claim maintenance under the Hindu Adoptions and Maintenance Act, 1956 ("HAMA"), and also in a substantive proceeding for either dissolution of marriage, or restitution of conjugal rights, etc. under the Hindu Marriage Act, 1955 ("HMA") by invoking Sections 24 and 25 of the said Act.

17. In *Nanak Chand* v. *Chandra Kishore Aggarwal*[10], the Supreme Court held that there was no inconsistency between the CrPC and HAMA. Section 4(*b*) of the HAMA would not repeal or affect the provisions of Section 488 of the old CrPC. It was held that: (SCC pp. 804-05, para 4)

> "*4. … Both can stand together. The Maintenance Act is an act to amend and codify the law relating to adoptions and maintenance among Hindus. The law was substantially similar before and nobody ever suggested that Hindu Law, as in force immediately before the commencement of this Act*, insofar as it dealt with the maintenance of children, *was in any way inconsistent with Section 488 CrPC. The scope of the two laws is different. Section 488 provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties*. Recently the question came before the Allahabad High Court in *Ram Singh* v. *State*[11], before the Calcutta High Court in *Mahabir*

9 (1978) 4 SCC 70 : 1978 SCC (Cri) 508
10 (1969) 3 SCC 802 : 1970 SCC (Cri) 127
11 1962 SCC OnLine All 191 : AIR 1963 All 355

Agarwalla v. *Gita Roy*[12] and before the Patna High Court in *Nalini Ranjan Chakravarty* v. *Kiran Rani Chakravarty*[13]. The three High Courts have, in our view, correctly come to the conclusion that *Section 4(b) of the Maintenance Act does not repeal or affect in any manner the provisions contained in Section 488 CrPC*." (emphasis supplied)

18. While it is true that a party is not precluded from approaching the Court under one or more enactments, since the nature and purpose of the relief under each Act is distinct and independent, it is equally true that the simultaneous operation of these Acts, would lead to multiplicity of proceedings and conflicting orders. This would have the inevitable effect of overlapping jurisdiction. This process requires to be streamlined, so that the respondent husband is not obligated to comply with successive orders of maintenance passed under different enactments. For instance, if in a previous proceeding under Section 125 CrPC, an amount is awarded towards maintenance, in the subsequent proceeding filed for dissolution of marriage under the Hindu Marriage Act, where an application for maintenance pendente lite is filed under Section 24 of that Act, or for maintenance under Section 25, the payment awarded in the earlier proceeding must be taken note of, while deciding the amount awarded under HMA.

1. ***Statutory provisions under various enactments***

(a) The Special Marriage Act, 1954 ("SMA")

19. Section 4 of the Special Marriage Act, 1954 provides that a marriage between any two persons who are citizens of India may be solemnised under this Act, notwithstanding anything contained in any other law for the time being in force. It is a secular legislation applicable to all persons who solemnise their marriage in India.

20. Section 36 of the Special Marriage Act provides that a wife is entitled to claim pendente lite maintenance, if she does not have sufficient independent income to support her and for legal expenses. The maintenance may be granted on a weekly or monthly basis during the pendency of the matrimonial proceedings. The court would determine the quantum of maintenance depending on the income of the husband, and award such amount as may seem reasonable. Section 36 reads as:

"**36.** ***Alimony pendente lite***.—Where in any proceeding under Chapter V or Chapter VI it appears to the District Court that the wife has no independent income sufficient for her support and the necessary expenses of the proceeding, it may, on the application of the wife, order the husband to pay her the expenses of the proceeding, and weekly or monthly during the proceeding such sum as, having regard to the husband's income, it may seem to the court to be reasonable:

12 (1962) 2 Cri LJ 528 (Cal)
13 1964 SCC OnLine Pat 160 : AIR 1965 Pat 442

Provided that the application for the payment of the expenses of the proceeding and such weekly or monthly sum during the proceeding under Chapter V or Chapter VI, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the husband."

21. Section 37 provides for grant of permanent alimony at the time of passing of the decree, or subsequent thereto. Permanent alimony is the consolidated payment made by the husband to the wife towards her maintenance for life. Section 37 reads as:

"**37.** ***Permanent alimony and maintenance.***—(1) Any court exercising jurisdiction under Chapter V or Chapter VI may, at the time of passing any decree or at any time subsequent to the decree, on application made to it for the purpose, order that the husband shall secure to the wife for her maintenance and support, if necessary, by a charge on the husband's property, such gross sum or such monthly or periodical payment of money for a term not exceeding her life, as, having regard to her own property, if any, her husband's property and ability, the conduct of the parties and other circumstances of the case, as it may seem to the court to be just.

(2) If the District Court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as it may seem to the court to be just.

(3) If the District Court is satisfied that the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life, it may, at the instance of the husband, vary, modify or rescind any such order and in such manner as the court may deem just."

(b) The Hindu Marriage Act, 1955 ("HMA")

22. The HMA is a complete code which provides for the rights, liabilities and obligations arising from a marriage between two Hindus. Sections 24 and 25 make provision for maintenance to a party who has no independent income sufficient for his or her support, and necessary expenses. This is a gender-neutral provision, where either the wife or the husband may claim maintenance. The prerequisite is that the applicant does not have independent income which is sufficient for her or his support, during the pendency of the lis.

23. Section 24 of the HMA provides for maintenance pendente lite, where the court may direct the respondent to pay the expenses of the proceeding, and pay such reasonable monthly amount, which is considered to be reasonable, having regard to the income of both the parties. Section 24 reads as:

"**24.** ***Maintenance pendente lite and expenses of proceedings***.—Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has *no independent income sufficient for her or his support and the necessary expenses* of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner *the expenses of the proceeding*, and *monthly during the proceeding*

such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable:

Provided that the application for the payment of the expenses of the proceeding and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be." (emphasis supplied)

The proviso to Section 24 providing a timeline of 60 days for disposal of the application was inserted vide Act 49 of 2001 w.e.f. 24-9-2001.

24. Section 25 provides for grant of permanent alimony, which reads as:

"**25.** ***Permanent alimony and maintenance.***—(1) Any court exercising jurisdiction under this Act may, at the time of *passing any decree or at any time subsequent thereto*, on application made to it for the purpose by either the wife or the husband, as the case may be, order that *the respondent shall pay to the applicant* for her or his *maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.*

(2) If the court is satisfied that there is, a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just." (emphasis supplied)

25. Section 26 of the HMA provides that the court may from time to time pass interim orders with respect to the custody, maintenance and education of the minor children.

(c) Hindu Adoptions & Maintenance Act, 1956 ("HAMA")

26. HAMA is a special legislation which was enacted to amend and codify the laws relating to adoption and maintenance amongst Hindus, during the subsistence of the marriage. Section 18 provides that a Hindu wife shall be entitled to be maintained by her husband during her lifetime. She is entitled to make a claim for a separate residence, without forfeiting her right to maintenance. Section 18 read in conjunction with Section 23 states the factors required to be considered for deciding the quantum of maintenance to be paid. Under sub-section (2) of Section 18, the husband has the obligation to maintain his wife, even though she may be living separately. The right of separate

residence and maintenance would however not be available if the wife has been unchaste, or has converted to another religion. Section 18 reads as follows:

"**18.** ***Maintenance of wife***.—(1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance—

(*a*) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her;

(*b*) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;

(*c*) [* * *]

(*d*) if he has any other wife living;

(*e*) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(*f*) if he has ceased to be a Hindu by conversion to another religion;

(*g*) if there is any other cause justifying living separately.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion."

27. The distinction between maintenance under HMA and HAMA is that the right under Section 18 of the HAMA is available during the subsistence of a marriage, without any matrimonial proceeding pending between the parties. Once there is a divorce, the wife has to seek relief under Section 25 of the HMA.[14] Under HMA, either the wife, or the husband, may move for judicial separation, restitution of conjugal rights, dissolution of marriage, payment of interim maintenance under Section 24, and permanent alimony under Section 25 of the Act, whereas under Section 18 of the HAMA, only a wife may seek maintenance.

28. The interplay between the claim for maintenance under HMA and HAMA came up for consideration by the Supreme Court in *Chand Dhawan* v. *Jawaharlal Dhawan*[15]. The Supreme Court, while considering the various laws relating to marriage amongst Hindus, discussed the scope of applications under the HMA and HAMA in the following words: (SCC pp. 415-16, para 23)

"*23. … Section 18(1) of the Hindu Adoptions and Maintenance Act, 1956 entitles a Hindu wife to claim maintenance from her husband during her lifetime. Sub-section (2) of Section 18 grants her the right to live*

14 *Panditrao Chimaji Kalure* v. *Gayabai Panditrao Kalure*, 2001 SCC OnLine Bom 165 : (2002) 2 Mah LJ 53

15 (1993) 3 SCC 406 : 1993 SCC (Cri) 915

separately, without forfeiting her claim to maintenance, if he is guilty of any of the misbehaviours enumerated therein or on account of his being in one of objectionable conditions as mentioned therein. So while sustaining her marriage and preserving her marital status, the wife is entitled to claim maintenance from her husband. *On the other hand, under the Hindu Marriage Act, in contrast, her claim for maintenance pendente lite is durated (sic) on the pendency of a litigation of the kind envisaged under Sections 9 to 14 of the Hindu Marriage Act, and her claim to permanent maintenance or alimony is based on the supposition that either her marital status has been strained or affected by passing a decree for restitution of conjugal rights or judicial separation in favour or against her, or her marriage stands dissolved by a decree of nullity or divorce, with or without her consent*. Thus when her marital status is to be affected or disrupted the court does so by passing a decree for or against her. On or at the time of the happening of that event, the court being seized of the matter, invokes its ancillary or incidental power to grant permanent alimony. Not only that, the court retains the jurisdiction at subsequent stages to fulfil this incidental or ancillary obligation when moved by an application on that behalf by a party entitled to relief. The court further retains the power to change or alter the order in view of the changed circumstances. Thus the whole exercise is within the gammit (sic gamut) of a diseased or a broken marriage. *And in order to avoid conflict of perceptions the legislature while codifying the Hindu Marriage Act preserved the right of permanent maintenance in favour of the husband or the wife, as the case may be, dependent on the court passing a decree of the kind as envisaged under Sections 9 to 14 of the Act. In other words without the marital status being affected or disrupted by the matrimonial court under the Hindu Marriage Act the claim of permanent alimony was not to be valid as ancillary or incidental to such affectation or disruption. The wife's claim to maintenance necessarily has then to be agitated under the Hindu Adoptions and Maintenance Act, 1956 which is a legislative measure later in point of time than the Hindu Marriage Act, 1955, though part of the same socio-legal scheme revolutionising the law applicable to Hindus*." (emphasis supplied)

29. Section 19 of the HAMA provides that a widowed daughter-in-law may claim maintenance from her father-in-law if (*i*) she is unable to maintain herself out of her own earnings or other property; or, (*ii*) where she has no property of her own, is unable to obtain maintenance; (*a*) from the estate of her husband, or her father or mother, or (*b*) from her son or daughter, if any, or his or her estate.

30. Section 20 of the HAMA provides for maintenance of children and aged parents. Section 20 casts a statutory obligation on a Hindu male to maintain an unmarried daughter, who is unable to maintain herself out of her own earnings, or other property. In *Abhilasha* v. *Parkash*[16], a three-Judge Bench of this Court held that Section 20(3) is a recognition of the principles of Hindu law, particularly the obligation of the father to maintain an unmarried

16 2020 SCC OnLine SC 736

daughter. The right is absolute under personal law, which has been given statutory recognition by this Act. The Court noted the distinction between the award of maintenance to children under Section 125 CrPC, which limits the claim of maintenance to a child, until he or she attains majority. However, if an unmarried daughter is by reason of any physical or mental abnormality or injury, unable to maintain herself, under Section 125(1)(*c*), the father would be obligated to maintain her even after she has attained majority. The maintenance contemplated under HAMA is a wider concept. Section 3(*b*) contains an inclusive definition of maintenance including marriage expenses. The purpose and object of Section 125 CrPC is to provide immediate relief to the wife and children in a summary proceeding, whereas under Section 20 read with Section 3(*b*) of the HAMA, a much larger right is contemplated, which requires determination by a civil court.

31. Section 22 provides for maintenance of dependants. Section 23 provides that while awarding maintenance, the court shall have due regard to the criteria mentioned therein:

> "**23.** ***Amount of maintenance***.—(1) It shall be in the discretion of the court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so, the court shall have due regard to the consideration set out in sub-section (2) or sub-section (3), as the case may be, so far as they are applicable.
>
> (2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, regard shall be had to—
>
> (*a*) the position and status of the parties;
>
> (*b*) the reasonable wants of the claimant;
>
> (*c*) if the claimant is living separately, whether the claimant is justified in doing so;
>
> (*d*) the value of the claimant's property and any income derived from such property, or from the claimant's own earning or from any other source;
>
> (*e*) the number of persons entitled to maintenance under this Act.
>
> (3) In determining the amount of maintenance, if any, to be awarded to a dependant under this Act, regard shall be had to—
>
> (*a*) the net value of the estate of the deceased after providing for the payment of his debts;
>
> (*b*) the provision, if any, made under a will of the deceased in respect, of the dependant;
>
> (*c*) the degree of relationship between the two;
>
> (*d*) the reasonable wants of the dependant;
>
> (*e*) the past relations between the dependant and the deceased;
>
> (*f*) the value of the property of the dependant and any income derived from such property, or from his or her earnings or from any other course;
>
> (*g*) the number of dependants entitled to maintenance under this Act."

(d) Section 125 CrPC

32. Chapter IX of the Code of Criminal Procedure, 1973 provides for maintenance of wife, children and parents in a summary proceeding. Maintenance under Section 125 CrPC may be claimed by a person irrespective of the religious community to which they belong. The purpose and object of Section 125 CrPC is to provide immediate relief to an applicant. An application under Section 125 CrPC is predicated on two conditions: (*i*) the husband has sufficient means; and (*ii*) "neglects" to maintain his wife, who is unable to maintain herself. In such a case, the husband may be directed by the Magistrate to pay such monthly sum to the wife, as deemed fit. Maintenance is awarded on the basis of the financial capacity of the husband and other relevant factors.

33. The remedy provided by Section 125 is summary in nature, and the substantive disputes with respect to dissolution of marriage can be determined by a civil court/Family Court in an appropriate proceeding, such as the Hindu Marriage Act, 1955.

34. In *Bhagwan Dutt* v. *Kamla Devi*[17] the Supreme Court held that under Section 125(1) CrPC only a wife who is "unable to maintain herself" is entitled to seek maintenance. The Court held: (SCC p. 392, para 19)

> "*19. The object of these provisions being to prevent vagrancy and destitution, the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family.* The needs and requirements of the wife for such moderate living can be fairly determined, only if her separate income, also, is taken into account together with the earnings of the husband and his commitments." (emphasis supplied)

35. Prior to the amendment of Section 125 in 2001, there was a ceiling on the amount which could be awarded as maintenance, being Rs 500 "in the whole". In view of the rising costs of living and inflation rates, the ceiling of Rs 500 was done away with by the 2001 Amendment Act. The Statement of Objects and Reasons of the Amendment Act states that the wife had to wait for several years before being granted maintenance. Consequently, the Amendment Act introduced an express provision for grant of "interim maintenance". The Magistrate was vested with the power to order the respondent to make a monthly allowance towards interim maintenance during the pendency of the petition. Under sub-section (2) of Section 125, the court is conferred with the discretion to award payment of maintenance either from the date of the order, or from the date of the application. Under the third proviso to the amended Section 125, the application for grant of interim maintenance must be disposed of as far as possible within sixty days from the date of service of notice on the respondent.

36. The amended Section 125 reads as under:

> "**125.** ***Order for maintenance of wives, children and parents.***—*(1) If any person having sufficient means neglects or refuses to maintain—*
>
> *(a) his wife, unable to maintain herself, or*

17 (1975) 2 SCC 386 : 1975 SCC (Cri) 563

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or *illegitimate child* (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(*d*) his father or mother, unable to maintain himself or herself,

a Magistrate of the First Class may, upon proof of such neglect or refusal, *order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:*

Provided that the *Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means*:

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the *interim maintenance and expenses* of proceeding *under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.*

Explanation.—For the purposes of this Chapter—

(*a*) "**minor**" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;

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

(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.—If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be a just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance for the maintenance or interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order." (emphasis supplied)

37. In *Chaturbhuj* v. *Sita Bai*[18] this Court held that the object of maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy and destitution of a deserted wife by providing her food, clothing and shelter by a speedy remedy. Section 125 CrPC is a measure of social justice especially enacted to protect women and children, and falls within the constitutional sweep of Article 15(3), reinforced by Article 39 of the Constitution.

38. Proceedings under Section 125 CrPC are summary in nature. In *Bhuwan Mohan Singh* v. *Meena*[19] this Court held that Section 125 CrPC was conceived to ameliorate the agony, anguish, financial suffering of a woman who had left her matrimonial home, so that some suitable arrangements could be made to enable her to sustain herself and the children. Since it is the sacrosanct duty of the husband to provide financial support to the wife and minor children, the husband was required to earn money even by physical labour, if he is able-bodied, and could not avoid his obligation, except on any legally permissible ground mentioned in the statute.

39. The issue whether presumption of marriage arises when parties are in a live-in relationship for a long period of time, which would give rise to a claim under Section 125 CrPC came up for consideration in *Chanmuniya* v. *Virendra Kumar Singh Kushwaha*[20] before the Supreme Court. It was held that where a man and a woman have cohabited for a long period of time, in the absence of legal necessities of a valid marriage, such a woman would be entitled to maintenance. A man should not be allowed to benefit from legal loopholes, by enjoying the advantages of a de facto marriage, without undertaking the duties and obligations of such marriage. A broad and expansive interpretation

18 (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356
19 (2015) 6 SCC 353 : (2015) 3 SCC (Civ) 321 : (2015) 4 SCC (Cri) 200
20 (2011) 1 SCC 141 : (2011) 1 SCC (Civ) 53 : (2011) 2 SCC (Cri) 666. This judgment was referred to a larger Bench.

must be given to the term "wife", to include even those cases where a man and woman have been living together as husband and wife for a reasonably long period of time. Strict proof of marriage should not be a precondition for grant of maintenance under Section 125 CrPC. The Court relied on the Malimath Committee Report on Reforms of Criminal Justice System published in 2003, which recommended that evidence regarding a man and woman living together for a reasonably long period, should be sufficient to draw the presumption of marriage.

40. The law presumes in favour of marriage, and against concubinage, when a man and woman cohabit continuously for a number of years. Unlike matrimonial proceedings where strict proof of marriage is essential, in proceedings under Section 125 CrPC such strict standard of proof is not necessary.[21]

(e) Protection of Women from Domestic Violence Act, 2005 ("the DV Act")

41. The DV Act stands on a separate footing from the laws discussed hereinabove. The DV Act provides relief to an aggrieved woman who is subjected to "domestic violence". The "aggrieved person" has been defined by Section 2(*a*) to mean any woman who is, or has been, in a domestic relationship with the respondent, and alleges to have been subjected to any act of domestic violence. Section 2(*f*) defines "domestic relationship" to include a relationship between two persons who live, or have at any point of time lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption, or are family members living together as a joint family.

42. Section 2(*q*) of the Act defined "respondent" to mean an "adult male person" who is, or has been, in a domestic relationship with the aggrieved woman. In *Hiral P. Harsora* v. *Kusum Narottamdas Harsora*[22] this Court held that the "respondent" could also be a female in a domestic relationship with the aggrieved person. Section 3 of the DV Act gives a gender-neutral definition to "domestic violence". Physical abuse, verbal abuse, emotional abuse and economic abuse can also be inflicted by women against other women. Even sexual abuse may, in a given fact circumstance, be by one woman on another. Section 17(2) provides that the aggrieved person cannot be evicted or excluded from a "shared household", or any part of it by the "respondent", save in accordance with the procedure established by law. If "respondent" is to be read as only an adult male person, women who evict or exclude the aggrieved person would then not be covered by the ambit of the Act, and defeat the very object, by putting forward female persons who can evict or exclude the aggrieved woman from the shared household. The Court struck down the words "adult male" before the word "person" in Section 2(*q*) of the 2005 Act, and deleted the proviso to Section 2(*q*), as being contrary to the object of the Act.

21 *Kamala* v. *M.R. Mohan Kumar*, (2019) 11 SCC 491 : (2019) 4 SCC (Civ) 732 : (2019) 4 SCC (Cri) 242

22 (2016) 10 SCC 165 : (2017) 1 SCC (Civ) 468 : (2017) 1 SCC (Cri) 1

43. The expression "relationship in the nature of marriage" as being akin to a common law or a de facto marriage, came up for consideration in *D. Velusamy* v. *D. Patchaiammal*[23]. It was opined that a common law marriage is one which requires that although a couple may not be formally married: (*a*) the couple hold themselves out to society as being akin to spouses; (*b*) the parties must be of legal age to marry; (*c*) the parties must be otherwise qualified to enter into a legal marriage, including being unmarried; and (*d*) the parties must have voluntarily cohabited, and held themselves out to the world as being akin to spouses for a significant period of time. However, not all live-in relationships would amount to a relationship in the nature of marriage to avail the benefit of the DV Act. Merely spending weekends together, or a one-night stand, would not make it a "domestic relationship".

44. For a live-in relationship to fall within the expression "relationship in the nature of marriage", this Court in *Indra Sarma* v. *V.K.V. Sarma*[24] laid down the following guidelines: (*a*) duration of period of relationship; (*b*) shared household; (*c*) domestic arrangements; (*d*) pooling of resources and financial arrangements; (*e*) sexual relationship; (*f*) children; (*g*) socialisation in public; and (*h*) intention and conduct of the parties. The Court held that these guidelines were only indicative, and not exhaustive.

45. "Domestic violence" has been defined in Section 3 of the Act, which includes economic abuse as defined in Explanation 1(*iv*) to Section 3, as:

> "Economic abuse which means deprivation of all or any economic or financial resources, to which the aggrieved person is entitled under any law or custom, whether payable under an order of a court or otherwise, or which the aggrieved person requires out of necessity, including but not limited to household necessities for the aggrieved person, or her children."

46. Section 17 by a non obstante clause provides that notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the "shared household", irrespective of whether she has any right, title or beneficial interest in the same. Section 17 reads as:

> "**17.** ***Right to reside in a shared household.***—(1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.
>
> (2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law."

Section 19 deals with residence orders, grant of injunctive reliefs, or for alternate accommodation/payment of rent by the respondent.

23 (2010) 10 SCC 469 : (2010) 4 SCC (Civ) 223 : (2011) 1 SCC (Cri) 59
24 (2013) 15 SCC 755 : (2014) 5 SCC (Civ) 440 : (2014) 6 SCC (Cri) 593

47. A three-Judge Bench of this Court in *Satish Chander Ahuja* v. *Sneha Ahuja*[25] has overruled the judgment in *S.R. Batra* v. *Taruna Batra*[26] wherein a two-Judge Bench held that the wife is entitled to claim a right of residence in a "shared household" under Section 17(1), which would only mean the house belonging to, or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member. In *Satish Chander Ahuja*[25], the Court has held that although the judgment in *S.R. Batra*[26] noticed the definition of shared household under Section 2(*s*), it did not advert to different parts of the definition, which makes it clear that there was no requirement for the shared household to be owned singly or jointly by the husband, or taken on rent by the husband. If the interpretation given in *S.R. Batra*[26] is accepted, it would frustrate the object of the Act. The Court has taken the view that the definition of "shared household" in Section 2(*s*) is an exhaustive definition. The "shared household" is the household which is the dwelling place of the aggrieved person in present time. If the definition of "shared household" in Section 2(*s*) is read to mean all the houses where the aggrieved person has lived in a domestic relationship along with the relatives of the husband, there will be a number of shared households, which was never contemplated by the legislative scheme. The entire scheme of the legislation is to provide immediate relief to the aggrieved person with respect to the shared household where the aggrieved woman lives or has lived. The use of the expression "at any stage has lived", is with the intent of not denying protection to an aggrieved woman merely on the ground that she was not living there on the date of the application, or on the date when the Magistrate passed the order under Section 19. The words "lives, or at any stage has lived in a domestic relationship" has to be given its normal and purposeful meaning. Living of the woman in a household must refer to a living which has some permanency. Mere fleeting or casual living at different places would not make it a shared household. The intention of the parties and the nature of living, including the nature of the household, must be considered, to determine as to whether the parties intended to treat the premises as a "shared household" or not. Section 2(*s*) read with Sections 17 and 19 grant an entitlement in favour of an aggrieved woman to the right of residence in a "shared household", irrespective of her having any legal interest in the same or not. From the definition of "aggrieved person" and "respondent", it was clear that:

(*i*) it is not the requirement of law that the aggrieved person may either own the premises jointly or singly, or by tenanting it jointly or singly;

(*ii*) the household may belong to a joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title, or interest in the shared household;

(*iii*) the shared household may either be owned, or tenanted by the respondent singly or jointly.

25 (2021) 1 SCC 414, by a Bench comprising of Hon'ble Ashok Bhushan, R. Subhash Reddy and M.R. Shah, JJ.

26 (2007) 3 SCC 169 : (2007) 2 SCC (Cri) 56

The right to residence under Section 19 is, however, not an indefeasible right, especially when a daughter-in-law is claiming a right against aged parents-in-law. While granting relief under Section 12 of the DV Act, or in any civil proceeding, the court has to balance the rights between the aggrieved woman and the parents-in-law.

48. Section 20 provides for monetary relief to the aggrieved woman:

> "**20.** ***Monetary reliefs***.—(1) While disposing of an application under sub-section (1) of Section 12, *the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of domestic violence* and such relief *may include*, but is *not limited to*—
>
> (*a*) *the loss of earnings;*
>
> (*b*) *the medical expenses;*
>
> (*c*) *the loss caused due to destruction, damage or removal of any property from the control of the aggrieved person; and*
>
> (*d*) *the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.*
>
> (2) *The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.*
>
> (3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require." (emphasis supplied)

Section 20(1)(*d*) provides that maintenance granted under the DV Act to an aggrieved woman and children, would be given effect to, in addition to an order of maintenance awarded under Section 125 CrPC, or any other law in force. Under sub-section (6) of Section 20, the Magistrate may direct the employer or debtor of the respondent, to directly pay the aggrieved person, or deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.

49. Section 22 provides that the Magistrate may pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence perpetrated by the respondent. Section 23 provides that the Magistrate may grant an ex parte order, including an order under Section 20 for monetary relief. The Magistrate must be satisfied that the application filed by the aggrieved woman discloses that the respondent is committing, or has committed an act of domestic violence, or that there is a likelihood that the respondent may commit an act of domestic violence. In such a case, the Magistrate is empowered to pass an ex parte order on the basis of the affidavit of the aggrieved woman.

50. Section 26 of the DV Act provides that any relief available under Sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding before a civil court, Family Court or criminal court. Sub-section (2) of Section 26 provides that the relief mentioned in sub-section (1) may be sought in addition to, and along with any other relief that the aggrieved person may seek in a suit or legal proceeding before a civil or criminal court. Section 26(3) provides that in case any relief has been obtained by the aggrieved person in any proceeding other than proceedings under this Act, the aggrieved woman would be bound to inform the Magistrate of the grant of such relief.

51. Section 36 provides that the DV Act shall be in addition to, and not in derogation of the provisions of any other law for the time being in force.

2. Conflicting judgments on overlapping jurisdiction

52. Some High Courts have taken the view that since each proceeding is distinct and independent of the other, maintenance granted in one proceeding cannot be adjusted or set off in the other. For instance, in *Ashok Singh Pal* v. *Manjulata*[27] the Madhya Pradesh High Court held that the remedies available to an aggrieved person under Section 24 of the HMA is independent of Section 125 CrPC. In an application filed by the husband for adjustment of the amounts awarded in the two proceedings, it was held that the question as to whether adjustment is to be granted, is a matter of judicial discretion to be exercised by the court. There is nothing to suggest as a thumb rule which lays down as a mandatory requirement that adjustment or deduction of maintenance awarded under Section 125 CrPC must be off-set from the amount awarded under Section 24 of the HMA, or vice versa. A similar view was taken by another Single Judge of the Madhya Pradesh High Court in *Mohan Swaroop Chauhan* v. *Mohini*[28]. Similarly, the Calcutta High Court in *Sujit Adhikari* v. *Tulika Adhikari*[29] held that adjustment is not a rule. It was held that the quantum of maintenance determined by the Court under HMA is required to be added to the quantum of maintenance under Section 125 CrPC.

53. A similar view has been taken in *Chandra Mohan Das* v. *Tapati Das*[30], wherein a challenge was made on the point that the Court ought to have adjusted the amount awarded in a proceeding under Section 125 CrPC, while determining the maintenance to be awarded under Section 24 of the HMA, 1955. It was held that the quantum of maintenance determined under Section 24 of the HMA was to be paid in addition to the maintenance awarded in a proceeding under Section 125 CrPC.

54. On the other hand, the Bombay and Delhi High Courts, have held that in case of parallel proceedings, adjustment or set-off must take place. The Bombay High Court in a well-reasoned judgment delivered in *Vishal* v. *Aparna*[31], has taken the correct view. The Court was considering the issue whether interim

27 2008 SCC OnLine MP 18 : AIR 2008 MP 139
28 2015 SCC OnLine MP 7427 : (2016) 2 MP LJ 179
29 2017 SCC OnLine Cal 15484 : (2018) 2 CHN 129
30 2015 SCC OnLine Cal 9554
31 2018 SCC OnLine Bom 1207

monthly maintenance awarded under Section 23 read with Section 20(1)(*d*) of the DV Act could be adjusted against the maintenance awarded under Section 125 CrPC. The Family Court held that the order passed under the DV Act and the CrPC were both independent proceedings, and adjustment was not permissible. The Bombay High Court set aside the judgment of the Family Court, and held that Section 20(1)(*d*) of the DV Act makes it clear that the maintenance granted under this Act, would be in addition to an order of maintenance under Section 125 CrPC, and any other law for the time being in force. Sub-section (3) of Section 26 of the DV Act enjoins upon the aggrieved person to inform the Magistrate, if she has obtained any relief available under Sections 18, 19, 20, 21 and 22, in any other legal proceeding filed by her, whether before a civil court, Family Court, or criminal court. The object being that while granting relief under the DV Act, the Magistrate shall take into account and consider if any similar relief has been obtained by the aggrieved person. Even though proceedings under the DV Act may be an independent proceeding, the Magistrate cannot ignore the maintenance awarded in any other legal proceedings, while determining whether over and above the maintenance already awarded, any further amount was required to be granted for reasons to be recorded in writing. The Court observed: (*Vishal case*[31], SCC OnLine Bom para 18)

> "*18.* What I intend to emphasise is the fact that the adjustment is permissible and the adjustment can be allowed of the lower amount against the higher amount. *Though the wife can simultaneously claim maintenance under the different enactments, it does not in any way mean that the husband can be made liable to pay the maintenance awarded in each of the said proceedings.*" (emphasis supplied)

It was held that while determining the quantum of maintenance awarded under Section 125 CrPC, the Magistrate would take into consideration the interim maintenance awarded to the aggrieved woman under the DV Act.

55. The issue of overlapping jurisdictions under the HMA and the DV Act or CrPC came up for consideration before a Division Bench of the Delhi High Court in *R.D.* v. *B.D.*[32] wherein the Court held that maintenance granted to an aggrieved person under the DV Act, would be in addition to an order of maintenance under Section 125 CrPC, or under the HMA. The legislative mandate envisages grant of maintenance to the wife under various statutes. It was not the intention of the legislature that once an order is passed in either of the maintenance proceedings, the order would debar re-adjudication of the issue of maintenance in any other proceeding. In paras 16 and 17 of the judgment, it was observed that: (SCC OnLine Del)

> "*16. A conjoint reading of the aforesaid Sections 20, 26 and 36 of the DV Act would clearly establish that the provisions of the DV Act dealing with maintenance are supplementary to the provisions of other laws and*

31 *Vishal* v. *Aparna*, 2018 SCC OnLine Bom 1207
32 2019 SCC OnLine Del 9526 : (2019) 7 AD 466

therefore maintenance can be granted to the aggrieved person(s) under the DV Act which would also be in addition to any order of maintenance arising out of Section 125 CrPC.

17. On the converse, if any order is passed by the Family Court under Section 24 of the HMA, the same would not debar the Court in the proceedings arising out of the DV Act or proceedings under Section 125 CrPC instituted by the wife/aggrieved person claiming maintenance. However, *it cannot be laid down as a proposition of law that once an order of maintenance has been passed by any court then the same cannot be re-adjudicated upon by any other court. The legislative mandate envisages grant of maintenance to the wife under various statutes such as HMA, Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as 'HAMA'), Section 125 CrPC as well as Section 20 of the DV Act. As such various statutes have been enacted to provide for the maintenance to the wife and it is nowhere the intention of the legislature that once any order is passed in either of the proceedings, the said order would debar re-adjudication of the issue of maintenance in any other court.*" (emphasis supplied)

The Court held that under Section 20(1)(*d*) of the DV Act, maintenance awarded to the aggrieved woman under the DV Act is in addition to an order of maintenance provided under Section 125 CrPC. The grant of maintenance under the DV Act would not be a bar to seek maintenance under Section 24 of the HMA.

56. Similarly, in *Tanushree* v. *A.S. Moorthy*[33] the Delhi High Court was considering a case where the Magistrate's Court had sine die adjourned the proceedings under Section 125 CrPC on the ground that parallel proceedings for maintenance under the DV Act were pending. In an appeal filed by the wife before the High Court, it was held that a reading of Section 20(1)(*d*) of the DV Act indicates that while considering an application under Section 12 of the DV Act, the Court would take into account an order of maintenance passed under Section 125 CrPC, or any other law for the time being in force. The mere fact that two proceedings were initiated by a party, would not imply that one would have to be adjourned sine die. There is a distinction in the scope and power exercised by the Magistrate under Section 125 CrPC and the DV Act. With respect to the overlap in both statutes, the Court held: (SCC OnLine Del para 5)

"*5.* Reading of Section 20(1)(*d*) of the DV Act further shows that the two proceedings are independent of each other and have different scope, though there is an overlap. *Insofar as the overlap is concerned, law has catered for that eventuality and laid down that at the time of consideration of an application for grant of maintenance under Section 12 of the DV Act, the maintenance fixed under Section 125 CrPC shall be taken into account.*" (emphasis supplied)

33 2018 SCC OnLine Del 7074

57. The issue whether maintenance under Section 125 CrPC could be awarded by the Magistrate, after permanent alimony was granted to the wife in the divorce proceedings, came up for consideration before the Supreme Court in *Rakesh Malhotra* v. *Krishna Malhotra*[34]. The Court held that once an order for permanent alimony was passed, the same could be modified by the same court by exercising its power under Section 25(2) of the HMA. The Court held that: (SCC OnLine SC para 16)

> "*16*. Since Parliament has empowered the Court under Section 25(2) of the Act and kept a remedy intact and made available to the party concerned seeking modification, the logical sequitur would be that the remedy so prescribed ought to be exercised rather than creating multiple channels of remedy seeking maintenance. One can understand the situation where considering the exigencies of the situation and urgency in the matter, a wife initially prefers an application under Section 125 of the Code to secure maintenance in order to sustain herself. In such matters the wife would certainly be entitled to have a full-fledged adjudication in the form of any challenge raised before a competent court either under the Act or similar such enactments. But the reverse cannot be the accepted norm."

The Court directed that the application under Section 125 CrPC be treated as an application under Section 25(2) of the HMA and be disposed of accordingly.

58. In *Nagendrappa Natikar* v. *Neelamma*[35] this Court considered a case where the wife instituted a suit under Section 18 of the HAMA, after signing a consent letter in proceedings under Section 125 CrPC, stating that she would not make any further claims for maintenance against the husband. It was held that the proceedings under Section 125 CrPC were summary in nature, and were intended to provide a speedy remedy to the wife. Any order passed under Section 125 CrPC by compromise or otherwise would not foreclose the remedy under Section 18 of the HAMA.

59. In *Sudeep Chaudhary* v. *Radha Chaudhary*[36] the Supreme Court directed adjustment in a case where the wife had filed an application under Section 125 CrPC, and under HMA. In the Section 125 proceedings, she had obtained an order of maintenance. Subsequently, in proceedings under the HMA, the wife sought alimony. Since the husband failed to pay maintenance awarded, the wife initiated recovery proceedings. The Supreme Court held that the maintenance awarded under Section 125 CrPC must be adjusted against the amount awarded in the matrimonial proceedings under HMA, and was not to be given over and above the same.

3. *Directions on overlapping jurisdictions*

60. It is well settled that a wife can make a claim for maintenance under different statutes. For instance, there is no bar to seek maintenance both under the DV Act and Section 125 CrPC, or under HMA. It would, however,

34 2020 SCC OnLine SC 239
35 (2014) 14 SCC 452 : (2015) 1 SCC (Civ) 346 : (2015) 1 SCC (Cri) 407
36 (1997) 11 SCC 286 : 1998 SCC (Cri) 160

be inequitable to direct the husband to pay maintenance under each of the proceedings, independent of the relief granted in a previous proceeding. If maintenance is awarded to the wife in a previously instituted proceeding, she is under a legal obligation to disclose the same in a subsequent proceeding for maintenance, which may be filed under another enactment. While deciding the quantum of maintenance in the subsequent proceeding, the civil court/Family Court shall take into account the maintenance awarded in any previously instituted proceeding, and determine the maintenance payable to the claimant.

61. To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings, we direct that in a subsequent maintenance proceeding, the applicant shall disclose the previous maintenance proceeding, and the orders passed therein, so that the court would take into consideration the maintenance already awarded in the previous proceeding, and grant an adjustment or set-off of the said amount. If the order passed in the previous proceeding requires any modification or variation, the party would be required to move the court concerned in the previous proceeding.

II. Payment of Interim Maintenance

62. The proviso to Section 24 of the HMA (inserted vide Act 49 of 2001 w.e.f. 24-9-2001), and the third proviso to Section 125 CrPC (inserted vide Act 50 of 2001 w.e.f. 24-9-2001) provide that the proceedings for interim maintenance, shall as far as possible, be disposed of within 60 days from the date of service of notice on the contesting spouse. Despite the statutory provisions granting a time-bound period for disposal of proceedings for interim maintenance, we find that applications remain pending for several years in most of the cases. The delays are caused by various factors, such as tremendous docket pressure on the Family Courts, repetitive adjournments sought by parties, enormous time taken for completion of pleadings at the interim stage itself, etc. Pendency of applications for maintenance at the interim stage for several years defeats the very object of the legislation.

63. At present, the issue of interim maintenance is decided on the basis of pleadings, where some amount of guesswork or rough estimation takes place, so as to make a prima facie assessment of the amount to be awarded. It is often seen that both parties submit scanty material, do not disclose the correct details, and suppress vital information, which makes it difficult for the Family Courts to make an objective assessment for grant of interim maintenance. While there is a tendency on the part of the wife to exaggerate her needs, there is a corresponding tendency by the husband to conceal his actual income. It has therefore become necessary to lay down a procedure to streamline the proceedings, since a dependent wife, who has no other source of income, has to take recourse to borrowings from her parents/relatives during the interregnum to sustain herself and the minor children, till she begins receiving interim maintenance.

64. In the first instance, the Family Court in compliance with the mandate of Section 9 of the Family Courts Act, 1984 must make an endeavour for settlement of the disputes. For this, Section 6 provides that the State

Government shall, in consultation with the High Court, make provision for counsellors to assist a Family Court in the discharge of its functions. Given the large and growing percentage of matrimonial litigation, it has become necessary that the provisions of Sections 5 and 6 of the Family Courts Act are given effect to, by providing for the appointment of marriage counsellors in every Family Court, which would help in the process of settlement. If the proceedings for settlement are unsuccessful, the Family Court would proceed with the matter on merits.

65. The party claiming maintenance either as a spouse, or as a partner in a civil union, live-in relationship, common law marriage, should be required to file a concise application for interim maintenance with limited pleadings, along with an Affidavit of Disclosure of Assets and Liabilities before the court concerned, as a mandatory requirement. On the basis of the pleadings filed by both parties and the Affidavits of Disclosure, the court would be in a position to make an objective assessment of the approximate amount to be awarded towards maintenance at the interim stage.

66. The Delhi High Court in a series of judgments beginning with *Puneet Kaur* v. *Inderjit Singh Sawhney*[37] and followed in *Kusum Sharma* v. *Mahinder Kumar Sharma*[38] ("*Kusum Sharma 1*") directed that applications for maintenance under the HMA, HAMA, the DV Act, and the CrPC be accompanied with an affidavit of assets, income and expenditure as prescribed. In *Kusum Sharma 2*[39], the Court framed a format of affidavit of assets, income and expenditure to be filed by both parties at the threshold of a matrimonial litigation. This procedure was extended to maintenance proceedings under the Special Marriage Act and the Divorce Act, 1869. In *Kusum Sharma 3*[40] the Delhi High Court modified the format of the affidavit, and extended it to maintenance proceedings under the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956. In *Kusum Sharma 4*[41] the Court took notice that the filing of affidavits along with pleadings gave an unfair advantage to the party who files the affidavit subsequently. In this judgment, it was clarified that the affidavit must be filed simultaneously by both parties. In *Kusum Sharma 5*[42] the Court consolidated the format of the affidavits in the previous judgments, and directed that the same be filed in maintenance proceedings.

67. Given the vastly divergent demographic profile of our country, which comprises of metropolitan cities, urban areas, rural areas, tribal areas, etc. it was considered appropriate to elicit responses from the various State Legal Services Authorities ("SLSAs"). This Court vide its order dated 17-12-2019[5] requested the National Legal Services Authority ("NALSA") to submit a report of the

37 2011 SCC OnLine Del 3841 : ILR (2012) 1 Del 73
38 2014 SCC OnLine Del 7627 : (2014) 214 DLT 493
39 *Kusum Sharma* v. *Mahinder Kumar Sharma*, 2015 SCC OnLine Del 6793 : (2015) 217 DLT 706
40 *Kusum Sharma* v. *Mahinder Kumar Sharma*, 2017 SCC OnLine Del 11796 : (2017) 241 DLT 252
41 *Kusum Sharma* v. *Mahinder Kumar Sharma*, 2017 SCC OnLine Del 12534 : (2018) 246 DLT 1
42 *Kusum Sharma* v. *Mahinder Kumar Sharma*, 2020 SCC OnLine Del 931
5 *Rajnesh* v. *Neha*, 2019 SCC OnLine SC 1918

suggestions received from the SLSAs for framing guidelines on the Affidavit of Disclosure of the Assets and Liabilities to be filed by the parties.

68. The NALSA submitted a comprehensive report dated 17-2-2020 containing suggestions from all the State Legal Services Authorities throughout the country. We find the various suggestions made by the SLSAs to be of great assistance in finalising the Affidavit of Disclosure which can be used by the Family Courts for determining the quantum of maintenance to be paid.

69. Keeping in mind the varied landscape of the country, and the recommendations made by the SLSAs, it was submitted that a simplified Affidavit of Disclosure may be framed to expedite the process of determining the quantum of maintenance.

70. We feel that the affidavit to be filed by parties residing in urban areas, would require to be entirely different from the one applicable to rural areas, or tribal areas. For this purpose, a comprehensive Affidavit of Disclosure of Assets and Liabilities is being attached as ***Enclosures I*** **and II***** to this judgment.

71. We have been informed by the Meghalaya State Legal Services Authority that the State of Meghalaya has a predominantly tribal population, which follows a matrilineal system of society. The population is comprised of three tribes viz. the Khasis, Jaintia and Garo tribes. In Meghalaya, the youngest daughter is the custodian of the property, and takes important decisions relating to family property in consultation with her maternal uncle. The majority of the population is employed in the unorganised sector, such as agriculture. Under Section 10(26) of the Income Tax Act, 1961, the tribals residing in this State are exempted from payment of income tax. The Meghalaya State Legal Services Authority has suggested that the declaration in Meghalaya be made in the format enclosed with this judgment as ***Enclosure III***#*.

72. Keeping in mind the need for a uniform format of Affidavit of Disclosure of Assets and Liabilities to be filed in maintenance proceedings, this Court considers it necessary to frame guidelines in exercise of our powers under Article 136 read with Article 142 of the Constitution of India:

72.1. (*a*) The Affidavit of Disclosure of Assets and Liabilities annexed at Enclosures I, II and III of this judgment, as may be applicable, shall be filed by the parties in all maintenance proceedings, including pending proceedings before the Family Court/District Court/Magistrate's Court concerned, as the case may be, throughout the country;

72.2. (*b*) The applicant making the claim for maintenance will be required to file a concise application accompanied with the Affidavit of Disclosure of Assets;

72.3. (*c*) The respondent must submit the reply along with the Affidavit of Disclosure within a maximum period of four weeks. The courts may not grant more than two opportunities for submission of the Affidavit of Disclosure of

* Set out at pp. 384 et. seq., below.
** Set out at pp. 389-390, below.
*# Set out at pp. 390 et. seq. below.

Assets and Liabilities to the respondent. If the respondent delays in filing the reply with the affidavit, and seeks more than two adjournments for this purpose, the court may consider exercising the power to strike off the defence of the respondent, if the conduct is found to be wilful and contumacious in delaying the proceedings[43]. On the failure to file the affidavit within the prescribed time, the Family Court may proceed to decide the application for maintenance on the basis of the affidavit filed by the applicant and the pleadings on record;

72.4. (*d*) The above format may be modified by the court concerned, if the exigencies of a case require the same. It would be left to the judicial discretion of the court concerned to issue necessary directions in this regard.

72.5. (*e*) If apart from the information contained in the Affidavits of Disclosure, any further information is required, the court concerned may pass appropriate orders in respect thereof.

72.6. (*f*) If there is any dispute with respect to the declaration made in the Affidavit of Disclosure, the aggrieved party may seek permission of the court to serve interrogatories, and seek production of relevant documents from the opposite party under Order 11 CPC. On filing of the affidavit, the court may invoke the provisions of Order 10 CPC or Section 165 of the Evidence Act, 1872, if it considers it necessary to do so. The income of one party is often not within the knowledge of the other spouse. The court may invoke Section 106 of the Evidence Act, 1872 if necessary, since the income, assets and liabilities of the spouse are within the personal knowledge of the party concerned.

72.7. (*g*) If during the course of proceedings, there is a change in the financial status of any party, or there is a change of any relevant circumstances, or if some new information comes to light, the party may submit an amended/ supplementary affidavit, which would be considered by the court at the time of final determination.

72.8. (*h*) The pleadings made in the applications for maintenance and replies filed should be responsible pleadings; if false statements and misrepresentations are made, the court may consider initiation of proceeding under Section 340 CrPC, and for contempt of court.

72.9. (*i*) In case the parties belong to the economically weaker sections ("EWS"), or are living below the poverty line ("BPL"), or are casual labourers, the requirement of filing the affidavit would be dispensed with.

72.10. (*j*) The Family Court/District Court/Magistrate's Court concerned must make an endeavour to decide the IA for interim maintenance by a reasoned order, within a period of four to six months at the latest, after the Affidavits of Disclosure have been filed before the court.

72.11. (*k*) A professional Marriage Counsellor must be made available in every Family Court.

43 *Kaushalya* v. *Mukesh Jain*, (2020) 17 SCC 822 : 2019 SCC OnLine SC 1915

Permanent alimony

73. Parties may lead oral and documentary evidence with respect to income, expenditure, standard of living, etc. before the court concerned, for fixing the permanent alimony payable to the spouse.

74. In contemporary society, where several marriages do not last for a reasonable length of time, it may be inequitable to direct the contesting spouse to pay permanent alimony to the applicant for the rest of her life. The duration of the marriage would be a relevant factor to be taken into consideration for determining the permanent alimony to be paid.

75. Provision for grant of reasonable expenses for the marriage of children must be made at the time of determining permanent alimony, where the custody is with the wife. The expenses would be determined by taking into account the financial position of the husband and the customs of the family.

76. If there are any trust funds/investments created by any spouse/ grandparents in favour of the children, this would also be taken into consideration while deciding the final child support.

III. ***Criteria for determining quantum of maintenance***

77. The objective of granting interim/permanent alimony is to ensure that the dependent spouse is not reduced to destitution or vagrancy on account of the failure of the marriage, and not as a punishment to the other spouse. There is no straitjacket formula for fixing the quantum of maintenance to be awarded.

78. The factors which would weigh with the court inter alia are the status of the parties; reasonable needs of the wife and dependent children; whether the applicant is educated and professionally qualified; whether the applicant has any independent source of income; whether the income is sufficient to enable her to maintain the same standard of living as she was accustomed to in her matrimonial home; whether the applicant was employed prior to her marriage; whether she was working during the subsistence of the marriage; whether the wife was required to sacrifice her employment opportunities for nurturing the family, child rearing, and looking after adult members of the family; reasonable costs of litigation for a non-working wife.[44]

79. In *Manish Jain* v. *Akanksha Jain*[45] this Court held that the financial position of the parents of the applicant wife, would not be material while determining the quantum of maintenance. An order of interim maintenance is conditional on the circumstance that the wife or husband who makes a claim has no independent income, sufficient for her or his support. It is no answer to a claim of maintenance that the wife is educated and could support herself. The court must take into consideration the status of the parties and the capacity of the spouse to pay for her or his support. Maintenance is dependent upon factual situations; the court should mould the claim for maintenance based on various factors brought before it.

44 Refer to *Jasbir Kaur Sehgal* v. *District Judge, Dehradun*, (1997) 7 SCC 7; Refer to *Vinny Parmvir Parmar* v. *Parmvir Parmar*, (2011) 13 SCC 112 : (2012) 3 SCC (Civ) 290

45 (2017) 15 SCC 801 : (2018) 2 SCC (Civ) 712

80. On the other hand, the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance, and dependent family members whom he is obliged to maintain under the law, liabilities if any, would be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid. The court must have due regard to the standard of living of the husband, as well as the spiralling inflation rates and high costs of living. The plea of the husband that he does not possess any source of income ipso facto does not absolve him of his moral duty to maintain his wife if he is able-bodied and has educational qualifications.[46]

81. A careful and just balance must be drawn between all relevant factors. The test for determination of maintenance in matrimonial disputes depends on the financial status of the respondent, and the standard of living that the applicant was accustomed to in her matrimonial home.[47] The maintenance amount awarded must be reasonable and realistic, and avoid either of the two extremes i.e. maintenance awarded to the wife should neither be so extravagant which becomes oppressive and unbearable for the respondent, nor should it be so meagre that it drives the wife to penury. The sufficiency of the quantum has to be adjudged so that the wife is able to maintain herself with reasonable comfort.

82. Section 23 of the HAMA provides statutory guidance with respect to the criteria for determining the quantum of maintenance. Sub-section (2) of Section 23 of the HAMA provides the following factors which may be taken into consideration: (*i*) position and status of the parties, (*ii*) reasonable wants of the claimant, (*iii*) if the petitioner/claimant is living separately, the justification for the same, (*iv*) value of the claimant's property and any income derived from such property, (*v*) income from claimant's own earning or from any other source.

83. Section 20(2) of the DV Act provides that the monetary relief granted to the aggrieved woman and/or the children must be adequate, fair, reasonable, and consistent with the standard of living to which the aggrieved woman was accustomed to in her matrimonial home.

84. The Delhi High Court in *Bharat Hegde* v. *Saroj Hegde*[48] laid down the following factors to be considered for determining maintenance: (SCC OnLine Del para 8)

> "1. Status of the parties.
>
> 2. Reasonable wants of the claimant.
>
> 3. The independent income and property of the claimant.
>
> 4. The number of persons, the non-applicant has to maintain.
>
> 5. The amount should aid the applicant to live in a similar lifestyle as he/she enjoyed in the matrimonial home.

46 *Reema Salkan* v. *Sumer Singh Salkan*, (2019) 12 SCC 303 : (2018) 5 SCC (Civ) 596 : (2019) 4 SCC (Cri) 339

47 *Chaturbhuj* v. *Sita Bai*, (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356

48 2007 SCC OnLine Del 622 : (2007) 140 DLT 16

6. Non-applicant's liabilities, if any.

7. Provisions for food, clothing, shelter, education, medical attendance and treatment, etc. of the applicant.

8. Payment capacity of the non-applicant.

9. Some guesswork is not ruled out while estimating the income of the non-applicant when all the sources or correct sources are not disclosed.

10. The non-applicant to defray the cost of litigation.

11. The amount awarded under Section 125 CrPC is adjustable against the amount awarded under Section 24 of the Act."

85. Apart from the aforesaid factors enumerated hereinabove, certain additional factors would also be relevant for determining the quantum of maintenance payable.

(a) Age and employment of parties

86. In a marriage of long duration, where parties have endured the relationship for several years, it would be a relevant factor to be taken into consideration. On termination of the relationship, if the wife is educated and professionally qualified, but had to give up her employment opportunities to look after the needs of the family being the primary caregiver to the minor children, and the elder members of the family, this factor would be required to be given due importance. This is of particular relevance in contemporary society, given the highly competitive industry standards, the separated wife would be required to undergo fresh training to acquire marketable skills and retrain herself to secure a job in the paid workforce to rehabilitate herself. With advancement of age, it would be difficult for a dependent wife to get an easy entry into the workforce after a break of several years.

(b) Right to residence

87. Section 17 of the DV Act grants an aggrieved woman the right to live in the "shared household". Section 2(*s*) defines "shared household" to include the household where the aggrieved woman lived at any stage of the domestic relationship; or the household owned and rented jointly or singly by both, or singly by either of the spouses; or a joint family house, of which the respondent is a member.

88. The right of a woman to reside in a "shared household" defined under Section 2(*s*) entitles the aggrieved woman for right of residence in the shared household, irrespective of her having any legal interest in the same. This Court in *Satish Chander Ahuja* v. *Sneha Ahuja*[25] held that "shared household" referred to in Section 2(*s*) is the shared household of the aggrieved person where she was living at the time when the application was filed, or at any stage lived in a domestic relationship. The living of the aggrieved woman in the shared household must have a degree of permanence. A mere fleeting or

25 (2021) 1 SCC 414, by a Bench comprising of Hon'ble Ashok Bhushan, R. Subhash Reddy and M.R. Shah, JJ.

casual living at different places would not constitute a "shared household". It is important to consider the intention of the parties, nature of living, and nature of the household, to determine whether the premises is a "shared household". Section 2(*s*) read with Sections 17 and 19 of the DV Act entitles a woman to the right of residence in a shared household, irrespective of her having any legal interest in the same. There is no requirement of law that the husband should be a member of the joint family, or that the household must belong to the joint family, in which he or the aggrieved woman has any right, title or interest. The shared household may not necessarily be owned or tenanted by the husband singly or jointly.

89. Section 19(1)(*f*) of the DV Act provides that the Magistrate may pass a residence order inter alia directing the respondent to secure the same level of alternate accommodation for the aggrieved woman as enjoyed by her in the shared household. While passing such an order, the Magistrate may direct the respondent to pay the rent and other payments, having regard to the financial needs and resources of the parties.

(c) Where wife is earning some income

90. The courts have held that if the wife is earning, it cannot operate as a bar from being awarded maintenance by the husband. The courts have provided guidance on this issue in the following judgments:

90.1. In *Shailja* v. *Khobbanna*[49], this Court held that merely because the wife is capable of earning, it would not be a sufficient ground to reduce the maintenance awarded by the Family Court. The court has to determine whether the income of the wife is sufficient to enable her to maintain herself, in accordance with the lifestyle of her husband in the matrimonial home.[47] Sustenance does not mean, and cannot be allowed to mean mere survival.[50]

90.2. In *Sunita Kachwaha* v. *Anil Kachwaha*[51] the wife had a postgraduate degree, and was employed as a teacher in Jabalpur. The husband raised a contention that since the wife had sufficient income, she would not require financial assistance from the husband. The Supreme Court repelled this contention, and held that merely because the wife was earning some income, it could not be a ground to reject her claim for maintenance.

90.3. The Bombay High Court in *Sanjay Damodar Kale* v. *Kalyani Sanjay Kale*[52] while relying upon the judgment in *Sunita Kachwaha*[51], held that neither the mere potential to earn, nor the actual earning of the wife, howsoever meagre, is sufficient to deny the claim of maintenance.

49 (2018) 12 SCC 199 : (2018) 5 SCC (Civ) 308; See also the decision of the Karnataka High Court in *P. Suresh* v. *S. Deepa*, 2016 SCC OnLine Kar 8848 : 2016 Cri LJ 4794 (Kar)
47 *Chaturbhuj* v. *Sita Bai*, (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356
50 *Vipul Lakhanpal* v. *Pooja Sharma*, 2015 SCC OnLine HP 1252 : 2015 Cri LJ 3451
51 (2014) 16 SCC 715 : (2015) 3 SCC (Civ) 753 : (2015) 3 SCC (Cri) 589
52 2020 SCC OnLine Bom 694

90.4. An able-bodied husband must be presumed to be capable of earning sufficient money to maintain his wife and children, and cannot contend that he is not in a position to earn sufficiently to maintain his family, as held by the Delhi High Court in *Chander Parkash* v. *Shila Rani*[53]. The onus is on the husband to establish with necessary material that there are sufficient grounds to show that he is unable to maintain the family, and discharge his legal obligations for reasons beyond his control. If the husband does not disclose the exact amount of his income, an adverse inference may be drawn by the court.

90.5. This Court in *Shamima Farooqui* v. *Shahid Khan*[54] cited the judgment in *Chander Parkash*[53] with approval, and held that the obligation of the husband to provide maintenance stands on a higher pedestal than the wife.

(d) Maintenance of minor children

91. The living expenses of the child would include expenses for food, clothing, residence, medical expenses, education of children. Extra coaching classes or any other vocational training courses to complement the basic education must be factored in, while awarding child support. Albeit, it should be a reasonable amount to be awarded for extracurricular/coaching classes, and not an overly extravagant amount which may be claimed.

92. Education expenses of the children must be normally borne by the father. If the wife is working and earning sufficiently, the expenses may be shared proportionately between the parties.

(e) Serious disability or ill health

93. Serious disability or ill health of a spouse, child/children from the marriage/dependent relative who require constant care and recurrent expenditure, would also be a relevant consideration while quantifying maintenance.

IV. ***Date from which Maintenance to be Awarded***

94. There is no provision in the HMA with respect to the date from which an order of maintenance may be made effective. Similarly, Section 12 of the DV Act, does not provide the date from which the maintenance is to be awarded. Section 125(2) CrPC is the only statutory provision which provides that the Magistrate may award maintenance either from the date of the order, or from the date of application.[55]

95. In the absence of a uniform regime, there is a vast variance in the practice adopted by the Family Courts in the country, with respect to the date from which maintenance must be awarded. The divergent views taken by the Family Courts are: *first*, from the date on which the application for maintenance was filed; *second*, the date of the order granting maintenance; *third*, the date on which the summons was served upon the respondent.

53 1968 SCC OnLine Del 52 : AIR 1968 Del 174
54 (2015) 5 SCC 705 : (2015) 3 SCC (Civ) 274 : (2015) 2 SCC (Cri) 785
55 *K. Sivaram* v. *K. Mangalamba*, 1989 SCC OnLine AP 60 : (1989) 1 AP LJ 604

(a) From date of application

96. The view that maintenance ought to be granted from the date when the application was made, is based on the rationale that the primary object of maintenance laws is to protect a deserted wife and dependent children from destitution and vagrancy. If maintenance is not paid from the date of application, the party seeking maintenance would be deprived of sustenance, owing to the time taken for disposal of the application, which often runs into several years.

97. The Orissa High Court in *Susmita Mohanty* v. *Rabindra Nath Sahu*[56] held that the legislature intended to provide a summary, quick and comparatively inexpensive remedy to the neglected person. Where a litigation is prolonged, either on account of the conduct of the opposite party, or due to the heavy docket in courts, or for unavoidable reasons, it would be unjust and contrary to the object of the provision, to provide maintenance from the date of the order.

98. In *Kanhu Charan Jena* v. *Nirmala Jena*[57], the Orissa High Court was considering an application under Section 125 CrPC, wherein it was held that even though the decision to award maintenance either from the date of application, or from the date of order, was within the discretion of the court, it would be appropriate to grant maintenance from the date of application. This was followed in *Arun Kumar Nayak* v. *Urmila Jena*[58], wherein it was reiterated that dependants were entitled to receive maintenance from the date of application.

99. The Madhya Pradesh High Court in *Krishna* v. *Dharam Raj*[59] held that a wife may set up a claim for maintenance to be granted from the date of application, and the husband may deny it. In such cases, the court may frame an issue, and decide the same based on evidence led by parties. The view that the "normal rule" was to grant maintenance from the date of order, and the exception was to grant maintenance from the date of application, would be to insert something more in Section 125(2) CrPC, which the legislature did not intend. Reasons must be recorded in both cases. i.e. when maintenance is awarded from the date of application, or when it is awarded from the date of order.

100. The law governing payment of maintenance under Section 125 CrPC from the date of application, was extended to HAMA by the Allahabad High Court in *Ganga Prasad Srivastava* v. *Addl. District Judge, Gonda*[60]. The Court held that the date of application should always be regarded as the starting point for payment of maintenance. The Court was considering a suit for maintenance under Section 18 of the HAMA, wherein the Civil Judge directed

56 (1996) 1 OLR 361
57 2000 SCC OnLine Ori 217 : 2001 Cri LJ 879
58 2010 SCC OnLine Ori 30 : (2010) 93 AIC 726
59 1991 SCC OnLine MP 6 : (1993) 2 MPJR 63
60 2019 SCC OnLine All 5428 : (2019) 6 ADJ 850

that maintenance be paid from the date of judgment. The High Court held that the normal inference should be that the order of maintenance would be effective from the date of application. A party seeking maintenance would otherwise be deprived of maintenance due to the delay in disposal of the application, which may arise due to paucity of time of the court, or on account of the conduct of one of the parties. In this case, there was a delay of seven years in disposing of the suit, and the wife could not be made to starve till such time. The wife was held to be entitled to maintenance from the date of application/suit.

101. The Delhi High Court in *Lavlesh Shukla* v. *Rukmani*[61] held that where the wife is unemployed and is incurring expenses towards maintaining herself and the minor child/children, she is entitled to receive maintenance from the date of application. Maintenance is awarded to a wife to overcome the financial crunch, which occurs on account of her separation from her husband. It is neither a matter of favour to the wife, nor any charity done by the husband.

(b) From the date of order

102. The second view that maintenance ought to be awarded from the date of order is based on the premise that the general rule is to award maintenance from the date of order, and grant of maintenance from the date of application must be the exception. The foundation of this view is based on the interpretation of Section 125(2) CrPC which provides:

> "**125. (2)** Any such allowance for the maintenance or interim maintenance and expenses for proceeding shall be payable from the date of the order, or, *if so ordered*, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be." (emphasis supplied)

The words "or, if so ordered" in Section 125 have been interpreted to mean that where the court is awarding maintenance from the date of application, special reasons ought to be recorded.[62]

103. In *Bina Devi* v. *State of U.P.*[62] the Allahabad High Court on an interpretation of Section 125(2) CrPC held that when maintenance is directed to be paid from the date of application, the court must record reasons. If the order is silent, it will be effective from the date of the order, for which reasons need not be recorded. The Court held that Section 125(2) CrPC is prima facie clear that maintenance shall be payable from the date of the order.

104. The Madhya Pradesh High Court in *Amit Verma* v. *Sangeeta Verma*[63] directed that maintenance ought to be granted from the date of the order.

(c) From the date of service of summons

105. The third view followed by some courts is that maintenance ought to be granted from the date of service of summons upon the respondent.

61 2019 SCC OnLine Del 11709
62 *Bina Devi* v. *State of U.P.*, 2010 SCC OnLine All 236 : (2010) 69 ACC 19
63 2020 SCC OnLine MP 2657

106. The Kerala High Court in *S. Radhakumari* v. *K.M.K. Nair*[64] was considering an application for interim maintenance preferred by the wife in divorce proceedings filed by the husband. The High Court held that maintenance must be awarded to the wife from the date on which summons were served in the main divorce petition. The Court relied upon the judgment of the Calcutta High Court in *Samir Kr. Banerjee* v. *Sujata Banerjee*[65] and held that Section 24 of the HMA does not contain any provision that maintenance must be awarded from a specific date. The court may, in exercise of its discretion, award maintenance from the date of service of summons.

107. The Orissa High Court in *Gouri Das* v. *Pradyumna Kumar Das*[66] was considering an application for interim maintenance filed under Section 24 HMA by the wife, in a divorce petition instituted by the husband. The Court held that the ordinary rule is to award maintenance from the date of service of summons. It was held that in cases where the applicant in the maintenance petition is also the petitioner in the divorce petition, maintenance becomes payable from the date when summons is served upon the respondent in the main proceeding.

108. In *Kalpana Das* v. *Sarat Kumar Das*[67] the Orissa High Court held that the wife was entitled to maintenance from the date when the husband entered appearance. The Court was considering an application for interim maintenance under Section 24 HMA in a petition for restitution of conjugal rights filed by the wife. The Family Court awarded interim maintenance to the wife and minor child from the date of the order. In an appeal filed by the wife and minor child seeking maintenance from the date of application, the High Court held that the Family Court had failed to assign any reasons in support of its order, and directed: (SCC OnLine Ori para 8)

> "*8.* … The learned Judge, Family Court has not assigned any reason as to why he passed the order of interim maintenance w.e.f. the date of order. When admittedly the parties are living separately and prima facie it appears that the petitioners have no independent source of income, therefore, *in our view order should have been passed for payment of interim maintenance from the date of appearance of the opposite party-husband.*" (emphasis supplied)

Discussion and Directions

109. The judgments hereinabove reveal the divergent views of different High Courts on the date from which maintenance must be awarded. Even though a judicial discretion is conferred upon the court to grant maintenance either from the date of application or from the date of the order in Section 125(2) CrPC, it would be appropriate to grant maintenance from the date of application in all cases, including Section 125 CrPC. In the practical working of the

64 1982 SCC OnLine Ker 51 : AIR 1983 Ker 139
65 1965 SCC OnLine Cal 196 : (1965-66) 70 CWN 633
66 (1986) 2 OLR 44
67 2009 SCC OnLine Ori 21 : AIR 2009 Ori 133

provisions relating to maintenance, we find that there is significant delay in disposal of the applications for interim maintenance for years on end. It would therefore be in the interests of justice and fair play that maintenance is awarded from the date of the application.

110. In *Shail Kumari Devi* v. *Krishan Bhagwan Pathak*[68], this Court held that the entitlement of maintenance should not be left to the uncertain date of disposal of the case. The enormous delay in disposal of proceedings justifies the award of maintenance from the date of application. In *Bhuwan Mohan Singh* v. *Meena*[69], this Court held that repetitive adjournments sought by the husband in that case resulted in delay of 9 years in the adjudication of the case. The delay in adjudication was not only against human rights, but also against the basic embodiment of dignity of an individual. The delay in the conduct of the proceedings would require grant of maintenance to date back to the date of application.

111. The rationale of granting maintenance from the date of application finds its roots in the object of enacting maintenance legislations, so as to enable the wife to overcome the financial crunch which occurs on separation from the husband. Financial constraints of a dependent spouse hamper their capacity to be effectively represented before the court. In order to prevent a dependant from being reduced to destitution, it is necessary that maintenance is awarded from the date on which the application for maintenance is filed before the court concerned.

112. In *Badshah* v. *Urmila Badshah Godse*[70], the Supreme Court was considering the interpretation of Section 125 CrPC. The Court held: (SCC p. 196, para 13)

> "*13.3.* ... purposive interpretation needs to be given to the provisions of Section 125 CrPC. *While dealing with the application of a destitute wife or hapless children or parents under this provision, the Court is dealing with the marginalised sections of the society. The purpose is to achieve "social justice" which is the constitutional vision, enshrined in the Preamble of the Constitution of India.* The Preamble to the Constitution of India clearly signals that we have chosen the democratic path under the rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. *Therefore, it becomes the bounden duty of the courts to advance the cause of social justice. While giving interpretation to a particular provision, the court is supposed to bridge the gap between the law and society.*" (emphasis supplied)

113. It has therefore become necessary to issue directions to bring about uniformity and consistency in the orders passed by all courts, by directing that maintenance be awarded from the date on which the application was made

68 (2008) 9 SCC 632 : (2008) 3 SCC (Cri) 839
69 (2015) 6 SCC 353 : (2015) 3 SCC (Civ) 321 : (2015) 4 SCC (Cri) 200
70 (2014) 1 SCC 188 : (2014) 1 SCC (Civ) 51

before the court concerned. The right to claim maintenance must date back to the date of filing the application, since the period during which the maintenance proceedings remained pending is not within the control of the applicant.

V. ***Enforcement of orders of maintenance***

114. Enforcement of the order of maintenance is the most challenging issue, which is encountered by the applicants. If maintenance is not paid in a timely manner, it defeats the very object of the social welfare legislation. Execution petitions usually remain pending for months, if not years, which completely nullifies the object of the law. The Bombay High Court in *Sushila Viresh Chhadva* v. *Viresh Nagshi Chhadva*[71] held that: (SCC OnLine Bom para 7)

> "*7.* … The direction of interim alimony and expenses of litigation under Section 24 is one of urgency and it must be decided as soon as it is raised and … the law takes care that nobody is disabled from prosecuting or defending the matrimonial case by starvation or lack of funds."

115. An application for execution of an order of maintenance can be filed under the following provisions:

(*a*) Section 28-A of the Hindu Marriage Act, 1955 read with Section 18 of the Family Courts Act, 1984 and Order 21 Rule 94 CPC for executing an order passed under Section 24 of the Hindu Marriage Act (before the Family Court);

(*b*) Section 20(6) of the DV Act (before the Judicial Magistrate); and

(*c*) Section 128 CrPC before the Magistrate's Court.

116. Section 18 of the Family Courts Act, 1984 provides that orders passed by the Family Court shall be executable in accordance with the CPC/CrPC.

117. Section 125(3) CrPC provides that if the party against whom the order of maintenance is passed fails to comply with the order of maintenance, the same shall be recovered in the manner as provided for fines, and the Magistrate may award sentence of imprisonment for a term which may extend to one month, or until payment, whichever is earlier.

Striking off the Defence

118. Some Family Courts have passed orders for striking off the defence of the respondent in case of non-payment of maintenance, so as to facilitate speedy disposal of the maintenance petition. In *Kaushalya* v. *Mukesh Jain*[43], the Supreme Court allowed a Family Court to strike off the defence of the respondent, in case of non-payment of maintenance in accordance with the interim order passed.

119. The Punjab and Haryana High Court in *Rani* v. *Parkash Singh*[72] was considering a case where the husband failed to comply with the maintenance

71 1995 SCC OnLine Bom 315 : AIR 1996 Bom 94
43 (2020) 17 SCC 822 : 2019 SCC OnLine SC 1915
72 1996 SCC OnLine P&H 52 : AIR 1996 P&H 175

order, despite several notices, for a period of over two years. The Court taking note of the power to strike off the defence of the respondent, held that: (SCC OnLine P&H para 7)

> "7. … Law is not that powerless as not to bring the husband to book. If the husband has failed to make the payment of maintenance and litigation expenses to wife, his defence be struck out."

120. The Punjab and Haryana High Court in *Mohinder Verma* v. *Sapna*[73], discussed the issue of striking off the defence in the following words: (SCC OnLine P&H para 8)

> "8. Section 24 of the Act empowers the matrimonial court to award maintenance pendente lite and also litigation expenses to a needy and indigent spouse so that the proceedings can be conducted without any hardship on his or her part. The proceedings under this section are summary in nature and confer a substantial right on the applicant during the pendency of the proceedings. *Where this amount is not paid to the applicant, then the very object and purpose of this provision stands defeated. No doubt, remedy of execution of decree or order passed by the matrimonial court is available under Section 28-A of the Act, but the same would not be a bar to striking off the defence of the spouse who violates the interim order of maintenance and litigation expenses passed by the said court.* In other words, the striking off the defence of the spouse not honouring the court's interim order is the instant relief to the needy one instead of waiting endlessly till its execution under Section 28-A of the Act. Where the spouse who is to pay maintenance fails to discharge the liability, the other spouse cannot be forced to adopt time consuming execution proceedings for realising the amount. Court cannot be a mute spectator watching flagrant disobedience of the interim orders passed by it showing its helplessness in its instant implementation. It would, thus, be appropriate even in the absence of any specific provision to that effect in the Act, to strike off the defence of the erring spouse in exercise of its inherent power under Section 151 of the Code of Civil Procedure read with Section 21 of the Act rather than to leave the aggrieved party to seek its enforcement through execution as execution is a long and arduous procedure. Needless to say, the remedy under Section 28-A of the Act regarding execution of decree or interim order does not stand obliterated or extinguished by striking off the defence of the defaulting spouse. Thus, where the spouse who is directed to pay the maintenance and litigation expenses, the legal consequences for its non-payment are that the defence of the said spouse is liable to be struck off." (emphasis supplied)

121. The Delhi High Court in *Satish Kumar* v. *Meena*[74] held that the Family Court had inherent powers to strike off the defence of the respondent, to ensure that no abuse of process of the court takes place.

73 2014 SCC OnLine P&H 25147
74 2001 SCC OnLine Del 817 : (2001) 60 DRJ 246

122. The Delhi High Court in *Santosh Sehgal* v. *Murari Lal Sehgal*[75], framed the following issue for consideration: (SCC OnLine Del para 3)

> "*3.* ... whether the appeal against the decree of divorce filed by the appellant wife can be allowed straightaway without hearing the respondent husband in the event of his failing to pay interim maintenance and litigation expenses granted to the wife during the pendency of the appeal."

The reference was answered as follows: (*Santosh Sehgal case*[75], SCC OnLine Del para 5)

> "*5.* The reference to the portion of the judgment in *Rani case*[72] extracted hereinabove would show that the Punjab and Haryana High Court and the Orissa High Court have taken a unanimous view that in case the husband commits default in payment of interim maintenance to his wife and children then he is not entitled to any matrimonial relief in proceedings by or against him. The view taken by the Punjab and Haryana High Court in *Rani case*[72] has been followed by a Single Judge of this Court in *Satish Kumar* v. *Meena*[74]. We tend to agree with this view as it is in consonance with the first principle of law. We are of the view that when a husband is negligent and does not pay maintenance to his wife as awarded by the Court, then how such a person is entitled to the relief claimed by him in the matrimonial proceedings. We have no hesitation in holding that in case the husband fails to pay maintenance and litigation expenses to his wife granted by the Court during the pendency of the appeal, then the appeal filed by the wife against the decree of divorce granted by the trial court in favour of the husband has to be allowed. Hence the question referred to us for decision is answered in the affirmative."

The Court concluded that if there was non-payment of interim maintenance, the defence of the respondent is liable to be struck off, and the appeal filed by the appellant wife can be allowed, without hearing the respondent.

123. The Punjab and Haryana High Court in *Gurvinder Singh* v. *Murti*[76] was considering a case where the trial court stuck off the defence of the husband for non-payment of ad interim maintenance. The High Court set aside the order of the trial court, and held that instead of following the correct procedure for recovery of interim maintenance as provided under Section 125(3) or Section 421 CrPC the trial court erred in striking off the defence of the husband. The error of the court did not assist in recovery of interim maintenance, but rather prolonged the litigation between the parties.

124. The issue whether defence can be struck off in proceedings under Section 125 CrPC came up before the Madhya Pradesh High Court in

75 2006 SCC OnLine Del 585 : AIR 2007 Del 210
72 *Rani* v. *Parkash Singh*, 1996 SCC OnLine P&H 52 : AIR 1996 P&H 175
74 2001 SCC OnLine Del 817 : (2001) 60 DRJ 246
76 1990 SCC OnLine P&H 35 : (1990) 1 DMC 559

Venkateshwar Dwivedi v. *Ruchi Dwivedi*[77]. The Court held that neither Section 125(3) CrPC nor Section 10 of the Family Courts Act either expressly or by necessary implication empower the Magistrate or Family Court to strike off the defence. A statutory remedy for recovery of maintenance was available, and the power to strike off defence does not exist in a proceeding under Section 125 CrPC. Such power cannot be presumed to exist as an inherent or implied power. The Court placed reliance on the judgment of the Kerala High Court in *Davis* v. *Thomas*[78], and held that the Magistrate does not possess the power to strike off the defence for failure to pay interim maintenance.

Discussion and Directions on Enforcement of orders of Maintenance

125. The order or decree of maintenance may be enforced like a decree of a civil court, through the provisions which are available for enforcing a money decree, including civil detention, attachment of property, etc. as provided by various provisions of the CPC, more particularly Sections 51, 55, 58, 60 read with Order 21.

126. Striking off the defence of the respondent is an order which ought to be passed in the last resort, if the courts find default to be wilful and contumacious, particularly to a dependent unemployed wife, and minor children. Contempt proceedings for wilful disobedience may be initiated before the appropriate court.

VI. ***Final Directions***

127. In view of the foregoing discussion as contained in Part B — I to V of this judgment, we deem it appropriate to pass the following directions in exercise of our powers under Article 142 of the Constitution of India.

(a) Issue of overlapping jurisdiction

128. To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings, it has become necessary to issue directions in this regard, so that there is uniformity in the practice followed by the Family Courts/District Courts/Magistrate Courts throughout the country. We direct that:

128.1. (*i*) Where successive claims for maintenance are made by a party under different statutes, the court would consider an adjustment or set-off, of the amount awarded in the previous proceeding(s), while determining whether any further amount is to be awarded in the subsequent proceeding.

128.2. (*ii*) It is made mandatory for the applicant to disclose the previous proceeding and the orders passed therein, in the subsequent proceeding.

128.3. (*iii*) If the order passed in the previous proceeding(s) requires any modification or variation, it would be required to be done in the same proceeding.

77 2017 SCC OnLine MP 2065 : (2018) 2 DMC 103 (MP). The Karnataka High Court affirmed this view in *Ravindra Kumar* v. *Renuka*, 2009 SCC OnLine Kar 481.

78 2007 SCC OnLine Ker 358 : ILR (2007) 4 Ker 389. See also *Sakeer Hussain T.P.* v. *Naseera*, 2016 SCC OnLine Ker 23592 : ILR (2016) 4 Ker 917

(b) Payment of Interim Maintenance

129. The Affidavit of Disclosure of Assets and Liabilities annexed as Enclosures I, II and III of this judgment, as may be applicable, shall be filed by both parties in all maintenance proceedings, including pending proceedings before the Family Court/District Court/Magistrates Court concerned, as the case may be, throughout the country.

(c) Criteria for determining the quantum of maintenance

130. For determining the quantum of maintenance payable to an applicant, the court shall take into account the criteria enumerated in Part B — III of the judgment. The aforesaid factors are however not exhaustive, and the court concerned may exercise its discretion to consider any other factor(s) which may be necessary or of relevance in the facts and circumstances of a case.

(d) Date from which maintenance is to be awarded

131. We make it clear that maintenance in all cases will be awarded from the date of filing the application for maintenance, as held in Part B — IV above.

(e) Enforcement/Execution of orders of maintenance

132. For enforcement/execution of orders of maintenance, it is directed that an order or decree of maintenance may be enforced under Section 28-A of the Hindu Marriage Act, 1955; Section 20(6) of the DV Act; and Section 128 of CrPC, as may be applicable. The order of maintenance may be enforced as a money decree of a civil court as per the provisions of the CPC, more particularly Sections 51, 55, 58, 60 read with Order 21.

133. Before we part with this judgment, we note our appreciation of the valuable assistance provided by the learned Amici Curiae Ms Anitha Shenoy and Mr Gopal Sankaranarayanan, Senior Advocates in this case.

134. A copy of this judgment be communicated by the Secretary General of this Court, to the Registrars of all High Courts, who would in turn circulate it to all the District Courts in the States. It shall be displayed on the website of all District Courts/Family Courts/Courts of Judicial Magistrates for awareness and implementation.

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ENCLOSURE I

Affidavit of Assets and Liabilities for Non-Agrarian Deponents

I _____, d/o _____ or s/o_____, aged about _____years, resident of_____, do hereby solemnly affirm and declare as under:

A. Personal Information

1. Name:
2. Age/Sex:
3. Qualifications (Educational and Professional):

4. Whether the Applicant is staying in the matrimonial house/parental home/separate residence. Please provide the current residential address of matrimonial home or place of residence and details of ownership of residence, if owned by other family member.
5. Date of marriage:
6. Date of separation:
7. General monthly expenses of the Applicant (rent, household expenses, medical bills, transportation, etc.):

B. Details of Legal Proceedings and Maintenance being paid

1. Particulars of any ongoing or past legal proceedings with respect to maintenance or child support between the Applicant and Non-Applicant.
2. Whether any maintenance has been awarded in any proceeding arising under the DV Act, CrPC, HMA, HAMA, etc.? If yes, provide details of the quantum of maintenance awarded in the proceedings.
3. If so, provide particulars thereof, along with a copy of the order(s) passed.
4. Whether the order of maintenance passed in earlier proceedings has been complied with. If not, arrears of maintenance.
5. Whether any voluntary contribution towards maintenance has been made/will be made in the future? If yes, provide details of the same.

C. Details of dependent family members

1. Details of dependent family members, if any.
   (*a*) Relationship with dependants:
   (*b*) Age and sex of dependant(s):
2. Disclose if any independent source(s) of income of the dependants, including interest income, assets, pension, tax liability on any such income and any other relevant details.
3. The approximate expenses incurred on account of the dependant.

D. Medical details if any, of the deponent and/or dependent family members

1. Whether either party or child/children is suffering from any physical/mental disability, or any other serious ailment. If yes, produce medical records.
2. Whether any dependent family member has serious disability, requiring continuous medical expenditure. If yes, produce disability certificate and approximate medical expenditure incurred on such medical treatment.
3. Whether either party or child/children or any other dependent family member is suffering from life-threatening diseases, which would entail expensive and regular medical expenditure? If yes, provide details of the same along with summary of previous details of hospitalisation/medical expenses incurred.

E. Details of children of the parties

1. Number of children from the existing marriage/marital relationship/ previous marriage.
2. Name and age of children.
3. Details of the parent who has the custody of the children.
4. Expenditure for maintenance of dependent children.
   (*a*) Towards food, clothing and medical expenses.
   (*b*) Towards expenses for education, and a summary of general expenses.
   (*c*) Towards expenses, if any, of any extra educational, vocational or professional/educational course, specialised training or special skills programme of dependent children.
   (*d*) Details of any loan, mortgage, charge incurred or instalment plan (being paid or payable), if any, on account of any educational expenses of children.
5. Whether any voluntary contribution by either of the parties is being made towards these educational expenses? If yes, provide details of the same. Also provide an estimate of any additional contribution that may be required.
6. Whether any financial support is being provided by a third party for the educational expenses of the children?

F. Details of Income of the Deponent

1. Name of employer:
2. Designation:
3. Monthly income:
4. If engaged in government service, furnish latest salary certificates or current pay slips or proof of deposit in bank account, if being remitted directly by employer.
5. If engaged in the private sector, furnish a certificate provided by the employer stating the designation and gross monthly income of such person, and Form 16 for the relevant period of current employment.
6. If any perquisites, benefits, house rent allowance, travel allowance, dearness allowance or any other service benefit is being provided by the employer during the course of current employment.
7. Whether assessed to income tax?
   If yes, submit copies of the Income Tax Returns for the periods given below:
   (*i*) One year prior to marriage
   (*ii*) One year prior to separation
   (*iii*) At the time when the application for maintenance is filed
8. Income from other sources, such as rent, interest, shares, dividends, capital gains, FDRs, Post office deposits, mutual funds, stocks, debentures, agriculture, or business, if any, along with TDS in respect of any such income.
9. Furnish copies of bank statement of all accounts for the last 3 years.

G. Assets (movable and immovable) owned by the Deponent

1. Self-acquired property, if any:
2. Properties jointly owned by the parties after marriage:
3. Share in any ancestral property:
4. Other joint properties of the parties (accounts/investments/FDR/ mutual funds, stocks, debentures, etc.), their value and status of possession:
5. Status of possession of immovable property and details of rent, if leased:
6. Details of loans taken or given by the Deponent:
7. Brief description of jewellery and ornaments of parties acquired during/after marriage:
8. Details of transfer deeds or transactions of alienation of properties previously owned by the applicant, executed during the subsistence of the marriage. Also provide brief reasons for such sale or transaction, if any.

H. Details of Liabilities of the Deponent

1. Loans, liabilities, mortgage, or charge outstanding against the Deponent, if any.
2. Details of any EMIs being paid.
3. Date and purpose of taking loan or incurring any such liability:
4. Actual amount borrowed, if any, and the amount paid up to date of filing the Affidavit:
5. Any other information which would be relevant to describe current liabilities of the Deponent.

I. Self-employed persons/Professionals/Business Persons/Entrepreneur

1. Brief description of nature of business/profession/vocation/self-employed/work activity.
2. Whether the business/profession/self-employment is carried on as an individual, sole proprietorship concern, partnership concern, LLP, company or association of persons, HUF, joint family business or any other form? Give particulars of Applicant's share in the partnership/business/professional association/self-employment. In case of partnership, specify the share in the profit/losses of the partnership.
3. Net Income from the business/profession/partnership/self-employment.
4. Business/partnership/self-employment liabilities, if any, in case of such activity.
5. In case of business of company, provide brief details of last audited balance sheet to indicate profit and loss of the company in which such party is in business in the company.
6. In case of a partnership firm, provide details of the filings of the last Income Tax Return of partnership.

7. In case of self-employed individual, provide the filings of the last Income Tax Return from any such professional/business/vocational activity.

J. Information provided by the Deponent with respect to the income, assets and liabilities of the other Spouse

1. Educational and professional qualifications of the other spouse:
2. Whether spouse is earning? If so, give particulars of the occupation and income of the spouse.
3. If not, whether he/she is staying in his/her own accommodation, or in a rented accommodation or in accommodation provided by employer/business/partnership?
4. Particulars of assets and liabilities of spouse as known to the deponent, along with any supporting documents.

K. Details of Applicant or the other Spouse, in case parties are Non-Resident Indians, Overseas Citizens of India, Foreign Nationals or Persons living abroad outside India

1. Details of Citizenship, Nationality and current place of residence, if the Applicant or other spouse is residing abroad outside India, temporarily or permanently.
2. Details of current employment and latest income in foreign currency of such applicant/spouse, duly supported by relevant documentation of employment and income from such foreign employer or overseas institution by way of employment letter or testimonial from foreign employer or overseas institution or latest relevant bank statement.
3. Details of household and other expenditure of such applicant/spouse in foreign jurisdiction.
4. Details of tax liability of applicant/other spouse in foreign jurisdiction.
5. Details of income of applicant/other spouse from other sources in India/foreign jurisdiction.
6. Details of expenses incurred or contribution made on account of spousal maintenance, child support or any other educational expenses, medical treatment of spouse or children.
7. Any other relevant detail of expenses or liabilities, not covered under any of the above headings and any other liabilities to any other dependent family members in India or abroad.

Declaration

1. I declare that I have made a full and accurate disclosure of my income, expenditure, assets and liabilities from all sources. I further declare that I have no assets, income, expenditure and liabilities other than as stated in this affidavit.
2. I undertake to inform this Court immediately with respect to any material change in my employment, assets, income, expenses or any other information included in this affidavit.

3. I understand that any false statement in this affidavit, apart from being contempt of court, may also constitute an offence under Section 199 read with Sections 191 and 193 of the Indian Penal Code punishable with imprisonment up to seven years and fine, and Section 209 of the Indian Penal Code punishable with imprisonment up to two years and fine. I have read and understood Sections 191, 193, 199 and 209 of the Indian Penal Code, 1860.

DEPONENT

Verification

Verified at ___on this _____day of _____ that the contents of the above affidavit are true to my personal knowledge, no part of it is false and nothing material has been concealed therefrom, whereas the contents of the above affidavit relating to the assets, income and expenditure of my spouse are based on information believed to be true on the basis of record. I further verify that the copies of the documents filed along with the affidavit are the copies of the originals.

DEPONENT

ENCLOSURE II

Details for Affidavit for Agrarian Deponents (Krishi)

1. Total extent of the rural land(s) owned, or the specific shareholding in the same land:
2. Jamabandis/Mutations to show ownership.
3. Location of the land owned by the party.
4. Nature of land : whether wet land or dry land.
5. Whether such land is agricultural land or non-agricultural land:
6. Nature of agriculture/horticulture:
7. Nature of crops cultivated during the year:
8. If rural land is not cultivable, whether the same is being used for business, leasing or other activity:
9. Income generated during the past 3 years from the land.
10. Whether any land is taken on lease/battai (or any other term used for a lease in the local area of the jurisdiction concerned where rural/ agricultural land is located.)
11. (*a*) Whether owner of any livestock, such as buffaloes, cows, goats, cattle, poultry, fishery, bee keeping, piggery, etc. the number thereof and income generated therefrom?
    (*b*) Whether engaged in dairy farming, poultry, fish farming or any other livestock activity.
12. Loans, if any obtained against the land. Furnish details of such loans.
13. Any other sources of income:
14. Liabilities, if any.
15. Any other relevant information:

Declaration

1. I declare that I have made a full and accurate disclosure of my income, expenditure, assets and liabilities from all sources. I further declare that I have no assets, income, expenditure and liabilities other than as stated in this affidavit.
2. I undertake to inform this Court immediately with respect to any material change in my employment, assets, income, expenses or any other information included in this affidavit.
3. I understand that any false statement in this affidavit, apart from being contempt of court, may constitute an offence under Section 199 read with Sections 191 and 193 of the Indian Penal Code punishable with imprisonment up to seven years and fine, and Section 209 of the Indian Penal Code punishable with imprisonment up to two years and fine. I have read and understood Sections 191, 193, 199 and 209 of the Indian Penal Code, 1860.

DEPONENT

Verification

Verified at ___on this ___day of_____that the contents of the above affidavit are true to my personal knowledge, no part of it is false and nothing material has been concealed therefrom. I further verify that the copies of the documents filed along with the affidavit are the copies of the originals.

DEPONENT

ENCLOSURE III

Affidavit for the State of Meghalaya

1. Whether the woman is the youngest daughter of the family.
2. Whether the woman is staying with her husband in her family property.
3. Whether she has any maternal uncle, who plays a very important role in their family matters, which includes settlement of matrimonial disputes. The woman should also disclose her clan and her lineage.
4. The woman should disclose if her children have adopted the surname of her mother, inasmuch as Khasi has been defined as "a person who adopts the surname of his or her mother".
5. The woman should disclose if she gets any financial assistance from her clan or family member.
6. The woman should disclose if her parents are alive more specifically, her mother, and how many siblings she has.
7. In event of a woman not being the youngest daughter, she has to disclose who the youngest daughter is.
8. The woman should disclose if she has any movable or any immovable property, self-acquired or inherited from her clan.

9. The woman should disclose if she is married to tribal or non-tribal. The above format may be modified or adapted by the court concerned, as may be considered appropriate.

Declaration

1. I declare that I have made a full and accurate disclosure of my income, expenditure, assets and liabilities from all sources. I further declare that I have no assets, income, expenditure and liabilities other than as stated in this affidavit.
2. I undertake to inform this Court immediately with respect to any material change in my employment, assets, income, expenses or any other information included in this affidavit.
3. I understand that any false statement in this affidavit, apart from being contempt of court, may also constitute an offence under Section 199 read with Sections 191 and 193 of the Indian Penal Code punishable with imprisonment up to seven years and fine, and Section 209 of the Indian Penal Code punishable with imprisonment up to two years and fine. I have read and understood Sections 191, 193, 199, and 209 of the Indian Penal Code, 1860.

DEPONENT

Verification

Verified at ___on this _____day of _____ that the contents of the above affidavit are true to my personal knowledge, no part of it is false and nothing material has been concealed therefrom, whereas the contents of the above affidavit relating to the assets, income and expenditure of my spouse are based on information believed to be true on the basis of record. I further verify that the copies of the documents filed along with the affidavit are the copies of the originals.

DEPONENT

_____

(1984) 2 Supreme Court Cases 244

(BEFORE P.N. BHAGWATI, R.S. PATHAK AND AMARENDRA NATH SEN, JJ.)

LAKSHMI KANT PANDEY .. Petitioner;

Versus

UNION OF INDIA .. Respondent.

Writ Petition (Criminal) No. 171 of 1982*, decided on February 6, 1984

Constitution of India — Articles 32, 15(3) and 39(e) and (f) — Public interest writ petition against malpractices and trafficking in children in connection with adoption of Indian children by foreigners living abroad — Directions laying down principles and norms to be followed in cases of such adoption given in detail — Guardians and Wards Act, 1890, Sections 4, 7, 8, 9, 11, 17, 26

R-M/6481/C

Advocates who appeared in this case:
Petitioner in person.
For the Respondents:
Miss A. Subashini, Advocate, for Union of India and Ministry of Social Welfare;
Miss Kamini Jaiswal, Advocate, for Indian Council of Social Welfare;
M/s J.B. Dadachanji & Co., Advocates, for Indian Council of Child Welfare and Swedish Embassy;
Dr. N.M. Ghatate, Advocate, for All God's Children Inc., Arizona, U.S.A.;
P.H. Parekh, Advocate, for Maharashtra State Women's Council of Child Welfare, Bombay and for Enfants de-L' espoir;
P.K. Chakravarti, Advocate, for Legal Aid Service, West Bengal;
Mrs Manik Karanjawala, Advocate, for Indian Associations for Promotion of Adoption;
Mrs Urmila Kapoor, Advocate, for SOS Children's Village of India;
Kailash Vasdev, Advocate, for Missionaries of Charity, Calcutta;
Baldev Raj, Respondent in person;
G.M. Coelho, Bar-at-Law for Enfant's du Monde (France);
Miss Rani Jethmalani, Advocate, for Kuan-yin Charitable Trust;
B.M. Bagaria, Advocate, for Terre Des Hommes (India) Society;
Sukumar Ghose, Advocate, for Mission of Hope (India) Society, Calcutta;
S.K. Mehta, Advocate, for Netherlands Inter-Country Child Welfare Organisation;
Parijat Sinha, Advocate, for Society for International Child Welfare;
Kailash Vasdev, Advocate, for Bhavishya.

The Judgment of the Court was delivered by

BHAGWATI, J.—This writ petition has been initiated on the basis of a letter addressed by one Laxmi Kant Pandey, an advocate practising in this Court, complaining of malpractices indulged in by social organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents. The letter referred to a press report based on "empirical investigation carried out by the staff of a reputed foreign magazine" called "The Mail" and alleged that not only Indian children of tender age are under the guise of adoption "exposed to the long horrendous journey to distant foreign countries at great risk to their lives but in cases where they survive and where these children are not placed in the shelter and relief Homes, they in course of time become beggars or prostitutes for want of proper care from their alleged foreign foster parents".

* Under Article 32 of the Constitution of India

The petitioner accordingly sought relief restraining India based private agencies "from carrying out further activity of routing children for adoption abroad" and directing the Government of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to carry out their obligations in the matter of adoption of Indian children by foreign parents. This letter was treated as a writ petition and by an Order dated September 1, 1982 the Court issued notice to the Union of India, the Indian Council of Child Welfare and the Indian Council of Social Welfare to appear in answer to the writ petition and assist the Court in laying down principles and norms which should be followed in determining whether a child should be allowed to be adopted by foreign parents and if so, the procedure to be followed for that purpose, with the object of ensuring the welfare of the child.

2. The Indian Council of Social Welfare was the first to file its written submissions in response to the notice issued by the Court and its written submission filed on September 30, 1982 not only carried considerable useful material bearing on the question of adoption of Indian children by foreign parents but also contained various suggestions and recommendations for consideration by the Court in formulating principles and norms for permitting such adoptions and laying down the procedure for that purpose. We shall have occasion to refer to this large material placed before us as also to discuss the various suggestions and recommendations made in the written submission by the Indian Council of Social Welfare when we take up for consideration the various issues arising in the writ petition. Suffice it to state for the present that the written submission of the Indian Council of Social Welfare is a well thought out document dealing comprehensively with various aspects of the problem in its manifold dimensions. When the writ petition reached hearing before the Court on October, 12, 1982 the only written submission filed was that of the Indian Council of Social Welfare and neither the Union of India nor the Indian Council of Child Welfare had made any response to the notice issued by the Court. But there was a telegram received from a Swedish organisation called "Barnen Framfoer Allt Adoptioner" intimating to the Court that this organisation desired to participate in the hearing of the writ petition and to present proper material before the Court. SOS Children's Villages of India also appeared through their counsel Mrs Urmila Kapoor and applied for being allowed to intervene at the hearing of the writ petition so that they could make their submissions on the question of adoption of Indian children by foreign parents. Since SOS Children's Villages of India is admittedly an organisation concerned with welfare of children, the Court, by an Order dated October 12, 1982, allowed them to intervene and to make their submissions before the Court. The Court also by the same Order directed that the Registry may address a communication to Barnen Framfoer Allt Adoptioner informing them about the adjourned date of hearing of the writ petition and stating that if they wished to present any material and make their submissions, they could do

so by filing an affidavit before the adjourned date of hearing. The Court also directed the Union of India to furnish before the next hearing of the writ petition the names of "any Indian institutions or organisations other than the Indian Council of Social Welfare and the Indian Council of Child Welfare, which are engaged or involved in offering Indian children for adoption by foreign parents" and observed that if the Union of India does not have this information, they should gather the requisite information so far as it is possible for them to do so and to make it available to the Court. The Court also issued a similar direction to the Indian Council of Child Welfare, Indian Council of Social Welfare and SOS Children's Villages of India. There was also a further direction given in the same Order to the Union of India, the Indian Council of Child Welfare, the Indian Council of Social Welfare and the SOS Children's Villages of India "to supply to the Court information in regard to the names and particulars of any foreign agencies which are engaged in the work of finding Indian children for adoption for foreign parents". The writ petition was adjourned to November 9, 1982 for enabling the parties to carry out these directions.

3. It appears that the Indian Council of Social Welfare thereafter, in compliance with the directions given by the Court, filed copies of the Adoption of Children Bill, 1972 and the Adoption of Children Bill, 1980. The Adoption of Children Bill, 1972 was introduced in the Rajya Sabha some time in 1972 but it was subsequently dropped, presumably because of the opposition of the Muslims stemming from the fact that it was intended to provide for a uniform law of adoption applicable to all communities including the Muslims. It is a little difficult to appreciate why the Muslims should have opposed this Bill which merely empowered a Muslim to adopt if he so wished; it had no compulsive force requiring a Muslim to act contrary to his religious tenets: it was merely an enabling legislation and if a Muslim felt that it was contrary to his religion to adopt, he was free not to adopt. But in view of the rather strong sentiments expressed by the members of the Muslim community and with a view not to offend their religious susceptibilities, the Adoption of Children Bill, 1980 which was introduced in the Lok Sabha eight years later on December 16, 1980, contained an express provision that it shall not be applicable to Muslims. Apart from this change in its coverage the Adoption of Children Bill, 1980 was substantially in the same terms as the Adoption of Children Bill, 1972. The Adoption of Children Bill, 1980 has unfortunately not yet been enacted into law but it would be useful to notice some of the relevant provisions of this Bill insofar as they indicate what principles and norms the Central Government regarded as necessary to be observed for securing the welfare of children sought to be given in adoption to foreign parents and what procedural safeguards the Central Government thought, were essential for securing this end. Clauses 23 and 24 of the Adoption of Children Bill, 1980 dealt with the problem of adoption of Indian children by parents domiciled abroad and, insofar as material, they provided as follows:

23. (1) Except under the authority of an order under Section 24, it shall not be lawful for any person to take or send out of India a child who is a citizen of India to any place outside India with a view to the adoption of the child by any person.

(2) Any person who takes or sends a child out of India to any place outside India in contravention of sub-section (1) or makes or takes part in any arrangements for transferring the care and custody of a child to any person for that purpose shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.

24. (1) If upon an application made by a person who is not domiciled in India, the district court is satisfied that the applicant intends to adopt a child under the law of or within the country in which he is domiciled, and for that purpose desires to remove the child from India either immediately or after an interval, the court may make an order (in this section referred to as a provisional adoption order) authorising the applicant to remove the child for the purpose aforesaid and giving to the applicant the care and custody of the child pending his adoption as aforesaid:

Provided that no application shall be entertained unless it is accompanied by a certificate by the Central Government to the effect that—

(*i*) the applicant is in its opinion a fit person to adopt the child;

(*ii*) the welfare and interests of the child shall be safeguarded under the law of the country of domicile of the applicant;

(*iii*) the applicant has made proper provision by way of deposit or bond or otherwise in accordance with the rules made under this Act to enable the child to be repatriated to India, should it become necessary for any reason.

(2) The provisions of this Act relating to an adoption order shall, as far as may be, apply in relation to a provisional adoption order made under this section.

The other clauses of the Adoption of Children Bill, 1980 were sought to be made applicable in relation to a provisional adoption order by reason of sub-clause (3) of Clause 24. The net effect of this provision, if the Bill were enacted into law, would be that in view of Clause 17 no institution or organisation can make any arrangement for the adoption of an Indian child by foreign parents unless such institution or organisation is licensed as a social welfare institution and under Clause 21, it would be unlawful to make or to give to any person any payment or reward for or in consideration of the grant by that person of any consent required in connection with the adoption of a child or the transfer by that person of the care and custody of such child with a view to its adoption or the making by that person of any arrangements for such adoption. Moreover, in view of Clause 8, no provisional adoption order can be made in respect of an Indian child except with the consent of the parent or guardian of such child and if such child is in the care of an institution, except with the consent of the institution given on its behalf by all the persons entrusted with or in charge of its management, but the district court can dispense with such consent if it is satisfied that

the person whose consent is to be dispensed with has abandoned, neglected or persistently ill-treated the child or has persistently failed without reasonable cause to discharge his obligation as parent or guardian or cannot be found or is incapable of giving consent or is withholding consent unreasonably. When a provisional adoption order is made by the district court on the application of a person domiciled abroad, such person would be entitled to obtain the care and custody of the child in respect of which the order is made and to remove such child for the purpose of adopting it under the law or within the country in which he is domiciled. These provisions in the Adoption of Children Bill, 1980 will have to be borne in mind when we formulate the guidelines which must be observed in permitting an Indian child to be given in adoption to foreign parents. Besides filing copies of the Adoption of Children Bill, 1972 and the Adoption of Children Bill, 1980, the Indian Council of Social Welfare also filed two lists, one list giving names and particulars of recognised agencies in foreign countries engaged in facilitating procurement of children from other countries for adoption in their own respective countries and the other list containing names and particulars of institutions and organisations in India engaged in the work of offering and placing Indian children for adoption by foreign parents.

4. The writ petition thereafter came up for hearing on November 9, 1982 when several applications were made by various institutions and organisations for intervention at the hearing of the writ petition. Since the questions arising in the writ petition were of national importance, the Court thought that it would be desirable to have assistance from whatever legitimate source it might come and accordingly, by an order dated November 9, 1982, the Court granted permission to eight specified institutions or organisations to file affidavits or statements placing relevant material before the Court in regard to the question of adoption of Indian children by foreign parents and directed that such affidavits or statements should be filed on or before November 27, 1982. The Court also issued notice of the writ petition to the State of West Bengal directing it to file its affidavit or statement on or before the same date. The Court also directed the Superintendent of Tees Hazari Courts to produce at the next hearing of the writ petition quarterly reports in regard to the orders made under the Guardian and Wards Act, 1890 entrusting care and custody of Indian children to foreign parents during the period of five years immediately prior to October 1, 1982. Since the Union of India had not yet filed its affidavit or statement setting out what was the attitude adopted by it in regard to this question, the Court directed the Union of India to file its affidavit or statement within the same time as the others. The Court then adjourned the hearing of the writ petition to December 1, 1982 in order that the record may be completed by that time.

5. Pursuant to these directions given by the Court, various affidavits and statements were filed on behalf of the Indian Council of

Social Welfare, Enfants Du Monde, Missionaries of Charity, Enfants De L's Espoir, Indian Association for Promotion of Adoption, Kuan-yin Charitable Trust, Terre Des Hommes (India) Society, Maharashtra State Women's Council, Legal Aid Services, West Bengal, SOS Children's Villages of India, Bhavishya International Union for Child Welfare and the Union of India. These affidavits and statements placed before the Court a wealth of material bearing upon the question of adoption of Indian children by foreign parents and made valuable suggestions and recommendations for the consideration of the Court. These affidavits and statements were supplemented by elaborate oral arguments which explored every facet of the question, involving not only legal but also sociological considerations. We are indeed grateful to the various participants in this inquiry and to their counsel for the very able assistance rendered by them in helping us to formulate principles and norms which should be observed in giving Indian children in adoption to foreign parents and the procedure that should be followed for the purpose of ensuring that such inter-country adoptions do not lead to abuse maltreatment or exploitation of children and secure to them a healthy, decent family life.

6. It is obvious that in a civilized society the importance of child welfare cannot be over-emphasized, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a "supremely important national asset" and the future well-being of the nation depends on how its children grow and develop. The great poet Milton put it admirably when he said: "Child shows the man as morning shows the day" and the Study Team on Social Welfare said much to the same effect when it observed that "the physical and mental health of the nation is determined largely by the manner in which it is shaped in the early stages". The child is a soul with a being, a nature and capacities of its own, who must be helped to find them, to grow into their maturity, into fulness of physical and vital energy and the utmost breath, depth and height of its emotional, intellectual and spiritual being; otherwise there cannot be a healthy growth of the nation. Now obviously children need special protection because of their tender age and physique, mental immaturity and incapacity to look after themselves. That is why there is a growing realisation in every part of the globe that children must be brought up in an atmosphere of love and affection and under the tender care and attention of parents so that they may be able to attain full emotional, intellectual and spiritual stability and maturity and acquire self-confidence and self-respect and a balanced view of life with full appreciation and realisation of the role which they have to play in the nation building process without which the nation cannot develop and attain real prosperity because a large segment of the society would then be left out of the developmental process. In India this consciousness is reflected in the provisions enacted in the Constitution. Clause (3) of Article 15 enables the State to make special provisions inter alia for children and Article 24 provides that no child below the age of

fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Clauses (*e*) and (*f*) of Article 39 provide that the State shall direct its policy towards securing inter alia that the tender age of children is not abused, that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength and that children are given facility to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. These constitutional provisions reflect the great anxiety of the constitution makers to protect and safeguard the interest and welfare of children in the country. The Government of India has also in pursuance of these constitutional provisions evolved a National Policy for the Welfare of Children. This Policy starts with a goal-oriented preambulatory introduction :

> The nation's children are a supremely important asset. Their nurture and solicitude are our responsibility. Children's programme should find a prominent part in our national plans for the development of human resources, so that our children grow up to become robust citizens, physically fit, mentally alert and morally healthy, endowed with the skills and motivations needed by society. Equal opportunities for development to all children during the period of growth should be our aim, for this would serve our larger purpose of reducing inequality and ensuring social justice.

The National Policy sets out the measures which the Government of India proposes to adopt towards attainment of the objectives set out in the preambulatory introduction and they include measures designed to protect children against neglect, cruelty and exploitation and to strengthen family ties "so that full potentialities of growth of children are realised within the normal family neighbourhood and community environment". The National Policy also lays down priority in programme formation and it gives fairly high priority to maintenance, education and training of orphan and destitute children. There is also provision made in the National Policy for constitution of a National Children's Board and pursuant to this provision, the Government of India has constituted the National Children's Board with the Prime Minister as the chair-person. It is the function of the National Children's Board to provide a focus for planning and review and proper coordination of the multiplicity of services striving to meet the needs of children and to ensure at different levels continuous planning, review and coordination of all the essential services. The National Policy also stresses the vital role which the voluntary organisations have to play in the field of education, health, recreation and social welfare services for children and declares that it shall be the endeavour of State to encourage and strengthen such voluntary organisations.

7. There has been equally great concern for the welfare of children at the international level culminating in the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on Novem-

ber 20, 1959. The Declaration in its Preamble points out that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth", and that "mankind owes to the child the best it has to give" and proceeds to formulate several Principles of which the following are material for our present purpose :

> *Principle 2.*—The child shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose the best interests of the child shall be the paramount consideration.
>
> *Principle 3.*—The child shall be entitled from his birth to a name and a nationality.
>
> *Principle 6.*—The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and in any case in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.
>
> *Principle 9.*—The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.
>
> *Principle 10.*—The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

Every child has a right to love and be loved and to grow up in an atmosphere of love and affection and of moral and material security and this is possible only if the child is brought up in a family. The most congenial environment would, of course, be that of the family of his biological parents. But if for any reason it is not possible for the biological parents or other near relative to look after the child or the child is abandoned and it is either not possible to trace the parents or the parents are not willing to take care of the child, the next best alternative would be to find adoptive parents for the child so that the the child can grow up under the loving care and attention of the adoptive parents. The adoptive parents would be the next best substitute for the biological parents. The practice of adoption has been prevalent in Hindu society for centuries and it is recognised by Hindu Law, but in a large number of other countries it is of comparatively recent origin while in the Muslim countries it is totally unknown. Amongst Hindus, it is not merely ancient Hindu Law which recognises the practice of adoption but it has

also been legislatively recognised in the Hindu Adoption and Maintenance Act, 1956. The adoption of Children Bill, 1972 sought to provide for a uniform law of adoption applicable to all communities including the Muslims but, as pointed out above, it was dropped owing to the strong opposition of the Muslim community. The Adoption of Children Bill, 1980 is now pending in Parliament and if enacted, it will provide a uniform law of adoption applicable to all communities in India excluding the Muslim community. Now when the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country, because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might arise on account of cultural, racial or linguistic differences in case of adoption of the child by foreign parents. If it is not possible to find suitable adoptive parents for the child within the country, it may become necessary to give the child in adoption to foreign parents rather than allow the child to grow up in an orphanage or an institution where it will have no family life and no love and affection of parents and quite often, in the socio-economic conditions prevailing in the country, it might have to lead the life of a destitute, half-clad, half-hungry and suffering from malnutrition and illness. Paul Harrison a free-lance journalist working for several U. N. Agencies including the International Year of the Child Secretariat points out that most Third World children suffer "because of their country's lack of resources for development as well as pronounced inequalities in the way available resources are distributed" and they face a situation of absolute material deprivation. He proceeds to say that for quite a large number of children in the rural areas, "poverty and lack of education of their parents, combined with little or no access to essential services of health, sanitation and education, prevent the realisation of their full human potential making them more likely to grow up uneducated, unskilled and unproductive" and their life is blighted by malnutrition, lack of health care and disease and illness caused by starvation, impure water and poor sanitation. What Paul Harrison has said about children of the Third World applies to children in India and if it is not possible to provide to them in India decent family life where they can grow up under the loving care and attention of parents and enjoy the basic necessities of life such as nutritive food, health care and education and lead a life of basic human dignity with stability and security, moral as well as material, there is no reason why such children should not be allowed to be given in adoption to foreign parents. Such adoption would be quite consistent with our National Policy on Children because it would provide an opportunity to children, otherwise destitute, neglected or abandoned, to lead a healthy decent life, without privation and suffering arising from poverty, ignorance, malnutrition and lack of sanitation and free from neglect and exploitation, where they would be able to realise "full potential of growth". But of course as we said above,

every effort must be made first to see if the child can be rehabilitated by adoption within the country and if that is not possible, then only adoption by foreign parents, or as it is some time called 'inter-country adoption' should be acceptable. This principle stems from the fact that inter-country adoption may involve trans-racial, trans-cultural and trans-national aspects which would not arise in case of adoption within the country and the first alternative should therefore always be to find adoptive parents for the child within the country. In fact, the Draft Guidelines of Procedures Concerning Inter-Country Adoption formulated at the International Council of Social Welfare Regional Conference of Asia and Western Pacific held in Bombay in 1981 and approved at the Workshop on Inter-Country Adoption held in Brighton, U.K. on September 4, 1982, recognise the validity of this principle in Clause 3-1 which provides: "Before any plans are considered for a child to be adopted by a foreigner, the appropriate authority or agency shall consider all alternatives for permanent family care within the child's own country". Where, however, it is not possible to find placement for the child in an adoptive family within the country, we do not see anything wrong if a home is provided to the child with an adoptive family in a foreign country. The Government of India also in the affidavit filed on its behalf by Miss B. Sennapati, Programme Officer in the Ministry of Social Welfare seems to approve of inter-country adoption for Indian children and the proceedings of the Workshop on Inter-Country Adoption held in Brighton, U.K. on September 4, 1982 clearly show that the Joint Secretary, Ministry of Social Welfare who represented the Government of India at the Workshop "affirmed support of the Indian Government to the efforts of the international organisations in promoting measures to protect welfare and interests of children who are adopted abroad".

8. But while supporting inter-country adoption, it is necessary to bear in mind that the primary object of giving the child in adoption being the welfare of the child, great care has to be exercised in permitting the child to be given in adoption to foreign parents, lest the child may be neglected or abandoned by the adoptive parents in the foreign country or the adoptive parents may not be able to provide to the child a life of moral or material security or the child may be subjected to moral or sexual abuse or forced labour or experimentation for medical or other research and may be placed in a worse situation than that in his own country. The Economic and Social Council as also the Commission for Social Development have therefore tried to evolve social and legal principles for the protection and welfare of children given in inter-country adoption. The Economic and Social Council by its Resolution 1925 LVIII requested the Secretary General of the United Nations to convene a group of experts with relevant experience of family and child welfare with the following mandate:

> (*a*) To prepare a draft declaration of social and legal principles relating to adoption and foster placement of children nationally and internationally, and to review and appraise the recommendations and

guidelines incorporated in the report of the Secretary-General and the relevant material submitted by Governments already available to the Secretary-General and the regional commissions.

(*b*) To draft guidelines for the use of Governments in the implementation of the above principles, as well as suggestions for improving procedures within the context of their social development—including family and child welfare programmes.

Pursuant to this mandate an expert group meeting was convened in Geneva in December, 1978 and this expert group adopted a "Draft declaration on social and legal principles relating to the protection and welfare of children with special reference of foster placement and adoption, nationally and internationally". The Commission for Social Development considered the draft Declaration at its Twenty-sixth Session and expressed agreement with its contents and the Economic and Social Council approved the draft Declaration and requested the General Assembly to consider it in a suitable manner. None of the parties appearing could give us information whether any action has been taken by the General Assembly. But the draft Declaration is a very important document inasmuch as it lays down certain social and legal principles which must be observed in case of inter-country adoption. Some of the relevant principles set out in the draft Declaration may be referred to with advantage:

Article 2. It is recognized that the best child welfare is good family welfare.

4. When biological family care is unavailable or inappropriate, substitute family care should be considered.

7. Every child has a right to a family. Children who cannot remain in their biological family should be placed in foster family or adoption in preference to institutions, unless the child's particular needs can best be met in a specialized facility.

8. Children for whom institutional care was formerly regarded as the only option should be placed with families, both foster and adoptive.

12. The primary purpose of adoption is to provide a permanent family for a child who cannot be cared for by his/her biological family.

14. In considering possible adoption placements, those responsible for the child should select the most appropriate environment for the particular child concerned.

15. Sufficient time and adequate counselling should be given to the biological parents to enable them to reach a decision on their child's future, recognizing that it is in the child's best interest to reach this decision as early as possible.

16. Legislation and services should ensure that the child becomes an integral part of the adoptive family.

17. The need of adult adoptees to know about their background should be recognized.

19. Governments should determine the adequacy of their national services for children, and recognize those children whose needs are not being met by existing services. For some of these children, inter-

country adoption may be considered as a suitable means of providing them with a family.

21. In each country, placements should be made through authorized agencies competent to deal with inter-country adoption services and providing the same safeguards and standards as are applied in national adoptions.

22. Proxy adoptions are not acceptable, in consideration of the child's legal and social safety.

23. No adoption plan should be considered before it has been established that the child is legally free for adoption and the pertinent documents necessary to complete the adoption are available. All necessary consents must be in a form which is legally valid in both countries. It must be definitely established that the child will be able to immigrate into the country of the prospective adopters and can subsequently obtain their nationality.

24. In inter-country adoptions, legal validation of the adoption should be assured in the countries involved.

25. The child should at all times have a name, nationality and legal guardian.

Thereafter at the Regional Conference of Asia and Western Pacific held by the International Council on Social Welfare in Bombay in 1981, draft guidelines of procedure concerning inter-country adoption were formulated and, as pointed out above, they were approved at the Workshop held in Brighton, U.K. on September 4, 1982. These guidelines were based on the draft Declaration and they are extremely relevant as they reflect the almost unanimous thinking of participants from various countries who took part in the Regional Conference in Bombay and in the Workshop in Brighton, U. K. There are quite a few of these guidelines which are important and which deserve serious consideration by us :

1.4. In all inter-country adoption arrangements, the welfare of the child shall be prime consideration.

Biological Parents :

2.2. When the biological parents are known they shall be offered social work services by professionally qualified workers (or experienced personnel who are supervised by such qualified workers) before and after the birth of the child.

2.3. These services shall assist the parents to consider all the alternatives for the child's future. Parents shall not be subject to any duress in making a decision about adoption. No commitment to an adoption plan shall be permitted before the birth of the child. After allowing parents a reasonable time to reconsider any decision to relinquish a child for adoption, the decision should become irrevocable.

2.5. If the parents decide to relinquish the child for adoption, they shall be helped to understand all the implications, including the possibility of adoption by foreigners and of no further contact with the child.

2.6. Parents should be encouraged, where possible, to provide

information about the child's background and development, and their own health.

2.8. It is the responsibility of the appropriate authority or agency to ensure that when the parents relinquish a child for adoption all of the legal requirements are met.

2.9. If the parents state a preference for the religious upbringing of the child, these wishes shall be respected as far as possible, but the best interest of the child will be the paramount consideration.

2.10. If the parents are not known, the appropriate authority or agency, in whose care the child has been placed, shall endeavour to trace the parents and ensure that the above services are provided, before taking any action in relation to adoption of the child.

The Child:

3.1. Before any plans are considered for a child to be adopted by foreigners, the appropriate authority or agency shall consider all alternatives for permanent family care within the child's own country.

3.2. A child-study report shall be prepared by professional workers (or experienced personnel who are supervised by such qualified workers) of an appropriate authority or agency, to provide information which will form a basis for the selection of prospective adopters for the child, assist with the child's need to know about his original family at the appropriate time, and help the adoptive parents understand the child and have relevant information about him/her.

3.3. As far as possible, the child-study report shall include the following:

3.3.1. Identifying information, supported where possible by documents.

3.3.2. Information about original parents, including their health and details of the mother's pregnancy and the birth.

3.3.3. Physical, intellectual and emotional development.

3.3.4. Health report.

3.3.5. Recent photograph.

3.3.6. Present environment—category of care (own home, foster home, institution, etc.) relationships, routines and habits.

3.3.7. Social worker's assessment and reasons for suggesting inter-country adoption.

3.4. Brothers and sisters and other children who have been cared for as siblings should not be separated by adoption placement except for special reasons.

3.5. When a decision about an adoption placement is finalised, adequate time and effort shall be given to preparation of the child in a manner appropriate to his/her age and level of development. Information about the child's new country and new home, and counselling shall be provided by a skilled worker.

3.5(*a*) Before any adoption placement is finalized the child concerned shall be consulted in a manner appropriate to his/her age and level of development.

3.6. When older children are placed for adoption, the adoptive

parents should be encouraged to come to the child's country of origin, to meet him/her there, learn personally about his/her first environment and escort the child to its new home.

Adoptive Parents :

4.3. In addition to the usual capacity for adoptive parenthood, applicants need to have the capacity to handle the trans-racial, trans-cultural and trans-national aspects of inter-country adoptions.

4.4. A family study report shall be prepared by professional worker (or experienced personnel who are supervised by such qualified workers) to indicate the basis on which the applicants were accepted as prospective adopters. It should include an assessment of the parents' capacity to parent a particular type of child and provide relevant information for other authorities such as courts.

4.5. The report on the family study, which must be made in the community where the applicants are residing, shall include details of the following :

4.5.1. Identifying information about parents and other members of the family, including any necessary documentation.

4.5.2. Emotional and intellectual capacities of prospective adopters, and their motivation to adoption.

4.5.3. Relationship (marital, family, relatives, friends, community).

4.5.4. Health.

4.5.5. Accommodation and financial position.

4.5.6. Employment and other interests.

4.5.7. Religious affiliations and/or attitudes.

4.5.8. Capacity for adoptive parenthood, and details of child preferred (age, sex, degree of disability).

4.5.9. Support available from relatives, friends, community.

4.5.10. Social worker's assessment and details of adoption authority's approval.

4.5.11. Recent photograph of family.

Adoption Authorities and Agencies :

5.1. Inter-country adoption arrangements should be made only through Government adoption authorities (or agencies recognised by them) in both sending and receiving countries. They shall use experienced staff with professional social work education or experienced personnel supervised by such qualified workers.

5.2. The appropriate authority or agency in the child's country should be informed of all proposed inter-country adoptions and have the opportunity to satisfy itself that all alternatives in the country have been considered, and that inter-country adoption is the optimal choice of care for the child.

5.3. Before any inter-country adoption plan is considered, the appropriate authority or agency in the child's country should be responsible for establishing that the child is legally free for adoption, and that the necessary documentation is legally valid in both countries.

5.4. Approval of inter-country adoption applications is a respon-

sibility of the appropriate authorities or agencies in both sending and receiving countries. An application to adopt a child shall not be considered by a sending country unless it is forwarded through the appropriate authority or agency in the receiving country.

5.5. The appropriate authority or agency in both countries shall monitor the reimbursement of costs involved in inter-country adoption to prevent profiteering and trafficking in children.

5.6. * * *

5.7. When a child goes to another country to be adopted, the appropriate authority or agency of the receiving country shall accept responsibility for supervision of the placement, and for the provision of progress reports for the adoption authority or agency in the sending country for the period agreed upon.

5.8. In cases where the adoption is not to be finalised in the sending country, the adoption authority in the receiving country shall ensure that an adoption order is sought as soon as possible but not later than 2 years after placement. It is the responsibility of the appropriate authority or agency in the receiving country to inform the appropriate authority or agency in the sending country, of the details of the adoption order when it is granted.

5.8.1. In cases where the adoption is to be finalised in the sending country after placement, it is the responsibility of the appropriate authority or agency in both the sending and receiving country to ensure that the adoption is finalised as soon as possible.

5.9. If the placement is disrupted before the adoption is finalised, the adoption authority in the receiving country shall be responsible for ensuring, with the agreement of the adoption authority in the sending country that a satisfactory alternative placement is made with prospective adoptive parents who are approved by the adoption authorities of both countries.

Adoption Services and Communities:

6.1. Appropriate authorities or agencies in receiving countries shall ensure that there is adequate feedback to the appropriate authorities or agencies in sending countries, both in relation to inter-country adoption generally and to individual children where required.

6.2. * * *

6.3. The appropriate authorities and agencies in both sending and receiving countries have a responsibility for public education in relation to inter-country adoption, to ensure that when such adoption is appropriate for children, public attitudes support this. Where public attitude is known to be discriminatory or likely to be hostile on grounds of race or colour, the appropriate authority or agency in the sending country should not consider placement of the child.

Status of the child

7.1. *Family.*—It is essential that in inter-country adoption child is given the same legal status and rights of inheritance, as if she/he had been born to the adoptive parents in marriage.

7.2. *Name.*—When the legal adoption process is concluded the child shall have the equivalent of a birth registration certificate.

7.3. *Nationality.*—When the legal adoption is concluded, the child shall be granted appropriate citizenship.

7.4. * * *

7.5. *Immigration.*—Before an inter-country adoption placement with particular prospective adopters is proposed, the appropriate authority or agency in the child's country shall ensure that there is no hindrance to the child entering the prospective adopters' country, and that travel documents can be obtained at the appropriate time.

We shall examine these provisions of the draft Declaration and the draft guidelines of procedure when we proceed to consider and lay down the principles and norms which should be followed in inter-country adoption.

9. Now it would be convenient at this stage to set out the procedure which is at present being followed for giving a child in adoption to foreign parents. Since there is no statutory enactment in our country providing for adoption of a child by foreign parents or laying down the procedure which must be followed in such a case, resort is had to the provisions of the Guardians and Wards Act, 1890 for the purpose of facilitating such adoption. This Act is an old statute enacted for the purpose of providing for appointment of guardian of the person or property of a minor. Section 4 sub-section (5) clause (*a*) defines the "court" to mean the district court having jurisdiction to entertain an application under the Act for an order appointing or declaring a person to be a guardian and the expression "district court" is defined in sub-section (4) of Section 4 to have the same meaning as assigned to it in the Code of Civil Procedure and includes a High Court in the exercise of its ordinary original civil jurisdiction. Section 7 sub-section (1) provides that where the court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both or declaring a person to be such a guardian, the court may make an order accordingly and, according to Section 8, such an order shall not be made except on the application of one of four categories of persons specified in clauses (*a*) to (*d*), one of them being "the person desirous of being the guardian of the minor" and the other being "any relative or friend of the minor". Sub-section (1) of Section 9 declares that if the 'application' is with respect to the guardianship of the person of the minor — and that is the kind of application which is availed of for the purpose of inter-country adoption — it shall be made to the district court having jurisdiction in the place where the minor ordinarily resides. Then follows Section 11, sub-section (1) which prescribes that if the court is satisfied that there is ground for proceeding on the application, it shall fix a date for the hearing thereof and cause notice of the application and of the date fixed for the hearing to be served on the parents of the minor if they are residing in any State to which the Act extends, the person if any named in the petition as having the custody or possession of the person of the minor, the person proposed in the application to be appointed guardian and any other person to whom, in the opinion of

the court, special notice of the application should be given. Section 17 provides that in appointing guardian of a minor, the court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor and in considering what will be for the welfare of the minor, the court shall have regard to the age, sex, and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent and any existing or previous relations of the proposed guardian with the minor or his property. The last material section is Section 26 which provides that a guardian of the person of a minor appointed by the court shall not, without the leave of the court by which he was appointed, remove the ward from the limits of its jurisdiction, except for such purposes as may be prescribed and the leave to be granted by the court may be special or general. These are the relevant provisions of the Guardians and Wards Act, 1890 which have a bearing on the procedure which is at present being followed for the purpose of carrying through inter-country adoption. The foreign parent makes an application to the court for being appointed guardian of the person of the child whom he wishes to take in adoption and for leave of the court to take the child with him to his country on being appointed such guardian. The procedure to be followed by the court in disposing of such application is laid down by three High Courts in the country with a view to protecting the interest and safeguarding the welfare of the child, but so far as the rest of the High Courts are concerned, they do not seem to have taken any steps so far in that direction. Since most of the applications by foreign parents wishing to take a child in adoption in the State of Maharashtra are made on the original side of the High Court of Bombay that High Court has issued a notification dated May 10, 1972 incorporating Rule 361-B in Chapter XX of the Rules of the High Court of Bombay (Original Side), 1957 and this newly added rule provides inter alia as follows :

> When a foreigner makes an application for being appointed as the guardian of the person or property of a minor, the Prothonotary and Senior Master shall address a letter to the Secretary of the Indian Council of Social Welfare, informing him of the presentation of the application and the date fixed for the hearing thereof. He shall also inform him that any representation which the Indian Council of Social Welfare may make in the matter would be considered by the Court before passing the order on the application. A copy of the application shall be forwarded to the Secretary of the Indian Council of Social Welfare along with the letter of Prothonotary and Senior Master.

The High Court of Delhi has also issued instructions on the same lines to the courts subordinate to it and these instructions read as follows :

> (*i*) A foreigner desirous of being appointed guardian or the person of a minor and praying for leave to remove the minor to a foreign country, shall make an application for the purpose in the prescribed form under the Guardians and Wards Act, attaching with it three

copies of passport size photographs of the minor, duly attested by the person having custody of the minor at the time;

(*ii*) If the court is satisfied that there is no ground for proceeding on the application, it shall fix a day for the hearing thereof and cause notice of the application and of the date fixed for the hearing on the person and in the manner mentioned in Section 11, Guardians and Wards Act, 1890 as also to the general public and the Secretary of the Indian Council of Child Welfare and consider their representation;

(*iii*) Every person appointed guardian of the person of a minor shall execute a bond with or without a surety or sureties as the court may think fit to direct and in such sum as the court may fix, having regard to the welfare of the minor and to ensure his production in the court if and when so required by the court;

(*iv*) On the court making an order for the appointment of a foreigner guardian of the person of an Indian minor, a copy of the minor's photograph shall be countersigned by the court and issued to the guardian or joint guardian, as the case may be, appointed by the court along with the certificate of guardianship.

The High Court of Gujarat has not framed any specific rule for this purpose like the High Courts of Bombay and Delhi but in a judgment delivered in 1982 in the case of *In re Rasiklal Chhaganlal Mehta*[1], the High Court of Gujarat has made the following observations:

> . . .In order that the courts can satisfactorily decide an inter-country adoption case against the aforesaid background and in the light of the above referred guidelines, we consider it necessary to give certain directions. In all such cases, the Court should issue notice to the Indian Council of Social Welfare (175, Dadabhai Naoroji Road, Bombay-400001) and seek its assistance. If the Indian Council of Social Welfare so desires, it should be made a party to the proceedings. If the Indian Council of Social Welfare does not appear, or if it is unable, for some reason, to render assistance, the Court should issue notice to an independent, reputed and publicly/officially recognised social welfare agency working in the field and in the area and request it to render assistance in the matter. . . .

The object of giving notice to the Indian Council of Social Welfare or the Indian Council for Child Welfare or any other independent, reputed and publicly or officially recognised social welfare agency is obviously to ensure that the application of foreign parents for guardianship of the child with a view to its eventual adoption is properly and carefully scrutinised and evaluated by an expert body having experience in the area of child welfare with a view to assisting the court in coming to the conclusion whether it will be in the interest of the child, promotive of its welfare, to be adopted by the foreign parents making the application or in other words, whether such adoption will provide moral and material security to the child with an opportunity to grow into the full stature of its personality in an atmosphere of love and affection and warmth of a family hearth and home. This procedure which has been evolved by the High Courts of Bombay, Delhi and

1. AIR 1982 Guj 193, 197: (1981) 22 Guj LR 921.

Gujarat is, in our opinion, eminently desirable and it can help considerably to reduce, if not eliminate, the possibility of the child being adopted by unsuitable or undesirable parents or being placed in a family where it may be neglected, maltreated or exploited by the adoptive parents. We would strongly commend this procedure for acceptance by every court in the country which has to deal with an application by a foreign parent for appointment of himself as guardian of a child with a view to its eventual adoption. We shall discuss this matter a little more in detail when we proceed to consider what principles and norms should be laid down for inter-country adoption, but, in the meanwhile, proceeding further with the narration of the procedure followed by the courts in Bombay, Delhi and Gujarat, we may point out that when notice is issued by the court, the Indian Council of Social Welfare or the Indian Council for Child Welfare or any other recognised social welfare agency to which notice is issued, prepares what may conveniently be described as a child study report and submits it to the court for its consideration. What are the different aspects relating to the child in respect of which the child study report should give information is a matter which we shall presently discuss, but suffice it to state for the time being that the child study report should contain legal and social data in regard to the child as also an assessment of its behavioural pattern and its intellectual, emotional and physical development. The Indian Council of Social Welfare has evolved a standardised form of the child study report and it has been annexed as Ex. 'C' to the reply filed in answer to the notice issued by the court. Ordinarily an adoption proposal from a foreign parent is sponsored by a social or child welfare agency recognised or licensed by the Government of the country in which the foreign parent resides and the application of the foreign parent for appointment as guardian of the child is accompanied by a home study report prepared by such social or child welfare agency. The home study report contains an assessment of the fitness and suitability of the foreign parent for taking the child in adoption based on his antecedents, family background, financial condition, psychological and emotional adaptability and the capacity to look after the child after adoption despite racial, national and cultural differences. The Indian Council of Social Welfare has set out in annexure 'B' to the reply filed by it, guidelines for the preparation of the home study report in regard to the foreign parent wishing to take a child in adoption, and it is obvious from these guidelines which we shall discuss a little later, that the home study report is intended to provide social and legal facts in regard to the foreign parent with a view to assisting the court in arriving at a proper determination of the question whether it will be in the interest of the child to be given in adoption to such foreign parent. The court thus has in most cases where an application is made by a foreign parent for being appointed guardian of a child in the courts in Bombay, Delhi and Gujarat, the child study report as well as the home study report together with other relevant material in order to enable it to decide whether it will be for the welfare of the child to be allowed to

be adopted by the foreign parent and if on a consideration of these reports and material, the court comes to the conclusion that it will be for the welfare of the child, the court makes an order appointing the foreign parent as guardian of the child with liberty to him to take the child to his own country with a view to its eventual adoption. Since adoption in a foreign country is bound to take some time and till then the child would continue to be under the guardianship of the foreign parent by virtue of the order made by the court, the foreign parent as guardian would continue to be accountable to the court for the welfare of the child and the court therefore takes a bond from him with or without surety or sureties in such sum as may be thought fit for ensuring its production if and when required by the court. The foreign parent then takes the child to his own country either personally or through an escort and the child is then adopted by the foreign parent according to the law of his country and on such adoption, the child acquires the same status as a natural born child with the same rights of inheritance and succession as also the same nationality as the foreign parent adopting it. This is broadly the procedure which is followed in the courts in Bombay, Delhi and Gujarat and there can be no doubt that, by and large, this procedure tends to ensure the welfare of the child, but even so, there are several aspects of procedure and detail which need to be considered in order to make sure that the child is placed in the right family where it will be able to grow into full maturity of its personality with moral and material security and in an atmosphere of love and warmth and it would not be subjected to neglect, maltreatment or exploitation.

10. Now one thing is certain that in the absence of a law providing for adoption of an Indian child by a foreign parent, the only way in which such adoption can be effectuated is by making it in accordance with the law of the country in which the foreign parent resides. But in order to enable such adoption to be made in the country of the foreign parent, it would be necessary for the foreign parent to take the child to his own country where the procedure for making the adoption in accordance with the law of that country can be followed. However, the child which is an Indian national cannot be allowed to be removed out of India by the foreign parent unless the foreign parent is appointed guardian of the person of the child by the court and is permitted by the court to take the child to his own country under the provisions of the Guardians and Wards Act, 1890. Today, therefore, as the law stands, the only way in which a foreign parent can take an Indian child in adoption is by making an application to the court in which the child ordinarily resides for being appointed guardian of the person of the child with leave to remove the child out of India and take it to his own country for the purpose of adopting it in accordance with the law of his country. We are definitely of the view that such inter-country adoption should be permitted after exhausting the possibility of adoption within the country by Indian parents. It has been the experience of a large number of social welfare agencies working in the area of adoption

that, by and large, Indian parents are not enthusiastic about taking a stranger child in adoption and even if they decide to take such child in adoption, they prefer to adopt a boy rather than a girl and they are wholly averse to adopting a handicapped child, with the result that the majority of abandoned, destitute or orphan girls and handicapped children have very little possibility of finding adoptive parents within the country and their future lies only in adoption by foreign parents. But at the same time it is necessary to bear in mind that by reason of the unavailability of children in the developed countries for adoption, there is a great demand for adoption of children from India and consequently there is increasing danger of ill-equipped and sometimes even undesirable organisations or individuals activising themselves in the field of inter-country adoption with a view to trafficking in children and sometimes it may also happen that the immediate prospect of transporting the child from neglect and abandonment to material comfort and security by placing it with a foreigner may lead to other relevant factors such as the intangible needs of the child, its emotional and psychological requirements and possible difficulty of its assimilation and integration in a foreign family with a different racial and cultural background, being under-emphasized, if not ignored. It is therefore necessary to evolve normative and procedural safeguards for ensuring that the child goes into the right family which would provide it warmth and affection of family life and help it to grow and develop physically, emotionally, intellectually and spiritually. These safeguards we now proceed to examine.

11. We may make it clear at the outset that we are not concerned here with cases of adoption of children living with their biological parents, for in such class of cases, the biological parents would be the best persons to decide whether to give their child in adoption to foreign parents. It is only in those cases where the children sought to be taken in adoption are destitute or abandoned and are living in social or child welfare centres that it is necessary to consider what normative and procedural safeguards should be forged for protecting their interest and promoting their welfare.

12. Let us first consider what are the requirements which should be insisted upon so far as a foreigner wishing to take a child in adoption is concerned. In the first place, every application from a foreigner desiring to adopt a child must be sponsored by a social or child welfare agency recognised or licensed by the government of the country in which the foreigner is resident. No application by a foreigner for taking a child in adoption should be entertained directly by any social or welfare agency in India working in the area of inter-country adoption or by any institution or centre or home to which children are committed by the juvenile court. This is essential primarily for three reasons.

13. Firstly, it will help to reduce, if not eliminate altogether, the possibility of profiteering and trafficking in children, because if a foreigner were allowed to contact directly agencies or individuals in India for the

purpose of obtaining a child in adoption, he might, in his anxiety to secure a child for adoption, be induced or persuaded to pay any unconscionable or unreasonable amount which might be demanded by the agency or individual procuring the child. Secondly it would be almost impossible for the court to satisfy itself that the foreigner who wishes to take the child in adoption would be suitable as a parent for the child and whether he would be able to provide a stable and secure family life to the child and would be able to handle trans-racial, trans-cultural and trans-national problems likely to arise from such adoption, because, where the application for adopting a child has not been sponsored by a social or child welfare agency in the country of the foreigner, there would be no proper and satisfactory home study report on which the court can rely. Thirdly, in such a case, where the application of a foreigner for taking a child in adoption is made directly without the intervention of a social or child welfare agency, there would be no authority or agency in the country of the foreigner who could be made responsible for supervising the progress of the child and ensuring that the child is adopted at the earliest in accordance with law and grows up in an atmosphere of warmth and affection with moral and material security assured to it. The record shows that in every foreign country where children from India are taken in adoption, there are social and child welfare agencies licensed or recognised by the government and it would not therefore cause any difficulty, hardship or inconvenience if it is insisted that every application from a foreigner for taking a child in adoption must be sponsored by a social or child welfare agency licensed or recognised by the government of the country in which the foreigner resides. It is not necessary that there should be only one social or child welfare agency in the foreign country through which an application for adoption of a child may be routed; there may be more than one such social or child welfare agencies, but every such social or child welfare agency must be licensed or recognised by the government of the foreign country and the court should not make an order for appointment of a foreigner as guardian unless it is satisfied that the application of the foreigner for adopting a child has been sponsored by such social or child welfare agency. The social or child welfare agency which sponsors the application for taking a child in adoption must get a home study report prepared by a professional worker indicating the basis on which the application of the foreigner for adopting a child has been sponsored by it. The home study report should broadly include information in regard to the various matters set out in Annexure 'A' to this judgment though it need not strictly adhere to the requirements of that annexure and it should also contain an assessment by the social or child welfare agency as to whether the foreigner wishing to take a child in adoption is fit and suitable and has the capacity to parent a child coming from a different racial and cultural milieu and whether the child will be able to fit into the environment of the adoptive family and the community in which it lives. Every application of a foreigner for taking a child in adoption must be accompanied by a home

study report and the social or child welfare agency sponsoring such application should also send along with it a recent photograph of the family, a marriage certificate of the foreigner and his or her spouse as also a declaration concerning their health together with a certificate regarding their medical fitness duly certified by a medical doctor, a declaration regarding their financial status along with supporting documents including employer's certificate where applicable, income-tax assessment orders, bank references and particulars concerning the properties owned by them, and also a declaration stating that they are willing to be appointed guardian of the child and undertaking that they would adopt the child according to the law of their country within a period of not more than two years from the time of arrival of the child in their country and give intimation of such adoption to the court appointing them as guardian as also to the social or child welfare agency in India processing their case, they would maintain the child and provide it necessary education and upbringing according to their status and they would also send to the court as also to the social or child welfare agency in India reports relating to the progress of the child along with its recent photograph, the frequency of such progress reports being quarterly during the first two years and half yearly for the next three years. The application of the foreigner must also be accompanied by a Power of Attorney in favour of an officer of the social or child welfare agency in India which is requested to process the case and such Power of Attorney should authorise the Attorney to handle the case on behalf of the foreigner in case the foreigner is not in a position to come to India. The social or child welfare agency sponsoring the application of the foreigner must also certify that the foreigner seeking to adopt a child is permitted to do so according to the law of his country. These certificates, declarations and documents which must accompany the application of the foreigner for taking a child in adoption, should be duly notarised by a Notary Public whose signature should be duly attested either by an officer of the Ministry of External Affairs or Justice or Social Welfare of the country of the foreigner or by an officer of the Indian Embassy or High Commission or Consulate in that country. The social or child welfare agency sponsoring the application of the foreigner must also undertake while forwarding the application to the social or child welfare agency in India, that it will ensure adoption of the child by the foreigner according to the law of his country within a period not exceeding two years and as soon as the adoption is effected, it will send two certified copies of the adoption order to the social or child welfare agency in India through which the application for guardianship is processed, so that one copy can be filed in court and the other can remain with the social or child welfare agency in India. The social or child welfare agency sponsoring the application must also agree to send to the concerned social or child welfare agency in India progress reports in regard to the child, quarterly during the first year and half yearly for the subsequent year or years until the adoption is effected, and it must also undertake that in case

of disruption of the family of the foreigner before adoption can be effected, it will take care of the child and find a suitable alternative placement for it with the approval of the concerned social or child welfare agency in India, and report such alternative placement to the court handling the guardianship proceedings and such information shall be passed on both by the court as also by the concerned social or child welfare agency in India to the Secretary, Ministry of Social Welfare, Government of India. The Government of India shall prepare a list of social or child welfare agencies licensed or recognised for inter-country adoption by the government of each foreign country where children from India are taken in adoption and this list shall be prepared after getting the necessary information from the government of each such foreign country and the Indian Diplomatic Mission in that foreign country. We may point out that the Swedish Embassy has in Annexure II to the affidavit filed on its behalf by Ulf Waltre, given names of seven Swedish organisations or agencies which are authorised by the National Board for Inter-Country Adoption functioning under the Swedish Ministry of Social Affairs to "mediate" applications for adoption by Swedish nationals and the Indian Council of Social Welfare has also in the reply filed by it in answer to the writ petition given a list of government recognised organisations or agencies dealing in inter-country adoption in foreign countries. It should not therefore be difficult for the Government of India to prepare a list of social or child welfare agencies licensed or recognised for inter-country adoption by the Government in various foreign countries. We direct the Government of India to prepare such list within six months from today and copies of such list shall be supplied by the Government of India to the various High Courts in India as also to the social or child welfare agencies operating in India in the area of inter-country adoption under licence or recognition from the Government of India. We may of course make it clear that applications of foreigners for appointment of themselves as guardians of children in India with a view to their eventual adoption shall not be held up until such list is prepared by the Government of India but they shall be processed and disposed of in the light of the principles and norms laid down in this judgment.

14. We then proceed to consider the position in regard to biological parents of the child proposed to be taken in adoption. What are the safeguards which are required to be provided insofar as biological parents are concerned? We may make it clear at the outset that when we talk about biological parents, we mean both parents if they are together or the mother or the father if either is alone. Now it should be regarded as an elementary requirement that if the biological parents are known, they should be properly assisted in making a decision about relinquishing the child for adoption, by the institution or centre or home for child care or social or child welfare agency to which the child is being surrendered. Before a decision is taken by the biological parents to surrender the child for adoption, they should be helped to understand all the implications of adoption includ-

ing the possibility of adoption by a foreigner and they should be told specifically that in case the child is adopted, it would not be possible for them to have any further contact with the child. The biological parents should not be subjected to any duress in making a decision about relinquishment and even after they have taken a decision to relinquish the child for giving in adoption, a further period of about three months should be allowed to them to reconsider their decision. But once the decision is taken and not reconsidered within such further time as may be allowed to them, it must be regarded as irrevocable and the procedure for giving the child in adoption to a foreigner can then be initiated without any further reference to the biological parents by filing an application for appointment of the foreigner as guardian of the child. Thereafter there can be no question of once again consulting the biological parents whether they wish to give the child in adoption or they want to take it back. It would be most unfair if after a child is approved by a foreigner and expenses are incurred by him for the purpose of maintenance of the child and sometimes on medical assistance and even hospitalisation for the child, the biological parents were once again to be consulted for giving them a locus penitentia to reconsider their decision. But in order to eliminate any possibility of mischief and to make sure that the child has in fact been surrendered by its biological parents, it is necessary that the institution or centre or home for child care or social or child welfare agency to which the child is surrendered by the biological parents, should take from the biological parents a document of surrender duly signed by the biological parents and attested by at least two responsible persons and such document of surrender should not only contain the names of the biological parents and their address but also information in regard to the birth of the child and its background, health and development. If the biological parents state a preference for the religious upbringing of the child, their wish should as far as possible be respected, but ultimately the interest of the child alone should be the sole guiding factor and the biological parents should be informed that the child may be given in adoption even to a foreigner who professes a religion different from that of the biological parents. This procedure can and must be followed where the biological parents are known and they relinquish the child for adoption to an institution or centre or home for child care or hospital or social or child welfare agency. But where the child is an orphan, destitute or abandoned child and its parents are not known, the institution or centre or home for child care or hospital or social or child welfare agency in whose care the child has come, must try to trace the biological parents of the child and if the biological parents can be traced and it is found that they do not want to take back the child, then the same procedure as outlined above should as far as possible be followed. But if for any reason the biological parents cannot be traced, then there can be no question of taking their consent or consulting them. It may also be pointed out that the biological parents should not be induced or encouraged or even be permitted to take a decision in

regard to giving of a child in adoption before the birth of the child or within a period of three months from the date of birth. This precaution is necessary because the biological parents must have reasonable time after the birth of the child to take a decision whether to rear up the child themselves or to relinquish it for adoption and moreover it may be necessary to allow some time to the child to overcome any health problems experienced after birth.

15. We may now turn to consider the safeguards which should be observed insofar as the child proposed to be taken in adoption is concerned. It was generally agreed by all parties appearing before the Court, whether as interveners or otherwise, that it should not be open to any and every agency or individual to process an application from a foreigner for taking a child in adoption and such application should be processed only through a social or child welfare agency licensed or recognised by the Government of India or the Government of the State in which it is operating, or to put it differently in the language used by the Indian Council of Social Welfare in the reply filed by it in answer to the writ petition, "all private adoptions conducted by unauthorised individuals or agencies should be stopped". The Indian Council of Social Welfare and the Indian Council for Child Welfare are clearly two social or child welfare agencies operating at the national level and recognised by the Government of India, as appears clearly from the letter dated August 23, 1980 addressed by the Deputy Secretary to the Government of India to the Secretary, Government of Kerala, Law Department, Annexure 'F' to the submissions filed by the Indian Council for Child Welfare in response to the writ petition. But apart from these two recognised social or child welfare agencies functioning at the national level, there are other social or child welfare agencies engaged in child care and welfare and if they have good standing and reputation and are doing commendable work in the area of child care and welfare, there is no reason why they should not be recognised by the Government of India or the Government of a State for the purpose of inter-country adoptions. We would direct the Government of India to consider and decide within a period of three months from today whether any of the institutions or agencies which have appeared as interveners in the present writ petition are engaged in child care and welfare and if so, whether they deserve to be recognised for inter-country adoptions. Of course it would be open to the Government of India or the Government of a State suo motu or on an application made to it to recognise any other social or child welfare agency for the purpose of inter-country adoptions, provided such social or child welfare agency enjoys good reputation and is known for its work in the field of child care and welfare. We would suggest that before taking a decision to recognise any particular social or child welfare agency for the purpose of inter-country adoptions, the Government of India or the Government of a State would do well to examine whether the social or child welfare agency has proper staff with professional social work experience, because otherwise

it may not be possible for the social or child welfare agency to carry out satisfactorily the highly responsible task of ensuring proper placement of a child with a foreign adoptive family. It would also be desirable not to recognise an organisation or agency which has been set up only for the purpose of placing children in adoption: it is only an organisation or agency which is engaged in the work of child care and welfare which should be regarded as eligible for recognition, since inter-country adoption must be looked upon not as an independent activity by itself, but as part of child welfare programme so that it may not tend to degenerate into trading. The Government of India or the Government of a State recognising any social or child welfare agency for inter-country adoptions must insist as a condition of recognition that the social or child welfare agency shall maintain proper accounts which shall be audited by a chartered accountant at the end of every year and it shall not charge from the foreigner wishing to adopt a child any amount in excess of that actually incurred by way of legal or other expenses in connection with the application for appointment of guardian including such reasonable remuneration or honorarium for the work done and trouble taken in processing, filing and pursuing the application as may be fixed by the Court.

16. Situations may frequently arise where a child may be in the care of a child welfare institution or centre or social or child welfare agency which has not been recognised by the Government. Since an application for appointment as guardian can, according to the principles and norms laid down by us, be processed only by a recognised social or child welfare agency and none else, any unrecognised institution, centre or agency which has a child under its care would have to approach a recognised social or child welfare agency if it desires such child to be given in inter-country adoption, and in that event it must send without any undue delay the name and particulars of such child to the recognised social or child welfare agency through which such child is proposed to be given in inter-country adoption. Every recognised social or child welfare agency must maintain a register in which the names and particulars of all children proposed to be given in inter-country adoption through it must be entered and in regard to each such child the recognised social or child welfare agency must prepare a child study report through a professional social worker giving all relevant information in regard to the child so as to help the foreigner to come to a decision whether or not to adopt the child and to understand the child, if he decides to adopt it as also to assist the court in coming to a decision whether it will be for the welfare of the child to be given in adoption to the foreigner wishing to adopt it. The child study report should contain as far as possible information in regard to the following matters:

(1) Identifying information, supported where possible by documents.

(2) Information about original parents, including their health and details of the mother's pregnancy and birth.

(3) Physical, intellectual and emotional development.

(4) Health report prepared by a registered medical practitioner preferably by a paediatrician.

(5) Recent photograph.

(6) Present environment—category of care (own home, foster home, institution etc.), relationships, routines and habits.

(7) Social worker's assessment and reasons for suggesting inter-country adoption.

The Government of India should, with the assistance of the Governments of the States, prepare a list of recognised social or child welfare agencies with their names, addresses and other particulars and send such list to the appropriate department of the Government of each foreign country where Indian children are ordinarily taken in adoption so that the social or child welfare agencies licensed or recognised by the Government of such foreign country for inter-country adoptions, would know which social or child welfare agency in India they should approach for processing an application of its national for taking an Indian child in adoption. Such list shall also be sent by the Government of India to each High Court with a request to forward it to the district courts within its jurisdiction so that the High Courts and the district courts in the country would know which are the recognised social or child welfare agencies entitled to process an application for appointment of a foreigner as guardian. Of course, it would be desirable if a Central Adoption Resource Agency is set up by the Government of India with regional branches at a few centres which are active in inter-country adoptions. Such Central Adoption Resource Agency can act as a clearing house of information in regard to children available for inter-country adoption and all applications by foreigners for taking Indian children in adoption can then be forwarded by the social or child welfare agency in the foreign country to such Central Adoption Resource Agency and the latter can in its turn forward them to one or the other of the recognised social or child welfare agencies in the country. Every social or child welfare agency taking children under its care can then be required to send to such Central Adoption Resource Agency the names and particulars of children under its care who are available for adoption and the names and particulars of such children can be entered in a register to be maintained by such Central Adoption Resource Agency. But until such Central Adoption Resource Agency is set up, an application of a foreigner for taking an Indian child in adoption must be routed through a recognised social or child welfare agency. Now before any such application from a foreigner is considered, every effort must be made by the recognised social or child welfare agency to find placement for the child by adoption in an Indian family. Whenever any Indian family approaches a recognised social or child welfare agency for taking a child in adoption, all facilities must be provided by such social or child welfare agency to the Indian family to have a look at the children available

with it for adoption and if the Indian family wants to see the child study report in respect of any particular child, such child study report must also be made available to the Indian family in order to enable the Indian family to decide whether they would take the child in adoption. It is only if no Indian family comes forward to take a child in adoption within a maximum period of two months that the child may be regarded as available for inter-country adoption, subject only to one exception, namely, that if the child is handicapped or is in bad state of health needing urgent medical attention, which is not possible for the social or child welfare agency looking after the child to provide, the recognised social or child welfare agency need not wait for a period of two months and it can and must take immediate steps for the purpose of giving such child in inter-country adoption. The recognised social or child welfare agency should, on receiving an application of a foreigner for adoption through a licensed or recognised social or child welfare agency in a foreign country, consider which child would be suitable for being given in adoption to the foreigner and would fit into the environment of his family and community and send the photograph and child study report of such child to the foreigner for the purpose of obtaining his approval to the adoption of such child. The practice of accepting a general approval of the foreigner to adopt any child should not be allowed, because it is possible that if the foreigner has not seen the photograph of the child and has not studied the child study report and a child is selected for him by the recognised social or child welfare agency in India on the basis of his general approval, he may on the arrival of the child in his country find that he does not like the child or that the child is not suitable in which event the interest of the child would be seriously prejudiced. The recognised social or child welfare agency must therefore insist upon approval of a specific known child and once that approval is obtained, that recognised social or child welfare agency should immediately without any undue delay proceed to make an application for appointment of the foreigner as guardian of the child. Such application would have to be made in the court within whose jurisdiction the child ordinarily resides and it must be accompanied by copies of the home study reports, the child study report and other certificates and documents forwarded by the social or child welfare agency sponsoring the application of the foreigner for taking the child in adoption.

17. Before we proceed to consider what procedure should be followed by the court in dealing with an application for appointment of a foreigner as guardian of a child, we may deal with a point of doubt which was raised before us, namely, whether the social or child welfare agency which is looking after the child should be entitled to receive from the foreigner wishing to take the child in adoption any amount in respect of maintenance of the child or its medical expenses. We were told that there are instances where large amounts are demanded by so-called social or child welfare agencies or individuals in consideration of giving a child in adoption and often this is done under the label of maintenance charges and medical expenses sup-

posed to have been incurred for the child. This is a pernicious practice which is really nothing short of trafficking in children and it is absolutely necessary to put an end to it by introducing adequate safeguards. There can be no doubt that if an application of a foreigner for taking a child in adoption is required to be routed through a recognised social or child welfare agency and the necessary steps for the purpose of securing appointment of the foreigner as guardian of the child have also to be taken only through a recognised social or child welfare agency, the possibility of any so-called social or child welfare agency or individual trafficking in children by demanding exorbitant amounts from prospective adoptive parents under the guise of maintenance charges and medical expenses or otherwise, would be almost eliminated. But, at the same time, it would not be fair to suggest that the social or child welfare agency which is looking after the child should not be entitled to receive any amount from the prospective adoptive parent, when maintenance and medical expenses in connection with the child are actually incurred by such social or child welfare agency. Many of the social or child welfare agencies running homes for children have little financial resources of their own and have to depend largely on voluntary donations and therefore if any maintenance or medical expenses are incurred by them on a child, there is no reason why they should not be entitled to receive reimbursement of such maintenance and medical expenses from the foreigner taking the child in adoption. We would therefore direct that the social or child welfare agency which is looking after the child selected by a prospective adoptive parent, may legitimately receive from such prospective adoptive parent maintenance expenses at a rate not exceeding Rs 60 per day (this outer limit being subject to revision by the Ministry of Social Welfare, Government of India from time to time) from the date of selection of the child by him until the date the child leaves for going to its new home as also medical expenses including hospitalisation charges, if any, actually incurred by such social or child welfare agency for the child. But the claim for payment of such maintenance charges and medical expenses shall be submitted to the prospective adoptive parent through the recognised social or child welfare agency which has processed the application for guardianship and payment in respect of such claim shall not be received directly by the social or child welfare agency making the claim but shall be paid only through the recognised social or child welfare agency. This procedure will to a large extent eliminate trafficking in children for money or benefits in kind and we would therefore direct that this procedure shall be followed in the future. But while giving this direction, we may make it clear that what we have said should not be interpreted as in any way preventing a foreigner from making voluntary donation to any social or child welfare agency but no such donation from a prospective adoptive parent shall be received until after the child has reached the country of its prospective adoptive parent.

18. It is also necessary to point out that the recognised social or child welfare agency through which an application of a foreigner for taking a child

in adoption is routed must, before offering a child in adoption, make sure that the child is free to be adopted. Where the parents have relinquished the child for adoption and there is a document of surrender, the child must obviously be taken to be free for adoption. So also where a child is an orphan or destitute or abandoned child and it has not been possible by the concerned social or child welfare agency to trace its parents or where the child is committed by a juvenile court to an institution, centre or home for committed children and is declared to be a destitute by the juvenile court, it must be regarded as free for adoption. The recognised social or child welfare agency must place sufficient material before the court to satisfy it that the child is legally available for adoption. It is also necessary that the recognised social or child welfare agency must satisfy itself, firstly, that there is no impediment in the way of the child entering the country of the prospective adoptive parent; secondly, that the travel documents for the child can be obtained at the appropriate time and lastly, that the law of the country of the prospective adoptive parent permits legal adoption of the child and that on such legal adoption being concluded, the child would acquire the same legal status and rights of inheritance as a natural born child and would be granted citizenship in the country of adoption and it should file along with the application for guardianship, a certificate reciting such satisfaction.

19. We may also at this stage refer to one other question that was raised before us, namely, whether a child under the care of a social or child welfare agency or hospital or orphanage in one State can be brought to another State by a social or child welfare agency for the purpose of being given in adoption and an application for appointment of a guardian of such child can be made in the court of the latter State. This question was debated before us in view of the judgment given by Justice Lentin of the Bombay High Court on July 22, 1982 in Miscellaneous Petition No. 178 of 1982 and other allied petitions. We agree with Justice Lentin that the practice of social or child welfare agencies or individuals going to different States for the purpose of collecting children for being given in inter-country adoption is likely to lead to considerable abuse, because it is possible that such social or child welfare agencies or individuals may, by offering monetary inducement, persuade indigent parents to part with their children and then give the children to foreigners in adoption by demanding a higher price, which the foreigners in their anxiety to secure a child for adoption may be willing to pay. But we do not think that if a child is relinquished by its biological parents or is an orphan or destitute or abandoned child in its parent State, there should be any objection to a social or child welfare agency taking the child to another State, even if the object be to give it in adoption, provided there are sufficient safeguards to ensure that such social or child welfare agency does not indulge in any malpractice. Since we are directing that every application of a foreigner for taking a child in adoption shall be routed only through a recognised social or child welfare agency and

an application for appointment of the foreigner as guardian of the child shall be made to the court only through such recognised social or child welfare agency, there would hardly be any scope for a social or child welfare agency or individual who brings a child from another State for the purpose of being given in adoption to indulge in trafficking and such a possibility would be reduced to almost nil. Moreover before proposing a child for adoption, the recognised social or child welfare agency must satisfy itself that the child has either been voluntarily relinquished by its biological parents without monetary inducement or is an orphan or destitute or abandoned child and for this pupose, the recognised social or child welfare agency may require the agency or individual who has the care and custody of the child to state on oath as to how he came by the child and may also, if it thinks fit, verify such statement, by directly enquiring from the biological parents or from the child care centre or hospital or orphanage from which the child is taken. This will considerably reduce the possibility of abuse while at the same time facilitating placement of children deprived of family love and care in smaller towns and rural areas. We do not see any reason why in cases of this kind where a child relinquished by its biological parents or an orphan or destitute or abandoned child is brought by an agency or individual from one State to another, it should not be possible to apply for guardianship of the child in the court of the latter State, because the child not having any permanent place of residence, would then be ordinarily resident in the place where it is in the care and custody of such agency or individual. But, quite apart from such cases, we are of the view that in all cases where a child is proposed to be given in adoption, enquiries regarding biological parents, whether they are traceable or not and if traceable, whether they have voluntarily relinquished the child and if not, whether they wish to take the child back, should be completed before the child is offered for adoption and thereafter no attempt should be made to trace or contact the biological parents. This would obviate the possibility of an ugly and unpleasant situation of biological parents coming forward to claim the child after it has been given to a foreigner in adoption. It is also necessary while considering placement of a child in adoption to bear in mind that brothers and sisters or children who have been brought up as siblings should not be separated except for special reasons and as soon as a decision to give a child in adoption to a foreigner is finalised, the recognised social or child welfare agency must if the child has reached the age of understanding, take steps to ensure that the child is given proper orientation and is prepared for going to its new home in a new country so that the assimilation of the child to the new environment is facilitated.

20. We must emphasize strongly that the entire procedure which we have indicated above including preparation of child study report, making of necessary enquiries and taking of requisite steps leading up to the filing of an application for guardianship of the child proposed to be given in adoption, must be completed expeditiously so that the child does not have to remain

in the care and custody of a social or child welfare agency without the warmth and affection of family life, longer than is absolutely necessary.

21. We may also point out that if a child is to be given in inter-country adoption, it would be desirable that it is given in such adoption as far as possible before it completes the age of 3 years. The reason is that if a child is adopted before it attains the age of understanding, it is always easier for it to get assimilated and integrated in the new environment in which it may find itself on being adopted by a foreign parent. Comparatively it may be somewhat difficult for a grown up child to get acclimatized to new surroundings in a different land and sometimes a problem may also arise whether foreign adoptive parents would be able to win the love and affection of such grown up child. But we make it clear that when we say this, we do not wish to suggest for a moment that children above the age of three years should not be given in inter-country adoption. There can be no hard and fast rule in this connection. Even children between the ages of 3 and 7 years may be able to assimilate themselves in the new surroundings without any difficulty and there is no reason why they should be denied the benefit of family warmth and affection in the home of foreign parents, merely because they are past the age of 3 years. We would suggest that even children above the age of 7 years may be given in inter-country adoption but we would recommend that in such cases, their wishes may be ascertained if they are in a position to indicate any preference. The statistics placed before us show that even children past the age of 7 years have been happily integrated in the family of their foreign adoptive parents.

22. Lastly, we come to the procedure to be followed by the court when an application for guardianship of a child is made to it. Section 11 of the Guardians and Wards Act, 1890 provides for notice of the application to be issued to various persons including the parents of the child if they are residing in any State to which the Act extends. But, we are definitely of the view that no notice under this section should be issued to the biological parents of the child, since it would create considerable amount of embarrassment and hardship if the biological parents were then to come forward and oppose the application of the prospective adoptive parent for guardianship of the child. Moreover, the biological parents would then come to know who is the person taking the child in adoption and with this knowledge they would at any time be able to trace the whereabouts of the child and they may try to contact the child resulting in emotional and psychological disturbance for the child which might affect his future happiness. The possibility also cannot be ruled out that if the biological parents know who are the adoptive parents they may try to extort money from the adoptive parents. It is therefore absolutely essential that the biological parents should not have any opportunity of knowing who are the adoptive parents taking the child in adoption and therefore notice of the application for guardianship should not be given to the biological parents. We would direct that for the same

reasons notice of the application for guardianship should also not be published in any newspaper. Section 11 of the Act empowers the court to serve notice of the application for guardianship on any other person to whom, in the opinion of the court, special notice of the application should be given and in exercise of this power the court should, before entertaining an application for guardianship, give notice to the Indian Council of Child Welfare or the Indian Council for Social Welfare or any of its branches for scrutiny of the application with a view to ensuring that it will be for the welfare of the child to be given in adoption to the foreigner making the application for guardianship. The Indian Council of Social Welfare or the Indian Council of Child Welfare to which notice is issued by the court would have to scrutinise the application for guardianship made on behalf of the foreigner wishing to take the child in adoption and after examining the home study report, the child study report as also documents and certificates forwarded by the sponsoring social or child welfare agency and making necessary enquiries, it must make its representation to the court so that the court may be able to satisfy itself whether the principles and norms as also the procedure laid down by us in this judgment have been observed and followed, whether the foreigner will be a suitable adoptive parent for the child and the child will be able to integrate and assimilate itself in the family and community of the foreigner and will be able to get warmth and affection of family life as also moral and material stability and security and whether it will be in the interest of the child to be taken in adoption by the foreigner. If the court is satisfied then and then only it will make an order appointing the foreigner as guardian of the child and permitting him to remove the child to his own country with a view to eventual adoption. The court will also introduce a condition in the order that the foreigner who is appointed guardian shall make proper provision by way of deposit or bond or otherwise to enable the child to be repatriated to India should it become necessary for any reason. We may point out that such a provision is to be found in Clause 24 of the Adoption of Children Bill No. 208 of 1980 and in fact the practice of taking a bond from the foreigner who is appointed guardian of the child is being followed by the courts in Delhi as a result of practice instructions issued by the High Court of Delhi. The order will also include a condition that the foreigner who is appointed guardian shall submit to the court as also to the social or child welfare agency processing the application for guardianship, progress reports of the child along with a recent photograph quarterly during the first two years and half yearly for the next three years. The court may also while making the order permit the social or child welfare agency which has taken care of the child pending its selection for adoption to receive such amount as the court thinks fit from the foreigner who is appointed guardian of such child. The order appointing guardian shall carry, attached to it, a photograph of the child duly countersigned by an officer of the court. This entire procedure shall be completed by the court expeditiously and as far as possible within a period of two months from the date of filing of the

application for guardianship of the child. The proceedings on the application for guardianship should be held by the court in camera and they should be regarded as confidential and as soon as an order is made on the application for guardianship the entire proceedings including the papers and documents should be sealed. When an order appointing guardian of a child is made by the court, immediate intimation of the same shall be given to the Ministry of Social Welfare, Government of India as also to the Ministry of Social Welfare of the Government of the State in which the court is situate and copies of such order shall also be forwarded to the two respective ministries of social welfare. The Ministry of Social Welfare, Government of India shall maintain a register containing names and other particulars of the children in respect of whom orders for appointment of guardian have been made as also names, addresses and other particulars of the prospective adoptive parents who have been appointed such guardians and who have been permitted to take away the children for the purpose of adoption. The Government of India will also send to the Indian Embassy or High Commission in the country of the prospective adoptive parents from time to time the names, addresses and other particulars of such prospective adoptive parents together with particulars of the children taken by them and requesting the Embassy or High Commission to maintain an unobtrusive watch over the welfare and progress of such children in order to safeguard against any possible maltreatment, exploitation or use for ulterior purposes and to immediately report any instance of maltreatment, negligence or exploitation to the Government of India for suitable action.

23. We may add even at the cost of repetition that the biological parents of a child taken in adoption should not under any circumstances be able to know who are the adoptive parents of the child nor should they have any access to the home study report or the child study report or the other papers and proceedings in the application for guardianship of the child. The foreign parents who have taken a child in adoption would normally have the child study report with them before they select the child for adoption and in case they do not have the child study report, the same should be supplied to them by the recognised social or child welfare agency processing the application for guardianship and from the child study report, they would be able to gather information as to who are the biological parents of the child, if the biological parents are known. There can be no objection in furnishing to the foreign adoptive parents particulars in regard to the biological parents of the child taken in adoption, but it should be made clear that it would be entirely at the discretion of the foreign adoptive parents whether and if so when, to inform the child about its biological parents. Once a child is taken in adoption by a foreigner and the child grows up in the surroundings of the country of adoption and becomes a part of the society of that country, it may not be desirable to give information to the child about its biological parents whilst it is young, as that might have the effect of exciting his curiosity to meet its biological parents resulting in

unsettling effect on its mind. But if after attaining the age of maturity, the child wants to know about its biological parents, there may not be any serious objection to the giving of such information to the child because after the child attains maturity, it is not likely to be easily affected by such information and in such a case, the foreign adoptive parents may, in exercise of their discretion, furnish such information to the child if they so think fit.

24. These are the principles and norms which must be observed and the procedure which must be followed in giving a child in adoption to foreign parents. If these principles and norms are observed and this procedure is followed, we have no doubt that the abuses to which inter-country adoptions if allowed without any safeguards, may lend themselves would be considerably reduced, if not eliminated and the welfare of the child would be protected and it would be able to find a new home where it can grow in an atmosphere of warmth and affection of family life with full opportunities for physical, intellectual and spiritual development. We may point out that the adoption of children by foregin parents need not wait until social or child welfare agencies are recognised by the Government as directed in this order, but pending recognition of social or child welfare agencies for the purpose of inter-country adoptions, which interregnum, we hope, will not last for a period of more than two months, any social or child welfare agency having the care and custody of child may be permitted to process an application of a foreigner, but barring this departure, the rest of the procedure laid down by us shall be followed wholly and the principles and norms enunciated by us in this Judgment shall be observed in giving a child in inter-country adoption.

25. The writ petition shall stand disposed of in these terms. Copies of this order shall be sent immediately to the Ministry of Social Welfare of the Government of India and the Ministry of Social Welfare of each of the State Governments as also to all the High Courts in the country and to the Indian Council of Social Welfare and the Indian Council of Child Welfare. We would direct that copies of this Order shall also be supplied to the Embassies and Diplomatic Missions of Norway, Sweden, France, Federal Republic of Germany and the United States of America and the High Commissions of Canada and Australia for their information since the statistics show that these are the countries where Indian children are taken in adoption.

ANNEXURE — 'A'

1. Source of Referral.
2. Number of single and joint interviews.
3. Personality of husband and wife.
4. Health details such as clinical tests, heart condition, past illnesses etc. (medical certificates required, sterility certificate required, if applicable).
5. Social status and family background.

6. Nature and Adjustment with occupation.
7. Relationship with community.
8. Description of home.
9. Accommodation for the child.
10. Schooling facilities.
11. Amenities in the home.
12. Standard of living as it appears in the home.
13. Type of neighbourhood.
14. Current relationship between husband and wife.
15. (*a*) Current relationship between parents and children (if any children).
    (*b*) Development of already adopted children (if any) and their acceptance of the child to be adopted.
16. Current relationship between the couple and the members of each other's families.
17. If the wife is working, will she be able to give up the job?
18. If she cannot leave the job, what arrangements will she make to look after the child?
19. Is adoption considered because of sterility of one of the marital partners?
20. If not, can they eventually have children of their own?
21. If a child is born to them, how will they treat the adopted child?
22. If the couple already has children how will these children react to an adopted child?
23. Important social and psychological experiences which have had a bearing on their desire to adopt a child.
24. Reasons for wanting to adopt an Indian child.
25. Attitude of grandparents and relatives towards the adoption.
26. Attitude of relatives, friends, community and neighbourhood towards adoption of an Indian child.
27. Anticipated plans for the adopted child.
28. Can the child be adopted according to the adoption law in the adoptive parent's country? Have they obtained the necessary permission to adopt? (Statement of permission required.)
29. Do the adoptive parents know anyone who adopted a child from their own country or another country? Who are they? From where did they fail to get a child from that source?
30. Did the couple apply for a child from any other source? If yes, which source?
31. What type of child is the couple interested in? (sex, age, and for what reasons.)
32. Worker's recommendation concerning the family and the type of child which would best fit into this home.
33. Name and address of the agency conducting the home study. Name of social worker, qualification of social worker.
34. Name of agency responsible for post-placement, supervision and follow-up.

THE SUPREME COURT CASES

(2014) 4 SCC

(2014) 4 Supreme Court Cases 1

(BEFORE P. SATHASIVAM, C.J. AND RANJAN GOGOI AND SHIVA KIRTI SINGH, JJ.)

SHABNAM HASHMI . . Petitioner;

Versus

UNION OF INDIA AND OTHERS . . Respondents.

Writ Petition (C) No. 470 of 2005†, decided on February 19, 2014

A. **Constitution of India — Arts. 14, 15 and 44 — Adoption by any person irrespective of religion, caste, creed, etc., held, permissible — Impact of applicable Personal Laws not recognising such adoption — Held, any person can adopt a child under Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended in 2006) — Prospective parents have option to employ the provisions of S. 41 of JJ Act, 2000 to adopt a child or they can also choose not to do so and to submit themselves to their applicable Personal Laws — However, Personal Laws cannot dictate the operation of provisions of an enabling statute like JJ Act, 2000 and cannot come in the way of person who chooses to adopt a child under JJ Act, 2000 — Further held, JJ Act, 2000 is a secular law and a small step in reaching the goal of Uniform Civil Code under Art. 44 of Constitution — Juvenile Justice (Care and Protection of Children) Act, 2000 — Chap. IV, S. 41 r/w S. 2(aa) (as amended in 2006) — Nature of — Held, overrides Personal Law when resorted to by any person — Juvenile Justice (Care and Protection of Children) Rules, 2007 — Chap. V, R. 33 — Central Adoption Resource Agency (CARA) Guidelines Governing the Adoption of Children, 2011 — Family and Personal Laws — Adoption — Words and Phrases — "Adoption"**

B. **Family and Personal Laws — Muslim Law — Adoption — Adoption by Muslims permitted vide JJ Act, 2000 — Held, Muslims can adopt a child with full rights as natural parents under provisions of S. 41 of Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended in 2006) —**

† Under Article 32 of the Constitution of India

Juvenile Justice (Care and Protection of Children) Act, 2000 — S. 41 r/w S. 2(aa) (as amended in 2006) — Juvenile Justice (Care and Protection of Children) Rules, 2007 — R. 33 — Central Adoption Resource Agency (CARA) Guidelines Governing the Adoption of Children, 2011 — Constitution of India, Arts. 14, 15 and 44

A public interest litigation (PIL) was filed under Article 32 of the Constitution requesting the Supreme Court to lay down optional guidelines to enable and facilitate adoption of children by persons irrespective of religion, caste, creed, etc. The petitioner, a Muslim and a civil rights activist had approached the Supreme Court to be legally recognised as the parent of her adopted daughter. The petitioner had taken her daughter in custody way back in 1996 but under the prevailing adoption laws applicable to Muslims, the petitioner was called only a guardian and her daughter, a ward.

[**Ed.**: The facts are taken from: <http://www.ndtv.com/article/india/when-it-comes-to-adoption-religion-no-bar-supreme-court-485800>, last visited on 10-3-2014.]

The petitioner in view of the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000, as amended in 2006 (JJ Act, 2000), stated that the prayer made in the writ petition with regard to the guidelines was satisfactorily answered and admitted before the Supreme Court that the JJ Act, 2000 is a secular law enabling any person, irrespective of the religion she professes, to take a child in adoption.

The All India Muslim Personal Law Board (AIMPLB) however raised an objection that the Islamic law (Muslim Personal Law) does not recognise adoption and instead professes "*kafala*" system under which the child is placed under a "*kafil*" who provides for the well-being of the child including financial support and is legally allowed to take care of the child. Further, the Islamic law does not recognise an adopted child to be on par with a biological child and adopted child remains the true descendant of his biological parents and not that of the "adoptive" parents.

Rejecting the objection of the AIMPLB to the extent it questioned the applicability of the JJ Act, 2000 to Muslims, the Supreme Court

Held :

The Juvenile Justice (Care and Protection of Children) Act, 2000, as amended in 2006 (JJ Act, 2000), is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the JJ Act, 2000, the Rules i.e. the Juvenile Justice (Care and Protection of Children) Rules, 2007 and the CARA (Central Adoption Resource Agency) Guidelines, as notified under the JJ Act, 2000. The JJ Act, 2000 does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the JJ Act, 2000, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the Personal law applicable to him. The JJ Act, 2000 is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. An optional legislation that does not contain an unavoidable imperative cannot be stultified by the principles of Personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a Uniform Civil Code is achieved. The same can only happen

by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date. (Para 13)

Lakshmi Kant Pandey v. *Union of India*, (1984) 2 SCC 244, *relied on*

[**Ed.**: This judgment has opened the doors for all the communities in India including Muslims, Christians, Parsi, Jews to adopt and also for millions of orphan children who are waiting for a home.

Earlier also, the Madras High Court in *R.R. George Christopher, In Re*, (2010) 2 LW 881, while dealing with application of Christian parents for recognising their adopted female child as natural born child, had accepted the rights of the aspiring parents to adopt under the provisions of the JJ Act, 2000. It would be relevant to mention the following few paragraphs from *R.R. George case*: (LW pp. 886 & 888, paras 13 & 22)

"*13.* The JJ Act for the first time provides 'adoption' as a means to rehabilitate and socially reintegrate a child. It had empowered the State Government and the JJ Board to give a child for adoption. This is the first secular law in India providing for adoption. The provision in Sections 40 and 41 are not restricted to persons belonging to particular religion alone.

* * *

22. As can be seen from the Preamble to the JJ Act, the Act itself was enacted with a view to fulfil the international obligations as well as the constitutional goal envisaged in Part IV of the Constitution. Therefore, this Court thought fit to deal with this issue in extenso. Aspiring parents, who intend to adopt children, without being inhibited by their personal laws, are entitled to adopt a child in terms of the provisons of the JJ Act."]

C. **Constitution of India — Pt. III, Arts. 21, 44, 15 and 14 — Adoption — Right to adopt and right of child to be adopted — Held, not a fundamental right — Elevation of this right to status of fundamental right not possible at present in view of conflicting faith/beliefs of different communities — View expressed by legislature for the present by enactment of Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended in 2006) under which adoption can be made by any person irrespective of religion, caste, creed, etc., however, must be given due respect — Juvenile Justice (Care and Protection of Children) Act, 2000 — S. 41 r/w S. 2(aa) (as amended in 2006) — Juvenile Justice (Care and Protection of Children) Rules, 2007, R. 33**

D. **Constitution of India — Pt. III and Art. 32 — Content of fundamental rights — Recognition of a particular entitlement as a fundamental right by Court when not expressly provided for in Constitution — Considerations involved — Conflicting faith/beliefs of different communities — Relevance — Constitutional Interpretation — Basic Rules — Temporally concordant interpretation**

E. **Constitutional Interpretation — Aids to construction — External Aids — Beliefs/Faith of People — Relevance — Constitution of India, Preamble, Pt. III and Arts. 14, 21, 15, 44 and 32**

Held :

The fundamental rights embodied in Part III of the Constitution constitute the basic human rights which inhere in every person and such other rights which are fundamental to the dignity and well-being of citizens. While it is correct that the dimensions and perspectives of the meaning and content of the fundamental rights are in a process of constant evolution as is bound to happen in a vibrant

democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a fundamental right, will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country. The legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view, for the present, by the enactment of the Juvenile Justice (Care and Protection of Children) Act, 2000 and the same must receive due respect. Conflicting viewpoints prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the Court is reminded of the anxiety expressed by it earlier with regard to the necessity to maintain restraint. All these impel the Court to take the view that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution. (Para 16)

Manuel Theodore D'Souza, In re, (2000) 3 Bom CR 244; *Philips Alfred Malvin* v. *Y.J. Gonsalvis*, AIR 1999 Ker 187, *distinguished* and *limited*

O-D/52903/CVR

Advocates who appeared in this case :

R.K. Khanna, Additional Solicitor General, Saurab Ajay Gupta, Suryanarayana Singh and Manjit Singh, Additional Advocates General, Colin Gonsalves, J.S. Attri, Raju Rama Chandran, Y.H. Muchhala, Huzefa Ahmadi and A. Mariarputham, Senior Advocates (Ms Varnika Singh, Ms Jyoti Mendiratta, Ms Sunita Sharma, Ms Seema Rao, Anirudh Tanwar, V.N. Subramanium, A.K. Kaul, D.S. Mahra, Ms Sushma Suri, B. Krishna Prasad, Ejaz Maqbool, Ms Tanima Kishore, Mrigank Prabhakar, Ms K. Enatoli Sema, Amit Kr. Singh, J.S. Chhabra, Ms Pragati Neekhra, Mishra Saurabh, Naveen Sharma, Ms Vanshaja Shukla, Mukul Singh, Anil K. Jha, Ms Priyanka Tyagi, Ms Bina Madhavan, Sapam Biswajit, Meitei, Kh. Nobin Singh, Ms Aruna Mathur, Yusuf, M/s Arputham Aruna & Co., Balasubramanian, K.V. Jagidishvaran, Ms G. Indira, Abhishek Atrey, Ashutosh Kr. Sharma, Ms Babita Tyagi, Ms Hemantika Wahi, Ms Preeti Bhardwaj, Anip Sachthey, Mohit Paul, M/s K.J. John & Co., Ms Neeru Vaid, Ajay Pal, Gopal Singh, M/s Corporate Law Group, Shibashish Misra, Milind Kumar, P.V. Yogeswaran, Sanjay R. Hegde, B.S. Banthia, Anuvrat Sharma, T.V. George, G. Prakash, Naresh K. Sharma, Ms Kamini Jaiwal, T. Harish Kumar, Ms D. Bharati Reddy, Aniruddha P. Mayee, Balaji Srinivasan, Ms A. Subhashini and Debasis Misra, Advocates) for the appearing parties.

Chronological list of cases cited ***on page(s)***

The Judgment of the Court was delivered by

RANJAN GOGOI, J.— Recognition of the right to adopt and to be adopted as a fundamental right under Part III of the Constitution is the vision scripted by the public-spirited individual who has moved this Court under Article 32 of the Constitution. There is an alternative prayer requesting the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed, etc. and further for a direction to the respondent Union of India to enact an optional law the prime focus of which is the child with considerations like religion, etc. taking a hind seat.

2. The aforesaid alternative prayer made in the writ petition appears to have been substantially fructified by the march that has taken place in this

sphere of law, gently nudged by the judicial verdict in *Lakshmi Kant Pandey* v. *Union of India*[1] and the supplemental, if not consequential, legislative innovations in the shape of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended in 2006 (hereinafter for short "the JJ Act, 2000") as also the Juvenile Justice (Care and Protection of Children) Rules promulgated in the year 2007 (hereinafter for short "the JJ Rules, 2007").

3. The alternative prayer made in the writ petition may be conveniently dealt with at the outset.

4. The decision of this Court in *Lakshmi Kant Pandey*[1] is a high watermark in the development of the law relating to adoption. Dealing with inter-country adoptions, elaborate guidelines had been laid down by this Court to protect and further the interest of the child. A regulatory body i.e. Central Adoption Resource Agency (for short "CARA") was recommended for creation and accordingly set up by the Government of India in the year 1989. Since then, the said body has been playing a pivotal role, laying down norms both substantive and procedural, in the matter of inter as well as intra-country adoptions. The said norms have received statutory recognition on being notified by the Central Government under Rule 33(2) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and are today in force throughout the country, having also been adopted and notified by several States under the Rules framed by the States in exercise of the rule-making power under Section 68 of the JJ Act, 2000.

5. A brief outline of the statutory developments in the sphere concerned may now be sketched. In stark contrast to the provisions of the JJ Act, 2000 in force as on date, the Juvenile Justice Act, 1986 (hereinafter for short "the JJ Act, 1986") dealt with only "neglected" and "delinquent juveniles". While the provisions of the 1986 Act dealing with delinquent juveniles are not relevant for the present, all that was contemplated for a "neglected juvenile" is custody in a Juvenile Home or an order placing such a juvenile under the care of a parent, guardian or other person who was willing to ensure his good behaviour during the period of observation as fixed by the Juvenile Welfare Board. The JJ Act, 2000 introduced a separate chapter i.e. Chapter IV under the head "*Rehabilitation and Social Reintegration*" for a child in need of care and protection. Such rehabilitation and social reintegration was to be carried out alternatively by adoption or foster care or sponsorship or by sending the child to an after-care organisation. Section 41 contemplates adoption though it makes it clear that the primary responsibility for providing care and protection to a child is of his immediate family. Sections 42, 43 and 44 of the JJ Act, 2000 deals with alternative methods of rehabilitation, namely, foster care, sponsorship and being looked after by an after-care organisation.

6. The JJ Act, 2000, however, did not define "adoption" and it is only by the Amendment of 2006 that the meaning thereof came to be expressed in the following terms:

1 (1984) 2 SCC 244

"**2. (*aa*) 'adoption'** means the process through which the adopted child is permanently separated from his biological parents and become the legitimate child of his adoptive parents with all the rights, privileges and responsibilities that are attached to the relationship;"

7. In fact, Section 41 of the JJ Act, 2000 was substantially amended in 2006 and for the first time the responsibility of giving in adoption was cast upon the court which was defined by the JJ Rules, 2007 to mean a civil court having jurisdiction in matters of adoption and guardianship including the Court of the District Judge, Family Courts and the City Civil Court [Rule 33(5)]. Substantial changes were made in the other sub-sections of Section 41 of the JJ Act, 2000. CARA, as an institution, received statutory recognition and so did the guidelines framed by it and notified by the Central Government [Section 41(3)].

8. In exercise of the rule-making power vested by Section 68 of the JJ Act, 2000, the JJ Rules, 2007 have been enacted. Chapter V of the said Rules deals with *rehabilitation and social reintegration.* Under Rule 33(2) guidelines issued by CARA, as notified by the Central Government under Section 41(3) of the JJ Act, 2000, were made applicable to all matters relating to adoption. It appears that pursuant to the JJ Rules, 2007 and in exercise of the rule-making power vested by the JJ Act, 2000 most of the States have followed suit and adopted the guidelines issued by CARA making the same applicable in the matter of adoption within the territorial boundaries of the State concerned.

9. Rules 33(3) and 33(4) of the JJ Rules, 2007 contain elaborate provisions regulating pre-adoption procedure i.e. for declaring a child legally free for adoption. The Rules also provide for foster care (including pre-adoption foster care) of such children who cannot be placed in adoption and lays down criteria for selection of families for foster care, for sponsorship and for being looked after by an after-care organisation. Whatever the Rules do not provide for are supplemented by the CARA Guidelines of 2011 which additionally provide measures for post-adoption follow-up and maintenance of data of adoptions.

10. It will now be relevant to take note of the stand of the Union of India. Way back on 15-5-2006 the Union in its counter-affidavit had informed the Court that prospective parents, irrespective of their religious background, are free to access the provisions of the Act for adoption of children after following the procedure prescribed. The progress on the ground as laid before the Court by the Union of India through the Ministry of Women and Child Development (Respondent 3 herein) may also be noticed at this stage. The Union in its written submission before the Court has highlighted that at the end of the calendar year 2013 the Child Welfare Committees (CWCs) are presently functioning in a total of 619 districts of the country whereas State Adoption Resource Agencies (SARA) has been set up in 26 States/Union Territories; Adoption Recommendation Committees (ARCs) have been constituted in 18 States/Union Territories whereas the number of recognised

adoption organisations in the country are 395. According to the Union the number of reported adoptions in the country from January 2013 to September 2013 was 19,884 out of which 1712 cases are of inter-country adoption. The third respondent has also drawn the attention of the Court that notwithstanding the time schedule specified in the Guidelines of 2011 as well as in the JJ Rules, 2007 there is undue delay in processing of adoption cases at the level of the Child Welfare Committees (CWCs), the Adoption Recommendation Committees (ARCs) as well as the courts concerned.

11. In the light of the aforesaid developments, the petitioner in his written submissions before the Court, admits that the JJ Act, 2000 is a secular law enabling any person, irrespective of the religion he professes, to take a child in adoption. It is akin to the Special Marriage Act, 1954 which enables any person living in India to get married under that Act irrespective of the religion he follows. The JJ Act, 2000 with regard to adoption is an enabling optional gender-just law, it is submitted. In the written arguments filed on behalf of the petitioner it has also been stated that in view of the enactment of the JJ Act, 2000 and the amending Act of 2006 the prayers made in the writ petition with regard to Guidelines to enable and facilitate adoption of children by persons irrespective of religion, caste, creed, etc. stands satisfactorily answered and that a direction be made by this Court to all States, Union Territories and authorities under the JJ Act, 2000 to implement the provisions of Section 41 of the Act and to follow the CARA Guidelines as notified.

12. The All India Muslim Personal Law Board (hereinafter referred to as "the Board") which has been allowed to intervene in the present proceeding has filed a detailed written submission wherein it has been contended that under the JJ Act, 2000 adoption is only one of the methods contemplated for taking care of a child in need of care and protection and that Section 41 explicitly recognises foster care, sponsorship and being looked after by after-care organisations as other/alternative modes of taking care of an abandoned/surrendered child. It is contended that the Islamic law does not recognise an adopted child to be on a par with a biological child. According to the Board, the Islamic law professes what is known as the "*kafala*" system under which the child is placed under a "*kafil*" who provides for the well-being of the child including financial support and thus is legally allowed to take care of the child though the child remains the true descendant of his biological parents and not that of the "adoptive" parents. The Board contends that the "*kafala*" system which is recognised by the United Nation's Convention of the Rights of the Child under Article 20(3) is one of the alternate system of child care contemplated by the JJ Act, 2000 and therefore a direction should be issued to all the Child Welfare Committees to keep in mind and follow the principles of the Islamic law before declaring a Muslim child available for adoption under Section 41(5) of the JJ Act, 2000.

13. The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, the Rules and the CARA Guidelines, as notified under the Act. The Act does not mandate any compulsive action by

any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the Personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by the principles of Personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a Uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date.

14. The writ petitioner has also prayed for a declaration that the right of a child to be adopted and that of the prospective parents to adopt be declared a fundamental right under Article 21 of the Constitution. Reliance is placed in this regard on the views of the Bombay and Kerala High Courts in *Manuel Theodore D'Souza, In re*[2] and *Philips Alfred Malvin* v. *Y.J. Gonsalvis*[3] respectively. The Board objects to such a declaration on the grounds already been noticed, namely, that Muslim Personal Law does not recognise adoption though it does not prohibit a childless couple from taking care and protecting a child with material and emotional support.

15. Even though no serious or substantial debate has been made on behalf of the petitioner on the issue, abundant literature including the holy scripts have been placed before the Court by the Board in support of its contention, noted above. Though enriched by the lengthy discourse laid before us, we do not think it necessary to go into any of the issues raised.

16. The fundamental rights embodied in Part III of the Constitution constitute the basic human rights which inhere in every person and such other rights which are fundamental to the dignity and well-being of citizens. While it is correct that the dimensions and perspectives of the meaning and content of the fundamental rights are in a process of constant evolution as is bound to happen in a vibrant democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a fundamental right, in our considered view, will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country. The legislature which is better equipped to comprehend the mental preparedness of the entire citizenry to think unitedly on the issue has expressed its view, for the present, by the enactment of the JJ Act 2000 and the same must receive due respect. Conflicting view-points prevailing between different communities, as on date, on the subject makes the vision contemplated by Article 44 of the Constitution i.e. a Uniform Civil Code a goal yet to be fully reached and the Court is reminded of the anxiety expressed by it earlier with

2 (2000) 3 Bom CR 244
3 AIR 1999 Ker 187

regard to the necessity to maintain restraint. All these impel us to take the view that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution. In this regard we would like to observe that the decisions of the Bombay High Court in *Manuel Theodore D'Souza*[2] and the Kerala High Court in *Philips Alfred Malvin*[3] can be best understood to have been rendered in the facts of the respective cases. While the larger question i.e. qua fundamental rights was not directly in issue before the Kerala High Court in *Manuel Theodore D'Souza*[2] the right to adopt was consistent with the canonical law applicable to the parties who were Christians by faith. We hardly need to reiterate the well-settled principles of judicial restraint, the fundamental of which requires the Court not to deal with issues of constitutional interpretation unless such an exercise is but unavoidable.

17. Consequently, the writ petition is disposed of in terms of our directions and observations made above.

(2014) 4 Supreme Court Cases 9

(BEFORE DR B.S. CHAUHAN AND J. CHELAMESWAR, JJ.)

PHULA SINGH .. Appellant;

Versus

STATE OF HIMACHAL PRADESH .. Respondent.

Criminal Appeal No. 2271 of 2011†, decided on March 3, 2014

A. **Criminal Procedure Code, 1973 — S. 313 — Adverse inference against accused — When may be drawn — Duty of accused to furnish an explanation regarding any incriminating material that has been produced against him — Accused may choose to maintain silence or even remain in complete denial when his statement under S. 313 CrPC is being recorded — However, in such an event, court would be entitled to draw an inference, including such adverse inference against accused as may be permissible in accordance with law — Submission that prosecution has to establish each and every fact and accused has a right only to maintain silence, rejected — Adverse inference drawn against appellant in this case for not at all trying to explain the incriminating circumstances against him — Evidence Act, 1872 — Ss. 103 and 106 — Prevention of Corruption Act, 1988, Ss. 7, 13(2) and 20 (Paras 10 and 11)**

B. **Prevention of Corruption Act, 1988 — Ss. 7, 13(2) and 20 — Trap case — Reversal of acquittal confirmed — Non-explanation of incriminating circumstances by accused — Adverse inference from — Appellant, Kanungo of a particular area, upon investigating complaint against father of**

2 *Manuel Theodore D'Souza, In re*, (2000) 3 Bom CR 244

3 *Philips Alfred Malvin* v. *Y.J. Gonsalvis*, AIR 1999 Ker 187

† From the Judgment and Order dated 24-8-2011/7-9-2011 of the High Court of Himachal Pradesh at Shimla in Crl. A. No. 358 of 2009