

Court No. - 3

Case :- FIRST APPEAL No. - 787 of 2022

Appellant :- Zahid Khatoon

Respondent :- Nurul Haque Khan

Counsel for Appellant :- Prakhar Saran Srivastava, Pradeep Kumar Rai

Counsel for Respondent :- Arvind Srivastava, Mohd. Naushad Siddiqui

Hon'ble Surya Prakash Kesarwani, J.

Hon'ble Mohd. Azhar Husain Idrisi, J.

1. Heard Sri Prakhar Saran Srivastava, learned counsel for the applicant/appellant and Sri Arvind Srivastava, learned counsel for the defendant/respondent.
2. This appeal under Section 19 of the Family Courts Act, 1984 has been filed praying to set aside the judgment and order dated 15.09.2022 passed by the Principal Judge, Family Court, Ghazipur in Criminal Misc. Case No. 2366 of 2014 (CNR No. UPGH 020019432014) under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as the Muslim Act, 1986) and to pass suitable order awarding monthly maintenance in favour of the applicant/appellant alongwith direction for return of the properties to her as narrated in the application.
3. On 24.11.2022 both the learned counsel for the parties have stated that there is no need to file paper book as entire relevant papers have been filed alongwith memorandum of appeal. Lower court record has been received and notified on 24.11.2022. In these circumstances, this Court had passed the order dated 24.11.2022, as under:-

“Learned counsel for the plaintiff - appellant states that entire relevant papers have been filed alongwith appeal and, therefore, the appellant does not wish to file paper book.

Lower court record has been received and notified on 24.11.2022.

Sri Arvind Srivastava, learned counsel for the defendant - respondent prays for a little time to look into the original record and to file paper book, if required.

As jointly prayed by learned counsels for the parties, put up as a fresh case on 01.12.2022 for further hearing.”

4. Again on 01.12.2022, learned counsel for the defendant/respondent prayed for final hearing of the case and, therefore, this Court passed the order dated 01.12.2022 as under:-

“Sri Arvind Srivastava, learned Counsel for defendant-respondent state that paper book is not ready in this case and entire relevant papers have been filed along-with appeal. He prays that the case may be listed after three days for final hearing.

As prayed by learned Counsel for the respondent; put up, as fresh case on 07.12.2022.”

5. In view of the aforesaid orders, this appeal is being heard finally.

Brief facts of the case:-

6. The applicant/appellant was married with the opposite party/respondent on 21.05.1989 as per Muslim Rites and Ritual. Her father was working as Sargent in the Air Force. At the time of marriage, the opposite party/respondent was not employed. He came in service of Postal Department subsequently and joined as Postal Assistant. Subsequent to joining of service, the opposite party/respondent gave divorce to the applicant/appellant on 28.06.2000 and thereafter he married with another Muslim woman some time in the year 2002. However, he neither paid Mahr nor any maintenance amount nor returned the articles belonging to the applicant/appellant, therefore, **the applicant/appellant filed on 10.09.2002 Criminal Misc. Case No. 488 of 2002 (Zahida Khatoon Vs. Nurul Haque Khan), under Section 3 of the Muslim Act, 1986 in the court of Vth Additional Civil Judge, Junior Division/ Judicial Magistrate, Ghazipur.** Subsequently, the aforesaid case was registered as **Criminal Misc. Case No. 1573 of 2004 in the court of Judicial Magistrate, Ghazipur and was converted into Criminal Misc. Case No. 2366 of 2014.** Thereafter, the aforesaid case was transferred by the District Judge, Ghazipur on 21.12.2013 in the court of Family Judge/F.T.C.-II, Ghazipur and was converted into **Criminal Misc. Case No. 2366 of 2014.**

7. The applicant/appellant had also filed an application being Criminal Misc. Case No. 79 of 2007 (Zahida Khatoon Vs. Nurul Haque Khan), under Section 125 Cr.P.C. in the court of Judicial

Magistrate, Court No. 10, Ghazipur, which was decided by order dated 29.08.2007 granting Rs. 1500/- per month for the **pre divorce period**. Against the said order, the applicant/appellant filed Criminal Revision No. 12 of 2008 in the court of Additional Sessions Judge, Court No. 2, Ghazipur, which was dismissed by order dated 08.09.2009. The order of revisional court was not challenged. **In the present case, we are not concerned with the orders passed under Section 125 Cr.P.C.**

8. In **Criminal Misc. Case No. 2366 of 2014 under Section 3 of the Muslim Act, 1986**, the applicant/appellant led her evidence as APW-1 and her father as APW-2. The opposite party/respondent led his own oral evidence as OPW-2 and also led evidence of one Mohd. Iqbal as OPW-1. The opposite party/respondent has not led any documentary evidence with regard to his income although applicant/appellant led her evidence and also cross examined the opposite party/respondent to establish his income as government employee. The Principal Judge, Family Court, Ghazipur by judgment and order dated 15.09.2022 partly allowed the aforesaid Criminal Misc. Case No. 2366 of 2014 (Zahida Khatoon Vs. Nurul Haque Khan), Police Station Gahmar, District Ghazipur, under Section 3 of the Muslim Act, 1986 as under:-

आदेश

1. प्रार्थिनी का प्रार्थना पत्र 3 अ अंतर्गत धारा 3 मुस्लिम स्त्री (विवाह विच्छेद पर अधिकार संरक्षण) अधिनियम, 1986 आंशिक रूप से स्वीकार किया जाता है।
2. विपक्षी को आदेशित किया जाता है कि देन मेहर की धनराशि मु० 1001/- रुपये प्रार्थिनी को अदा करे। इसके अलावा मु० 1500/- रुपये मासिक की दर से इद्दत काल की अवधि 03 माह 13 दिन के लिए इद्दत खर्च भी प्रदान करे।
3. विपक्षी को यह भी आदेशित किया जाता है कि प्रार्थिनी को उसके मायके से प्राप्त एक सोने का झाला वजन 01 भर, चाँदी का पायल वजन 10 भर तथा एक बिस्तर, एक सुतली की पलंग, एक लोटा, एक प्याला, एक प्लेट, एक गिलास एवं एक कटोरी कीमती लगभग 5000/- रुपये भी प्रदान करे।
4. शेष अनुतोष हेतु प्रार्थिनी का प्रार्थना पत्र निरस्त किया जाता है।

ह०अप०

15.9.22

(शिव कुमार सिंह)

जे.ओ.कोड यू.पी.5743

प्रधान न्यायाधीश,

दिनांक : 15.9.2022

9. Aggrieved with the aforesaid judgment and order dated 15.09.2022 passed by the Principal Judge, Family Court, Ghazipur in Criminal Misc. Case No. 2366 of 2014, the applicant/appellant filed the present appeal under Section 19 of the Family Courts Act, 1984.

Submissions on behalf of the applicant/appellant

10. Learned counsel for the applicant/appellant submits that the appellant is entitled for maintenance from the opposite party/respondent for future period beyond the period of *Iddat* in terms of Section 3 of the Muslim Act, 1986 and law laid down by the Hon'ble Supreme Court in the case of **Danial Latifi and another Vs. Union of India (2001) 7 SCC 740 (paragraphs 29, 31 and 36)**. He further submits that the applicant/appellant has proved income of the opposite party/respondent by oral and documentary evidences and has also established that she has no source of income and she has not remarried. He, therefore, submits that the court below has committed manifest error of law in refusing to grant reasonable and fair amount for the future of the applicant/appellant. Therefore, the impugned order in so far as it refuses to grant relief as mentioned above, deserves to be set aside and the applicant/appellant may be granted fair and reasonable amount for her future including maintenance amount month to month to be paid by the opposite party/respondent.

Submissions on behalf of opposite party/respondent

11. Learned counsel for the opposite party/respondent has raised objection that the Principal Judge, Family Court, Ghazipur had no jurisdiction to decide the case under Section 3 of the Muslim Act, 1986. The jurisdiction lies with the Magistrate and, therefore, the Principal Judge, Family Court, Ghazipur was incompetent to pass the impugned judgment and order. The second submission is that the onus was on the applicant/appellant to establish that she has no source of income and opposite party has sufficient source of income. Since the applicant/appellant could not prove that she has

no source of income, therefore, no amount towards maintenance could be granted to her. He further submits that the divorced muslim woman has no right to get any amount towards maintenance or for any other purposes except for the period of *Iddat*. Therefore, this Court cannot grant any amount either towards maintenance for future or reasonable and fair amount for her future until she remarries.

12. The judgment in the case of **Danial Latifi (supra)** is of no help to the applicant-appellant inasmuch as it clearly provides for **Pre Iddat Period**.

Discussion and Findings

13. We have carefully considered the submissions of learned counsels for the parties and perused the memorandum of appeal as well as original records of the court below.

14. Before we proceed to examine rival submissions of the learned counsel for the parties, it would be appropriate to reproduce certain provisions of Family Courts Act, 1984 and Muslim Act, 1986.

Family Courts Act, 1984

Section 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

(c) such other jurisdiction as may be conferred on it by any other enactment.

Section 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 powers 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.”

Section 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.

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

Section 3. Mahr or other properties of Muslim woman to be given to her at the time of divorce.—

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

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

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

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

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

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

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

- (a) her husband having sufficient means, has failed or neglected to make or pay her within the *iddat* period a reasonable and fair provision and maintenance for her and the children; or
- (b) the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her.

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

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

- (4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974) and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

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

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

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

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

as he may specify in his order.

Section 5. Option to be governed by the provisions of sections 125 to 128 of Act 2 of 1974.—If, on the date of the first hearing of the application under sub-section (2) of section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure, 1973 (2 of 1974), and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.

Explanation.—For the purposes of this section, “date of the first hearing of the application” means the date fixed in the summons for the attendance of the respondent to the application.

Jurisdiction:-

15. Learned counsel for the respondent has raised an objection that the Principal Judge, Family Court, Ghazipur had no jurisdiction to decide the aforesaid Criminal Misc. Case No.2366 of 2014 by the impugned judgment under Section 3 of the Muslim Act, 1986. We have perused the entire original record including the order-sheet and we find that **no such objection was ever raised by the respondent** before the court below.

16. Apart from above, on perusal of the original record of the court below, we find that the applicant-appellant namely Smt. Zaheed Khatoon filed a Criminal Misc. Case No.488 of 2002 under Section 3 of the Muslim Act, 1986 on 10.09.2002 in the court of Judicial Magistrate, Ghazipur which fact is evident from the order-sheet entry dated 10.09.2002. Subsequently, the aforesaid case was renumbered as Criminal Misc. Case No.1573 of 2004 in the Court of Judicial Magistrate, Ghazipur. By order dated 21.12.2013, the aforesaid Criminal Misc. Case No.1753 of 2004 was transferred to the Court of Family Judge/ FTC-II, Ghazipur and the said case was renumbered as Criminal Misc. Case No.2366 of 2014. Thus, the requirement of Section 4 of the Muslim Act regarding institution of the case under Section 3, stood satisfied. Section 7 of the Act, 1984 provides for jurisdiction of a Family Court. Section 8 of the Act, 1984 provides for exclusion of jurisdiction of Civil Court and Magistrate in respect of the matters specified therein which includes a suit or proceeding for maintenance and matters under Chapter IX of the Code of Criminal Procedure, 1973. Section 20 of the Act, 1984 has overriding effect over other laws. The application under

Section 3 of the Muslim Act, 1986 filed by the applicant-appellant herein was for reasonable and fair provision and maintenance etc. Thus, non-obstante clause in Section 20 of the Act, 1984 makes the legislative intent in enacting the Act, 1984 absolutely clear.

17. Section 20 of the Act, 1984 starts with a non-obstante clause using important phrases “the provision of this court 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.**” The expression “**any other law for the time being in force**” and the expression “Or in any instrument having effect **by virtue of any law other than this Act**” seem to include Muslim Act, 1986 also.

18. This Court is conscious of the fact that the question of jurisdiction of Family Court with respect to matters under Section 3 of the Muslim Act, 1986 has been referred to a larger bench by Hon'ble Supreme Court in the case of **Rana Nahid @ Reshma @ Sana vs Sahidul Haq Chisti, (2020) 7 SCC 657**. However, since the record of the court below discloses that the application by the applicant-appellant herein under Section 3 of the Muslim Act, 1986 was filed by the Applicant in the court of Judicial Magistrate, Ghazipur as a Criminal Misc. Case No.488 of 2002, which was later renumbered as Misc. Case No.1573 of 2004 in the Court of Judicial Magistrate, Ghazipur and again it was renumbered as Criminal Misc. Case No.2366 of 2014 transferred by the District Judge, Ghazipur on 21.12.2013 to the Court of Family Judge/ FTC-II, Ghazipur and accordingly the case was decided by the impugned judgement and order. Perusal of the record of the court below including the ordersheet clearly reveals that the respondent herein has never raised any objection as to the jurisdiction and instead participated in the entire proceedings, filed evidences, produced himself as OPW-1 and his other witnesses as OPW-2 and also crossexamined the witnesses of the applicant being APW-1 and APW-2. Both the parties have also filed documentary evidences.

19. The question as to overriding effect over other laws provided under Section 20 of the Family Courts Act, 1984 was considered by

Hon'ble Supreme Court in the case of **Shabana Bano vs. Imran Khan, (2010) 1 SCC 666 (Paras-11 to 15)** and after considering the provisions of Sections 4 and 5 of the Muslim Act, 1986 and Sections 7 and 20 of the Family Courts Act, 1984, Hon'ble Supreme Court held that ***“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.”***

20. Apart from above, **the respondent-husband has not filed the present appeal. He has not challenged the impugned judgment dated 15.09.2022. He has not raised any objection as to the jurisdiction before the court below, rather he has accepted the impugned judgment dated 15.09.2022.** Therefore, the submission of learned counsel for the respondent that the court below was having no jurisdiction to pass the impugned judgment, deserves to be rejected and is hereby rejected.

Object and background of the Muslim Act, 1986:-

21. In the case of **Mohd. Ahmed Khan vs. Shah Bano Begum, (1985) 2 SCC 556**, which arose from the judgment of Madhya Pradesh High Court involving the principal question of interpretation of Section 127(3)(b) of Cr.P.C. 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, Cr.P.C. The Five Judges Bench of Hon'ble Supreme Court reiterated that the Code of Criminal Procedure deals with the proceedings in such matter and overrides the personal law of the parties and in case there is a conflict between the terms of the Code and the rights of the obligations of the individuals, the Code would prevail. Hon'ble Supreme Court further held that Mahr is more closely connected with marriage than divorce and held that payment of Mahr cannot ipso facto absolve the husband's liability and further held that the divorced women were entitled to apply for maintenance orders against their former husbands under Section 125, Cr.P.C. and such applications were not barred under Section 127(3)(b), Cr.P.C. After referring to various text books on Muslim Law, Hon'ble Supreme Court concluded that the Ayats of 'the Holy Quran' Chapter II Suras

241 and 242, 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. On pronouncement of judgement in the case of Shah Bano Begum (supra), there was a big uproar and thereafter, the Parliament enacted the Muslim Act, 1986 with the object and reasons to the Bill, as follows:

“The Supreme Court, in Mohd. Ahmed Khan vs. Shah Bano Begum & Others (AIR 1985 SC 945), has held that although the Muslim Law limits the husbands liability to provide for maintenance of the divorced wife to the period of iddat, it does not contemplate or countenance 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 husbands 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 husbands relatives. If the above benefits are not given to her at the time of divorce, she is entitled to apply to the Magistrate for an order directing her former husband to provide for such maintenance, the payment of mahr or dower or the deliver 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.”

22. The object of enacting the Muslim Act, 1986 was meticulously examined by the Constitution Bench of Hon'ble Supreme Court in

the case of **Danial Latifi and another (supra)** and it has been observed in paragraph-7, as under:

“7. The object of enacting the Act, as stated in the Statement of Objects & Reasons to the Act, is that this Court, in Shah Banos case held that Muslim Law limits the husbands 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.**”

23. The Muslim Act, 1986 is a piece of beneficial legislation enacted for welfare of such class of society who suffer great disparity and whose (her) investment in the marriage is the investment of her entire life which if breaks up and compensated in terms of money towards her livelihood, **partakes the character of basic human rights to secure gender and social justice which 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 and to deprive a divorced lady to any means of livelihood resulting in social injustice and leaving her life as curse. Keeping in mind these great realities of a class of society, the provisions of the Muslim Act, 1986 has to be interpreted.**

24. In the case of **Danial Latifi and another (supra)** Hon'ble Supreme Court also made certain observations for interpretation of provisions where matrimonial relationship is involved, as under:

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

in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity **in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question.**"

Whether a Muslim divorced lady is entitled for maintenance from her husband for future period after Iddat under Section 3 of the Muslim Act, 1986?

25. It is admitted case of the respondent that he is a Class-III Government Employee working in Postal Department. He joined service much after marriage and gave divorce to the applicant-appellant herein on 28.06.2000 after he joined the service and thereafter married with another Muslim woman some time in the year 2002. The applicant-appellant herein is a semi-literate woman and has no source of livelihood. By the impugned judgment, the court below has directed the respondent-husband to pay to the applicant-appellant herein under Section 3 of the Muslim Act, 1986, only Rs.1001/- as amount of Mahr and another sum of Rs.1500/- per month for the period of iddat, i.e. for three months and 13 days. That apart, the court below has directed to give her one bed, one lota, one payal, one plate, one glass, one katora, gold earring of one gram and silver payal of 10 grams only. The court below has misread and misunderstood the judgment of Hon'ble Supreme Court in the case of **Danial Latifi and another** (supra).

26. In the case of **Danial Latifi and another** (supra), the Constitution Bench of Hon'ble Supreme Court, after considering the aforesaid provisions including Sections 3 and 4 of the Muslim Act, 1986 held as under:

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

Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be. Rest of the provisions of Section 3 of the Act may not be of much relevance, which are procedural in nature.

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

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

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

needs. Reasonable and fair provision may include provision for her residence, her food, her cloths, and other articles. The expression within should be read as during or for and this cannot be done because words cannot be construed contrary to their meaning as the word within would mean on or before, not beyond and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but no where the Parliament has provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.

29.*The important section in the Act is Section 3 which provides that divorced woman is entitled to obtain from her former husband maintenance, provision and mahr, and to recover from his possession her wedding presents and dowry and authorizes the magistrate to order payment or restoration of these sums or properties. **The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations : (1) to make a reasonable and fair provision for his divorced wife; and (2) to provide maintenance for her.** The emphasis of this section is not on the nature or duration of any such provision or maintenance, but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, within the iddat period. If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both reasonable and fair provision and maintenance by paying these amounts in a lump sum to his wife, in addition to having paid his wives mahr and restored her dowry as per Section 3(1)(c) and 3(1)(d) of the Act. Precisely, the point that arose for consideration in Shah Banos case was that the husband has not made a reasonable and fair provision for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are a reasonable and fair provision and maintenance to be made and paid as provided under Section 3(1)(a) of the Act and these expressions cover different things, firstly, by the use of two different verbs to be made and paid to her within the iddat period, it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4 of the Act, which empowers the magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to provision. Obviously, the right to have a fair and reasonable provision in her favour is a right enforceable only against the womans former husband, and in addition to what he is obliged to pay as maintenance; thirdly, the words of the Holy Quran, as translated by Yusuf Ali of mata as maintenance though may be incorrect and that other translations employed the word provision, this Court in Shah Banos case dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether mata was rendered maintenance or provision, there could be no pretence that the husband in Shah Banos case had provided anything at all by way of mata to his divorced wife. The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to mata is only a single or one time transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word provision in Section 3(1)(a) of the Act incorporates mata as a right of the divorced Muslim woman distinct from and in addition to mahr*

and maintenance for the iddat period, also enables a reasonable and fair provision and a reasonable and fair provision as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in Shah Banos case, actually codifies the very rationale contained therein.

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

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

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

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

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

27. In the case of **Sabra Shamim vs. Maqsood Ansari, (2004) 9 SCC 616 (para-3)**, Hon'ble Supreme Court has set aside the judgment of the High Court and restored the order passed by the Principal Judge, Family Court for grant of maintenance beyond the period of Iddat, observing as under:

"3. The High Court proceeded on a premise that the Muslim Women (Protection of Rights on Divorce) Act, 1986 provides that a divorced wife will be entitled to maintenance till the iddat period only and not any further and on that basis set aside the order made by the Principal Judge, Family Court, Dhanbad in Misc. Case No. 40 of 1991 (arising out of MP Case No. 19 of 1982). This proposition of law on which the High Court proceeded is plainly contrary to the decision of this Court in Danial Latifi v. Union of India. Therefore, the order made by the High Court is set aside and the order made by Family Court stands restored. The appeal is allowed accordingly."

28. Thus the correct position of law is that under Section 3(2) of the Muslim Act, 1986, a divorcee can file an application before a Magistrate if her 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 her

marriage by her relatives or friends or the husband or any of his relatives or friends. **Under Section 3(3) of the Muslim Act, 1986, an order can be passed directing the former husband of the divorcee to pay to her such reasonable and fair provision and maintenance as deemed fit and proper having regard to needs of the divorced woman, her standard of life enjoyed by her during her marriage and means of her former husband. The word “provision” used in Section 3 of the Muslim Act, 1986 indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. “Reasonable and fair provision” may include provision for her residence, her food, her cloths, and other articles.** In the case of Danial Latifi and another (supra), in Para-28, Hon'ble Supreme Court has fairly interpreted the provisions of Section 3 with regard to fair provision and maintenance and held that ***“it would extend to the whole life of the divorced wife unless she gets married for a second time”***.

29. From the facts and legal position as discussed above, we have no hesitation to hold that the Principal Judge, Family Court has committed a manifest error of law in its impugned judgement and order dated 15.09.2022 in Criminal Misc. Case No.2366 of 2014 to hold that the applicant-appellant herein is entitled for maintenance only for the period of iddat, i.e. for three months and 13 days @ Rs.1500/- per month.

30. Apart from above, we find that the court below has not properly considered the various evidences on record regarding the properties given to the applicant-appellant before or at the time of marriage or after marriage by her relatives or friends or the husband or relatives or the husband or his friends. Therefore, the findings of the court below on this aspect of the matter can also not be sustained.

31. For all the reasons aforesaid, **the appeal is allowed and the impugned judgment and order dated 15.09.2022 in Criminal Misc. Case No.2366 of 2014 (Zahida Khatoon Vs. Nurul Haque**

Khan) passed by the Principal Judge, Family Court, Ghazipur is hereby set aside and Criminal Misc. Case No.2366 of 2014 is restored to its original number. Matter is remitted back to the competent court, i.e. concerned Magistrate to decide the Criminal Misc. Case No.2366 of 2014 determining the amount of maintenance and return of properties to the applicant-appellant herein by the respondent husband in accordance with law, positively within three months from the date of presentation of a certified copy of this order, without granting any unnecessary adjournment to either of the parties.

32. For a period of three months or till the aforesaid Criminal Misc. Case No.2366 of 2014 is decided, whichever is earlier, the respondent No.3 herein shall pay to the applicant/ appellant herein a sum of Rs.5000/- per month before the 10th day of each month towards interim maintenance.

Order Date :- 20.12.2022
Rmk.