Chapter-4
MAINTENANCE

4.1 INTRODUCTORY REMARKS

The chapter of maintenance has been discussed under the following headings and sub-headings: Maintenance of Wife under Hindu, Muslims, Christian and Parsi Laws- (a) Analysis of the legislative provisions (b) Evaluation of the judicial pronouncements (c) Identification of pitfalls (d) Advocacy of reforms and improvements.

*Maintenance of wife under Hindu Law* deals with the relevant provisions of Modern Hindu Law regarding the Maintenance of wife. It is a noteworthy fact that the maintenance of wife under the Hindu Marriage Act, 1955 and the Hindu Adoption and Maintenance Act, 1956. The 'evaluation of the judicial pronouncements' in which the judicial pronouncements of the various High Courts and Hon'ble Supreme Court regarding the maintenance of wife under the Hindu Laws have been evaluated. In the process of the evaluation of the judicial pronouncements the issue involved in the case, the contention of the petitioner and the respondent, the order or the judgments of the respective High Courts or the Hon'ble Supreme Court and the merits or the demerits of the judgments has been humbly tried to put forth. Further, 'the identification of pitfalls' deals with the areas which has been in the serious requirement to be noticed and calls for some responsible steps for the reformation by the appropriate authority. The area of the pitfalls has been found during the process of the analysis of the legislative provisions and the evaluation of the judicial
pronouncements. Lastly, the advocacy for reforms and improvements which deals with the suggestions and the progressive ideas for coping up with these areas of pitfalls.

*Maintenance of wife under Muslim Law* deals with the responsibility of the Muslim husband to maintain his wife in the form of *Kharch-i-pandan*. After this the controversy between the Criminal Procedure Code, 1973 and Muslim Personal Law regarding the maintenance of Muslim divorcee has been discussed. The agitation of the Muslim community due to the controversial judgment of the *Shah Bano's case* which paved the way to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 has also been analyzed under this heading. The 'Evaluation of the judicial pronouncements' deals with the evaluation of the decisions of the various High Courts and Hon'ble Supreme Court regarding the maintenance of Muslim divorcee. The evaluation of the cases and judicial pronouncements describe the judicial scenario before and after the *Shah Bano's judgment*. This heading also deals with the cause of the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, and the role of judiciary towards the application of the provisions of this enactment. The reasons have also been mentioned as to why the judiciary is sometimes blamed for promoting the application of the provisions of Cr.P.C., rather the provisions of this enactment regarding the maintenance if Muslim divorcee through the sufficient case laws. Further, this part in the identification of pitfalls shows some loopholes in the hurry and rash drafting of the Muslim Women (Protection of Rights on Divorce) Act, 1986. These loopholes may be blamed to allow the judiciary to distort some intactable rules of Muslim Law.
regarding the maintenance of Muslim divorcee in the guise of the judicial activism which can't be said a proper way for the intrusion in the personal law of any community. Lastly, this part which is the 'advocacy of reforms and improvements', covers some humble suggestions regarding the reformation of some provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, as this Act has the heavy responsibility to represent manifestly the Islamic Community to the whole world.

*Maintenance of wife under Christian Law* deals with the analysis of the relevant provisions of the Indian Divorce Act, 1869, regarding the maintenance of wife under the Christian Law. Further it deals with the evaluation of the judicial pronouncements.

*Maintenance of the wife under Parsi Law* deals with the relevant provisions of the Parsi Marriage and Divorce Act, 1988, regarding the maintenance of wife. After the analysis of the legislative provisions of the Parsi Marriage and Divorce Act, 1988, regarding the maintenance of wife, the rest of the headings, i.e., evaluation of the judicial pronouncements, identification of pitfalls, advocacy of reforms and improvements have been discussed.

### 4.2 MAINTENANCE OF WIFE UNDER HINDU LAW

(a) **Analysis of Legislative Provisions**

The relevant legislations which govern the maintenance of wife under Hindu law are: The Hindu Marriage Act, 1955, and the Hindu Adoption and Maintenance Act, 1956. Provisions contained therein would be discussed to know the legislative position of wife under Hindu law. The relevant provisions are: Section 24, and Section 25 of
the Hindu Marriage Act, 1955, and Section 18 of the Hindu Adoption and Maintenance Act, 1956. Section 24 of the Hindu Marriage Act, 1955, deals with the alimony *pendente lite* and the expenses of the proceedings. This Section empowers the court to order the respondent to pay the petitioner the expenses of the proceedings, if it appears that either wife or the husband has not independent income for his or her support and to meet out the necessary expenses of the proceedings. It is to be noted that the court while making order under this Section, pays due regard to the petitioner's own income and the income of the respondent.

The Marriage Laws (Amendment) Act, 2001 was introduced. This amendment inserted the proviso in Section 24 of the Hindu Marriage Act, 1955, which aimed to fix the duration of six months in the disposal of the application of the payment of the expenses of the proceeding and monthly sum during proceeding within the sixty days from the date of the service of notice on the wife or husband, as the case may be. Section 25 of the Hindu Marriage Act, 1955 deals with the permanent alimony and maintenance. It comprises three Subsections. Subsection 1 of this Section deals with the condition where any husband or wife may for the permanent alimony or maintenance at the time of passing any decree or at any time subsequent thereto. This Subsection empowers the court to order the respondent to pay the maintenance and support the gross sum or the monthly or periodical sum for a term not exceeding the life of applicant. According to this Subsection the responsibility of the paying spouse ends on the marriage of the other spouse. The court fixes the amount of permanent alimony and maintenance, keeping in view the
respondent's own income and other property and the income and other property of the applicant. The court may, if necessary, also secure the payment of permanent alimony by a charge on the immovable property of the husband. Subsection 2 of this Section says that after the passing of the order of the payment of permanent alimony under this Section, in case the court is satisfied that there is a change in the circumstances of either party. In this condition, the court may, at the instances of either party, vary, modify or rescind any such order in such manner as court deems just. Subsection 3 of this Section empowers the court to rescind the order of the payment of permanent alimony, if it is satisfied that the party in whose favour an order has been passed under this Section has been remarried or if such party is the wife, that she has not remained chaste, or if such party is the husband, that he had sexual intercourse with any woman outside the wedlock.

Section 18 of the Hindu Adoption and Maintenance Act, 1956, deals with the married women's right to reside separate and claim maintenance. This Section comprises three Subsections. Subsection 1 of this Section entitles the Hindu wife to get the maintenance from her husband during her life time. The right to be maintained is irrespective of the fact that whether she was married before or after the commencement of the Act. Subsection 2 of this Section provides justifiable grounds to the Hindu wife under clause (a) to clause (g) which entitle the Hindu wife to live separately from her husband without forfeiting her claim to maintenance. The grounds are desertion, cruelty leprosy, having another wife by the husband, keeping a concubine by the husband, conversion from Hinduism to another religion by the husband or any other justifiable cause.
Sub-Section 3 of this Section disentitles the Hindu wife to separate residence and claim of maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

The rule laid down in Section 18 of the Hindu Adoption and maintenance Act, 1956 must also be read with Section 23 of this Act which lays down that it shall be the discretion of the court to determine whether any, and if so what maintenance shall be awarded under the provisions of this Act. Here in this Section, the right of the Hindu wife whether married before or after the commencement of this Act, to be maintained by her husband during her life time has been reiterated substantially in Subsection (1). However, this Subsection (1) must be read with Subsection (2) and Subsection (3). Subsection (3) is an exception to Subsection (1) which lays down that the Hindu wife can not claim separate residence and maintenance, if she is unchaste or ceases to be a Hindu by conversion to another religion. Subsection (2) shows the justifiable ground upon which a Hindu wife lives separately from her husband without forfeiting her claim to maintenance.

Clause (a) of Subsection 2 of the Hindu Adoption and Maintenance Act, 1956 deals with the "Desertion of wife by husband". This clause aims at giving the meaning of desertion as abandonment of the wife by the husband without reasonable cause without her consent or against her will or willful neglect of the wife by the husband. It accords with the meaning given to the expression as used in Section 13(1) of the Hindu Marriage Act 1955. The only distinction between Section 18(2) (a), and explanation to Section 13(1), the Hindu Marriage Act, 1955 is that under the latter the petitioner should show the respondent had

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deserted him or her for a period of 2 years prior to the presentation of the while under Section 18(2)(a) of the Hindu Adoption and maintenance Act, 1956, desertion might be any duration. A full bench of the Kerala High Court has held that if a husband had deserted the wife, the wife need not give the proof of animus.

Clause (b) of Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 deals with the "cruelty" by the husband to wife. For succeeding the claim of cruelty, the wife must prove two distinct element, first, ill treatment complained of, and secondly, the result and danger of apprehension thereof. Any conduct of husband which causes disgrace of wife or subject to a course of annoyance and indignity amounts to legal cruelty. The harm apprehended by the wife may be a mental suffering as distinct from bodily harm, because the pain of the mind may be even more severe than bodily pain.

In *Swajyam Prabha v. A.S. Chandra Shekhar*, it was held that "the baseless allegations about the adultery would constitute mental cruelty to the wife, so that cruelty is a solid ground for claiming maintenance and separate residence". It is well settled principle of law that leveling allegations of adultery without proper foundation and basis would tantamount to perpetrating mental cruelty on the other spouse. In *Ram Devi v. Raja Ram*, the husband by his conduct made it evidently clear that she was not wanted in the house and her presence was resented by him, it was held that this amounted to cruelty and justified wife's living

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3 Raghavan v. Satyabhama Jaya Kumari AIR 1985 Kerala 193 (FB)
4 Supra note: 2, p. 136
5 AIR 1982 Kant. 295.
7 1963 All. 564.
Clause (c) of Section 18(2) of the Hindu Adoption and Maintenance Act, 1956, deals with the "Leprosy" of the husband. A Hindu wife is also entitled to live separately from her husband and has a right to claims maintenance from him on the ground that he is suffering from a virulent form of leprosy. It may be noted that no period is prescribed, but it must be existing at the time when the claim for maintenance is made. It does not make any effect whether the disease started before or after the coming into force of the Act. A mild type of leprosy which is capable of treatment can not be called virulent leprosy which is malignant and contiguous and in which prognosis is usually grave.

Clause (d) of Section (18)2 of the Hindu Adoption and Maintenance Act, 1956 deals with the ground which is "the husband having another wife. A Hindu husband can not marry another wife after the commencement of the Hindu marriage Act, 1955. Act lays down monogamy as a rule of law. This gives the right to a wife to claim maintenance, while living separately without forfeiting her claim to maintenance on the ground that his husband has another wife living with him. The interpretation of this Subsection has resulted into conflicting judicial pronouncements by the entitlement of the second wife to claim maintenance from the husband after the commencement of the Hindu Marriage Act, 1955. In Annamalai v. perumayee Amnamal, the High Court of Madras has held that clause (d) of sec-18(2), would apply only in case of marriage solemnized before this

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8 Supra Note: 4, p. 137  
9 Supra Note: I p. 569  
11 Supra Note: 1 p. 570.  
12 AIR 1965 Mad 139, 141
Act came into operation. The Andhra Pradesh High Court had earlier taken the view that the second wife would be entitled to claim maintenance under this provision.\textsuperscript{13} The High Court of Calcutta has taken the view that second wife would not be so entitled.\textsuperscript{14} The Madhya Pradesh High Court as well as the Bombay High Court had in the context of Sections 24-25 of the Hindu Marriage Act, 1955 and also taking into consideration of present Section had expressed the view that the expression 'wife' and 'husband' used in the Act can not be given a strict literal meaning so as to convey only a legally married husband and wife. It was also held that the word used in Section would refer to parties who have gone through the ceremonies of marriage, and the court can make order of maintenance at the instance of the second wife.\textsuperscript{15} The Andhra Pradesh High Court in a recent full bench decision over ruled the earlier decision while holding that second wife is not entitled to maintenance under this Section, since after coming into force of the Hindu Marriage Act, 1955, bigamous marriage is prohibited. The second Marriage being void, the second wife cannot claim maintenance under this Section since the parties to the marriage will not have the status of legally married husband and wife.\textsuperscript{16} The decision of the High Court of the Bombay in Kirshnakant's Case was overruled by the decision of the Full Bench.

In \textit{Bhau Saheb v. Lilabai}\textsuperscript{17} which took the view that petition challenging the nullity of marriage by Virtue of Section 5(1) of the Hindu Marriage Act, 1955, is petition seeking declaration of the nullity

\textsuperscript{13} C. Obula Konda Reddy V.C. Pedda Venkata AIR 1976 AP
\textsuperscript{14} Ranjit Bhattacharya v. Sabita AIR 1996 Cal 301.
\textsuperscript{17} JT 2004 (10) SC 366
of the marriage and is not a petition affecting marital status and thus, would not entitle the wife if such is void marriage to the relief of maintenance. The Court held that the words 'any decree' in Section 25 of the Hindu Marriage Act can't be construed to mean 'every decree' so as to entitle such spouse to maintenance. The Supreme Court has in the context of entitlement to a spouse of void marriage, now held that once there is a decree of nullity in respect of void marriage such spouse would be entitled to maintenance. The Court taking note of its earlier decision in the Chand Dhawan v. Jawahar Lai Dhawan\textsuperscript{18} held that decision clearly stipulated that once there is decree bringing about disruption of marital tie, including a decree nullifying a void marriage, the spouse was entitled to maintenance.

Section 25 of the Hindu marriage Act, 1955 applies on the disruption of the marriage tie, as explained and interpreted by Supreme Court in above decisions, whereas Section 18 of the Hindu Adoptions and Maintenance Act. 1956 applies in cases where the marriage subsists and confers upon the wife the right to claim maintenance without seeking disruption and the marriage tie.\textsuperscript{19}

In fact Supreme Court while analyzing the provisions of the Hindu Marriage Act, 1955 in Ramesh Chandra Daga v. Rameskwari Daga\textsuperscript{20} stated where the marriage is not dissolved by any decree of the court, resort to Section 25 of the Hindu Marriage Act, 1955 is not allowed as any of the spouse whose marriage continues can resort to any other provision like Section 125 of Criminal Procedure Code, 1973 or Section 18 of the Hindu Adoptions and Maintenance Act, 1956.

\textsuperscript{18}JT 2004 (10) SC 366
\textsuperscript{19}Supra Note: 1 p. 571
\textsuperscript{20}JT 2004 (10) SC 366
It appears that though the Hindu Marriage Act, 1955, the second marriage during the life time of first wife, the present Sections does not clearly states that it is only the legally married wife who can claim maintenance in the above circumstance. If it had been the language of the Section the claim of the second wife would necessary fail.\footnote{Supra Note: 1 p. 571-572.}

The Hindu Marriage Act, 1955, which prohibited bigamy, was enacted before the Hindu Adoption and Maintenance Act, 1956. The legislature therefore conscious of the fact that the Hindu marriage Act, 1955, prohibited of bigamous marriage, and yet the present Section, as it stands today had been enacted. It is submitted that if the legislative intent in the context of this Section were to grant the right of maintenance only to a legally married wife, it would have clearly stated so. It is worth while to note that maintenance under Section 18 of the Hindu Adoption and Maintenance Act, 1956 has been construed the beneficial piece of legislation. It also appears that the word 'husband' and wife in the context of this Section cannot be read to convey only a legally needed but be read as conveying the meaning of person who has undergone the ceremonies of marriage. The provision as it stands today is widely worded so as to sustain the claim of maintenance by second wife. The claim is maintainable irrespective of the fact that the other marriage had taken place after or before the marriage of applicant wife, provided the other wife is living.\footnote{Ibid p. 572} The word any other wife living, in this clause are of sufficiently wide connection to include any wife other them the wife claiming maintenance under this Section. The meaning is not confined to a wife

\footnote{Supra Note: 1 p. 571-572.}
who is junior to the wife who is claimant,\textsuperscript{23} nor is it necessary that the husband and other wife should be living together. The word living here means alive and not living with the husband,\textsuperscript{24} a Second wife who had abandoned her husband for no justifiable reasons and not for immoral purpose would be entitled to live separately from the husband by virtue of present clause, and claim maintenance under present Section.\textsuperscript{25}

Clause (e) of Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 deals with a ground which is "husband keeping a Concubine". A Hindu wife is also entitled to live separately from her husband and claim maintenance from him and the ground that he keeps a concubine in the same house in which she is living or habitually resides with a concubine elsewhere. In the second part of this clause, the emphasis is the ‘habitually’ and not so much on residence.\textsuperscript{26} It is not necessary that the husband should have actually shifted his residence to the place where concubine lives.

Clause (f) of Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 deals with the ground which is "husband ceased to be a Hindu by conversion".

A Hindu wife is entitled to live separately from her husband if he has ceased to be a Hindu. However, the terms Hindu in this clause must be understood in the wide sense given to it in Section 2 as will be seen from Subsection 3 of that Section. So husband continues to be a Hindu even though he may have been converted to any other of four religions:

\textsuperscript{23} Jagamma v. Satyanarayana Murti AIR 1958 All 582.
\textsuperscript{24} Kalawati v. Ratan Chand AIR 1960 All 601
\textsuperscript{25} Ram Prakash v. Savitri Devi AIR 1958 Punj. 87
\textsuperscript{26} Kesar Bai v. Hari Bhan AIR 1975 Bom. 115
Hinduism, Buddhism, Jainism, Sikhism. Conversion in the present context implies that the husband has voluntarily relinquished his religion and adopted another religion after a formal ceremonial conversion; A Hindu does not cease to be a Hindu merely because he professes an ardent admirer and advocate of such religion and its practices. However if he abdicate his religion by a clear act of renunciation and adopts the other religion, he would cease to be Hindu within the meaning of that clause.

Clause (g) of this Section 18(2) of the Hindu Adoption and Maintenance Act, 1956 deals with the ground which is 'any other justifiable cause'. It is a residue clause; it runs, "if there is any other cause justifying her living separately". For seeking in the remedy under this clause the conduct of the husband should be such that, in the opinion of the court, the wife has 'grave and weighty' or grave and convincing reason for withdrawing from the society of the husband and it would amount to a justifiable cause. It is submitted that all those cases where the court may refer husband’s petition for the restitution of conjugal right will be covered under this clause entitling a wife to claim separate residence & maintenance under this clause. In Sitbegowda v. Hoonamma, the wife claimed maintenance on the ground that husband treated her with cruelty and that he remarried and was living with second wife. The charge of cruelty was not established, but it was found by the court that husband was living with woman, having illicit relation with her and from which a child was born. Since marriage with this wife was not established, the case was not covered

27 Supra Note: 1 p. 574.
28 Kesar Bai v. Haribhan AIR 1974 Bom 115
29 AIR 1984 Kant. 41
by clause (d) of Section 18(2). The court held that this was nonetheless a just cause for her to live separate and she was entitled to claim maintenance. The court took recourse to clause (g).

But according to Subsection (3) of Section 18, 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.

(b) Evaluation of judicial pronouncements

Now, some landmark judicial decisions would be discussed here to clarify the application of these Sections in the matrimonial cases. First of all, we would like to discuss the application of Section 24 and Section 25 of the Hindu Marriage Act, 1955, then some cases would be discussed regarding the application of Section 18 of the Hindu Adoption and Maintenance Act, 1956. In *Hani v. Parkash*, the question before the High Court was that in case of non-compliance an order under Section 24 of the Hindu marriage Act, 1955, can be the defence of the defaulter. Husband obtained a decree of divorce against the wife on the ground of cruelty. She filed an appeal against it. During pendency of appeal, she sought maintenance and litigation expenses under Section 24 of the Hindu Marriage Act, 1955. The court decreed Rs. 500 per month as maintenance *pendente lite* and Rs.2, 200 as litigation expenses. The husband failed to comply with this order despite several notices over a period of two years. The court observed: "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." The verdict of the High Court was that in case of non-compliance an order under Section 24 of the Hindu marriage Act, 1955, can be the defence of the defaulter.

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30 AIR 1964 P & H 175.
Court in this case shows that the purpose behind this is to ensure that a husband provides for the wife and children while the litigation is on. If he fails to do so, his defence will be struck out and the case will proceed.

In *Sushila Viresh Chhawda v. Viresh Nagsi Chhawda,* the issue involved in this case was whether the litigation expenses and interim maintenance under Section 24 can be claimed, even when the main petition is for nullity of the marriage. Husband filed a suit for nullity of marriage under the Hindu Marriage Act on the ground of fraud. His allegation was that the wife suffering from a big ovarian tumour which had to be surgically removed along with an ovary just eight days after the marriage and this fact that the tumour was concealed at the time of marriage. The wife filed an application for interim maintenance under Section 24 of Hindu marriage Act. This was opposed by the husband on the ground that the marriage was void and the view of the fraud committed by her, she was not entitled to interim maintenance. The family court rejected the wife's application without even going into merits. Hence her special leave petition under Article 227 of the constitution. The High Court set aside the order of the family court. It was held that the wording of Section 24 the Hindu Marriage Act, 1955 is very clear that an application for maintenance can be filed in any proceeding under the Act, "When a fact of marriage is acknowledged and a proved, alimony follows subject, of course, to the discretion of the court in matter having regard to the means of the parties and it would be no answer to the claim. That the marriage was void ipso jure or was voidable." The court further remarked; "The direction of interim

31 AIR 1996 Bom. 94.
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 take care that nobody is disabled from prosecuting or defending the matrimonial case by starvation or lack of funds". The purpose of Section 24 is to provide sustenance and financial assistance for pursuing the litigation. The provision is available in case of any proceeding under the Act and not confined to any particular proceeding.

In *Lataben Y. Goswami v. Yogendra Kumar S. Goswami*,\(^\text{32}\) the issue before the Gujrat High Court was whether the husband can be absolved of the liability to pay arrears of interim maintenance to the wife, after allowing dismissal of this main petition under the Act? In the instant case, husband filed a petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955, whereupon the wife applied for maintenance under Section 24, Hindu marriage Act, 1955. The court allowed Rs. 200 per month as interim maintenance and Rs. 300/- towards litigation expenses. The husband challenged this but his application was rejected. He was given sufficient time for making the payment which he failed to do. He made no appearance on subsequent dates either in person or through counsel; hence the same was dismissed for non-prosecution. The wife filed an application for recovery of arrears of maintenance amount w.e.f., April 1, 1988 to August 5, 1993. The same was turned down as being not maintainable in view of the dismissal of the main petition of the husband. Hence, the wife's revision, it was argued on behalf of the wife that under the provision of Section 28(a) of the Hindu Marriage Act, all decree and orders made by it in any proceeding under the Act are enforceable in

\(^{32}\text{AIR 1996 Guj. 103.}\)
the same manner as decrees and orders of the made in the exercise of its original civil jurisdiction. And further, it was contended that an order for alimony *pendente lite* remains in force during pendency of proceedings and in this case the proceedings under Section 9 for the restitution of conjugal rights remained pending till the application was dismissed on August 5, 1993 and so the wife was entitled to the arrears. After going through the contentions of both the parties, the wife's revision was allowed. The court observed 'That the finding of the learned trial court that the interim order passed in any proceedings would itself get extinguished or lost the sanctity with the ultimate fate of the main proceedings is perverse in the face of it. In case such interpretation is given, then the whole purpose enacting the aforesaid Section of the Act will be frustrated. Not only this, but it will be easy for a spouse who does not want to pay the amount of the maintenance or the cost of litigation despite the order of the Court to deny the same by allowing the dismissal of the petition for non-prosecution. Section 28A was substituted in the Act of 1955 to mitigate the hardships". Here it can be said that the decision is praiseworthy as the husband cannot be allowed to defeat the claim of the wife to the arrears of maintenance by simply dropping or not proceeding with the main petition. This would not only be unfair but also the defiance of court order.

In *Ghari Lai v. Surjit Kaur*, the issue before the High Court of Jammu and Kashmir was under Section 5 of the Limitation Act, 1963 for condonation of delay be termed as proceedings for purposes of Section 24 of the Hindu Marriage Act, 1955. In that case the husband obtained an ex-parte restitution decree against the wife. The wife filed

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33 AIR 1997 J & K 72.
an application for setting aside the same after the period of limitation had expired. She also filed an application under Section 5 of the Limitation Act for condonation of delay. Pending this application, she filed an application under Section 30 of the J & K Hindu Marriage Act (4 of 1980) for maintenance. This Section of the J&K Act in pari material with Section 24 of the Hindu Marriage Act, 1955) The husband objected to her application on the ground that proceeding under Section 5 of the Limitation Act could not be considered as proceeding for purpose of grant of maintenance. His plea was, however, rejected. Hence, he appealed. The husband's appeal was admitted. The High Court reiterated the decision on Puran Chand v. Kamla Devi\textsuperscript{34} where it was held that maintenance is awardable on monthly basis "during the proceeding which connotes that maintenance is admissible from the time of commencement of the proceedings till their termination. According to the court proceeding in trial court would naturally commence from the date on which issues are framed and since there can be no stage of framing of issues in an application seeking condonation of delay in proceedings under Section 5 of the Limitation Act, Section 30 of the J&K Hindu marriage Act cannot apply. Accordingly, the court held that application for condonation of delay was not a proceeding within the meaning of Section 30 of the J&K Hindu marriage Act (or Section 24 of the Hindu Marriage Act). While conceding that this provision seeks to help a litigating spouse who does not have sufficient means to maintain himself/herself, the court observed that provision cannot be used in such a way that it acts as a weapon of sword for harassment of the other party.

\textsuperscript{34} AIR 1981 J&K 5.
Virtually the strict interpretation of the provision can work hardship on the party sometimes. Supposedly wife obtains an ex-parte order and the husband files an application for setting aside and condonation of delay for seeking restoration of the order only to harass the wife, would the court deny her expenses to fight out the application? Each case needs to be decided on its own facts and circumstances.

In *Amit Kumar Sharma v, Vlth Addl. District and Session Judge, Bijnor* 35 the issue before the Allahabad High Court was whether a husband’s mother's needs be taken care of in a wife application for maintenance when the mother is staying with her? In that case the husband filed a petition for divorce. Thereupon, the wife filed application for maintenance under Section 24 and 25 of the Hindu Marriage Act, 1955, claiming maintenance for herself, two minor children and ailing mother of the husband who too was staying with her. The same was allowed by the trial court and affirmed by the additional district judge in appeal. The husband filed an appeal against the order. The court held that Section 24 contemplates maintenance either to wife or husband and the mother is in no way connected with us relating to marriage between the husband and wife. The court observed that the Indian social fabric involves maintenance of parents with religious scruples and devotion but the court is called upon to interpret the law and not religious or social duties. Section 125 of the Cr. P.C. and Section 20 of the Hindu Adoptions and Maintenance Act are there to take care of the Parents maintenance rights according to the court. The court further held that where there is specific provision of law on the basis of religious scruples or social system, it could not be

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35 *AIR 1999 All 4.*
permissible to stretch Section 20 of the Hindu Adoption and Maintenance Act, 1956, nor it can overlap the said Sections. Section 24 of the Hindu Marriage Act, 1955, does not postulate the scope of granting maintenance to the mother of the husband even when she is ailing and lives with the applicant. Maintenance award in favour of the mother was accordingly set aside by the High Court.

On evaluation of this decision of High Court it may be pointed out that here the court has taken a very rigid and technical view. Further, while awarding maintenance in an application the court considers, inter alia, the needs of the applicant. Besides, under Section 25 "any other circumstances of the case" is a relevant consideration. When the husband's mother, whom in any case he is liable to maintain, is staying with his estranged wife, who is taking care of her needs, including medical treatment, the court should have given due consideration to these needs rather than driving her (the mother) to file separate suits for maintenance under the provision of the Cr. P.C. or Hindu Adoption and maintenance Act, 1956.

In Meshchandra Rampratapji Daga v. Rameskwari Rameshchandra Daga,36 the Bombay High Court has held that the wife is not entitled to maintenance if the marriage is void. The observations of the court in Krishnakant v. Reena,37 were referred to "that the Hindu Marriage Act, 955, is a piece of social welfare legislation regulating the marital relations of Hindus consistently with their customary law, i.e. Hindu law. The object behind Section 24 of the Act providing for maintenance pendente lite to a party in matrimonial proceeding is

\[\text{36} \quad (2001) \quad 1 \text{ Femi-Juris CC 60 (Bom)}\]
\[\text{37} \quad (1999) \quad 1 \text{ Mah. LJ 388.}\]
obviously to financial assistance to the indigent spouse to maintain herself during the pendency of the proceedings and also have sufficient funds to carry on the litigations so that the spouse does not unduly suffer in the conduct of the case for want of funds. The words 'wife' or 'Husband' used in Section 24 of the Act include a man and a woman who have gone through the ceremony of Hindu marriage which would have been valid but for the provisions of Section 11 read with clause (i) of Section 5 of the Hindu Marriage Act, 1955. These words have been used as convenient terms to refer to the parties who have gone through a ceremony of marriage whether or not that marriage is valid or subsisting, just as word marriage has been used in the Act to include a purported marriage which is void ab initio”.

In Padmavathi v. C. Lakshminarayana,\textsuperscript{38} the question before the Karnataka High Court was whether the mere fact that the wife being educated is capable of earning, defeat her claim for maintenance under Section 24 of the Hindu Marriage Act, 1955. It was held by the High Court that the only condition for granting maintenance under Section 24 is that the applicant has no independent income sufficient for support. The court observed that the object of Section 24 would be defeated if the interim maintenance is denied during the matrimonial proceedings on the ground that the wife is capable of earning her living because of her qualification. It further remarked by the Court that the reasoning of the family court judge was "not only contrary to settled legal position but the spirit and purpose of Section 24 of the Act". The decision seems to be correct that the mere fact that the wife is capable of earning, without any contention or proof that she is in fact earning,

\textsuperscript{38} AIR 2002 Kant 424
does not disentitle the wife to claim maintenance under Section 24 of
the Hindu Marriage Act, 1955.

In *R. Suresh v. Chandra*, the court has elucidated the concept and
meaning of term support in Section 24 of the Hindu Marriage Act,
1955, and held that the expense incurred on medical treatment would
also be covered in the word 'support' It was held that since the word
"support" in Section 24 of the Hindu Marriage Act, 1955, was not
defined, it should be given dictionary meaning or as understood in
general parlance. Further, the court can draw inspiration from the word
"maintenance" as defined in Section 3(b) (i) of the Hindu Adoption
and Maintenance Act, 1956, which includes provision for food,
clothing, residence, education, medical attendance and treatment.
Though this definition too is not exhaustive but only inclusive, medical
attendance and treatment have been specifically mentioned. Referring
to *Pradeep kumar Kapoor v. Shailja Kapoor*, it was held that the
word "support" and "maintenance" are synonymous and the definition
of "maintenance" as given in the Hindu Adoptions and Maintenance
Act, 1956, equally applies to the word "support" in Section 24 of the
Hindu Marriage Act, 1955. As far as the point reimbursement from
office was concerned, the court held that the issue is not of *his*
reimbursement from office but the wife's claim for reimbursement
from him. The wife was, accordingly, held to be entitled for
reimbursement of her medical expenses from the husband under
Section 24 of the Hindu Marriage Act, 1955.

In *Ramesh Babu v. Usha*, the issue before the Court was that whether

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39 AIR 2003 Kant 183
40 AIR 1989 DEL. 70
41 AIR 2003 Mad. 281.
the applicant who is entitled to free legal aid, can seek litigation expenses under Section 24 of the Hindu Marriage Act, 1955. In the instant case, a husband filed a petition for annulment of marriage. The wife claimed interim maintenance and litigation expenses under Section 24 of the Hindu Marriage Act, 1955. The family court ordered Rs. 2,500/- towards litigation expenses and Rs. 1,250 per month as interim maintenance. Both were dissatisfied and filed appeal against the maintainability of the litigation expenses and the wife against inadequacy of the amount of interim maintenance. The husband’s argument was that the wife was entitled to free legal aid and, therefore, he was not liable to pay her litigation expenses. The court, however, did not accept this argument and held. Though free legal aid is available however, I am of the view that on this ground the claim of the deserving person cannot be rejected. The amount of interim maintenance was also raised from Rs. 1,250/- to Rs. 3,000/- per month as the wife had no independent source of income and the carry home salary of the husband was assessed at around Rs. 9,000 per month. To deny litigation expenses under Section 24, only on the ground that legal aid available to the applicant is not justified, as was done by the Gujarat High Court in K.K. Desai v. A.K. Bhai Desai. In this case the court rejected a wife's claim for litigation expenses on the ground that she can avail free legal aid which is provided by the state. According to the court, in that case, the burden cannot be put on the husband merely because the wife was ignorant of her right to avail legal aid. The view adopted by the court in Ramesh Babu is more realistic and logical.

\[42\] AIR 2000 Guj 232.
In *S.S. Bindra v. Tarvinder kaur*,\(^{43}\) the court had to determine that in a claim for maintenance *pendente lite* what is the crucial time for assessing the income of the non-claimant - time of petition of claimant or time of order. Here the Court held that in awarding interim maintenance, one of the considerations is that the wife and children shall enjoy the same standard of living as the husband, but emphasized that "the intention was not to peg it or freeze it to the date of separation". If in term, orders are to be pegged to a particular point in time then if income of the earning of the spouse were to suffer a drastic reduction for any reason including deterioration in his/her health, the court would be precluded from making any adjustment because of these factors. According to my perception a very logical interpretation indeed. If the income of the husband increases manifold between the time of the application and order of the judge should not be precluded to fix the amount in that basis; and so also if it decreases. It should not be left to the claimant or non-complainant to file fresh application for reassessment.

In *Chandra Guha Roy v. Gantam Guha Roy*,\(^{44}\) the issue that whether an educated young lady should be expected to be capable of maintaining her own self or not. In that case, a husband filed a petition for divorce and the wife applied maintenance under the Section 24 of the Hindu marriage Act, 1955 and also under the Section 125 of Cr. P.C. thereafter, the husband also filed an application under Section 24 of the Hindu Marriage Act, 1955. The applications of both the parties were dismissed by the trial court. Against the wife's application, it was held that the husband was no longer in service as, consequent to his arrest

\(^{43}\) AIR 2004 DEL 242.

\(^{44}\) AIR 2004 Jhar 36
after wife's criminal complaints against him, his services were terminated. The court further observed that it was a settled principle of law that an educated lady can not be encouraged to sit idle expecting any allowance from the husband. The wife filed an appeal against the order. It was held that the ground for rejection of the wife's application was not proper. The income of the husband must be his special knowledge; he did not make any attempt to prove either his actual income or his dismissal from job, besides, when his application for maintenance was rejected he did not challenge the same and this implied that he was not prejudicially affected by the order. Above all, according to the court, the husband had filed the divorce suit which also incurred expenditure which goes to show that he did have some income. In view of all these facts, the matter was remanded for fresh trial. According to my point of view in our times of equality, a wife is as much liable to maintain her husband as the husband is to maintain his wife -depending on the circumstances of the case. However, the trial court's observation in this case that an educated young lady cannot be expected to sit idle expecting allowance from the husband, did not find favour with the High Court. There can, however, be no hard and fast rule in this respect and each case would have to be decided on its own fact and situations.

Now, some cases with regard to the permanent alimony and maintenance under Section 25 of the Hindu Marriage Act, 1955 would be analyzed. In *Chand Dhawan v. Jawaharlal Dhawan*, the issue before the court was: Do the term "any decree" in Section 25 of the Hindu Marriage Act include an order of dismissal of the petition? The

45 (1993) 3 SCC 406
parties were married in 1972 and had three children. In 1985, a petition for divorce by mutual consent was filed in the purported to have been filed jointly by the consent of both the spouse as per the requirement of Section 13(b) of the Act. The petition was kept pending for six months. On coming to know of the petition, the wife filed objections. According to her she never consented to the divorce and the husband had duped her into signing some blank paper on a false pretext, which he used in the petition. However, some understanding was arrived at, under which the wife agreed to join the husband. Both the parties gave a joint statement and the divorce petition was got dismissed. Barely three months later, the husband filed a divorce petition on several ground. Wife's is application under Section 24 for litigation expenses and maintenance pendente lite, which was granted. Since the husband did not make the payments, the divorce proceeding was initiated by him were stayed under order of the High Court of Allahabad. The wife filed a petition under Section 25 for grant of permanent alimony on the ground that she was facing starvation whereas the husband was a multimillionaire. She also filed a petition under Section 24 for maintenance pendente lite and litigation expenses. The Additional District Judge allowed her petition and granted a sum of Rs. 6,000 as litigation expenses and Rs 2,000/- per month as alimony pendente lite from the date of application. The husband filed a revision petition against it in the High Court; the wife also approached the court seeking enhancement of the amount. Both the revision petitions were referred to a larger Bench. The husband's objection was that the wife's application was not maintainable since there was no decree under the Act, and in the absence of "any decree" no order under Section 24 or 25 of the Act could be passed. This objection was sustained whereupon
wife filed an appeal in the Supreme Court. The issue was whether the words any Section 25 includes an order of dismissal of petition. Reference was made to several cases. Some courts held that permanent alimony can be granted only when any decree and the relief sought is given, if the relief is not granted then it means that there is no decree and in such situation maintenance cannot be awarded. On the other hand, there were cases supporting the argument that the words "passing any decree" imply both the allowing and dismissal of the main petition.

After an analysis of the case law, the Supreme Court came to the conclusion that the wife's application for maintenance was not maintainable as the wife had withdrawn her consent to the divorce petition and the same was dismissed. An order of dismissal of a petition does not disturb the marriage not confers or takes away any legal character or status.

According to the court that without the marital status being affected or disrupted by the matrimonial court under the Hindu Marriage Act, 1955, the claim of permanent alimony was not valid as ancillary or incident to such affection or disruption. The wife's claim for maintenance under the Hindu Marriage Act, 1955 was dismissed. The court held that the wife's claim in such a situation can be agitated under the Hindu adoption and maintenance Act, 1956 since Section 18(1) if this Act entitles a wife to maintenance even with any disruption in her marital status. It observed that like a surgeon, the matrimonial court, if operating assumes the obligation of the post operatives and when not leaves the patient to the physician. This judgment is bound to create problems for wives whose husband want to get rid of them and file petition which for whatever reasons get dismissed. The dismissal of the
petition only goes to show that the case of the husband against the wife is unfounded. What is the fault of the wife in such case? Secondly while Hindu Adoption and Maintenance Act where a wife can seek maintenance even without any disruption of her marital status what about woman from other communities. They have to bank upon the provision of the Cr.PC.

In *Ashabi B. Takke v. Bashasab Takke,*\(^46\) the issue before the Karnataka High Court was that whether a wife's refusal to join her husband who has remarried sufficient justification for her withdrawal from him and claiming maintenance. The High Court held question of the wife deserting the husband or the husband deserting the wife pales into insignificance in the light of this development. The fact that the wife could not get maintenance earlier under Section 125 of Cr. PC proceeding also cannot have any hearing in a suit for maintenance file subsequent to the defendant husband having contracted a second marriage. This is so even if the personal law of the defendant permits him to contract more than one marriage. The second marriage of the husband *per se* is sufficient justification for a wife to leave him and claim maintenance. When that is proved, nothing else needs to be established.

In *Bhau Saheb v. Leelabai,*\(^47\) there were two main issues which had to be settled by the court:(i)Whether an order dismissing a wife's petition seeking declaration that her marriage was valid can come under the term "any decree" so as to entitle her to claim maintenance under Section 25 of the Hindu Marriage Act,1955. (ii) Whether a wife whose

\(^{46}\) AIR 2003 Kant 172
\(^{47}\) AIR 2004 Bom. 283 (FB)
marriage is void, is entitled to maintenance. The facts of the case was that shortly after marriage, the wife filed criminal case under Sections 498A, 323, and 506 of the penal Code against the husband. She also filed case for maintenance under Section 125 of the Cr. P.C. this was dismissed by the family court on the ground that she was not the legally wedded wife of the opposite party. Meanwhile she filed an application before the family court seeking declaration that the marriage was valid and the child is legitimate. Along with that she sought maintenance for the daughter. Her petition seeking declaration regarding validity of the marriage was dismissed by observing that she was not legally wedded wife since her husband was an already married man. Maintenance, however, was granted in favour of the child. In the backdrop of this legal battle she filed a petition under Section 25 of the Hindu Marriage Act, 1955 for permanent alimony which was allowed by the family court and the husband was ordered to pay Rs. 1,000 per month to the wife w.e.f. the date of application. The family court drew support for its order from several judgments. The husband appealed against the family court order. He denied solemnization of marriage and in the alternative claimed that he was already married on the alleged date of marriage with the petitioner and so the marriage if any, was void in view of Section 5(i) read with Section II of the Hindu Marriage Act, 1955, and so the "wife" was not entitled to any maintenance. The court pointed out that conduct of the parties and also other circumstances of the case are important consideration and they cannot control the discretion conferred upon the court by the expression "court may", If there can be cases of denial of maintenance to even legally wedded wife the liberal construction of Section 25 so as to entitle an illegitimate wife to maintenance would not be proper.
According to the court, it is a fundamental principle of law that in order to claim a relief from the court of law, there must be a legal right based on a legal status. When status of a woman as wife is not recognized by the provisions of the Act which confers the right of permanent alimony, she cannot be entertained for grant of relief in the absence of recognition of her status by the Act. If the construction of the word "wife" is not accepted uniformly for the same remedy provided in special legislation i.e., Section 125 of Cr, P.C. and personal law, anomalous position may occur, in personal law. The court observed: "Even while considering Section 25 to be a "welfare legislation", it cannot be ignored that a liberal construction although may benefit the second wives who are drawn into the form of marriage by keeping them ignorant about illegitimacy of the same, may encourage bigamous marriage with preventing bigamous marriage". Further the court made a distinction between a marriage which is void and one which is voidable. The court may consider granting of maintenance while declaring the nullity of a voidable marriage as the relationship would be legal in law until annulled, but not in case of nullity of marriage which is void ipso jure. The wife lost her case. The court held that any decree would not mean every decree so as to entitle a wife to claim maintenance; and further that wife of a void marriage is not entitled to maintenance. That absolving a husband of the liability to maintain his second wife who was kept in the dark about the fact of his first marriage would encourage, rather than discourage a man to enter into such bigamous marriage. A wife would rarely enter into a marriage with an already married man with full knowledge of this fact simply because she would not be denied maintenance.
In *Geeta Satish Gokarna v. Satish Gokarna*, the issue before the Court was: Can a wife under a consent decree agree to give up to her claim for any maintenance in future and would this debar her from claiming any maintenance from her husband thereafter? In the instant case, a marriage was dissolved by mutual consent of the parties and as one of the terms of the consent decree, the wife agreed not to claim any maintenance/alimony from the husband. However, after two years of the decree, she filed an application under Section 25 of the Hindu Marriage Act, 1955 for permanent alimony at the rate of Rs. 25,000/- per month from the date of application. The trial court held that the wife's application of maintenance despite the consent clause where under it was agreed that "the petitioner [wife] will not claim any maintenance or alimony in future from the respondent [husband]". Accordingly, it ordered the husband to pay Rs. 2,000 per month as maintenance to the wife. Both the parties appealed - the wife against the quantum and the husband against the very maintainability of the wife's claim. The appeals were dismissed. The High Court found no material on record which could justify enhancement of the amount in favour of the wife, and as to the husband's objection, it held that the power to grant maintenance has been conferred on the court by parliament under the Act and the parties cannot, by agreement, oust the court's jurisdiction. The court further stated that permanent alimony and maintenance are a larger part of the right to life. These provisions according to the court are included "to enable a person unable to maintain her/him to be protected. Therefore, any clause in a contract or consent terms providing to the contrary would be against public policy". The principle is that where on grounds of public policy, wife

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48 AIR 2004 Bom 345
cannot enter into such contract then the contract is void and the court will take no notice of that and ignore that part of the order though it was made by consent because as remarked by Lord Atkin 'the wife right to future maintenance is matter of public concern which she; cannot barter away.' An agreement in a consent decree not to claim maintenance cannot close the doors for a wife's claim of maintenance thereafter. Maintenance has been construed as an integral part of right to life. The decision is good as it cannot be denied that maintenance is an integral part of right to life; one really wonders whether it is fair to allow a consenting party to retract. The view taken by the court has the potential of discouraging mutual settlement of issues and consent divorce since consent agreements are package where parties agree to barter certain rights and claim to buy peace. If term and conditions of the consent agreement are fair and reasonable the courts should honour such agreement and discourage retraction.

In Surendra Kumar Bhansali v. Judge, Family Court,\textsuperscript{49} the issue was whether an application under Section 25 of the Hindu Marriage Act, 1955, maintainable while an appeal against divorce is pending. High Court held that an application, under Section 25 can be made of passing of the decree or at any time subsequent thereto. In this case, since the divorce petition by the husband was decreed and the marriage dissolved, the wife's application was held to be tenable. According to the court, the relief could have been refused if the main petition had been dismissed as per the decision of the Supreme Court in Chand Dhawan v. Jawaharla Dhawan,\textsuperscript{50} but not simply because an appeal against the divorce decree was pending. The decision is right which

\textsuperscript{49} AIR 2004 Raj 257
\textsuperscript{50} 1993 3 SCC 406
declares that an appeal against a decree of divorce does not disentitle a party from filing an application for maintenance under Section 25 of the Hindu Marriage Act, 1955. Such application, in terms of the provision of Section 25, can be filed at the time of the passing of the decree or at any time subsequent thereto. An appeal against the decree does not take away this right.

In *Sudha Suhas Nandanvankar v. Suhas Ramrao Nandanvankar*, the issue was: Can a wife whose conduct demonstration that she is trying to take advantage of her own wrong or fraud to harass the husband. The parties were married in 1995 according to Hindu rites. The marriage was annulled by a decree of nullity in 1996 on the ground that the wife was suffering from epilepsy at the time of marriage which fact was not disclosed to the husband and hence a fraud was committed on him [prior to the Marriage Laws (Amendment) Act, 1999 epilepsy was a ground on which a marriage could be avoided and decree obtained under Section 11, coupled with Section 5(ii) (c) of the Hindu Marriage Act, 1955. The word epilepsy in Section (c) of Section (5(ii) has now been deleted.] Even though the decree was *ex parte*, it was not challenged by the wife. However, after the decree the wife first claimed return of articles which were presented to her by her parents at the time of marriage. Further, she claimed expenses incurred at the marriage. During pendency of this application she again submitted application for articles and jewelry presented to her by her in-laws at the time of marriage. She further claimed permanent alimony. The wife's application was partly allowed by the family court. Hence, she files an appeal in respect of part rejection of her application. The main

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51 AIR 2005 Bom 62.
issue for consideration was in respect of alimony claimed by her. The court of nullity conceded that a wife is entitled to claim alimony even though a decree of nullity is passed at the instance of the applicant. This, however, according to the court is not an absolute right. If a wife's conduct is such that the court feels that she should not be granted maintenance, the court may refuse her application. In this case, according to the court the nondisclosure by the parents of the appellant and the appellant's accepting the decree as it is, without making any grudge in respect of the ground that the appellant was suffering from epilepsy prior to the marriage reflects upon the conduct of the applicant, and if we take into consideration this aspect what we find is that the appellant is trying to take advantage of her wrong or fraud and is trying to harass the respondent by claiming the amount of alimony". And further, the court held "What we find is that after a decree of annulment, the respondent has married and he is having a child. Now this appears to be an attempt on the part of the appellant and her parents to disturb the marital life of the respondent which he has tried to settle after annulment of the marriage. This is an attempt to shift the liability of maintenance by the appellant wife on a husband who was not fault and who has not consummated the marriage. Even though the law permits the right of alimony in favour of the appellant, however, the conduct and circumstances involved in the present case does not permit us to pass an order of permanent nature in favour of the appellant". The wife's appeal was, thus, dismissed.

Now some cases relating to the Section 18 of the Hindu Adoption and maintenance Act, 1956, will be discussed. In Ranjit Kumar
the issue before the Court was: Is a married woman who lived with a married man as his wife, entitled to damages because she, not being a legal wife is not entitled to maintenance? Facts of the case were that a married man lived with a woman for several years including her to believe that she was his wife, and also had children from her. Later they fell apart. The woman filed a suit for maintenance under the Hindu Adoption and Maintenance Act, 1956, and also under Section 125 of Criminal Procedure Code, 1973. The man denied marriage and his liability to maintain her. The additional District and session judge held that in view of long and continuous co-habitation between the parties, there was a strong presumption of marriage and that mere absence of proof regarding marriage rites could not dislodge the presumption unless there was proof of insurmountable obstacles to a valid marriage. A decree of maintenance for Rs. 500/- per month was passed. Hence, husband appeal. It was argued that Section 18 of the Hindu Adoptions and Maintenance Act, 1956, makes no provision for maintenance from a 'husband' with whom a woman has entered into a void marriage. The contention was accepted by the court and it was held that the woman was not entitled to maintenance. The Court, however, ordered the man to pay damages. According to the court, it is obvious that the man must have induced her to believe that she is his wife: for such immoral activities, the applicant should not be spared altogether, though the damage that had been caused, both physically and mentally, could not be compensated in any way," the court remarked. He was, accordingly, directed to pay Rs.30000/- by way of damages. This case is yet another example of how a woman can be defrauded and entrapped into a

52 AIR 1996 Cal. 301
relationship and the man can just get away because under the law they are not husband and wife. There is a need for a law which should impose liability on such erring males who defraud women into a legally void marriage only to abandon them later and then take advantage of their own illegal/immoral act. As rightly remarked by the court on this case, no amount of damage can compensate the damage caused to the woman.

In Boummma v. Siddappa Jeevappa Patarad,53 the main issue was whether “an arrangement to live separately” be treated as a "divorce deed". The facts of the case were that a wife filed an application for maintenance under Section 18 of the Hindu Adoption and Maintenance Act1956. The parties were married in 1966 and the claim was made by the wife in 1995. She claimed past maintenance also. She pleaded desertion and alleged that the husband had another wife and they both ill treated her and threw her out of the house. The husband resisted the application on the ground that their marriage had been dissolved by consent as per "an arrangement to live separately", and in terms of the provision of Section 18 of the Hindu Adoptions and Maintenance Act, 1956, a claim for maintenance can be made only when there is subsisting marriage. The trial court held that there was no maintenance under the provisions of the Hindu Adoptions and Maintenance Act. Hence the wife appeals, it was held by the court that the second marriage by itself is desertion of the wife and that fact having been proved; no further proof of desertion was required. Besides, "an arrangement to live separately", even assuming that it is proved, could not have the effect of bringing the marriage to an end. Such agreement

53 AIR 2003 Kant 342
was, allegedly, entered into long after the enactment of the Hindu Marriage Act, 1955. According to the court "a marriage in law can be dissolved only by a method recognized in law and not otherwise". The so-called arrangement sought to be passed off as a divorce-deed" could not, firstly, be treated as a divorce, and secondly, after the coming into force of the Hindu Marriage Act, 1955, a marriage could be dissolved only under the provisions of the Act, of exceptionally, under custom permitting divorce. In this case there was no assertion by the husband that there was a divorce under a customs prevalent in the community to which they belonged. The marriage was thus held to be subsisting and the wife's claim tenable and bona fide. She was, however, not entitled to past maintenance but only to maintenance with effect the cast of her application. In Sheela Rani v. Jagdish Chander Sharma.\(^5^4\) It was held that the right of residence as part of maintenance is a personal right of the wife.

(c) Identification of Pitfalls

The Hindu marriage Act, 1955 is social welfare legislation. It was with this end certain rights were conferred on Hindu women by the Act, Therefore, such a piece of legislation should be constructed by adopting progressive and liberal approach and not a narrow and pedantic approach. However, there is some judicial pronouncement which shows the strict behaviour of Judiciary toward the aggrieved spouse. In the matter of implementing the provisions of Act, the technicalities of the provision must be left to some extent. This view was adopted by the High Court of Calcutta in Sisir Kumar v. Sabita

\(^{54}\) AIR 2004 Del 158
“The word 'Wife' or 'Husband' in Section 25, has been used as convenient terms to refer to the parties to a marriage whether or not the marriage was valid or subsisting. Marriage had been used to include a purported marriage which was void *ab initio*”.

Here it is also a noteworthy fact which was discussed in *Amit Kumar Sharma v. VIth Add. District Session Judge Bijnor*, that whether a wife can also seek maintenance for husband’s mother who need to be taken care of under the same application for maintenance under Section-25 when mother is staying with her? Here court has taken a very rigid and technical view and ordered the old mother to file separate claim under Criminal Procedure Code, 1973 or under Section 20 of the Hindu Adoption and Maintenance Act, 1956. While awarding the maintenance in an application the court must consider, *inter alia*, the needs of the applicant. When the husband's mother is staying with the estranged wife, the court should have given consideration to those needs rather than driving her (the mother) to file separate suits for maintenance under Cr. P.C or the Hindu Adoption and Maintenance Act, 1955.

The another pitfall which may be noticed is that in some cases the husband has tried to be absolved of the liability to pay the arrears of interim maintenance to the wife after allowing dismissal of the main petition under the Act, e.g. in *Lataben Y, Goswami v. S. Goswami*, that has been discussed earlier in this project. Here the court noticed

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55 AIR 1972 Cal.
56 AIR 1999 All
57 AIR 1999 Guj.
the husband’s trick and wife was found entitled to the arrears. The husband was not allowed to defeat the claim of wife to the arrears of maintenance by simply or not proceeding with the main petition.

Another point of discussion regarding the identification as pitfalls in the application of the provisions of Hindu law is in *Ramesh Babu v. Usha*.\(^5\) In the instant case, the husband denied the maintenance of wife on the ground that the wife is entitled to free legal aid. The Court refused the argument of husband and awarded maintenance to wife. The court caught the trick of husband and gave relief to wife.

In some cases the husband contended against the maintainability of wife's claim of maintenance under the Hindu Marriage Act, 1955 on the ground that wife gave up her claim under consent decree for maintenance in future, e.g. in *Geeta Satish Gokarna v. Satish Gokarna*.\(^5\) This case came before Bombay High Court, the court, however, refused to accept the husband's argument and held that "An agreement in consent decree not to claim maintenance cannot close the doors for a wife to maintenance thereafter".

The other loophole in the Act is that there is no legislative provision regarding maintenances to the place of filing of petition or jurisdiction of court. In the absence of the specific provision regarding this matter the provisions of CPC is applied, In *Sucha Dilip Ghate v. Dilip Shanta Ram Ghate*,\(^6\) the issue was: can a maintenance petition by wife under the Hindu Adoption and Maintenance Act, 1956 be filed at a place where wife resides. Here Section 20 (c) of CPC was applied and was

\(^5\) AIR 2003 Mad.  
\(^5\) AIR 2004 Bom. 345  
\(^6\) AIR 2003 Bom. 390
held where petitioner resides.

In *Popri Bai v. Teerath Singh*\(^{61}\) this case was explicit example of how unscrupulous husbands try to harass their wives and use the process of court for achieving this. The court noting the tricks of the husband with regard to the alimony *pendente lite* under Section-18 of Hindu Adoption and Maintenance Act, 1956, ordered the maintenance from the date of application and not from the date of the order. Thus, there is some pitfalls in the Hindu Law regarding the maintenance of wife which have already been pointed out. As the maintenance of the women is a very sensitive issue, so, it must be handled in a careful manner, it must be paid sharing the due regard to the intention of the legislature.

**(d) Advocacy for Reforms and Improvements**

It is a well known fact that Hindu Marriage Act, 1955 is social welfare legislation. The judiciary must always while interpreting its provision, keep in consideration its social welfare nature. A liberal approach must be adopted in the interpretation of its provisions.

It is also necessary that the tricks of the spouses, for avoiding the charge to maintenance must be noticed timely so as to implement the Act sharing the true intention of legislature for its enactment.

Right of a wife to maintenance where a marriage is void had always been controversial. An amendment in law is in offing where the simple fact of the parties having gone through a ceremony of marriage would be enough to entitle the wife to maintenance.

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\(^{61}\) AIR 2004 Raj. 128
It is also a remarkable point that a subjective approach in order to avoid the grant of relief must not be allowed by a court. The denial of maintenance under Section-25 of Hindu Marriage Act, 1955, was due to the concealment of her epilepsy by the wife before marriage on the already obtained annulment. Here I am not justifying "wrong", "misconduct" or "fraud" on the part of any spouse but only indicating how subjective approach can lead to varying interpretations in order to deny or granting a relief. Bakul Bai v. Ganga Ram case the fraud is serious but the victim is the wife only. Thus the court, while deciding this type of matrimonial case, must always take into consideration that the aim of the enactment should not be frustrated. To avoid the confusion regarding the maintenance as has been discussed in Geeta Satish Gokarna v. Satish Gokarna, there must be insertion of the provision by the legislature regarding the nullification of consent agreement not to claim maintenance in future as the maintenance has been construed as an integral part of right to life.

The Hindu Law is social welfare legislation and beneficial in nature, it has been enacted in comprehensive manner so, it would be unfair not to have the specific provision regarding the place of filling of petition or jurisdiction of the court. There must be some specific provision regarding that to face the problem raised in Sucheta Dilip Ghate v. Dilip Shanta Ram Ghate. The insertion of the specific provision regarding the place of filing suit will cause the great help in avoiding confusion and will reduce the delay in deciding cases.

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63 1988 1 Scale 188.
64 AIR 2004 Bom. 345
65 AIR 2003 Bom. 390
4.3 MAINTENANCE OF WIFE UNDER MUSLIM LAW

(a) Analysis of Legislative Provision

The rules regarding the maintenance of Muslim wife has been given in Sharia. According to the ordinary sequence of natural events, the wife comes first. Her right of maintenance is absolute. Her right remains unprejudiced even if she has property or income of her own and the husband is poor. A husband is bound to maintain his wife, irrespective of being a Muslim, non-Muslim, poor or rich, young or old if not young to be unfit for matrimonial intercourse. In addition to the legal obligation to maintain, there may be stipulations in the marriage contract which may render the husband liable to make a special allowance to the wife. Such allowances are called *kharch-i-pandan*, *guzara*, *mewa-khori*, etc. The husband is bound to maintain if she fulfils the following conditions: (i) She has attained puberty, i.e., an age at which she can render to the husband for his conjugal rights; (ii) She places and offers to place herself in his power so as to allow free access to herself at all lawful times and obeys all his lawful commands. It is to be noted that a Muslim wife is not entitled to maintenance in certain conditions. These conditions are: (i) If she abandons the conjugal domicile without any valid cause; (ii) If she refuses access to her husband without and valid cause; (iii) If she disobedient to his reasonable commands; (iv) If she refuse to live with her husband without any lawful excuse; (v) If she has been imprisoned; (vi) If she has eloped with somebody; (vii) If she is a minor on which account marriage cannot be consummated. (viii) If she deserts her husband voluntarily and does not perform her marital duties, and (ix) If she makes an agreement of desertion on the second
marriage of her husband.

The wife's right to maintenance ceases on the death of her husband, as in this condition her right of inheritance supervenes. The widow is, therefore, not entitled to maintenance during the Iddat of death. But under Muslim Law, a divorce wife is entitled to be maintained by her former husband during the period of Iddat.

Now after discussing the maintenance of Muslim wife during the subsistence of marriage, it is planned to discuss the maintenance of Muslim divorcee and controversy between the provisions of Criminal Procedure Code and the Muslim Personal Law on the point of maintenance of Muslim divorcee. It is pertinent to note that under classical Islamic law, a divorcee is entitled to get the maintenance provision but the same will continue till the expiry of the period of iddat. There is controversy between the classical rules of Islamic Law and provisions of Criminal Procedure Code regarding maintenance. The controversy arose when British India took a legislative step to regulate the institution of maintenance of wife, under Section 488 of the old Criminal Procedure Code, 1898, the husband might be compelled to make a monthly allowance not exceeding Rs. 500 per month as maintenance to his wife. But the wife's right to maintenance under this Section could be defeat by the husband by obtaining the divorce under the personal law. The provision under Section 488 of the old Criminal Procedure Code, 1898 was very much in the line with the sprit of Islamic law, where it furnished a speedy remedy for securing maintenance to all Indian wives neglected by their husband on certain grounds including bigamy. In several cases the separate maintenance orders were granted in favour of the wives, but in many cases where a
maintenance order under Section 488 of Criminal Procedure Code, 1898 were granted to Muslim wife, her husband subsequently divorced her by *Talaq*, consequently the maintenance order so granted ceased to be effective after the expiry of *iddat* period as per the rules of Muslim law. This situation caused hardship and opened the gate for a long battled between the *Sharia* on one side, Criminal Procedure and the Indian courts on the other. To remove conflict, the joint committee recommended that the benefit of the provisions should be extended to a woman who has been divorced by her husband and it should continue so long as she has not been remarried after the divorce. Accordingly, the uniform law of maintenance was introduced to all citizens of India through the amendment in criminal procedure code in 1973. Accordingly, clause (b) of explanation to Section 125(1) was enacted, which laid down that for the purpose of maintenance "wife" includes a woman who has been divorced by or has obtained a divorce from her husband and has not remarried, however, Section 127 (3)(b) was added to provide protection to Muslims and Muslim Personal laws. This code under chapter IX, provides a uniform law of maintenance through the amendment in Criminal Procedure Code in 1973 the uniform law of maintenance was introduced to all citizens of India. The definition of wife as given in explanation of Section 125 of the Criminal Procedure Code, 1973 is noteworthy for the purpose of analysis: •"Wife includes a woman who has been divorced by or has obtained a divorce from her husband and she has not remarried". This definition of the wife was objectionable to the scholars to the Islamic matrimonial jurisprudence as the same was foreign to the Islamic concept of wife and Indian Muslim resented and thus their resentment was duly recognized. This definition of wife laid down by the legal fiction on the basis of which
the two strangers being of opposite sex (after the divorce on the expiry of *lddat* period) are treated to be the husband and wife under Section 125 of the Cr. P.C. for the purposes of maintenance even after divorce. When the bill to this effect was in process it was subjected to tooth and nail opposition by Muslim members in the legislative house *viz*, Ibrahim Sulaiman Seth, G.M. Banatwala, and others. They objected the explanatory clause defining the term 'wife' and they advanced potent advocacy that the Muslim must be exempted from the ambit of the definition of wife, but the strong defense of the then law minister and minority of opposition including Muslim members came in the way and resultanty could not achieve the desired goal. The law minister painted out that the explanation in Section 125, of the Cr.P.C. did not affect the civil status of husband and wife and manner and besides this, made the following observation: "we have received a lot of representations which show that after divorce, woman are generally in verybad plight and it is a very difficult social and humanitarian problem, I do not think that Muslim Personal Law comes into the problem". However, the advocacy of law minister and other supporter's plea could not satisfy, and a proposed modification was vehemently opposed by the numerous Section of Muslims.

The definition of the wife was objected by the scholars Islamic matrimonial jurisprudence as the same is foreign to Islamic concept of wife and Indian Muslim resented and thus their resentment was duly recognized, Resultantly, Section 127 (3)(b) was added to satisfy the Muslim community's resentment and the same was desired to work as exception, this empowers the Magistrate to cancel the order to maintenance passed under Section 125 of the code. If the divorce
women has received whether before or after the date of the said order, the whole or the sum which was payable under customary or personal law applicable to parties. The Provision for maintenance of wives, whether married or divorced, who are unable to maintain themselves is a social welfare measure applicable to all people irrespective of caste, creed, community or nationality.

In Bai Tahira's case, the supreme Court did not turn to the Holy Quran but confined itself to Section 125 considering it as a secular provision and came to the conclusion that the claim of maintenance by the divorcee was indefeasible be the husband Hindu, Muslim or others, so long as the spouse had not remarried and had no means to maintain herself. The very next year the court reinforced it's earlier decision in Fuzlunbi's case in the following words:

"Whatever be the facts of a particular case, the Criminal Procedure Code by enacting Section 125 to 127, charges the court with the humane obligation of enforcing maintenance or its just equivalent to ill used wives and the castaway ex-wives, only if the woman has not receive voluntarily a sum at the time of divorce, sufficient to keep her going according to the circumstances of the parties".

Section 127 (3) (b) of Criminal Procedure Code lays down that "Where any order has been made under Section 125 in favour of a woman who has been divorced by or has obtained a divorce from her husband, the Magistrate shall cancel such order of maintenance if he is satisfied that the divorced woman has received the whole of the sum

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66 Mohammad Shabbir, Muslim Pesonal Law and Judiciary (Ed.. 1st, 1988, Allahabad)
whether before or after the date of such order under the personal law applicable to the parties.

The position as finally enacted laid down that through court could grant maintenance to a divorced wife, at the time of so doing, they should give due consideration as to whether she had already realized from her husband in full, her post divorce entitlement under any customary or the personal law of the parties.

The perusal of the legislative history of Section-127 (3) (b) made it clear that this provision was brought to provide to safeguard to Muslims and their persons law. It empowers the magistrate to cancel the order Section 125 of Criminal Procedure Code, 1973 if the divorced women who has received whether before or after the date of said order the whole of sum which was payable under any customary or personal law applicable to those parties. Mr. Justice Krishna Iyer further states: "Neither personal law nor other salvationary plea will hold against the policy of public law pervading Section 127 (3) (b) as much as it does Section!25. So a farthing is not substitute for a fortune nor naive consent equivalent to intelligent acceptance". Thus the impact of Sections 125-127 of the Criminal Procedure Code, 1973, on the maintenance rights of Muslim ex-wives has been the subject of interpretation through Indian judiciary. The ruling laid down in Bai Tahira's case and Fuzlunbi's case, and their objection ability to Muslims are well known and to get the desired result in 1981. The Supreme Court was asked to reconsider these ruling in Mohd Ahamd Khan v. Shah Bano Begum.\(^69\) However it added fuel to the fire by

\(^69\) AIR 1985, SC 945.
laying down: "Although the limits of the Muslim Husband's liability to prove for maintenance of the divorced wife is up to the period of Iddat it does not contemplate or countenance the situation envisaged by Section 125 of the code, it would be incorrect and unjust to extend the above principle of Muslim law cases in which the divorced wife is able to maintain herself. The husband liability ceases with the expiration of 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”.

But chief Justice of Supreme Court Mr. Justice Y.V. Chandrachud going for beyond Mr. Justice Iyer's thinking intruded into Muslim Personal Law saying the said special provision of the code totally ineffective. Two points mainly alarmed the Muslim of such judgment for the Alleged attempt of the judge to "reinterpret" certain Qur’anic verses and Second admonition to the state in respect of the uniform civil code.

As a result religious sentiments of Muslim were not only injured by the wording and purport of the Shah Bano's judgment, but also much more by its projection on an anti - Islamic law ruling of the highest court of justice in the country. There upon Muslim organizations and individuals under the leadership of the All India Muslim Personal law Board started a country wide agitation and caused the majority of Muslim citizen in India to demand statutory protection of their personal law.

Some relevant provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 regarding Maintenance of Muslim Divorce are in need of separate treatment. Section 3(l)(a) of Muslim Women
(Protection of Rights on Divorce) Act, 1986 lays down that a divorced Muslim wife 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. Section 3(1) (b) of Muslim Women (Protection of Rights on Divorce) Act, 1986, lays down the condition where divorced Muslim wife herself maintains the children born to her before or after her divorce, In this condition she will be entitled to 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. Section 3(l)(c) of Muslim Women (Protection of Rights on Divorce) Act, 1986 lays down that a Muslim divorced wife shall be entitled to an amount equal to the sum of *mahr* or *dower* agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law. Section 3(l)(d) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 lays down a Muslim divorcee will be entitled to 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. Section 3(2) of this act lays down that where a reasonable and fair provision and maintenance or the amount of *mahr* or dower due has not been or 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 authorized by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, *mahr* or *dower* or the delivery of properties, as the case may be.

Section 4 of Muslim Women (Protection of Rights on Divorce) Act,
1986, deals with the rules as to order for payment of maintenance. Sub-section (1) of this Section lays down that notwithstanding anything contained in the forgoing provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, 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 reasonable and fair maintenance to her as he 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 period as he may specify in his order. There is a proviso in this Section which provides that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and 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. The second proviso of this Section provides further that if any of the parents is unable to pay his or share of the maintenance ordered by the Magistrate on the ground of his or 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 order by him be paid by such of the order relatives as may appear to the Magistrate to have the means of paying the same in such proportion as the Magistrate may think fit to order. Sub-section 2 of this Section lays down that where divorced woman is unable to maintain herself and she has no relatives as mentioned 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 shares of those relatives whose shares have been
ordered by the magistrate to be paid by such other relatives under the
proviso to sub-Section (1), the Magistrate may, by order direct the
State Wakf Board established under Section 9 of the Wakf Act (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 the 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 of the Muslim Women (Protection of Rights on Divorce)
Act, 1986, gives the option to divorced Muslim wife to be governed by
the provisions of Section 125 to Section 128 of Criminal Procedure
Code, 1973, but the condition is that there must be an agreement
between the husband and wife by an affidavit, that they would prefer
to be governed by the provisions of Section 125 to Section-128 of
Criminal Procedure Code, 1973. It is also necessary that the declare
must be made on the date of the first hearing. The explanation of this
Section says that for the purpose of this Section, "date of the first
hearing of the application" means the date fixed in the summons for
the attendance of the respondent to the application.

Section 7 of the Muslim Women (Protection of Rights on Divorce)
Act, 1986, is the transitional position which lays down that every
application by a divorced woman under Section 125 or under Section
127 of the Criminal Procedure Code , 1973 (2 of 1974), pending
before a Magistrate or the commencement of this Act, shall,
notwithstanding anything contained in that code and subject to the provisions of Section 5 of this Act, be disposed of by such magistrate in accordance with the provisions of this Act.

(b) Evaluation of judicial pronouncements

The judicial attitude towards the application of maintenance provisions to Muslim wives and divorcee has created a crisis. The interpretation of Section 125 and 12 (3) (b) of the code as applicable to Muslim has been considered by the Supreme Court and High Courts but the decision are somehow opposed to the Spirit of Islamic Law. The courts have dealt with the following issues from time to time.

1. Whether Section 125 of the code is violative of Articles 14 and 19, offends the fundamental rights under Articles 25 and 26 of the Constitution?

2. Whether the definition of the wife envisaged in explanation (b) of Section 125 (1) of the code is in conflict with the personal law of Muslims of India?

3. Whether a Muslim divorce can seek the benefit of Section 125 of the code?

4. Whether the payment of mahr by a Muslim satisfied the requirements of Section 127 (3) (b) and obliged the Magistrate to cancel a maintenance order made in favour of a Muslim divorcee? The Criminal Procedure Code, 1973 provides a uniforms law of maintenance. The new provisions enjoin payment of maintenance to divorce till their remarriage of death. It imports to create an artificial relation of husband and wife
only for the purpose of maintenance after divorce.\textsuperscript{70} Section 125 of the Criminal Procedure Code, 1973 by means of an explanation sought to extend the magisterial power to provide for maintenance of an ex-wife also.

However, an exception in the form of Section 127 (3) (b), this empowers a magistrate to cancel the order of maintenance made under Section 125 of the code, if the divorced women has received, whether before or after the date of the said order, the whole of the sum which under any customary of personal law applicable to the parties was payable.\textsuperscript{71}

Where any order has been made under Section 125 of Cr. P.C. in favour of a women who has been divorced by or has obtained a divorce from or her husband, the magistrate shall if he is satisfied that the women has been divorced by her husband and that she has received, whether before or after the date of order, the whole of the sum which under any customary or personal law applicable to the parties, was payable on such divorce.

Under the new code the questions arise:

1. Whether a Muslim divorce can seek to the benefits of Section 125?

2. What is the 'sum due' from the husband to the wife on divorce under the Muslim law?

3. If the husband paid the whole of sum is there any justification in

\textsuperscript{70} See Chapter 9 of the new code- 1973.
\textsuperscript{71} See 127 93(b) of the Cr. PC.
refusing the benefits conferred by Section 127 (3) (b)?

In 1976, the Division Bench of Kerala High Court in *Kunhi Moyln Case*\(^\text{72}\) held that under the new code the Muslim divorced wife is entitled for maintenance under Section 125 of the new code after the *Iddat* period. In *U.A. Khan*\(^\text{73}\) the Karnataka High Court observed that the maintenance for some additional period beyond the period of *Iddat* becomes available to divorced Muslim women under Section 125 of the code. This additional benefit does not at all in the conflict with the right she has under the Mohammaden Law.

For the first time in *Kunhi Moyin's* case, the division of bench of Kerala High Court has held that the payment of maintenance during *'Iddat'* or the payment of *Mahr* will not exonerate the Muslim Husband from the liability towards the divorced wife under Section 125. Justice Khalid speaking on behalf of division Bench gave the social purpose of legislation and observed:

"The new definition (of wife) does not violate the fundamental rights guaranteed under article 25 (1) of the constitution. The definition of Section 125 (1) comes with the expression "providing for social welfare and reform", legislation contained in Art 25 (2) of the constitutions, and hence the challenge of Articles 25 is not available for the petitioner. The Criminal Procedure Code, 1973 transcends the personal law of the parties".

The Constitution is openly and determinedly secular. Religious discrimination on the part of the state is forbidden.\(^\text{74}\) Freedom of

\(^{74}\) Article 15, 16, 29(2), 30(2) of the Indian Constitution
Religion is guaranteed. Dr. Ambedkar in the constituent Assembly had expressed his awareness of the situation that would crop out in the field of social welfare legislation and social welfare programs of a government.

In *Iqbal Ahmad Khan*\textsuperscript{76} Case, the Allahabad High Court held that Section 125 of the code is not repugnant to Article 25 of the constitution. The court further observed that the history of applicability of Muslim law shows that the payment or non-payment of maintenance to one's wife could never be regarded as a matter of personal law.

In *Isac Chandra Palker*\textsuperscript{77} Case, the division bench of the Bombay High Court held that the maintenance right conferred upon the divorcee even after the *Iddat* period, under Section 125, is additional and independent right. The provisions of the *Shariai Application Act*, 1937 and Section 125 of the Cr.P.C. can stand together as there is no inconsistency between them.

Justice R.K. Shukla of Allahabad High Court in *Mohd Yameen*\textsuperscript{78} Case, observed that Section 125 is applicable and enforceable whatever may be the personal law of parties. Thus Kerala, Bombay, Calcutta and Karnataka High Court have taken the view that the Muslim Divorcees are entitled to the maintenance under Section 125 of the code even after the *Iddat* period. However, later Bombay, Andhra Pradesh and Full bench of Kerala High Court have taken a contrary view holding that if the husband satisfied the magistrate in proceedings under Section 125 of the code, that he has complied with requirements of

\textsuperscript{75} Article 25, 26, 28m 29 and 30(1) of the Indian Constitution
\textsuperscript{76} I.A. Khan v. State of UP 1980, Cr. LJ (80 NOC) All 34.
\textsuperscript{77} Isac Chandra Palker v. Nayamat Bi (1980) Cr. LJ. 1180
\textsuperscript{78} Mohd Yameen v. Shamim Bano (1984) Cr. LJ 1297
Section 127 (3) (b), the divorced wife does not have any subsisting right of maintenance.

The Supreme Court of India in case of Bai-Tahira v. Ali Hussain\(^{79}\) found itself in dilemma at the time of interpreting Sections, of Criminal Procedure Code, 1973. The facts of the case are enumerated as follows:

The respondent Ali Hussain (Husband) married the appellant Tahira (Wife) as a second wife, way back in 1956, and after few years had a son by her.

The initial warmth vanished and jealous is of triangular situation erupted marrying mutual affection. The respondent divorced the appellant around July 1962.

A suit relating to a flat in which the husband had housed the wife resulted in a consent decree, which also settled the marital dispute. For instance is recited that the respondent had transferred the suit premises, namely a flat in Bombay to the appellant and also the shares of the cooperatives housing society, which built that flat. The amount of *Mahr* (money Rs. 5000/-) and maintenance of *Iddat* period was also paid to the appellant.

The plaintiff declares that she has no claim or rights what so ever against the defendant or against states or properties of the defendant.\(^{80}\)

After the enforcement of code\(^{81}\) wife made a claim for maintenance from her husband under the Section.

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\(^{79}\) AIR 1979 SC 362

\(^{80}\) 127 (3) (b) of Cr. PC

\(^{81}\) See Section 125 of Cr. PC.
In the instant case, supreme court surprisingly ignored the express legislative intention and connected the amount of dower payable at the time of divorce under the personal law with the amount of maintenance which accordingly to the court must sufficient to maintain the divorced women.

The Apex Court Bench, consisting of Justice Tulza Pulkar and Justice Pathak honoured the appeal of Bai Tahira 's maintenance and on behalf of the court justice Krishna Iyer observed the following.

He further says: The payment of illusory amount by way of customary or personal laws requirement will be considered in the reduction of maintenance state but can not annihilate unless it is reasonable substitution. The observation of the Supreme Court has amended some words in Section 127(3)(b) giving meaning t it that the magistrate is empowered to cancel such order on the satisfaction that such whole of the sum is sufficient to do the duty of the wife and if it is not. It shall any be adjusted to be claim. Now in effect 'magistrate shall cancel' has turned to be 'magistrate may cancel' and after the words 'whole of the sum' the words 'sufficient to do the duty of maintenance' are inserted by construction.

In Fazlun Bi v. Khader & others\(^{82}\), the Apex court again followed the ruling in Bai Tahira's case. Where the husband had divorced his wife & paid Rs. 500/- as a Mehr and Rs. 750/- as a maintenance for the Iddat period. The Andhra Pradesh High Court made a clear distinction from the issue raised in Bai Tahira's case. In the instant case the husband did not raised any plea based on Section 127 (3) (b) of Cr.

\(^{82}\) (1980) Cr. LJ 1249.
P.C. But the Supreme Court reiterating its previous ruling observed that whether or not the plea was explicitly answered in that case, the wife was given right to demand maintenance from her husband. The facts of the case are enumerated in the following manner:

Fazlun Bi, the appellant married Khader Wall, the respondent in 1966 and during their conjugal relationship a son was born to them. Due to some misunderstanding and strain relationship between the couple, the appellant left the house of her husband and went to her father's house. She prayed for maintenance, which was granted by lower court and upheld by the High Court. After this the respondent divorced his wife unilaterally and paid her amount of 'Mahr' which was Rs. 500/- and the maintenance for the period Iddat which Rs. 750/- on the basis of divorce. The appellant Fuzlun Bi was ordered not entitled for maintenance as her 'Mahr' money and maintenance for 3 months was already paid. The session judge and High court also upheld the order of the magistrate. The appellant landed in Supreme Court against this judgment. The judgment was delivered by justice Krishna Iyer on behalf of Justice Chennappa Reddy & Justice A.P. Singh. The Honorable justice Krishna Iyer again expressed. That the payment of personal law amount as envisaged by Cr.PC\textsuperscript{83} should be reasonable and not illusory. According to justice Krishna Iyer: "even by harmonizing payments under personal and customary laws with the obligation under Section 125 to 127 of the liquidated and not a illusory amount will released the former husband from the continuing liability only if the sum paid is sufficient to maintain the former wife and salvage from the destitution. The payment of amount, customary or

\textsuperscript{83} Section 127(3)(b)
others, contemplated by the measure must inset the intent of preventing destitution and providing a sum which in more or Jess the present worth of the monthly maintenance allowances the divorces may need until death or remarriage overtake her. The policy of the law about neglected wives and destitute divorcees and Section 127 (3) (b) takes care to avoid double one under custom at the time of divorce and another under Section 125, A farthing is no substitute for a fortune nor naive consent equivalent to intelligent acceptance",

*Mahr* as defined by Muslim law is a token of respect for a Muslim women and payment of the *Mahr* would be payable by the husband in the loss of connubial relationship. The principle laid down in *Fazlun Bi* and *Bai Tahira's* case violate the substantive Islamic law of maintenance. The approach of SC reflects the judicial legislation and not judicial interpretation. It is well established fact that constitution of India is the supreme law of the land. Therefore, the courts are in duty to follow the constitution rather then to deviate from the very sprit of the Constitution. Constitution is the source from which every institution derives authority admits the theory of separation of power. Therefore, constitutionally the approach of the Apex court in the instant case is not legitimate. There is an experiment to give the harmonious construction to the Section 125 and 127(3)(b) or Cr. P.C. so as to achieve the true intention of the legislation. Section 127(3)(b) was mean to provide protection to Muslim Women and dilute the evil effect of the definition of the 'wife' given under Section 125 of Cr.P.C. But it is very unfortunate that judiciary could not take the cognizance in number of cases of conflict between Muslim personal law and

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84 Fazun Bi v. Khader and another (1980) Cr. LJ 1249
Section 125 of Cr.P.C. There is a clear cut conflict between Section 125 of Criminal Procedure Code, 1973, and Muslim law. The court has restricted itself to only one aspect of the problem, that is right of a women saying that it is right of the women conferring an additional right is not in conflict with Muslim law, But the court failed to consider this important aspect, the duty of husband under Islamic law under Islam he is under obligation to pay maintenance till *Iddat* period and not after that period and divorce. Where as Section 125 required conversely.

Moreover the provision of the Cr.P.C. are applicable to all Indians irrespective of their cast, creed and religion. In order to prevent any grievance to any portion of state population by any state law or action special enactment are made to harnessed any excessive effect on their faith and sentiments. Thus in case of any inconstancy with Section 125 of Cr.P.C. and the Shariyat Application Act, 1937, latter should prevail. The definition of wife leads to the fact that a divorced Muslim woman irrespective of more resolution of marriage is entitled to maintenance up to the marriage or death.

Therefore, the correct construction of Section 127(3)(b) which impliedly protects the Muslim personal law, is that it is applicable to all the modes of the Muslim divorce determining the period of maintenance of divorced women. Further, Section 127(3)(b) does not deal with the case in which divorce has been obtained through the process of law.
Position after Shah Bano’s Judgment

The unanimous decision of a five judge's constitution Bench of the Supreme Court in *Mohd Ahmad Khan v. Shah Bano*\(^5\) has evoked strong reaction among the Muslim and has also created the crisis. The facts of the case are as follows:

Mohd Ahamd Khan an advocate of Indore married Shah Bano in the year 1932. In the course of matrimonial wedlock three sons and two daughters were born to Shah Bano, lived as husband and wife for more than four decades. But then Mohammad Ahmad Khan drove Shah Bano of the matrimonial home. In the year 1975, in April 1978. after Shah Bano filed a petition under Section 125 of the code in the court of Judicial Magistrate, Indore asking for maintenance allowing from her husband of Rs, 500/- per month. Six months later filing of petition by Shah Bano her husband on November 6, 1978 divorced her by an irrevocable Talaq then Mohd Ahamd Khan himself, opposed the petition on the ground that he had already divorced her and paid her a sum of Rs. 3000/- on account of *Mahr* and maintenance for the period of *Iddat*. In August, 1979 after hearing both the sides the magistrate overruled the defence of Mohammad Ahmad Khan and passed an order granting Shah Bano a sum of Rs. 25/- per month by way of maintenance. She was not happy about the magistrate order as the income of the husband was around 60,000/- per year. Therefore, she filed an application in M.P. High Court to enhance this amount. The High Court enhanced the maintenance allowance to 179, 00 per month. Aggrieved by this order of the High Court, Mohammad Ahmad Khan filed on appeal in the Supreme Court which was heard by a Bench
consisting of Justice Murtaza Fazal Ali and Justice A. Varadh Rajan observed that Bai Tahira\textsuperscript{86} and Fazlun Bi,\textsuperscript{87} cases where were not rightly decided, therefore, they referred this appeal to a larger Bench by an order.

In this case Mohammad Ahmad Khan sought to defend his case in the following enumerated grounds:

1. Under Muslim law a divorced women is entitled to maintenance during the period of \textit{Iddat} only and not there after.

2. Since, Mohd. Ahmad Khan has already paid her the dower money which was according to him sum payable on divorce within the meaning of Section\textsuperscript{88} of Cr. P.C. and maintenance order could be passed against him or maintained any longer the Five Judges Constitutional Bench of the Supreme Court, after wide ranging discussion based arrangement by the courts as well as by several intervenes including the All India Muslim Personal Law Board, animously upheld a single judgment delivered by the chief justice Chandrachud.

3. A divorced wife is entitled to apply for maintenance under Section 125 of the code. A \textit{Mahr} is not a sum which under Muslim law is payable on divorce. So \textit{Mahr} does not fall in the ambit of Section 127 (3) (b) of the code. If there is only conflict between the Section 125 of the code and Muslim Personal Law, Section 125 overrides the personal laws. The government

\textsuperscript{85} AIR 1985 SC 945
\textsuperscript{86} Bai Tahira v. Ali Husain
\textsuperscript{87} Fazlun Bi v. Khader AIR 1980 SC 1730
\textsuperscript{88} Section 127 (3) (b)
should implement Article 44 of the Constitution of India the written arguments of the appellant are raised as follows.  

It has been contended on behalf of the intravenous supporting the respondents by Sri Danial Latiti, Senior Advocate that under the Muslim Personal Law there is liability on the part on the former husband to his divorced wife. He relied on verse 241 of chapter II of the holy Quran. Which says; "For divorced women maintenance should be provided on a reasonable scale this is a duty of righteous". All that has been stated in the various verses of the Qur’an does not contain the percepts of the law. Is the Prophet (S.A.W.) ordained, should be followed by the Muslim as regard instances in point what Shafi which founder of Shafi School said can be pursued? He is of the view that no maintenance is due to a woman repudiated by irrevocable divorce unless she is pregnant. It is clear that prophet (S.A.W.) himself made if clear that in case of irrevocable divorce no maintenance will be payable to divorce.

Second caliph has recorded, a percep of the Prophet (S.A.W.) to the effect that maintenance is due to a women divorced thrice during her Iddat. The Hedaya says, there are also a variety of traditions of same purpose.

The Holy Quran says, divorced women shall wait concerning them selves three monthly periods. Baillie has also state that a divorced women is entitled to maintenance during the period of Iddat. Further, so many event of authors have stated that divorced women is entitled

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90 Chapter XV p. 145.
91 Verse 228.
to maintenance only during the period of *Iddat*.

The question of *Mata* in the *Quran*\(^{92}\) the nearest English equivalent is the word, 'Provision', the essence lies in that 'mata' has no connotation of recurrence as maintenance in Islam lays down that on divorce, women should be treated with due respect and apart from the husband, the later is exerted to make suitable gift at the time of separation. It is significant to point out the word 'mata' as temporary conventions in sura 40 verse 39. The verse says, "O my people: thus life of the present is nothing but (temporary) convenience".

The period of three months after divorce for women without menstruation. (*Surah-talaq: Aiyat-4*) of the *Holy Quran* which prescribed.

"Such of you women as have passed the age of monthly course for them the prescribed period, if he has any doubt is three months, and for those who have no course (it is the same).\(^{93}\)

The period till delivery for those pregnant above *Aiyat* further prescribed:

"*for those who carry, (life within their wombs), there period is until they deliver their burden's and for those who fear God, he will make their path easy".\(^{94}\)

The fact is that only Islamic *Sharia* does not leave any women married, divorced women, widow without adequate protection even for a day. The rules relating for maintenance under Islam are based on definite and firm ground. The close relative of a divorced women in necessities

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\(^{92}\) *Surah 2 Ayar 241.*

\(^{93}\) *Surah Talaq Verse 4.*
are obliged to maintain her and this obligation calculated as per the schemes of inheritance. Thus the judgment in Bai Tahira's and Fazlum Bi’s case went against the Islamic law on divorce and maintenance which has been expressly protected by the Shariat Act, 1937.

**Enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986.**

In 1986, it was the after a month of Shah Bano's judgment when the parliament had to mend not only to renovate the maintenance provisions but to pass a full fledged Act, relating to the maintenance for Muslim divorcee in accordance with Shariat. When the Shah Bano's case was decided by the Apex judiciary a great controversy in Muslim circle denoted and the Muslims depreciated and deprecated to accept the judgment thereof and further demonstrated that the line of reasoning adopted by the judiciary was wholly unjustifiable and contrary to the Shariat. Under the banner of All India Muslim Personal Law Board, a countrywide, agitation and protest was started and same germinant the consensus of the majority of Muslim of India in favour of the move to demand statutory protection of their personal law relating to maintenance.

The Muslim women (Protection of Rights on Divorce) Act, 1986 inspite of some shortcomings is by and large in consonance with Muslim law of maintenance and secures maintenance rights of Muslim married women to a great extent. The Apex court in such cases not merely ignored legislature history and the intention of the legislation but also violated the well established rules of harmonious construction.

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94 Ibid.
In the name of women emancipation the Supreme Court at so many occasions tried to violate the personal laws of Muslim and encroached the universally accepted principles of *Quran* and *Hadith*.

**Judicial Scenario after the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986.**

Now some cases would be discussed to show the judicial scenario after enactment of Muslim Woman Act, 1986.

*Md. Yunus v. Bibi Phenkani Alias Nisa*,\(^95\) the court was required to decide whether the right under Section 125 of the Cr. P.C. to claim maintenance subsists even after the Act of 1986. It was held by the court that Section 3 (1) (a) of the Act 1986 curtailed the right of a divorced Muslim women to get maintenance for the period *olddat* only. It was further said that the right to get maintenance from her husband given to a wife under Section 125 of the court until she remarried has been impliedly repealed in case of a divorced Muslim wife governed by the provision of Section 3 (1) (a) of the Act of 1986.

In *Haji Farzand Ali v. Noor Jahan*,\(^96\) a women filed an application for the maintenance of herself and her 3 children. The magistrate granted rupees 300/- for children. The husband filed and appeal against the order arguing that the right of he children ancillary of 1986 Act, the children right to maintenance under Section 125 also was not maintainable. Negating the contention the court held that the children's right was independent of mother. All the clauses (a) (b) (c) and (d) of Section 125 have used the conjunction 'or\(^1\)' which is significant and

\(^{95}\) (1987) 2 Crimes 241.
\(^{96}\) (1988) Cr. P.C. L.J. 1421 (Raj)
shall each claimant's right is independent.

In A.A. **Abdullah v. A.B. Mehmoona Saiyad**,\(^97\) it was held that a divorced Muslim woman is entitled to maintenance after contemplation of her need and the maintenance is not limited only up to *Iddat* period. The phrase used in Section 3 (1) (a) of the Act of 1986 is "Reasonable and fair provision and maintenance to be made and paid to her" indicates that the parliament intended to see that the divorced women gets sufficient means of livelihood after the divorce and that she does not become destitute or is not thrown on the street without a roof over her head and without any means of sustaining herself and her children. It was also held that the word 'within' under Section 3 (1) (a) could not be read as for or during therefore the husband was held to be liable for making reasonable and fair provision and maintenance to the wife even after the period of *Iddat*.

*In AbidAli v. Mst Raisa Begum*,\(^98\) the division bench of Rajasthan High Court has given the following view. In this case the question before the court was the effect of the provision of Act 1986 on an order passed under Section 125 of Cr.P.C. The division bench held that the Act of 1986 does not contain any saving clause for the right created by an order passed in favour of divorced Muslim women. The Act has completely obliterated the right of such women to get maintenance. The appeal without saving such right and that right now can not be enforced under Section 125 clause (3) of the code. A brief reference may also be made to the decision in *Abduallah Gafoor v. A.U. Pathumma Bibi*,\(^99\) it was held by the court that divorced Muslim

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\(^97\) AIR 1988 (Guj.) 141.
\(^98\) (1988) L. Raj. L.R. 104
\(^99\) (1989) Cr. L.J. 1224 Karnataka
women is not entitled to invoked Section 127 of the Criminal Procedure code for seeking enhancement of maintenance after 19 May, 1986, the date on which the Act of 1986 came in to force. The court further held that even though Section 125-127 of the code have not been repealed by the Act of 1986, it can be said that the Act of 1986 supplemented, widen, or enshrined the contents of the rights ensuring to the wife under the code.

In *Ali v. Sufaira*,¹⁰⁰ it was held that under Section 3 (1) (a) of the Act of 1986, a divorced Muslim woman is not only entitled to maintenance for the period of *Iddat* from her former husband but also to a reasonable and fair provision for her future. In this case the distinction was made between what is reasonable and fair provision and maintenance which is payable to the divorced women. The learned judge concluded that: "It is clear that the Muslim who believes in god must give a reasonable amount by way of gift or maintenance to the divorced lady. The gift or maintenance which is payable to the divorced women." The learned judge concluded that: "It is clear that Muslim who believes in God must give a reasonable amount by way of gift or maintenance is not limited to the period of *Iddat* it is for her future livelihood because God wishes to see all well".

The court, therefore held that under Section 3 (1) (a) a divorced Muslim not only entitled to the maintenance for the period of *Iddat* from her former husband but also to a reasonable and fair provision for her future and directed the Magistrate to pass orders giving effect to this intention of the legislature.

¹⁰⁰ (1988) 3 crimes 147.
Judiciary on the Application of the Muslim Women (Protection of Rights on Divorce) Act, 1986

An impression is there that the Act undoes the gains of divorced Muslim Woman. It is not correct as a close analysis shows that the Act does nothing like throwing out of window the Shah Bano's verdict or the legislative progress enshrined in the provisions of Criminal Procedure Code, 1973. The main features of this enactment may be summed up as the Act accords relief the divorcee. It does not say that Mahr is a consideration for divorce for is the sum referred to in Section 127(3)(b) Cr. P.C. It does not lay down that no maintenance is to be paid to the divorcee after iddat or that she is to be abandoned for the life after iddat.

The preamble of Act says that it is 'an Act to protect the rights of Muslim Women who have been divorced and further to provide for matters, connected and incidental thereto. Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986, entitles a divorced woman to (i) reasonable and fair provision, and (ii) maintenance to her, (iii) provision and maintenance to her children for two years, (iv) Mahr amount and (v) All properties given to her before, at the time and after her marriage. Out of these, the 'provision' and 'maintenance' are to be made and paid to her within the Iddat period by her former husband.

Does it mean that the maintenance is to be paid to her only during the Iddat period? The original controversy resurrected in Arab A. Abdullah v. Arab Arab Bail Mohmuna Saiyad Bhai.101 In the instant case, the

101 AIR 1988 Guj 141
matter takes into consideration was the validity of an order passed under Section 125 of Cr P.C. in view of Muslim Women (Protection of Rights on Divorce) Act, 1986. The main questions arose in the instant case for the determinations are: (i) Whether by the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, the orders passed by the Judicial Magistrate of First Class, under Cr, P.C. ordering the husband to pay the maintenance to the wife are nullified? (ii) Whether the Muslim Women (Protection of Rights on Divorce) Act, 1986, takes away the rights which are conferred upon the Muslim divorced wife under the personal law or under general law. (iii) Whether the Muslim Women (Protection of Rights on Divorce) Act, 1986 provides that a divorced Woman is entitled to have maintenance during the iddat Period only. The divorced wife (the respondent) has filed criminal application under Sec. 125 of Cr. P.C. claiming maintenance allowance, the magistrate granted Rs. 250 per month. Additional Session Judge confirmed the order. Against that order, the petitioner husband filed the criminal application in the High Court. The petitioner husband contended that So far as the first issue was concerned they alleged that in view of the provision of Muslim Women (Protection of Rights on Divorce) Act 1986, the orders passed by the magistrate under Section 125 of Criminal Procedure Code is non-est. They relied on Section 7 of the Muslim Women (Protection of Rights on Divorce) Act 1986 to support their argument. In regard to the second issue they contended according to the Muslim Personal Law, the husbands liability to provide of his divorced wife is limited to iddat period, despite the fact that she is unable to maintain herself. The reason behind that is that the enactment of Muslim Women (Protection of Rights on Divorce) Act 1986 is to nullify the interpretation given by
the Supreme Court in Shah Bano’s Case. He contended that a divorced woman is entitled to get maintenance from her former husband within the *iddat* period only and that word within should be read as "during" or "for". It was further admitted that if the parliament wanted to provide for future maintenance to the divorced women, then the parliament would not have provided that the said amount should be paid within the *iddat* period but instead of that the parliament has specified the time. Contentions of the respondent wife were that with regard to the first issue they submitted that Section 7 of Muslim Woman (Protection of Rights on Divorce) Act 1986 clearly indicates that there is no inconsistency between the Muslim Women (Protection of Rights on Divorce) Act 1986 and the provisions of Cr. P.C. 125 to 128. The provisions of Muslim Women (Protection of Rights on Divorce) Act 1986 grant more relief to the divorced women depending upon the financial position of her former husband. So far as the second point is concerned the and alleged that there is a presumption against an implied repeal because there is a presumption that the legislature enacts the laws with complete knowledge of existing laws obtaining on the same subject and to failure to add a repealing clause indicates that the intention of the legislature was not to repeal the existing laws. As to the third question they submitted that parliament has provided for making fair and reasonable provision and the payment of fair and reasonable provision and the payment of fair and reasonable maintenance to the divorced women after visualizing and contemplating her future need and the same has to be made within the *iddat* period by her former husband. The Hon'ble Gujrat High Court speaking through M.B. Shah J. reasoned and held as under:
(i) As regards the nullify of an order passed under Section 125 of Cr. P.C. after the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986, the Court reasoned that there is no Section in the Act which nullifies the order passed by the magistrate under Section 125 of Cr. P.C. Further once the order under Section 125 of Cr P.C. has been passed granting maintenance to the divorced wife then her rights are crystallized. There is no inconsistency between the provisions of the Act and provisions of Section 125-128 of Cr. P.C. On the contrary Act grants more relief to divorced Muslim Women depending upon the financial position of her husband.

(ii) As to the second issue the court relied on the statement of object and reasons as well as preamble of the Act. The Court held that on the plain reading of the Act, it cannot be said that Muslim Women (Protection of Rights on Divorce) Act 1986 in any way adversely affects the personal right of a Muslim divorced woman. Nowhere, it is provided that the rights which are conferred upon a Muslim divorced wife under personal law are abrogated or repealed. It does not provide that it was enacted for taking away same rights which Muslim woman seeking either under the personal law or general law under Section 125 of Criminal Procedure Code.

(iii) For the third issue, the court held that the Act nowhere specified the period for which she was entitled to get maintenance, nor did the Act provide that it was for iddat only.

The dictionary meaning of the word 'within' is 'on or before' and 'not later than', 'not beyond' therefore the word 'within' meant that he was
bound to make and pay the provision and maintenance before the expiration of *iddat* period. It seems that the Judgment is not upto the mark as it could not decide successfully the matter whether maintenance of Muslim Women is only for *iddat* period or beyond *Iddat* Period.

But the Kerala High Court has expressed a different view in *Abdul Gafoor Kunju v. Patumma Beevi*,\(^1\) The question before the Kerala High Court was whether the Muslim Women was entitled to invoke the Section 127 after the Muslim Women (Protection of Rights on Divorce) Act, 1986 came into force. The Session Judge was of the opinion that she could invoke the Section 127 of Muslim Women (Protection of Rights on Divorce) Act, 1986 as the Act contained no repeal, express or implied of the Code. Hon'ble High Court held that the Section 125 to 128 of the Cr. P.C. are not repealed but excluded or restricted. The well known rule of interpretation is that a special law excludes a general law when a special law namely the Muslim women (Protection of Rights on Divorce) Act, 1986 was passed to govern maintenance to Muslim wives, application to general law i.e. under code was excluded or restricted. On giving the answer to the argument that the right under the code is independent of personal law and unaffected., it was the opinion of Kerala High Court that if one considers the context in which the Act came into existence or its object, it is not possible to think that it was intended to provide additional right. It seems that the Judgment tried to give some clear cut picture regarding the (i)Application of Muslim Woman (Protection of Rights on Divorce)Act, 1986, (ii) Exclusion or restriction of the

\(^1\) (1989) 1 KLJ 337
application of Section 125 to 128 of Cr. P.C. by a well known rule of interpretation that special law exclude the general law; (iii) it tried to reduce the effect of judgment in A. A. Abdullah's case which says that the Act gives the additional arrangement for the maintenance of women when maintenance by previous husband fell short of her needs. This judgment clarified that the provisions of the Act is not to provide additional right. The view of Gujrat High Court in A.A. Abdullah Case was also not approved by the High Courts of Andhra Pradesh, Guwahati and Calcutta.

In Usma Khan Bahmani v. Fathimunnissa Begum,103 the issues of the case were: (i) Whether a divorced Muslim woman can claim maintenance under Section 125 of Criminal Procedure Code, 1973 from her former husband even after the passing of the Act of 1986? (ii) Whether the maintenance contemplated under Section 3(1) (a) of the Act of 1986 is restricted only for the period of Iddat? Or (iii) whether a fair and reasonable provision has to be made for future also within the period of Iddat. Here the ratio of Majority judgment was 2:1. The Court held on issue No.1 that Section 3 of the Act of 1986 starts with a non obstante clause as it provides that "not with standing anything contained in any other law for the time being in force……"

Under Section 4 of the Act, the liability to pay maintenance to a divorced woman, if she is unable to maintain herself after the period of Iddat, is devolved upon the relatives and if the relatives are not available on the Waqf Board.

The very concept of the liability of the husband is limited for and

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103 1990 Cr. L.J. 1364 APHC
during the period of *Iddat*, under Section 5, it is provided that the husband and wife would be governed Section 125 to 128 of the Cr. P.C if they exercise their option in the manner stated therein. If the option is not exercised, then it is clear that they will not be governed by the provision of Sections 125 to 128 of the Cr.P.C.

Further, under Section 7 of the Act, the intention of the legislature is clear when it provided that every application by a divorced woman under Section 125 or 127 of the Cr.P.C., pending before the court or magistrate in the commencement of the Act of 1986, shall note with standing contained in that code and subject to the provision of in accordance with the provisions Section 5 of this Act be disposed of in accordance with the provision of the Act of 1986.

A combined and harmonious reading of the provisions of Section 3 to 7 of the Act of 1986 clearly demonstrate that the general object of the legislation is to bring the law of maintenance payable to the wife in consonance with the principles of Muslim law. On the Issue No.2, the court held that the liability of the Muslim husband to pay reasonable and fair provision and maintenance is confined only for and during the period *oilddat*. The concept of reasonable and fair provision and maintenance cannot be read as meaning two different things. The word "*Mafa*" used in Ayat 241 in chapter II" of the *Holy Quran* indicates that the word "Provision" and "maintenance" convey the same meaning. Even in *Shah Bano* case, it is recognized that the word "provision" and "maintenance" convey the same meaning. In such circumstances to say that a fair and reasonable provision shall be made by her husband forecasting her future needs, would amount to the negation of the very object of the Act for which Act of 1986 has been promulgated. It
would give rise to a new concept of liability on the part of the husband which would be difficult to be translated in concrete term as it would be almost impossible to visualize the future needs of the divorced Muslim woman which would be depending upon the several factor like remarriage, change in the circumstances, or in the life style etc.

Therefore, in regard to the second question the judge held that the liability of Muslim husband to pay the fair and reasonable provision and maintenance contemplated under Section 3(1)(a), of the Act is confined only upto the period of *Iddat* On the Issue No.3 the Court held that under Section 7 of the Act of 1986, it is specifically stated that every application by a divorced women under Section 125 or 127 of the code pending before a Magistrate on the commencement of the Act, shall be disposed of by the Magistrate in accordance with the provision of the Act of 1986, having due regard to Section 5 of the Act and the rules framed there under with regard to the option to be exercised by the parties. Any order of maintenance which is not warranted by the provision of the Act can not be executed against the husband. Therefore the Judge held that the Section 125 to 128 of Cr. P.C is not applicable after coming into force Act 1986, save in so far as the parties exercise their option under Section 5 of the Act, to be governed by the provision of Section 125 to 128 of Cr.P.C. it seems that judgment is good keeping in view of the actual position under the Muslim personal Law and historical background of the Act of 1986. It has very rightly decided the issues involved in the present case and has clarified the legal position on those issues. It has rightly remarked that divorced woman can not claim maintenance under Section 125 of Cr. P.C., after passing of the Act of 1986, except under some
special circumstances. It has held that if it has been recognized that the liability of the husband to pay maintenance is limited to the period of *Iddat*, then there is no justification to hold that the liability of making a reasonable future provision extend beyond the period of *Iddat* under Section 3(l)(a) of the Act. It has remarked correctly that the combined and harmonious reading of the Section 3 to Section 7 the Act of 1986, clearly demonstrate that the general object of the legislation is to bring the law of maintenance payable to the wife in consonance with the principles of Muslim law. In this case the majority dissented from the decision of Gujrat high Court in *A.A. Abdullah’s* case, and decision of the Kerela High Court in *Ali v. Sufaira*,\(^{104}\) wherein it was held that under Section 3(1)(a) a divorced woman was not only entitled to maintenance up to the period of *Iddat* but also to a reasonable and fair provision for her future.

The Calcutta High court, also dissented from the decision of the Gujrat High Court in *Abdul Rashid v. Sultana Begum*,\(^{105}\) in the instant case, the main issues were: (i) Whether the Muslim husband has to provide maintenance to his divorced wife up to the period of *Iddat* or beyond the *Iddat* period? (ii) Can the Section 4 be interpreted to mean that it was open to divorced wife to claim maintenance under Section 4 of the Act in addition to Section 3 of Act. The Hon’ble High Court held on issue 1 that the liability of the husband to provide maintenance was limited for the period of *Iddat* and therefore, she was unable to maintain herself. She had to make an application under Section 4 of the Act. In view of the Act the court held on issue 2, that the provision could not be fairly interpreted to mean that it was open to divorced wife

\(^{104}\) (1999) 3 Crimes 147.

\(^{105}\) (1992) Cri. LJ 76
to claim maintenance under Section 4 of Act in addition to what she might have received under Section 3 of Act. This judgment seems to be good one keeping in view of the legislative background of Act of 1986 and actual position of Muslim personal law. This judgment was akin to the principles laid down in Usman Khan Bahmani’s case. It opposes the decision of A.A. Abdullah’s Case decided by the Gujrat High Court. It rejected the interpretation of the Gujrat High Court which laid down that the provisions of the Act is to make an additional arrangements for her when maintenance allowance and provision settled by the previous husband fell short of her needs on account of some unforeseen circumstances.

Yet the Calcutta High Court took a different liberal view in Shakeela Parveen Ali, the main Issues were: (i) Whether the term 'with in' used in 1i (a) of Muslim Women (Protection of Rights on Divorce) Act, 1986 be interpreted only as 'for or during' or a future provision may be made within Iddat period or for beyond Iddat period, (ii) What procedure is to be followed when the petition regarding maintenance under Section 125 of Cr P.C. is pending before the passing of Act? The Calcutta High Court extensively quoted the judgment of Gujrat High Court and approved both the principles therein. The order passed by the Magistrate under Section 125 of Cr. P.C. was not by nullified the Muslim Women (Protection of Rights on Divorce) Act, 1986. The word 'within' in Section 3 does not mean 'for or during', it means 'on or before', and the parliament has nowhere provided that the reasonable and fair provision and maintenance are limited only for the Iddat period. Therefore the word 'within' meant the he was bound to make

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106 2001 (1) CLJ 608
and to pay the provision and maintenance before expiration of *Iddat*. Accordingly it was held that the expression during *Iddat* period should be extended till a Mohammedan divorced female enters remarriage. The magistrate's order was modified to the effect that the petitioner was entitled to get maintenance allowance from the date of application till she remarries. This judgment can't be said upto the mark as it did not pay regard to the historical background of the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986. The High Court under the guise of so called judicial activism tried to extend the meaning of word 'within' unnecessarily. The additional benefit of maintenance to the divorced Muslim women till she remarries was an open encroachment of Muslim Personal Law. The meaning of word 'within' under Section 3(l)(a) of the Act can't be extended 'upto the remarriage of divorcee, while taking regard to the purpose, object & preamble of the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986.

Here it would be worth mentioning the case of *Idris Ali v. Ramesha Khatoon*,\(^{107}\) the question before the court was whether the provision of Muslim Women (Protection of Rights on Divorce) Act, 1986, shall have the application when a divorced woman approaches the court of a magistrate for the execution of final order already *passed in her* favour under Section 125 of Cr.P.C. Petitioner contended that as soon as the Muslim Women (Protection of Rights on Divorce) Act, 1986 came into force. Sections 125, 127, 128 of Cr.P.C, so far as *divorced Muslim women* are concerned became inapplicable on Muslim women by virtue of Section 7 of Muslim Women (Protection of Rights on

\(^{107}\) AIR 1989 Gauhati 24
Divorce) Act, 1986. It was also pointed out that such aforesaid order maintenance would become nugatory and non-est in the eye of Law as the right of the parties have to be decided according to the provision of Section 3 and Section 4 of this new Act by virtue of Section 7 of the Muslim Women Protection of Rights on Divorce) Act, 1986. Respondent contended that action 7 has settled all controversy at rest. It was pointed out that Section 7 in terms mentioned that if an application filed by a divorced woman under Section 125 or 127 of Cr. P.C., is pending before a magistrate on the commencement of the Act of 1986 then only it has to be disposed of according to the provisions of new Act of 1986. His submission was that condition precedent for the application of new Act was the pendency of the proceedings, under Section 125 and 127 of Cr. P.C., on the date of the commencement a new Act of 1986 and once the proceeding is disposed of under Section 125 or 127 of Cr. P.C., by the magistrate then there is no pendency. After analyzing the fact and the law on the point the Hon'ble High Court held that if a divorced Muslim woman approaches the court of a magistrate for the execution of a final order already passed under Section 125, 127 of Cr. P.C., earlier to the new act of 1986, then she will have the right to get the order executed under Section 128 of Cr. P.C., which Section has been excluded from Section 7 of Act of 1986, and Section 7 of new Act of 1986 would not take away the right. It may be said, that this judgment shows the tendency of the judiciary to the application of the provisions of Criminal Procedure Code inspite of the coming into force of Muslim Women (Protection of Rights on Divorce) Act, 1986, which has made the sufficient provisions for providing the right to the maintenance of Muslim divorcees.
The single bench of the Bombay High Court had considered it just and equitable that the husband should pay the divorced wife the maintenance allowance even after the *Iddat* period, but thought it is necessary that this matter, in the interest of justice, should be re-accessed to full bench for its decision, therefore this revision application of *Karim Abdul Rehman Seikh v. Shehnaiz Karim Seikh*, came up before the full bench comprising Shah J., Smt. Ranjana Desai J., and Fatil J. The four prime questions before the court were:

1. Whether the Muslim husband's liability under Section 3(a) of Muslim Women (Protection of Rights on Divorce) Act, 1986 to make a fair and reasonable provision and to pay maintenance is restricted only upto the *Iddat* period or whether it extends beyond *Iddat* period.

2. Whether the Act has the effect of invalidating the orders Judgments passed under Section 125 of the Code prior to the coming into force of Act, that is, whether the Act divests parties of vested rights or benefits by acting retrospectively,

3. After the commencement of Muslim Women (Protection of Rights on Divorce) Act, 1986 whether the divorced Muslim wife apply for maintenance by invoking the provision of Chapter IX of Criminal Procedure Code, 1973.

4. Whether the family court has the jurisdiction to try applications of Muslim divorced woman for maintenance after coming into operation of Muslim woman Act 1986.

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108 2000 (3) Mh. LJ 555.
The High Court held for issue No. 1, that a reasonable and fair provision has got to be distinct from maintenance. The word provision has a future content. In the context be of Section 3(1) (a) of this Act, it would mean an amount as would be necessary for the divorced woman to look after herself after the Iddat period. This may involve amount for her residence, food, clothing, medicine and the like expenses. So, like Section 125 of the code no maximum amount is fixed here, but the quantum, has got to be substantial having regard to the future needs of the woman. The court concluded that the husband has to pay her within the Iddat period but he has to make the reasonable and fait provision for her within the Iddat period, which should take care of her for the rest of her life or till she incurs any disability under the Muslim Women (Protection of Rights on Divorce) Act, 1986 while deciding this amount regard will be had to the needs of the divorced woman, the standards of the life enjoyed by her during her marriage and the means of her former husband. If the husband is unable to arrange for such a lump sum payment he can ask for the installment. Further, till the husband makes the provision the magistrate may direct monthly payment to her even beyond Iddat, till amount is fixed. On the second Issue, the court held that "The Section of 125 Cr P.C., prior to the commencement of Muslim Women (Protection of Rights on Divorce) Act, 1986 are not nullified by reason of its coming into force. The Act does not direct the divorced woman's right to get maintenance under Section 125 of the vested in her by reason of the order of he competent court passed prior to its coming into force".

For the issue No.3, the court ruled that "After the commencement of the Act a divorced wife cannot apply for maintenance by invoking the
provisions of Chapter IX\textsuperscript{th} of the code. According to Section 5 a divorced wife and her husband can by an agreement subject themselves to the jurisdiction of magistrate under Section 125 and 127 of the code and agree to be governed by the said provisions (but not without such agreement).

On the 4\textsuperscript{th} issue, the Court held "by virtue of Section 3 and Section 4 of the said Act the application under Section 5 and Section 7 of the Act have to be filed before the Magistrate only. We therefore hold that after coming into force of the Act of 1986 the Muslim women can apply under Section 3 and Section 4 of Act only before the first class Magistrate having jurisdiction under the code. The Family court can not deal with such application".

These case prior to Denial Latifi case can be quoted in brief such as in 

\textit{Raflq v. Farida Bi,}\textsuperscript{109} Madhya Pradesh High Court held that if a divorced Muslim wife wanted maintenance beyond the \textit{Iddat} period, she had to make her relatives/Waqf Board as parties to suit under Section 4 of Muslim Women (Protection of Rights on Divorce) Act, 1986, as the husband could not be made a party. Virtually this judgment is in the consonance of the intention of the legislature in enactment of Muslim woman Act, 1986. This judgment support the traditional view of Muslim Personal Law that the view of Muslim Personal law that the husband could not be made a party if the divorced Muslim woman wanted maintenance beyond the \textit{Iddat} period.

In \textit{Julekha v. M. Fazal,}\textsuperscript{110} again the M.P. High Court held that the

\textsuperscript{109} 2000 (2) MPWM 77 MP
\textsuperscript{110} 2000 (1) Vidhi Baswar 123 MP
Muslim law makes the husband liable for the maintenance of his divorced wife during *Iddat* only. It seems that this judgment of Court also supported the traditional view of Muslim Personal Law that the liability of the Muslim husband to maintain his divorced wife is only for the duration of *Iddat*. Thus the legal status if the right of the divorced wife continued to be fluid variable according to the views of different High Courts. The main contentious issues were:

I. Whether the fair and reasonable provision was in additions to the maintenance allowance or included in it, i.e. quantum of maintenance.

II. The duration of time for which the husband liability extends whether within *Iddat* or beyond *Iddat* period.

No doubt, the Muslim divorcee's fate was a progressive path:

- In the first stage the husband could get rid of himself of all liability by simply divorcing her.
- The second stage was the 1973 amendment in the Criminal Procedure Code which laid down that husband was liable to maintain her even after Talaq; this was her first stage of acquirement. But the husband found an escape value which was the payment of *Mahr*.
- In the third stage, the Judiciary insisted on making this *Mahr* reasonable.
- The forth stage came when the court insisted on her maintenance, whether *Mahr* is given or not.
- The fifth stage was marked by Act of 1986.
The uncertainties, which were led by the different decisions of the various High Courts had to be settled. The verdict of Supreme Court in *Danial Latifi v. Union of India*,\(^\text{111}\) deciding some of the unsolved questions. Issue before the Hon'ble Supreme Court was whether Muslim Women (Protection of Rights on Divorce) Act, 1986 is an unconstitutional on the ground that it infringed Articles 14, 15 and 21 of the Constitution? Contentions of Petitioner were the following:

(i) Section 125 Cr. P.C. is a provision made in respect of woman belonging to all religions and the exclusion of Muslim woman from its benefit would be discrimination between woman and woman.

(ii) A part from the gender justice caused in the country this discrimination further leads to a monstrous proposition of nullifying a law declared by this court in Shah Bano's case. Thus there is the violation of equality before law but also the equal protection of law and inherent infringement of article 21 of the Constitution as well as basic human values.

(iii) If the object of Section of 125 Criminal Procedure Code, 1973 is to avoid vagrancy, the remedy there under can not be denied to Muslim woman.

(iv) The Act is un-Islamic, un-Constitutional and it has the potential of suffocating the Muslim woman and under mines the secular, character which is the basic feature of the Constitution.

(v) There is no reason to deprive the Muslim women from the

\(^{111}\) (2001) 7 SCC 740; 11 (2001) DMC 714
applicability of the provision of Section 125 Cr.P.C., and consequently, the present Act must be held to be discriminatory and violative of Article 14 of Constitution.

(vi) The conferment of the power on magistrate under Section 3 (2) 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 of Cr.P.C. and such deprivation would make the act unconstitutional as there is no nexus to deprive a Muslim woman from availing remedies under Section 125 of Cr.P.C., not with standing the fact that the conditions precedent for availing of the said remedies are satisfied.

The Contention of respondent in the support of the impugned act, were the following:

(i) Where a question of maintenance which forms parts 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 to be made and paid by her former husband within the period of Iddat and when the fact has clearly been stated in the provision, the question of interpretation as to whether it is for life or for the period of Iddat would not arise.

(ii) The personal law of any community is a legitimate basis for discrimination, if at all and therefore does not offend Article 14 & 21 of the Constitution.

(iii) The parliament enacted the impugned Article respecting the
personal law of the Muslims and that itself is a legitimate basis for making a differentiation; that a separate law for community on the basis of personal law applicable to such community can not be held to be discriminatory.

(iv) The Act resolved all issues, bearing in mind the personal law of the Muslim community and the fact that the benefit of Section 125 of Cr.P.C have not been extended to a Muslim woman would not necessarily lead to a conclusion that there is no provision on the Act to protect the Muslim woman from vagrancy and from being a destitute.

The Hon'ble Supreme Court by analyzing these points held that Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986, lays down two separate and distinct obligations on the part of the husband, viz,

(i) To make reasonable and fair provision for his divorced wife,
(ii) To provide maintenance for her

The emphasis is not on the nature of duration of any such provision or maintenance, but on the time by which an arrangement for the payment of provisions and maintenance should be concluded namely, 'within the Iddat period'.

The Court upheld the validity of Muslim Women (Protection of Rights on Divorce) Act, 1986 and observed in para 31 as under:

"Para 31 - Even under the Act, the parties agreed that the provisions of Section 125 of Cr.P.C. would still be attracted and even otherwise, the Magistrate has been conferred the power to make appropriate
provision. Therefore, what could be earlier granted by Magistrate under Section 125 of Cr.P.C. would now be granted by the magistrate under the very Act itself.

The Court finally concluded in para 36, while upholding the validity of the Act. We may sum up our conclusions:

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

(ii) Liability of the husband of maintains his wife under Section 3(1) (a) of the Act is not confined to Iddat period.

(iii) A divorced Muslim woman, who has not remarried and who is not able to maintain herself after the Iddat period can proceed 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, from such divorced woman including her children and her parents. In case of any of the relative being unable to pay maintenance, Magistrate may direct the State Waqf Board, established under the Act to pay maintenance.

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

This judgment can be said the commendable and praiseworthy step of the Supreme Court to upheld the Constitutional validity of the Muslim
Women (Protection of Rights on Divorce) Act, 1986 and paid due regard to the feelings of the minority community, i.e., the Muslim Community. As the right of the preservation of personal law is the fundamental right of any community, on that ground the Muslim Women (Protection of Rights on Divorce) Act, 1986 can not be called to run counter to the constitutional mandate. But besides it, it can also be said that in the guise of Judicial activism the court has given the liberal meaning to term within under Section - 3(1) (a) of Muslim Women (Protection of Rights on Divorce) Act, 1986 by making the husband liable to make fair and reasonable provision within the *Iddat* period, for beyond the *Iddat* period. It must be noted that the making of the future provision beyond the *Iddat* period for the maintenance of the divorced Muslim wife is foreign to Muslim Personal Law. Indian Muslims have their deep feelings and emotional attachment to their personal law, so it can also be said here that the sorry position is that even the Apex court was no more hesitant to venture in the areas well understood and free from legislative *activity*. It is to be noteworthy that as the court refers the question of Section 4 of Muslim Women (Protection of Rights on Divorce) Act, 1986 for upholding the constitutional validity of the same, is appreciable. This step of the court tried to avoid the jurisdiction of the enactment of Muslim Women (Protection of Rights on Divorce) Act, 1986.

After the judgment of Denial Latif’s case a very interesting question came before the Bombay High Court in *Sayeed Khan Faujdar Khan v. Zaheba Begum*,\(^{112}\) the question was that, can a divorced Muslim wife who withdraw an earlier application under Section 125 of Cr.P.C., on

\(^{112}\) AIR 2006 Bom. 39.
the basis of settlement, subsequently claim maintenances under Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986. The court held that earlier settlement made by the parties was binding on the parties. The wife's application under Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986 is nothing but an abuse of the process of the court. A consent order or settlement arrived between the parties in proceeding under Section 125 of Cr.P.C., operates as estoppels and no party can be allowed to Muslim or abuse the process of court by filing subsequent application under a different act for the same relief, on the same set of facts or circumstances.

Recently in 2007 a very interesting question came before Bombay High Court that whether a divorced Muslim wife alone can apply for the maintenance from her husband under Section-125 of chapter IXth of Criminal Procedure Code, 1973 in Seikh Mohammad V. Naseem Begum,113 the Hon'ble High Court held that Muslim divorced wife alone cannot apply for the maintenance under chapter IXth of Cr.P.C., she can only apply under this chapter IX, Section 125 of Cr.P.C., when there is an agreement between her and her husband under Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The court held that Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 has been designed to mean that no proceeding can be initiated on the application of Section 125 of Criminal Procedure Code, 1973 by divorced Muslim wife unless there is an agreement between her and her husband to be governed under Section 125 of Criminal Procedure Code, 1973. Application of the Section 125 of Criminal Procedure Code, 1973 is maintainable subject to the

113 (2007) DMC 226 Bombay High Court.
mandate of Section 5 of Muslim Women (Protection of Rights on Divorce) Act, 1986.

Virtually the judgment of the court is good as it held that the purpose of the enactment of Section 5 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 must be fulfilled. The contrary view of the court would have under that Section otiose. Here the High Court relied on the Judgment of Supreme Court in Denial Latifi v. Union of India,\textsuperscript{114} in which court upheld the validity of Muslim woman Act, 1986.

In Riaj Fitima and Another (Petitioner) v. Mohd. Sharif\textsuperscript{115} [Respondent], the issues before the Hon'ble High Court of Delhi were:

(i) Whether the statement of divorce taken by the husband in the written statement sufficient to constitute divorce?

(ii) Whether in the absence of direct and insufficient evidence to prove divorce, the bar of the Act of 1986, be made applicable in entertaining application of maintenance under Section 125 of Cr. P.C.?

The petitioner alleged that she was still the wife of the respondent and she was turned out of the matrimonial home for the want of dowry.

Respondent husband contended that he had obtained divorce from his wife by the Mufti. He also alleged that in view of the divorce the petition was debarred from claiming maintenance under Section 125 Cr. P.C. Instead of the remedy of the petitioner was to take recourse to

\textsuperscript{114} II (2001) DMC 174
\textsuperscript{115} (2007) DMC 26 Delhi High Court
the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 as under:

So far as the first issue was concerned it was laid down that mere statement of the husband taken in a written statement that he had divorced his wife on a particular date would not suffice. If this accepted it would be prone to misuse. The court laid down the following perquisites for proving that divorce had taken place:

- Divorce must be for the reasonable cause.
- There must be a proclamation of Talaq thrice in the presence of witnesses.
- There must the proof of the payment of *Mahr*.
- The husband must prove that there was attempt for conciliation prior to divorce,

As far as the second contention is concerned the court relied upon on *Salim Basha v. Mumtaz Begum*,¹¹⁶ where Madras High Court opines that Talaq was not valid if there was no valid evidence of pre-divorce conference for the settlement by two mediators from both sides. The Court held that respondent could not proved that he had divorced his wife and, thus the bar of the Act of 1986 was not applicable in entertaining the application of the petition under Section 125 of Cr. P.C.

This judgment is based on the Judgment of the Supreme Court in *Shamim Ara v. State of U.P.*,¹¹⁷ wherein the court held that 'Talaq' to be

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¹¹⁶ J.T. 2002 (7) SC 570
¹¹⁷ 1991 (Criminal)
effective has to be explicitly proclaimed'. Thus in the present social welfare context the judgment is praiseworthy as it lays down that for a valid Talaq the prerequisites of the valid Talaq must be fulfilled. It will be helpful in the future to reduce the abuse of the authority of the Muslim man of giving his wife divorce arbitrary and in rash manner. Here it was clearly settled that mere the written statement of the husband that he had divorced his wife on a particular day will not be sufficient to prove divorce.

In *Tripura Board of Waqf* (petitioner) v. *Ayesha Bibi* [118] [Respondent], the issue before the Gauhati High Court was that whether the Waqf board can be directed to pay maintenance amount without offering a opportunity of hearing before passing the order? The petitioner contended that there is no provision in the Act of 1986 to pay a maintenance allowance to a divorced Muslim woman by the Waqf Board, unless there is a specific order of competent court of law. He has submitted that before passing the initial order, the Waqf board ought to have been heard by the learned CJM.

Countering the contentions of the petitioner, the learned council for respondent submitted that the whole exercise on the part of the Waqf Board is to frustrate the claim of the respondent wife for the maintenance. As regard the notice to the Board, he has submitted that such notice is not contemplated in Section 4(2) of the Act nor in any provision of the Act, In this contention he has placed his reliance on the two decision of the Apex cast in *Syed Fatima Machrs* and *Denial Latifl's* case. The learned Judge held that the plea of the petitioner board that before passing the order, they ought to have been heard, it

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118 AIR 2008 Gauhati 10
will be suffice to say that no such provision is discernible in the Act. Section 4(2) of the Act provides that where a divorced woman is unable to maintain herself and she has no relative in Subsection 4(1) or such relatives have not enough means to pay the maintenance ordered by the magistrate or 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 Subsection (1), the magistrate may by order direct the State Waqf Board to pay such maintenance as determined by him.

It seems that in the present case the petitioner board instead of acting towards implementation of the object and reasons for which the aforesaid Act of 1986 was made, resisted the same making all efforts. Therefore, the court should resort to prompt implementation of the order.

**Judicial Activism and its limits**

The concept of judicial activism which is another name of innovative interpretation was not of the recent past. The twin concept of judicial review and judicial activism were said to be born simultaneously. The judicial creativity may yield good results if it is the result of principled activism but if it is propelled by partisanship, it may result in catastrophic consequences generating conflicts which may lead to the agitation to a particular community or group.

The common criticism we hear about the judicial activism is that in the name of interpreting the provisions of the Constitution and legislative enactments, the judiciary often rewrites them without explicitly stating so and in this process, some of the personal opinions of the judges
metamorphose into legal principles and constitutional values. On the other facet of this line of criticism is that in the name of judicial activism, the theory of separation of powers, is overthrown and the judiciary is undermining the authority of the legislature and the executive by encroaching upon the spheres reserved for them. Judicial activism can be compared with legislative activism. The latter is of two types: (i) activist law making; (ii) dynamic law making. Activist law making implies the legislature taking the existing ideas from the consensus prevailing in the society. Dynamic law making surfaces when legislature creates an idea outside the consensus and before it is formulated, propagates it. Dynamic law making always ordinarily carries with it legitimacy because it is the creation of the legislatures who have the popular mandate. Judges cannot play such a dynamic role; no idea alien to the constitutional objectives can be metamorphosed by judicial interpretation into a binding constitutional principle.

Thus from the above discussion on the case laws regarding the maintenance of the divorced Muslim wife, I feel that judiciary has taken the double standard in the interpretations of the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986.

On one side the decisions of various High Courts and Apex Court upheld the constitutional validity of Muslim Women (Protection of Rights on Divorce) Act, 1986, but on the other side I, may feel sorry to say that by unnecessarily interpreting the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986, the judiciary has tried to venture in the areas well understood and free from legislative activity.
During the process of the analysis of the background history and spirit of the Muslim Women (Protection of Rights on Divorce) Act, 1986, I felt that Indian Muslims have deep emotional feelings regarding their personal law. Their personal law is constitutionally recognized and judicially enforced. So that the judiciary while interpreting the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986, should pay due regard to the sentiment and emotion of the Muslim community, as "religion, ethics and law are therefore, so intermixed in Islam ...... “

(c) Identification of Pitfalls

The above analysis of the case shows that the role of judiciary is under the sphere of doubt regarding the implementation of Islamic personal law with respect to maintenance, divorce intestate succession despite the fact that these matters have been specifically included in Section 2 of Sharlai Application Act, 1937.

Specially in the matter of maintenance and divorce the steps of judiciary has been very harsh and has been touching the line of judicial distortion rather than judicial Activism.

The tendency of the Judiciary to the implementation of the Section 125 of Cr. P.C. regarding the maintenance of the divorce wife is frustrating the people of Islamic community. This step is being taken inspite of the fact that the Muslim divorced spouse can be governed by Section 125 of Cr, P.C. only when there is an agreement between them under Section 5 of Muslim Women (Protection of Rights on Divorce)Act, 1986.or the application of the secular provisions to the divorced

Muslim Spouse the judiciary has taken the innovative steps of not accepting the validity of talaq which has been give under the rules of Islamic Shariah. As soon as there is not the sufficient proof of talaq. The spouse comes outside the preview of Muslim Women (Protection of Rights on Divorce) Act, 1986, and the maintenance provision under secular law under Section 125 of Cr. P.C. is applied.

These cases have been recently shown in.

- *Iqbal Bano v. State of U.P.*\(^\text{120}\)
- *Shameen Beig v. Najmunnisa Begum*\(^\text{121}\)

The burning question is that the judiciary's steps to decided the validity of talaq is correct of which the sole authority of taking decision is with the Muslim community. It comes under the sphere of personal law which has been constitutionally recognized. The right of the application of the personal law in these matters has been specifically provided under the Section 2 of *Shariat Application Act, 1937* by the Indian Legislature. The main pitfalls in the interpretation of Muslim Women (Protection of Rights on Divorce) Act, 1986 is, that is felt by me as a Student of personal law, the interpretation of Section 3 of this Act in such manner so as to stretch the maintenance provision beyond the *Iddat* period in the guise of future maintenance. Moreover it gas been done by the Apex Judiciary through the *Denial Latifi's case*. Now the various decisions of High Courts is recognizing the existence and validity of provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986.

But they are very much hesitant to cross the limits set by the apex

\(^{120}\) DMC 2007
\(^{121}\) DMC 2007 Bom. H.C. 738.
judiciary. The recent case\textsuperscript{122} of Bombay High Court is the clear example of the hesitant tendency of the High Court to cross the limits set by Apex judiciary.

The pitfalls may be summed up briefly in the following manners:

- The wrong implementation of the Cr.P.C. 127(3)(b) by not taking into consideration the legislative history and intention of legislature of inserting it. The judiciary forgot that this Section was inserted to save the Muslim Personal Law.

- The solution made by the judiciary regarding the controversy of maintenance of divorced Muslim wife within \textit{Iddat} period went against the Islamic Personal Law,

- The loopholes in the drafting of Muslim Women (Protection of Rights on Divorce) Act, 1986, which provides the chance to judiciary to interpret the provisions of the Act against the Islamic Personal Law.

The indifferent behaviours of judiciary toward the Islamic Personal Law, despite knowing the fact that this community has deep feeling and emotion regarding their religion.

(d) **Advocacy for reforms and improvements**

There are some loopholes which are being felt by the scholars of the Islamic Matrimony regarding the drafting of Muslim women (Protection of Rights on Divorce) Act, 1986.

As it is very contentious issue so I want to put forth some humble

\textsuperscript{122} Sheikh Mohd v. Naseem Gegum I (2007) DMC 226 Bombay High Court
point regarding the reforms in the drafting of Muslim Women (Protection of Rights on Divorce) Act, 1986:

- The expression "who has been divorce by or has obtained divorce from her husband" used in the act includes.
  
  (a) Unilateral Talaq by Husband
  (b) Khula demanded by and effected at the wife's instances whether in or outside the court
  (c) Divorce by mutual consent (mubarat)
  (d) Dissolution of Marriage under the provisions of the Dissolution of Muslim marriage 1939
  (e) Annulment of void or irregular marriage.

These kinds do not have similar consequences for maintenance in different school. But Act deals with all forms of divorce without attaching importance of differences.

- The definition of term *Iddat* in Section 2(b) does not expressly state as to upon whom observing of *Iddat* is mandatory and on whose part it is not obligatory.

For example a woman divorced before consummation of marriage, is not required to observe *Iddat*, hence the clumsy definition in Section 2(a) by not excluding such woman is objectionable under Islamic rules.

- Despite the clear cut humane rule of Muslim law that Muslim law cares the maintenance of divorce who is breast feeding and child maintenance is the absolute duty of father, the Section 3(i)
(b) is the victim of confused drafting and bound to be interpreted by court in various ways.

- Section 3(i) (c) of the Act states that a divorced woman is entitled to "an amount equal to sum of Mahr or Dower is payable because in Islamic law there are many situations in which payment varies. The ambiguous language of said Section makes Mahr payable in every case of divorce.

Thus by analyzing the aforesaid loopholes of the Act which is now representing manifestly the Islamic Community to whole world, must be removed and be tried to be reformed in the line of true Islamic principles.

As the Constitution of India regards the personal laws of every community the judiciary must not assume the role of legislature and Mujtahid and does not try to venture into areas of personal laws which are well understood and free from legislative activity.

It is also to be noted that the trend which has been set by the Judiciary to maintain Muslim divorce beyond the Iddat period must be reviewed according to line of Islamic Sharia. As this concept is foreign to the spirit of Islamic law. The reason is that there is no any interfamiliar transfer of girl on marriage unlike Hindu family.

4.4 MAINTENANCE OF WIFE UNDER CHRISTIAN LAW

(a) Analysis of legislative provisions

Maintenance of wife under Christian Law is dealt with the Section-36, Section-37 and Section-38 of the Indian Divorce Act, 1869. Section 36 of Indian divorce Act, 1869, deals with the petition for the expenses of
the proceedings and alimony pending the suit. According to this Section, in any suit under this act whether it be instituted by a husband or a wife and whether or not she has obtained an order of protection, the wife may present a petition for the expenses of the proceedings and alimony pending the suit. Such a petition shall be served on the husband and the court on being satisfied by the truth of the statement contained therein, may make such order on the husband for the expenses of proceedings and alimony pending the suit as it may seem just. There is a proviso in this Section which says that the petition for the expenses of the proceeding and alimony pending the suit shall as far as possible, be disposed of within the sixty days from the date of the service of notice on the respondent.

The object of this Section is to provide the wife with a source of maintenance, whilst a matrimonial suit is pending. She is entitled to present a petition of alimony *pendente lite*. Alimony *pendente lite* is an *ad interim* arrangement and its payment is enforced on the ground of necessity and only when the wife has no other means of subsistence. Where pending her application for alimony the wife gets advances from a third party to meet her necessaries the third party is in equity entitled to recover the sums advanced by him from the husband. The alimony may be claimed by the wife in suits for (i) Nullity (ii) Dissolution (iii) Judicial Separation (iv) Restitution conjugal rights of marriage.

A husband should file an oath to a petition for alimony by the wife. He

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123 Substituted for the word “for the alimony pending suit by Indian Divorce (Amendment) Act, 2001
124 By Amending Act of 2001
125 Inserted by the Amending Act of 2001.
126 *Weingarten v. Engel* 1947, All ER 425
must state his gross income. He must specify deductions of any that he claims and it is not sufficient for him merely to state his net annual income. A husband who does not file an answer to the petition cannot be allowed to cross examine witnesses produced by the wife in support of her alimony petition nor can he give any rebutting evidence. Husband may plead that his wife has income and property. It is to open to the husband to plead that the wife is being supported by the corespondent and is not entitled to alimony *pendente lite*. He may also plead that the wife has been living separate for many years before the institution of suit and she has supported herself during the separation and is still able to do so. The husband is not allowed to put any question direct or indirect with regard to her adultery. The averment of adulatory in answer to a petition for alimony is irrelevant and the court is bound to presume that the wife is innocent till she is proved guilty. An alimony petition should be made at the earliest opportunity, as delay may go to show that the wife has a means of subsistence and is not in any need of alimony.

The Indian law is quite clear that in case of a suit for divorce or for nullity of marriage, the order for alimony remains operative only till the decree is made absolute or is confirmed. In case of a suit for the restitution of conjugal rights the order for alimony *pendente lite* extends up to the time allowed to the husband for complying with the decree or till such times she refuse to comply with it. The quantum of alimony that should be awarded to a wife will depend on the facts and circumstances of each case. The parties may mutually agree to the amount. The Indian law with regard to the quantum of alimony

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pendente lite that the alimony pendente lite should in no case exceed 1/5th of the husband's average net income for the past three years. The general rule regarding the commencement of payment of alimony is that it commences from the date of the service of the petition on the husband and not the date of the return of the citation. The Indian law is quite clear that alimony shall continue till such time as the decree is not made absolute or is confirmed by High Court. The Act contemplates the payment of alimony to the wife so long as she continues in law to be a wife.\textsuperscript{128}

The Indian Divorce Act, 1869 is silent as to the mode of the enforcement of decrees and an order for the payment of alimony pendente lite must be made according to the provisions of Civil Procedure Code, 1908 for the execution of decrees.

An order for alimony pendente lite does not create a legal debt, but a liability to pay and is only a personal allowance and so long as the order subsist the right to alimony can not be alienated or released. When a marriage has been validity terminated under the law of the parties domicile, any maintenance order made by the court other than the court of parties domicile, must also comes to an end.\textsuperscript{129}

Section 37 of the Indian Divorce Act 1869, deals with the petition of permanent alimony. This Section empowers the High Court and District judge to order that the husband shall secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as having regard to her fortune. This order may be made by the High Court or District Judge, if it thinks fit, on

\textsuperscript{128} Manchanda, The law and Practice of Divorce (ed. 2\textsuperscript{nd}, 1958, Allahabad), pp. 303-304
\textsuperscript{129} Id. pp. 305, 306.
any decree absolutely declaring a marriage to be dissolved, or any
decree of judicial separation obtained by wife. In every such case the
court may make an order on the husband for payment to the wife of
such monthly or weekly sum for her maintenance and support as the
court may think reasonable. There is also a proviso in this Section
which provides that if the husband afterwards from any cause becomes
unable to make such payment, it shall be lawful for the court to
discharge or modify the order or temporarily to suspend the same as to
whole or any part of the money so ordered to be paid, and again to
revive the same order wholly or in part, as to the court seems fit. This
Section empowers the court to order for the permanent alimony or
permanent maintenance after a final decree for judicial separation or
dissolution of marriage has been granted. The District Judge is also
given the same power after the decree passed by him has been
confirmed by the High Court.

The court may order the payment of such permanent alimony or
maintenance in three ways:

1) It may secure a gross sum of money

2) It may provide an annuity for wife life

3) It may order the husband for the payment of monthly or weekly
   sum for her maintenance.

The proviso to the Section gives the court a power to vary, discharge,
modify or temporarily suspend the payment order, if the husband
subsequently becoming unable to make such payment.
There is no hard and fast rule as to the quantum of alimony that should be given to an innocent wife. The law has laid down no exact proportion. The allocation of alimony is a matter for the discretion of the court to be exercised upon a consideration of all the circumstances of the case.\textsuperscript{130} As a general rule permanent alimony may be more than alimony pendente lite. There are some factors of which Section 37 of the Indian Divorce Act, 1869 enjoins the court. The factors are:

(i) The conduct of the parties before and after marriage.

(ii) The nature and source of husband

(iii) Fortune of the wife, if any, and other circumstances of the case.

The usual rate of permanent alimony is one third of joint net income. The court in this matter is guided by the practice of the ecclesiastical courts. However, the court has the discretion and may award less than one third of the joint net income, if the circumstances so warrant. But the court will not grant more than one third unless exceptional circumstances exist.

The permanent alimony may be increased or decreased by the court according or the changing circumstance and the fortune of the parties.

Permanent maintenance may be claimed by an application filed at any time after the decree nisi. In any event no order for permanent maintenance can take effect prior to the passing of the decree absolute. An application after final decree may be made within the two months of the final decree; but it may be filed even subsequently with the leave

\textsuperscript{130} Id. p. 310
of the court. The petition for the permanent maintenance must be served on the opposite party.

Section 38 of the Indian Divorce Act, 1869, deals with the rules regarding the payment of alimony. According to this Section, in all cases in which the Court makes any decree or order for alimony, it may direct the same to be paid either to the wife herself, or to any trustee on her behalf. The Court may impose any terms or restrictions which to the Court seems expedient. Thus this Section lays down the mode of payment of alimony. The court is given power on making an order for alimony, be it alimony *pendente lite* or permanent alimony. Alimony may be paid wither direct to the wife herself or to her trustee. Such trustee, must however be approved by the court. The court is given power to impose any term or restrictions on the payment of alimony and may appoint new trustee from time to time. The whole object of this Section is to ensure that the wife receives the allotted alimony.

(b) **Evaluation of Judicial Pronouncements**

As it has been mentioned earlier that only landmark and trendsetter judicial decisions in the Indian context are being shown and discussed here. Since the Christians are not the majority in India population is less and the number of litigation and reported cases are almost negligible. There are not any recent cases regarding the maintenance of wife which can be termed as landmark and trendsetter. This community is also peace loving and satisfied like the Parsi community. Thus, though having the many loopholes in the drafting of the Christian laws regarding the matrimonial causes and maintenance, there is not any huge controversy like other communities.
(c) **Identification of Pitfalls**

The need for reforms in the Indian Divorce Act enacted as early as 1869 has long been felt and advocated by the public, jurist, the law commission and the judiciary, including Supreme Court.

It is noteworthy that the ground for divorce under the Act were too limited and harsh too before the insertion of Section 10 A as amended in 2001.

Even as between husband and wife there is discrimination as under Section 10, the husband has simply to prove adultery where as the wife has to prove another matrimonial offence along with adultery, for granting relief.

There was another lacuna which is not suitable as per the present conditions of the society that a dissolution decree passed by the District Court needs to be confirmed by the High Court. It makes the procedure of divorce complicated and time killing. \[Requirement of confirmation by the High Court has now, been dropped the Divorce Act, 2001\].

Besides these shortcomings there are also some shortcomings in the drafting of the Indian Divorce Act, 1869 which is shown by the fact that the Act considers the wife as a property of the husband. Who under Section 34 of the Act, is entitled to claim damages from the wife's adulterer.\(^{131}\)

The Act was also discriminatory on the basis of religion. While under all other personal laws cruelty and desertion, inter alia are the grounds

\(^{131}\) Kusum, Marriage & Divorce Law Manuual (ed. 2000, Delhi) p. 28
for divorce but under this Act, there are only ground for judicial separation. Thus a Christian married wife under the Act was expected to endure all sort of cruelties without any right to seek divorce where as "wife married under the Hindu or the Parsi Marriage Law, is entitled to divorce, may be even in less unbearable situations.\textsuperscript{132}

As early as Section 10, was challenged as illegal discrimination on the ground of gender in \textit{Dwarja Bai v. Ninan},\textsuperscript{133} the court however dismissed the plea and observed (obiter).

"................. I consider that Section 10 as it stands is not prima facie repugnant to Articles 13 and 15 of the constitution. It appears to be based on a sensible classification and after taking the abilities of the man and woman and the result of their Acts, and not merely based on sex, when alone it will be repugnant to the constitution...

\textbf{(d) Advocacy for Reforms and Improvements}

The issue relating to the changes in the Indian Divorce act, 1869 has been hanging for more than forty years. Various law commissions in their reports stating with the 15\textsuperscript{th} report as well as various High Courts, such as the High Courts of Mumbai, Chennai, Andhra Pradesh, Kolkata and Kerala has emphasized the need for bringing about gender equality in the matter on grounds of divorce as available to the Christian spouse. It was also painted out that there was no need for a provision which required confirmation of decree for dissolution of marriage by the High Courts. In the Indian Divorce (Amendment) Bill 2001, the Government had sought to bring about gender equality by amending Section 10, Section 17and Section, 20 to do away with the

\textsuperscript{132} Jorden Deingdeh v. S.S. Chopra AIR 1985 SC 955.
confirmation by the High Court of decree of divorce or nullity of marriage.

Other provisions of the Indian Divorce Act, 1869, were also sought to be amended to make certain consequential changes. The Governments approach in the matter was to bring about minimal changes in consonance with ruling of the courts and uniformity of law among Christians.

A provision has been made for the dissolution of marriage by mutual consent. This is an the lines of Section 13(b) of the Hindu Marriage Act, 1955 and Section 28 of the Special Marriage Act, 1954

Section 7 of the Indian Divorce Act, 1869 which provides that the High Courts and the District court shall act and give relief on the principles applied by the English Courts has been deleted since after attaining independence, this provision seems to have become redundant. Section 34 of this Act which provided that the husband may claim damages for adultery in a petition limited to that object, and the ground of his wife having committed adultery has been deleted.

Section 35 of this Act provided that where in a petition by the husband, the alleged adulterer was made a co-respondent and the adultery is established, the court may order the respondent (adulterer) to pay the cost of the proceedings. This provision has also which provides that the alimony *pendente lite* shall not exceed one fifth of the husband's average net income for the 3 years, the next proceeding date of the order has also been deleted.

\[\text{AIR 1953 Mad. 792 at 800.}\]
Section 10 for which there were objections by the jurists that it was against the gender equality. It has now been modified after the Personal Laws Amendment, 2001, both husband and wife can seek a divorce on the grounds of-

(i) Adultery
(ii) Cruelty
(iii) Insanity for more than 2 years
(iv) Incurable leprosy for more than 2 years
(v) Conversion to another religion
(vi) Willful refusal to consummate marriage
(vii) Not being heard of for 7 years
(viii) Venereal disease in communicable stage from for 2 years
(ix) Failure to obey the order for the restitution of conjugal rights.

However the wife has been permitted to sue for divorce of additional grounds if the husband is guilty of:

(i) Rape
(ii) Sodomy
(iii) Bestiality

All these years, Christian Spouses were compelled to mudslinging each other even if they desired to for in for divorce due to the non establishment of grounds. Now Section 10-A is added under which mutual consent has also been made a ground for divorce.

Thus it can be said that after the Indian Divorce (Amendment) Act, 2001, is a great step for the improvement of the lacunas in the drafting of old Act.

It has adopted the good features of Hindu Marriage Act, 1955 and
Special Marriage Act, 1954. The present situation of the Christian law thus can be said to be satisfactory.

4.5 MAINTENANCE OF WIFE UNDER PARSI LAW

(a) Analysis of the Legislative provisions

Maintenance of wife under Parsi Law is dealt with the Parsi Marriage and Divorce Act, 1988. The relevant provisions of this Act regarding the maintenance of wife are: Section 39, Section 40, Section 41 and Section 42. Section 39 of the Parsi Marriage and Divorce Act, 1988, deals with the alimony *pendente lite*. This Section empowers the court to order the defendant to pay to the plaintiff, the expenses of the suit, and weekly or monthly sum during the suit, if it appears to the Court that either the wife or the husband has no independent income sufficient for her or his support and the necessary expenses of the suit. The Court, while ordering under this Section pay regard to the plaintiffs owns income and the income of the defendant. There is a proviso in this Section which provides that the application for the payment of expenses of suit shall be disposed of within 60 days from date of service of notice on the wife or the husband as the case may be. Alimony *pendente lite* as a temporary provision for the wife or the husband awarded by the court, ordering the husband or wife, as the case may be to pay alimony *pendente lite*. In order to obtain alimony *pendente lite* and expenses of proceeding, the wife or the husband has to prove following conditions that:

1) She or he has no independent income.

2) Her or his income is not sufficient for her or his support and the

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134 Subs by the Marriage laws Amendment Act, 2001 [Act No. 49 of 2001].
necessary expenses of the suit.

Where neither party (husband or wife) has means to meet the expenses of other party, no order may be made. In granting relief under Section of Act, the court shall take into consideration:-

1) The defendants income and;

2) The plaintiff own income

Relief under Section 39 can be sought either by wife or the husband who initiated the substantive proceedings. The question as to who is the husband or wife has been interpreted by Deshpande J. of Bombay high Court while interpreting the said term with reference to Sections 24 & 25 of the Hindu Marriage Act, 1955 which are pari materia to instant provision. His lordship has taken the view that the expression wife as used in Section 24 and Section 25 of the Hindu Marriage Act, 1955, doesn't presupposes an existing jural relationship of husband and wife, but it merely descriptive of the person who may claim to any other relief which can be granted under Hindu Marriage Act, 1955. Alimony pendente lite under Section 39 can be sought during the pendency of any suit arising under the Act. When proceedings are over in their entirely, there is no question of the application of Section 39.

Under Section 39 of Parsi Marriage and Divorce Act, 1988, no fixation of the quantum by the legislature is made for the purpose of alimony pendent elite. It is left to the court to determine the same having regard to the income of plaintiff and defendant. Ordinary, the Court grant maintenance under Section-39 from the date of the application.

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136 Hemraj Shamrao Umedkar v. Smt. Leela, AIR 1989 Bom. 146 (SC)
137 Nirmala v. Ramdas AIR 1973 P&H 48
court should grant alimony *pendente lite* since the date of demand.\textsuperscript{138} The judiciary is of the view that the court may grant alimony *pendente lite* from the date of the service of the notice or petition on the defendant.\textsuperscript{139} Section 40 of the Parsi Marriage and Divorce Act, 1988, deals with the permanent alimony and maintenance, Section 40(1) of the Parsi Marriage and Divorce Act, 1988, empowers any court to order the defendant to pay to the plaintiff for her or his maintenance and support, such gross sum or such monthly or periodical sum for a term not exceeding the life of a plaintiff as having regard to the defendant's own income and other property, at the time of passing any decree or at any time subsequent thereto on application made to it for the purpose by either spouse. *Any such payment may be secured if necessary by a charge on the movable or immovable property of the defendant, if it may seems to the court to be just.* According to Section-40(2) of the Parsi Marriage and Divorce Act, 1988, 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 Subsection (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. According to Section-40(3) of the Parsi Marriage and Divorce Act, 1988, if the Court is satisfied that the party in whose favour an order has been made under this Section has remarried or if party is husband, had sexual intercourse with any woman outside wedlock, it may at the instance of other party vary modify or rescind any such order in such manner as the court may deem just. This Section aims at providing for permanent alimony and maintenance to the husband or wife, whoever is in need of the same.

\textsuperscript{138} Pratima v. Kamal (1964) 68 CWM 316.
\textsuperscript{139} Sudharshan Kumar v. Chhagar Singh (1978) Kash. L.J.
This relief would be available only when a decree for judicial separation or restitution of conjugal rights or divorce or nullity of marriage has been passed by any court exercising jurisdiction under this Act. An order under Section 40 can be passed: (a) either at the time of passing any decree, or (b) at any time subsequent thereto. No order can be passed under Section 40 if the substantive petition is whether dismissed by the court, or withdrawn by the petitioner. While passing under Section 40 (1) of the Act, it is obligatory upon the court to have regard to the conduct of the parties of the case. The conduct of the parties does not mean merely the conduct of the party who is applicant for maintenance, but also of the other spouse in relation to their life together as husband and wife. Permanent alimony can be granted even to an erring spouse and the fact that the wife did not comply with the restitution of conjugal right can not by itself disentitle her to claim permanent alimony.

Doubtless, the conduct of the parties any be factor in deciding claim or permanent alimony, but each case has to be decided on its own merits, it is not correct to say that grant of judicial separation on the ground of cruelty of the wife, is a bar to her getting permanent alimony.

Section 40 of the Parsi Marriage and Divorce Act, 1988, Act puts stress on the conduct of the parties during the matrimonial life and the court pays due regard to that factor. Section 40 (1) and (3) place considerable emphasis on wife being chaste not during matrimonial tie but also after the decree to retain her eligibility for the purpose of

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140 Mazumdeet v. Mazumdar, AIR Cal 428.
141 Shanta Ram v. Hirabai, AIR 1962 Bom. 27.
143 Premji v. Rai Sarkar Kanji AIR 1968
maintenance. Now in view of the Phrase -"the conduct of the parties and other circumstance of the case," under Section 40 (1) of the Act, the courts are duty bound to take into consideration the health of applicant and source of income and if court satisfied that she is in poor health and has no sources of income and there is no one to look after her, maintenance should be granted though she had been guilty of adultery and divorce was granted on that ground.\textsuperscript{145} The Madhya Pradesh High Court opined that where the conduct of wife is unchaste; the question of alimony or maintenance does not arise.\textsuperscript{146} It is clear from the above discussion that regarding the relevancy of the conduct of the parties in deciding claim of permanent alimony, each case should be decided on its own merits. In fixing the amount of maintenance under Section 40 of the Act the court is required to consider the following matter:

(a) Income and property of the party who is required to pay.
(b) Income and property of the non claimant
(c) Conduct of the parties
(d) Circumstances of the case.

Under Section 40 of the Parsi Marriage and Divorce Act, 1988, the court can order one party to pay the other for the maintenance and support:

(a) A gross sum
(b) A sum to be paid monthly
(c) A sum to be paid periodically.

The status of the husband and wife must be taken into account and not the status of father or any other relations.

\textsuperscript{145} Jain, SC. The law relating to Marriage and Divorce, (ed. Ilnd, 1980, Delhi) p. 195.
\textsuperscript{146} Lila Devi v. Manohar Lal AIR 1959 MP 349.
According to the practice of English courts, which generally influences our judicial activity, the monthly allowance that the defendant may be ordered to is one third of his or her income. In some cases, the Indian Judiciary has followed this English Rule. The one third rule is merely a guideline and there is no rigidity about it.\textsuperscript{147}

The court is competent to fix more than one third or less than one third in a given case depending on the circumstances of the case. The court under Section 40 (2) and (3) is empowered to vary, modify or rescind its order passed under Section 40 (1) of the Parsi Marriage and Divorce Act, 1988, Act in any of the following circumstances:

- If the court is satisfied that the party in whose favour an order has been passed, has remarried; or
- If such party is wife, that she has not remain chaste; or
- If such party is the husband, that he had sexual intercourse with any woman outside wedlock.

Thus, in view of the change in circumstances of either party at any time after it has made an order under Section 40 (1), the court may vary, modify, or rescind at the instance of either party in such manner as the court deem just,

(b) Evaluation of the Judicial Pronouncements

As it has been mentioned earlier that in this dissertation only landmark and trend setter judicial decision has been put forth. Since the Parsi community is a self satisfied community with the position of their

\textsuperscript{147} Supra Note 144, p. 114.
existing laws, the number of litigation cases is almost negligible regarding the maintenance of wife which can be said a trend setter and landmark. This community is peace loving and has been free from the controversies we see and had been watching in the other communities. There is no denying the fact that the modern and forward looking approach of the Indian Parses is praiseworthy. The self contentment of the Indian Parses is undoubtedly a challenge to the other communities.

(c) Identification of Pitfalls

It is a well known fact that the Parsi community is a self satisfied community towards their laws. It is a very progress looking community and deals mostly matters according to their customs. The Parsi Law regarding the Marriage, divorce or the matrimonial relief has been amended in 1936 and 1988. The original Act\textsuperscript{148} was passed at the express representation of the Parsi community. The Parsi Marriage and Divorce Act, 1936, has amended the original Act, i.e., 'the Parsi Marriage and Divorce Act, 1865'. The original Act was based on the recommendation of the marriage committee of the Parsi Law Association. The provisions of the Act were essentially based on the Matrimonial Causes Act, 1858. As a general rule there is a presumption that the Parsi is governed by English common law.\textsuperscript{149} The Parsi Marriage and Divorce Act, 1936 was also amended in 1988 and the same is known as the Parsi Marriage and Divorce (Amendment) Act, 1988.

Some pitfalls in the original Act i.e., the Parsi Marriage and Divorce Act, 1865, were found by the Parsi community whose sentiments and

\textsuperscript{148} See Ardasar v. Arabai 9 Bom. 290.
\textsuperscript{149} Naroji v. Roges 4 Bom. HCRI; Bai Manek Bai v. Bai Meerbai 6 Bom. 363.
values was for the time being governed by the Act of 1865. They
desired a variation in their legal resolve. The Act of 1865 had been
obtained after sincere endeavour of the community, yet the legislation
which followed the model of the British Matrimonial Causes Act,
1857, had featured that had became repugnant to the conscience of the
community, e.g., adultery or adultery coupled with some other
matrimonial offence were the extreme circumstances entitling the
aggrieved party to a divorce, the remedy of judicial separation was
available only to the wife etc.

It was the background that the Act of 1936 sought. The model of the
Act of 1936 largely follows that of its predecessor. It provides for
matrimonial remedies of divorce, dissolution and annulment of
marriage. Contemporary views of the community called for updating
the law. As a result the Parsi Marriage and Divorce (Amendment) Act,
1988, was enacted. This incorporates the advantageous aspect of the
Hindu Marriage Act, 1955, the Indian Divorce Act 1869; the Special
Marriage Act 1954 the Matrimonial causes act, 1965 and the
Dissolution of Muslim Marriage Act 1939.

(d) Advocacy of Reforms and Improvements

We have analyzed that the contemporary view of the Parsi Community
called for updating the law. The result is the Parsi Marriage and
Divorce (Amendment) Act, 1988. This incorporates the advantageous
aspects of the Hindu Marriage Act, 1955, the Indian Divorce Act,
1869, the Special Marriage Act, 1954, the Matrimonial Cause Act
1965 and the Dissolution of Muslim Marriage Act, 1939.

The remedy of divorce by mutual consent has been extended in favour
of Parsi Spouses. The relief of alimony *pendente lite* and permanent alimony technically known as ancillary relief is available to both spouses without any discrimination on the basis of sex.

It shows that the Indian Parsi have shown the forward looking and Modern approach towards their personal law. They have shown their willingness to adopt the good and beneficial provisions from many sister communities. There is no hesitation in the Parsi community to adopt the beneficial provisions from any sister community.

It is to be a noteworthy fact that the population of the Parsi community is very much lesser than the other communities in India. They are peace loving people and satisfied with their existing laws. Due to these reasons the number of the litigation cases in India is very much negligible.

From the above discussion it can be concluded that the modern and forward looking approach of the Indian Parsis are praiseworthy. The self-contentment of the Indian Parsis is a challenge to the other Indian minorities as their successful survival need the desirability of the rational rethinking regarding the fate of their personal laws particularly against the complexities of contemporary era. The discussion is clear from the fact that at one hand there is a plethora of cases in Hindu and Muslim community regarding the matrimonial causes which exert a lot of pressure of the judiciary, on the other hand the cases of Parsi community is almost negligible.

Therefore it seems to be correct to conclude that the present law system of the Parsi community is satisfactory and not many instant reforms are needed regarding the maintenance of wife.