CHAPTER III

LAW RELATING TO MAINTENANCE OF MUSLIM WIFE

Law relating to maintenance of wife is different in different religion. Among all communities the question of maintenance to women has acquired great importance. The women being the partner of man in life, plays a vital role in raising family especially to maintain social order. This basic involvement of women gives her the right of maintenance from her husband. Husband is under a legal, social and moral obligation to maintain his wife. Hardly there is any law including the personal law which do not provide for such maintenance. Almost in every society the obligation of husband to maintain the wife arises out of the jural relationship of marriage.

India is a secular country with several legal systems governing the laws of family relations. Muslims are governed by their personal laws in matters pertaining to marriage, divorce, maintenance, custody, guardianship and inheritance etc., whereas in all other matters i.e. in civil and criminal matters, general law of the land applies. It was the same position under British period and afterwards in India that matrimonial disputes were dealt with customary laws based on contemporary Quranic or Shastric interpretations. In the late nineteenth century the situation started to change. Islamic law relating to civil and criminal procedures and practically every field except personal law was replaced by legislation. Even some aspects of Muslim personal law e.g. dissolution of marriage, Waqf, maintenance, etc. have been touched by legislation.

In addition to this, in the year 1898 legislation was introduced under the British Rule, which provided maintenance to women in general. Section 488 of the Criminal Procedure Code, 1898 was applicable to all wives
belonging to any religion. It was not dependent upon the personal law of the parties. But the provisions were not extended to benefit ‘divorced wives.’

The object of maintenance provisions in the personal law as well as under the Criminal Procedure Code is to prevent destitution and save indigent wives or divorced women who have no means of sustenance from seeking sanctuary in the streets. A Muslim wife is entitled to recover maintenance from her husband in the following ways:

A. **Under the Personal Law**

B. **Under an Agreement**

C. **Under the Code of Criminal Procedure.**

**A. Maintenance under the Personal Law**

Maintenance of the wife is incumbent upon the husband because after the marriage the wife has to shoulder new responsibilities and consequently some more rights become vested in her which she can assert at any time as and when the occasions arises. The husband is required to maintain his wife irrespective of his financial position. The wife is entitled to maintenance from her husband though she may have the means to maintain herself. For better understanding maintenance rights of Muslim women under the personal law may be studied under the following headings:

**(a) During the Continuance of the Marriage**

A Muslim husband is legally bound to maintain his wife. In this connection Syed Ameer Ali says:

"It is incumbent on the man to maintain his wife, says, the fatawa-i-kazi Khan, whether she is Moslemah or non Moslemah, poor or rich, whether there has been copula or not; whether grown-up (adult) or young, so that intercourse with her is possible."\(^2\)

This is the duty of the husband to maintain his wife. The obligation arises from the marriage validly contracted. If the marriage is void or

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1 Nanak Chand v. Chandra Kishore Agarwal (1969) 3 S.C.C. 804
irregular, the husband has no obligation to maintain his wife. However, where
the marriage is irregular merely because of the absence of witnesses, she is
entitled to maintenance\(^3\). It is not necessary that the wife must be Muslim.
She may belong to any religion. Fatawa-i-Kazi Khan\(^4\) says that there is no
difference in the right of a wife to maintenance whether she be a Muslim or
non-Muslim, free and bound.

The husband’s duty to maintain commences only from the date when
the wife attains puberty and not before it\(^5\). Where a wife is too young for
sexual intercourse and lives with her parents, she has no right to claim
maintenance. Although a Muslim wife’s right to be maintained by her
husband is an absolute right, but she must be faithful and obedient to him in
respect of matrimonial affairs. Similarly, if she refuses to obey the reasonable
orders of the husband or lives separately without any reasonable justification,
she forfeits her right of maintenance against her husband\(^6\). A Muslim wife
cannot claim maintenance from the husband if her own conduct is violative of
her matrimonial obligation. According to Tyabji, a wife does not lose her right
to maintenance in the following cases.

(i) Where she refuses access to her husband on some lawful ground;
(ii) Where the marriage cannot be consummated owing to
(1) the husband’s minority; or
(2) due to her absence from him with his permission; or
(3) because of her illness, or
(4) due to malformation\(^7\).

In the following cases wife was held to be justified in refusing access to
her husband;

A wife, whose marriage has not been consummated, may lawfully leave
the husband’s house or may refuse cohabitation with him if her prompt dower
is not paid by the husband on demand as non-payment of the prompt dower

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\(^3\) Tyabji, F.B. Muslim Law, 263 (1968, 4th Ed)
\(^5\) Fyzee, outlines of Mohammedan Law, 212.
\(^7\) Supra Note 2 at 267.
is a lawful ground to live separate from the society of the husband and in such situations her right of maintenance is not lost and the husband is bound to maintain her. Similarly, where a wife lives separately because of the cruel behaviour of her husband, she is entitled to be maintained by him. One of the basic obligations of a wife is to allow the husband to cohabit with her. Her refusal without any reasonable justification deprives her of right of maintenance. A wife can claim maintenance only during the subsistence of marriage. Muslim law does not recognize any obligation on the part of a man to maintain a wife when marriage had dissolved either by death or divorce.

(b) After the Dissolution of the Marriage

The wife is entitled to maintenance only during the continuance of marriage and not beyond it. A marriage, in Muslim law may be dissolved either by death or by divorce.

(i) Dissolution of Marriage by Death

Where the marriage is terminated by the death of the husband, both under the Hanafi Law as enunciated in the Hedaya and the Baillie’s Digest and the Shiah law in the Imamia, the widow has no right to maintenance, even if pregnant at the time of the death of her husband. After the husband’s death the widow is not entitled to maintenance even during her period of Iddat. Husband’s liability to maintain his wife is his personal liability which comes to an end upon his death.

Section 125 of the Code of Criminal Procedure, does not include widow in term ‘wife’ therefore, a widow has no right to claim maintenance also under the Criminal Procedure Code, 1973. The present position of the personal law

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10 Fatwai Alamgiri, Volume I, P. 745; Hedaya Volume p. 407
does not follow Quran which requires that a widow is to be maintained for one year\textsuperscript{11}.

\textbf{(ii) Dissolution of Marriage by Divorce}

Under Muslim Personal law wife's right to receive maintenance from her husband during subsistence of marriage is absolute. As regards maintenance after divorce, the Muslim personal law provided for the husband's obligation to maintain her in a limited way. It is provided that wife is entitled to maintenance only during the continuance of marriage and not after it. A Muslim husband is obliged to maintain his divorced wife only up to the period of Iddat and thereafter, his liability is over. The period of Iddat upon divorce is three menstrual courses or otherwise three lunar months. The Iddat of a widow is four months and ten days. Moreover, not only the type of Iddat period determines the wife's right to maintenance, the type of repudiation is also observed in this respect. According to Hanafi School of Muslim law, a wife who has been divorced, whether by a revocable talaq or by an irrevocable talaq, is entitled to maintenance only during the period of Iddat. According to the Shafei school of Muslim law, a wife who has been irrevocably divorced has no right of maintenance. In case wife is pregnant, the period would extend up to the time of delivery or abortion even if it extends beyond the period of Iddat, i.e. three months. If, however, the wife delivers before that period, Iddat will terminate with that event. Once Iddat period is over, the wife cannot claim maintenance under any circumstances. Both Hanafi and Shafei schools maintain that a pregnant divorced wife is entitled to maintenance.

Women's right to maintenance arises upon marriage and the wife is first in order of priority to this entitlement, even before the children. So long she continues to remain as wife, husband is duty bound to maintain her. Once divorced, she is entitled for her maintenance only for the period of Iddat, being a period as prescribed by Shariat Law.

\textsuperscript{11} Aga Mohammed v. Koolsombibee (1887) 25 Cal. 9.
B. Maintenance under an Agreement

A wife is also entitled to recover maintenance from her husband under an agreement signed between the spouses or their guardians. Accordingly, a stipulation by the husband to pay separate maintenance to his wife in case of disagreement, dissension, ill-feeling or separation between the spouses is not against public policy and is enforceable in law.\textsuperscript{12}\ The wife may even obtain from her husband an agreement to give her separate maintenance if the husband ill-treats her or disagrees with her or marries with another woman\textsuperscript{13} and an agreement to the effect that the wife would be entitled to claim maintenance till her life time and such right cannot be defeated by divorcing her.

In Mohammad Moinuddin v. Jamal Fatima\textsuperscript{14}, Mehndi Hassan had married thrice before he and his father had entered into an anti-nuptial agreement with Jamal Fatima, the prospective bride providing that in case of disunion or dissension between the couple, Mehndi Hasan would be bound to pay to the women an allowance of Rs. 15/- per month for her life and certain properties hypothecated to ensured payment of such allowance. There were dissensions between the couple and the husband divorced the wife. Wife filed a suit for claiming the allowance. The court held that the contract was valid and the divorced wife was entitled to receive the allowances as provided in the contract. The court further said.

"The marital rights ended with the divorce, but the contract subsists till the plaintiff dies or breaks it, so long as the right to maintenance lasts, it cannot be treated as devoid of consideration or opposed to public policy."\textsuperscript{15}

This shows that an agreement for maintenance stands on a more solid footing then the wife's bare claim for maintenance under the personal law.

\begin{footnotes}
\item[15] Id at p. 153
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The reason is obvious. A marriage under the Muslim law is a contract simpliciter and any agreement entered into between the spouses or their guardians has a binding force provided that it is not opposed to any law or public policy.

Law recognises the duty of every husband to maintain his wife and children. The wife is also under the duty to be obedient towards her husband and allow him free access at all lawful times. Apart from this obligation, the spouses can enter into an agreement that the husband will pay special allowance to his wife. Such allowance one called Kharach-i-Pandan, guzara and Mewa Khor. Tayabji\(^\text{16}\) say that stipulations in the marriage contract may render the husband liable to make special allowance to the wife in addition to maintenance.

According to Mulla\(^\text{17}\) ‘Kharach-i-Pandan’ literally means betel-box expenses, is a personal allowance to the wife customary among Muslim families of rank. It is kind of maintenance given to the wife by her husband if she stays along with her husband and is obedient to him. It is an expense of the betel-box hence pockets money. It is personal allowance to the wife customary among Muslim families fixed either before or after the marriage, and varying according to the means and position of the parties.

Kharach-i-Pandan is the absolute property of the wife and she is at liberty to use it according to her sweet will and the husband has no control over that money. In Nawab Khwaja Muhammad Khan v. Nawab Hussaini Begum\(^\text{18}\), the marriage was held during the infancy of the children. It was agreed by the parents of the spouses that the father of the son will pay Rs. 500/- per month in perpetuity to his son’s wife. The payment was known as “Kharach-i-Pandan’ and no conditions were laid down for its payment. The wife went to her husband’s house and lived there for some years. Later on,

\(^{16}\) Tyabji, Muslim law, p. 264.  
\(^{17}\) Mulla, Mahamedan law, p. 292 see also Sikandar Ara v. Hasan Ara, AIR 1936 Oudh 196.  
\(^{18}\) (1910)371 I.A. 152, ILR 32 All. 410.
there arose differences between husband and wife. Consequently, the wife left matrimonial home. She filed a suit for the realization of her Kharach-i-Pandan. It was held that she was entitled to recover the whole amount notwithstanding the fact that she was not a party to the agreement. She was clearly entitled to proceed in equity to enforce her claim. The judicial committee of the Privy Council further held that it was not necessary for her to live with her husband. The Privy Council held:

"By the agreement on which the present suit is passed, the defendant binds himself unreservedly to pay to the plaintiff the fixed allowance, there is no condition that it should be paid only when the wife is living in the husband's home or that his liability should cease at whatever the circumstances under which she happens to leave it." 19

The term Mewa Khorí (literary means eating of fruits) and guzara (literary means allowance for subsistence) are similar in character. In *Ali Akbar v. Mst. Fatima* 20 an allowance of Rs. 25.00 per month was fixed for Kharach-i-Pandan in addition to maintenance to which she would be entitled. It was held that the wife was entitled even though she may be refusing to return to her husband.

Kharach-i-Pandan is a personal allowance and it cannot be transferred even though payment secured on immovable property 21.

In *Mydeen Beevi Ammal v. T.N. Mydeen Rowther* 22 after his second marriage without the consent of the first wife, the husband settled certain properties on his first wife for her maintenance till her life. Subsequently he divorced her and filed a suit for the possession of the properties settled on her. The court held that she was entitled to the income of the properties for her lifetime, whether she was divorced or not. The court further stated the principles of law as;

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19 *Id.* at 155.
20 (1929) ILR II Lah. 85.
22 AIR 1951 Mad. 992.
“Where a Muhammedan husband executes a deed of maintenance in favour of his wife setting certain properties upon her for her maintenance for her life without any condition attached thereto, the husband cannot recover possession of the properties from his wife on the ground that he has subsequently divorced her.”

The Indian courts have recognized as valid the agreement for living separate. The court awarded the arrears of maintenance according to stipulation for living separately.

An agreement entered for special guzara, if the wife was not willing to live along with her husband has been held as valid. Similarly, an agreement by way of family settlement was held as valid.

Kharach-i-Pandan is the absolute property of the wife and she is at liberty to use it according to her sweet will. Sometimes the conditions relating to the wife’s maintenance and residence, immovable property are reduced to writing in Nikahanama. Such agreements are made to ensure wife’s right to receive a regular pocket allowance called Kharach-i-Pandan; beetle box expenses or Mewa Khor.

It is her absolute property and she has absolute freedom to spend it as she likes. But the husband’s obligation to maintain his wife does not depend on any express contract but flows from the status of marriage. Special agreement in the form of Kharach-i-Pandan, Mewa-Khori or Guzara etc. are in no way related with the right of maintenance of the wife. Question of maintenance is related with the jural relationship between husband and wife whereas right under the special agreement is a separate right conferred upon the wife under the contract law. The right of maintenance and right under special agreement are two separate things not in any manner connected with each other.

23 Ibid.
Apart from the personal law, there is a statutory provision contained in the Code of Criminal Procedure regarding maintenance of wife where husband have neglected or refused to maintain her.

C. Maintenance under the Code of Criminal Procedure

Coming to the legislation, which provides for maintenance to women in general is Criminal Procedure Code. As early as in 1847, the Government of India instituted the First Law Commission to prepare a code of procedure to bring about effective criminal justice system. In response to this, a scheme was prepared which after due consideration by the second law commission was developed into a draft Criminal Procedure Code. This enactment had a limited application and, therefore, many subsequent enactments were passed. In his dispatch of October 26, 1876, the Secretary of State for India instructed the Government of India to take measures to assimilate all the provisions relating to criminal procedure. This task was undertaken by Witely Stocks and the Criminal Procedure Code of 1882 was the result. In this code, provisions for maintenance were incorporated in S.536 which in fact provided for the maintenance of women. Under this section, any Indian wife could claim maintenance from her husband by the order of the Magistrate. In order to improve the effectiveness of the procedure, the code of 1898 was enacted which, with some amendments from time to time continued to apply till 1974. In the State of Jammu and Kashmir also a code of Criminal Procedure was enacted with almost similar provisions. On 1st April 1974, new Code of Criminal Procedure came into force which extended the maintenance provisions to divorced wife also. Right to maintenance and procedure for claiming the same under the old Code of Criminal Procedure is being discussed here-in-under.

(a) Under the old Code of Criminal Procedure, 1898

Section 488 to 490 of the Code of 1898 dealt with maintenance of women and children. These provisions were introduced with the object of
providing speedier remedy to the desperate wives. The Magistrate under the
code had been empowered to pass an order directing the husband to pay
certain monthly allowance for the maintenance of his wife. The provisions of
the code were applicable to all Indian wives irrespective of caste and religion.
Under the same section, the code of Jammu & Kashmir also incorporates the
provision for maintenance of wives and children. Section 488-490 runs, thus:-

(i) Any person having sufficient means neglects or refuses to
maintain his wife or his legitimate or illegitimate child unable to
maintain itself, the District magistrate, a Presidency Magistrate, a
Sub-divisional Magistrate or a Magistrate of the first class may,
upon proof of such neglect or refusal, order such person to make
a monthly allowance for the maintenance of his wife or such
child, at such monthly rate, not exceeding five hundred rupees in
the whole, as such magistrate thinks fit, and to pay the same to
such person as the magistrate from time to time directs.

(ii) Such allowance shall be payable from the date of the order, or if
so ordered from the date of the application for maintenance.

(iii) If any person so ordered (fails without sufficient cause) to comply
with the order, any such Magistrate may, for every breach of the
order, issue a warrant for levying the amount due in manner
hereinbefore provided for levying fines, and may sentence such
person, for the whole or any part of each month's allowance
remaining unpaid after the execution of the warrant, to
imprisonment for a term which may extend to one month or until
payment if sooner made.
Provided that, if such person offers to maintain his wife on
condition of her living with him, and she refuses to live with him,
such Magistrate may consider any grounds of refusal stated by
her, and may make an order under this section notwithstanding
such offer, if he is satisfied that there is just ground for so doing;
2.(if a husband has contracted marriage with another wife or
keeps a mistakes it shall be considered to be just ground for his
wife's refusal to live with him).
3. (Provided, further that no warrant shall be issued for the
recovery of any amount due under this section unless
application be made to the court to levy such amount within a
period of one years from the date on which it became due.)
(iv) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

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

(vi) All evidence under this chapter shall be taken in the presence of the husband or father, as the case may be, or when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases;

Provided that if the Magistrate is satisfied that he is willfully avoiding service, or willfully neglect to attend the court, the Magistrate may proceed to hear and determine the case ex parte.

Any orders so made within three months from the date thereof.

(vii) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(viii) Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.

S. 489 (1) On proof of a change in the circumstances of any person receiving under section 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance the monthly rate of (one hundred) rupees in the whole be not exceeded.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent civil court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be vary the same accordingly.

S. 490 A copy of the order of maintenance shall be given to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non payment of the allowance due
A Muslim Wife was entitled to claim maintenance under her personal law as well as under the code of Criminal Procedure. Section 488 of the code of 1898 reveals that the Magistrate was authorized to pass an order for maintenance of a wife only when certain condition laid down by the section itself were fulfilled.

A Magistrate under section 488 of the Code of 1898 could make an order requiring a husband to make a monthly allowance for the maintenance of his wife if:

(i) the husband has sufficient means;
(ii) the husband neglected or refused to maintain her;
(iii) the wife had not refused to live with the husband except for a sufficient reason;
(iv) husband having contracted a second marriage or keeping a mistress to be considered a just ground for wife's refusal to live with him
(v) wife not living in adultery;
(vi) the husband and the wife not living separately by mutual consent;

If the wife subsequently obtained a civil remedy, the Magistrate may vary or cancel the order. The significant question that arises for consideration is that how far there exists conformity or conflict between the two laws with respect to a Muslim wife’s right to maintenance.

(i) **Husband Having Sufficient Means:** What is meant by having sufficient means. Whether the words refer to property and financial position of a man or does it refer to physical ability of a man to do physical labour and earn money. There can be cases, where a man is weak and disabled but has a lot of property bringing in good income. On the other hand, there can be cases where a man has no property whatsoever and thus no income as such, but he is healthy and able-bodied, capable of doing hard work and earn money. The law intends that the man shall be deemed to have sufficient means in either case. The phrase “sufficient means” is thus not being confined either to pecuniary or to financial resources only. Under Islamic law the wife can claim maintenance irrespective of the financial conditions or any other limitation of
the husband, although it needs due consideration in fixing the amount of maintenance.

(ii) Husband’s Neglect or Refusal: Neglect means the fact of disregarding, “slighting or paying no attention to a person,” the fact or condition of being treated in this way. The dictionary meaning of the word ‘refuses’ is ‘declines’. Thus, the word ‘refuses’ implies a positive idea or positive act of not acceding to an obligation existing legitimately. The neglect or refusal can be by words or by conduct, for instance, ill treating a wife or turning her out of the house or refusing to maintain her separately when she is so entitled. Neglect or refusal is the sine qua non for a wife to be entitled to a maintenance order from the Magistrate against the husband. This principal is in conformity with the Islamic maintenance law which attaches equal importance to this requirement. It has been made clear in Mst. Khatijan Begum’s case that where a wife is turned out or ill treated so as to make it impossible for her to live with her husband she is entitled to maintenance by living separate from him. This principal ought to apply equally to the case of a Muslim whether the question arises under S.488 or in a civil suit.

(iii) Wife’s Refusal to Live with the Husband for a Just Cause:-
The normal course of conduct of a wife is to live with her husband and to give him company in all respects. However, keeping in view varying circumstances in day to day practical life, a wife may for some ‘just and reasonable’ cause refuse to live with her husband, then in such circumstance she would not lose her right to claim maintenance from the husband. In principal, there is no contradiction between the two laws that is S.488 of the code of 1898 and the Muslim law regarding maintenance. But judicial interpretation has revealed that a ground on which a wife is entitled to refuse to live with her husband may be a just and reasonable cause under the Muslim personal law but not treated so under the provisions of S. 488. Thus, there was conflict in judicial decisions. This will be more clear from the following discussion:

1. **Non Payment of Prompt Dower**: When the husband fail to prompt dower to his wife on demand the latter can

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27 Mst. Khatijan v. Abdul Rashid A.I.R 1927 Nag 139 at 144
validly refused to live with the former without losing her right to maintenance under the maintenance law of Islam. But this has not been considered as a reasonable cause for refusal to live with the husband under the provisions of S. 488, Thomas, J. in Mohd. Azizullah’s case\textsuperscript{28} observed:

"The non-payment by the husband of prompt dower may be good and sufficient reason under the Mohammadan law for the married woman to withheld her person from her husband, but it does not follow within the meaning of S.488 as to empower a court to pass decree for maintenance to a Mohammadan wife against a husband who is willing to maintain her upon conditions of her living with him. S.488 provides a statutory right independent of personal law and cannot be affected by the personal law."\textsuperscript{29}

2. \textbf{Refusal on the Basis of Customs:} The matter which come for consideration before the High Court of Jammu and Kashmir\textsuperscript{30} was whether a wife who refuses to accompany a husband on the basis of some existing custom is entitled to get an order under S.488. The husband in this case was a Khana-damad and accordingly he was required to live in the house of his wife's parents. But he discontinued to live with his in-laws and showed his willingness to maintain the wife in his own house, but the wife refused to do so. The wife applied for maintenance under S.488 Cr.P.C Shanmire, J. observed

"The provisions of S. 488 are independent of any custom governing marriage between the parties. Mere customs by which the husband is required to live with his wife's parents cannot be a good

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\item \textsuperscript{28} Modh Azizullah v. Abdul Halim, A.I.R 1935, oudh, 285.
\item \textsuperscript{29} Ibid.
\item \textsuperscript{30} Qadir v, Mst. Zoni A.I.R 1957 J & K, 37.
\end{itemize}
ground for refusal to live with the husband under S.488.31

This view has also been followed by the court subsequently with respect to the wife’s right to claim maintenance under S.488.32

3. Exception when Wife is Entitled to Maintenance: Though Living Apart: Where the wife refuses to live with the husband on the basis of his ill treatment, cruelty or any other such ground, the refusal will be justified under the Islamic laws as well as under S. 488. Thus, where the wife refuses to live with the husband on the basis of the latter’s adultery, it was held that the wife had a right to claim an order for separate maintenance under S. 488. The court said that this amounts to ‘physical as well as legal cruelty’33. Recently, Andhra Pradesh High Court held that Magistrate has a discretion to grant separate maintenance order, where the wife has been ill-treated, in spite of the husband’s offer to maintenance her34.

4. Second Marriage by the Husband

If a husband has contracted marriage with another wife or ‘keeps a mistress’ it shall be considered to be just ground for his wife’s refusal to live with him. Under S.488 a wife who, therefore, refuses to live with her husband on the basis of his second marriage can claim maintenance under S. 488. On the other hand the Islamic law permits polygamy (up to four wives at a time). The question that arises for consideration is whether a Muslim wife can claim separate maintenance under S. 488 on her refusal to live with her husband, because the husband has contracted a second marriage. There is difference of opinion on the question among the various High Courts.

In Abdullah Khan v. Smt. Chandni35 Justice Mathur has taken the view that a Muslim wife will not be justified in refusing to live with

31 Ibid.
33 Shamsher Khan v. Siddiquunisa AIR 1953 All 720.
34 Gulam Syed Sajad v. Parveen Fatima 1981 Cr.L.J.(NOC) 2 AP.
35 AIR 1956 Bhopal 71.
her husband on account of his marrying with second woman. The Court said:

"The Muslim woman will have no justification to refuse to live with her husband simply because he has contracted marriage with another wife. This rule would be applicable only to Muslim married woman and not to Hindu woman who have been given a right to separate residence and maintenance, under the Hindu Married Women's Right to separate Residence and maintenance Act, 1946. But a Muslim woman has no such right and she must submit to the second marriage unless the husband neglects or refuses to maintain her."³⁶

This Judgment supports the view that in order to determine whether wife's refusal to live with her husband is just or reasonable, personal law (Islamic Law in this case) is to be taken into consideration. The above court reiterated the same view in 1970 and refused to grant maintenance order in favour of a wife who had refused to live with her husband on the ground of his marrying a second wife.³⁷

On the other hand, the Allahabad High court followed the view that a Muslim wife who resides separately from her husband on his contracting a second marriage is not disentitled to claim her statutory right of maintenance under Cr.P.C. The court emphasized the fact that this is an independent right under S. 488 and is not affected by any provision of the wife's personal law. In Baddruddin's case³⁸ the court made it clear:

"Polygamy is only permitted in Islam. It is not a fundamental right of a Muslim to have four wives, it can, therefore, be said that the provisions of law in favour of monogamy are not violative of Act, 25 of the Indian Constitution. Moreover, the Shariat Act 1937, does not affect the provisions of S. 488 Cr.P.C. This is an independent right and it is not affected by any provisions of the wife's personal law. This statutory right continues only during the continuance of marriage. Even where the parties are Muslim, if a husband has contracted marriage

³⁶ Ibid.
with another wife, it shall be considered to be a just ground for his first wife's refusal to live with him. The civil court may not accept the principal laid down in S.488 but a criminal court dealing with an application for maintenance is bound to follow that provision contained in S.488 of the code of criminal procedure."

In **Syed Ahmad v. Parveen Begum** the Mysore High Court, while upholding the wife’s right to separate maintenance observed:

"Neglect or no neglect, the petitioner (husband) in this case is liable to pay separate maintenance to his wife on the sole ground that he had taken the second wife."

Later, the Andhra Pradesh and Jammu & Kashmir High Court too have held that the right to Muslim wife under S. 488 is independent of the personal law of the parties. Thus if the parties come within the ambit of S. 488, they shall be governed by its provisions, notwithstanding their personal law. Recently the Karnataka High court followed the same view.

In **Abul Gafoor v. Bibi Hafiza Khatoon** it has been pointed out that even if the husband takes a second wife with the consent of his first wife, the first wife would still have a just ground for refusing to live with him and in such circumstances she would be entitled to claim separate maintenance without proving the husband’s neglect. Similarly, the Allahabad High Court in **Shamsher Khan v. S. M. Siddiqunnisa** and others held that neither the wife nor children can be deprived of the maintenance merely because they chose to live separately from Shamasher Khan.

40 AIR 1958 Mys. 125.
45 Khadira Sab Bab Sab Pinjar v Narunbi 1979 Cr. L.J. (NOC), 12 Karnataka.
46 1968 Pat 307-309.
47 AIR 1953 All. 720.
In *Jagir Kaur v. Jaswant Singh* 48, Justice Subha Rao Speaking for the Supreme Court held that S. 488 Cr.P.C, 1898 intends to serve a social purpose. In *Nanak Chand v. Shari Chandra Kishore Aggarwal*,49 Justice Sikri held that section 488 of Cr.P.C 1898 which corresponds to S. 125 of Cr.P.C, 1973 was “applicable to all persons belonging to all religions and has no relationship with the personal law of the parties”. On the point of maintenance to a neglected women the Kerala High Court through Justice V.R. Krishna Iyer in *Zubaida Bibi’s* 50 case observed:

“It is distressing for a court to discriminate against women who have for ages been subjected to several social disabilities clamped down on them in the name of personal law. The Indian constitution direct that the State should endeavour to have a uniform civil code applicable to the entire Indian humanity and indeed, when motivated by public policy, section 488 of the criminal procedure code has made such a law, it would be improper for an Indian court to exclude any section of the community born and bred upon Indian earth from the benefits of that law, importing religious privilege of a somewhat obscurantist order. It behoves the courts in India to enforce section 488(3) in favour of Indian women Hindu, Muslim or the other. It follows that Muslim women should not be denied the advantage of para 2 of the proviso to S. 488 (3).”51

The above mentioned judicial decision it seems to have precipitated that the courts have allowed maintenance to the first wife when she refuses not only to live in husband’s house but also to make herself available for conjugal relationship. Islamic law on the point appears to be more reasonable which allows a wife to claim a separate house or at least a separate apartment and also a servant, but to keep no other impediments between herself and the husband.

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48 AIR 1963 SC 1521.
49 AIR 1970 SC 446.
51 *Id.* at 4.
(iv) Wife Living in Adultery

S. 488 (4) provides that a wife living in adultery shall not be entitled to receive an allowance from her husband and clause (5) thereof empowers the Magistrate to cancel an order of monthly allowance, if already passed in favour of a wife living in adultery. Relation between the husband and the wife are sacred and confidential. Every husband expects his wife to be faithful to him. That being so it is the bounded duty of the wife to always safeguard her chastity. Such wives are deprived of the right to maintenance under S. 488 under Islamic law as is very much clear from its matrimonial law, the prime object of marriage is 'chastity', the unchaste or adulterous wife is not entitled to maintenance. 52

(v) Living Separately by Mutual Consent

Where the husband and the wife are living separately by mutual consent the wife cannot claim maintenance from her husband under S. 488 Cr.P.C. Ordinarily it is rather difficult to visualize a husband and wife living separate by mutual consent. Still situation cannot be ruled out where the two may be willing to live separately, however, it is well settled that a wife who is living separate because of the husband's second marriage or after divorce cannot be said to be living separate by mutual consent. 53

(vi) Muslim Divorcee and Section 488

The wife is entitled for maintenance allowance under S. 488, if the relationship between the husband and the wife subsists. The wife is not entitled to claim relief under this section if the marriage has already been dissolved. Under Islamic Law, a divorced wife is entitled to maintenance even after dissolution of marriage for the period of iddat. On the other hand,

52 Ameer Ali, II 360
whether a Magistrate u/s 488 is empowered to pass an order for maintenance in favour of a divorced wife for the period of Iddat or not, is a controversial question that has frequently arisen before the courts. Through, Madras High Court, Mr. Justice Yahya Ali in Kariyadan Pokkar v. Kayat Beeran Kutti expressed his view regarding the operation of Sections 488 and 489 Cr.P.C.

"The question that arises for consideration is whether when a valid and irrevocable divorced has been given by husband to his wife in conformity with the Mohammada law and he has also paid the Iddat maintenance he is still bound to pay the maintenance awarded to his wife under section 488, Cr P. C when the marriage is not subsisting between them. The answer to this question is straight and simple. The foundation upon which sections 488 and 489, Cr. P.C rest, so far as the granting of maintenance by the husband to the wife is concerned, is that relationship of the husband and wife subsists between them. When the relationship is lawfully dissolved and there is no marital tie either in reason or upon any common of justice or even upon the language of section 488 and 489, how the husband can be directed to continue to maintain his divorced wife".

Allahabad High Court in Shamshudin v. Zamina Bibi through Mr. Justice Broome observed on the same footing:

"......... a court which is asked to enforce an order for maintenance under section 488, Cr.P.C. is bound to entertain plea of divorce and if it finds that the plea is established must decline to enforce the maintenance order for any period subsequent to the date when the marriage ceased to subsists between the parties."

Mr. Justice Mehmood in Re Din Mohammad’s case settled this question on the strength of Hedaya

"when a man divorced his wife her subsistence and lodging are incumbent upon him during the term of her Iddat whether the divorced be of reversible or of irreversible kind The argument of our doctors is that maintenance is a return for custody and custody still continues on account of that which is the chief end of

54 ILR 19 Mad 461.
56 In the matter of Re Din Mohammad (1883 S All 226 I.L.R. All 226)
marriage, namely, offspring (as the intent of Iddat is to ascertain whether the women is pregnant or not), therefore subsistence is due to her, as well as loading, which is admitted by all to be her right."

The question also arose before the Allahbad High Court in Shah Abu lyas v. Ulfat Bibi. Musammat Ulfat Bibi presented an application before the Magistrate of the first class at Basti, praying for an order of maintenance to be granted in her favour under section 488 of criminal Procedure. The Court held that a Mohammadan wife, divorced after an order for maintenance, had been passed in her favour is entitled to maintenance during her Iddat, but that order cannot be enforced for a time subsequent to the expiry of the Iddat.

Similarly in Chandbi Badesha Mujawar v. Badesha Balwant Mujawar a Mohammedan wife made an application for maintenance. The husband made a statement in his written statement that he had divorced his wife about thirty years ago and that he was not liable to maintain her. It was held that the statement of the fact of such divorced was not proved. It operated as a declaration of the divorce from the date of the written statement and in that event the wife would be entitled to maintenance only for the period of Iddat i.e for three lunar months. The Madras High Court also held that under section 488 of the old code of criminal procedure, 1898 divorced wife is entitled to claim maintenance till the Iddat period only.

Then arises the question whether a Muslim wife, divorced by an irrevocable Talak, had a right to sue for the interim maintenance amount due & return of her clothes & jewel. Madras High Court in K.A.S Mohamed Ibrahim v. Minor Jaithon Bivi Amnal, represented by her next friend and guardian, Shaik Dawood Rowther, held that an irrevocable talak only

57 (1897) ILR 19 All 50.
58 AIR 1961 Bom 121.
59 Syed Saib v. Meerum Bee (1910) 20 MLJ 12.
60 AIR 1951 Mad 831.
terminates the wife's right to conjugal relationship and makes the venue for filing a suit for restitution of conjugal rights at the place where the irrevocable talak was pronounced. Mr Justice Mahmood in Re Din Mohd's case 61 settled this question on the strength of Hedaya “ when a man divorced his wife her subsistence and lodging are incumbent upon him during the term of her Iddat whether the divorce be or reversible or of irreversible kind.

It is relevant to discuss here that according to Hanafi school of Muslim Law, a wife who has been divorced , whether by a revocable talak or by an irrevocable talaq is entitled to maintenance only during the period of Iddat. According to the Shafei school of Muslim law, a wife who has been irrevocably divorced has no right of maintenance. In India, applying the Hanafi law to the Sunnis who are governed by the Hanafi school, courts held that the divorced wife was not entitled to maintenance beyond the period of Iddat. 62 So this statutory right also continues only during the continuance of marriage and marriage tie under Islamic law subsists till the end of Iddat period. 63

Section 488 of the Code of Criminal Procedure, 1898, marked the beginning of the secularisation of the maintenance law in India. The object of this remedy was to overcome the inordinate delay in obtaining relief in Civil Courts and to provide a speedy and cheap remedy for destitute women against want and starvation. Under the said provisions Magistrates had been empowered to order a husband to make monthly payments to the wife for her living where the husband neglects or fails to do so. The basis on which a wife can establish her claim for maintenance allowance under section 488 Cr.P.C. was the subsistence of marital relationship between the husband and the wife. The wife was not entitled to claim maintenance under this section if the

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61 Supra Note 54.
63 Abdul Kadir v. Azizbee, AIR 1944 Mad. 227.
marriage has already been dissolved. As for instance, maintenance order on the ground of non-payment of prompt mahr which is in fact a reasonable ground to refuse company or where maintenance has been granted to a wife neglected by the husband in cases of bigamy. The courts have expressed conflicting opinions and in most of the cases allowed separate maintenance. All these conflicts have been justified on the basis that the right under the code is a statutory right independent of any personal law.

But, the Muslim male did not want to give up his right of polygamy and unilateral divorce, therefore, in a number of cases where the courts ordered maintenance to the Muslim wife, was defeated by unilaterally divorcing under Muslim law or by obtaining a decree of divorce against her under the other system of law. It is submitted that the law instead of improving the position of Muslim woman, received a slap of talaq.

(b) Maintenance under the Code of Criminal Procedure 1973

Wife's right to maintenance, were incorporated in the Code of Criminal Procedure 1898. These provisions were made applicable to all the Indian wives irrespective of any religion or caste. It is to be noted that under section 488 of Cr.P.C. of 1898, the wife's right to maintenance depended upon the continuance of her married status. Therefore, it could be defeated by the husband by divorcing her unilaterally as under the Muslim Personal Law, or by obtaining a decree of divorce against her under the other systems of law. To remove this hardship, the joint committee recommended that the benefit of the provisions regarding maintenance should be extended to a divorced woman, so long as she has not remarried after the divorce which was accepted by the legislature. The legislature took a drastic step and an amendment in Criminal Procedure Code came into being in 1973.

Later, under the new Criminal Procedure Code of 1973, Section 125 empowered the Magistrates to order the husband to provide maintenance to the wives. The provision was extended to 'divorced wives' also. Under section
125, a divorced Muslim wife, who has not remarried can make an application to the Magistrate for seeking a maintenance order against the husband provided she is unable to maintain herself and her former husband despite having sufficient means neglects or refuses to maintain her. On her application, the Magistrate can order the former husband to pay her a monthly allowance. If the order is not complied with, the Magistrate can issue warrants in the manner provided for levying fines. Further non compliance results in imprisonment up to one month or till due payment, if made earlier. But, under section 127 (3) (b), such an order has to be cancelled or modified on the proof that she has received in full from her former husband the sum which under the Personal Law is payable on such divorce. The provisions of the Criminal Procedure Code, 1973 constitute a piece of legislation which aims to help deserted wife and other relations and require the husband to pay a monthly sum to enable them to live in the society. Section of 125 of the Criminal Procedure Code runs as follow:

125. Order for maintenance of wives, children and parents. (1) If any person having sufficient means neglects or refuses to maintain-
(a) His wife, unable to maintain herself, or
(b) His legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
(c) His legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
(d) His father or mother, unable to maintain himself or herself,a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

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

Provided further that the Magistrate may, during the pendency of the Proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable,
and to pay the same to such person as the Magistrate may from time to
time direct:
Provided also that an application for the monthly allowance for the
interim maintenance and expenses for proceeding under the second
proviso shall, as far as possible, be disposed of within sixty days from the
date of the service of notice of the application to such person]
Explanation, - For the purposes of this Chapter.
(a) Minor means a person who, under the provisions of the Indian
Majority Act, 1975 (9 of 1875) is deemed not to have attained his
majority;
(b) "Wife" includes a woman who has been divorced by, or has obtained a
divorce from, her husband and has not remarried.
(2) Any Such allowance for the maintenance or interim maintenance and
expenses for proceeding shall be payable from the date of the order, or, if
so ordered, from the date of the application for maintenance or interim
maintenance and expenses of proceeding, as the case may be.]
(3) If any Person so ordered fails without sufficient cause to company
with the order, any such Magistrate may, for every breach of the order,
issued a warrant for levying the amount due in the manner provided for
levying fines, and may sentence such person, for the whole, or any part
of each month's. [ allowance for the maintenance or the interim
maintenance and expenses of proceeding, as the case be,] remaining
unpaid after the execution of the warrant, to imprisonment for a term
which may extend to one month or until payment if sooner made:
Provided that no warrant shall be issued for the recovery of
any amount due under this section unless application be made to the
court to levy such amount within a period of one year from the dare on
which it became due:
Provided further that if such person offers to maintain his
wife on condition of her living with him, and she refuses to live with him,
such Magistrate may consider any grounds of refusal stated by her, and
may make an order under this section notwithstanding such offer, if he
is satisfied that there is just ground for so doing.
Explanation. If a husband has contracted marriage with
another woman or keeps a mistress, it shall be considered to just ground
for his wife's refusal to live with him.
(4) No wife shall be entitled to receive an allowance from her husband
under this section she is living in adultery, or if, without any sufficient
reason, she refuses to live with her, husband, or if they are living
separately by mutual consent.
(5) On proof that any wife in whose favour an order has been made under
this section is living in adultery, or that without sufficient reason she
refuses to, live with her, husband, or that they are living separately by
mutual consent, the Magistrate shall cancel the order.
The provision of section 125 of the Criminal Procedure Code provides a simple speedy but limited relief and seeks to ensure that the neglected wife, children and parents are not left beggared and destitute on the scrap-heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence. The term 'wife' appearing in sec.125 (1) means only a legally wedded wife. Therefore, legally wedded wife, unable to maintain herself is entitled to claim maintenance under this section. On the other hand, it is also necessary that the person from whom maintenance is claimed have sufficient means to maintain the wife claiming maintenance. The term 'means' in sec.125 (1) is not confined only to visible such as lands and other property or employment. Where a person is healthy and able-bodied he must be held to have means to support his wife and other relations. Some courts have gone to the extent of laying down that the husband may be insolvent or professing beggar or a minor or a monk, but he must support his wife so long as he is able-bodied and eke out his livelihood.

The provisions under Ss. 125-128 are applicable to all persons belonging to all religions and have no relationship with the personal laws of the parties. The relief given under these sections is of a civil nature and findings of the Magistrate are not final and parties can legitimately agitate their rights in a civil court even after the order of the Magistrate. The explanation (b) of sec.125 (1) provides that for the purpose of Ss.125-128, 'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and not remarried. Under the extended definition of 'wife' the right to claim maintenance is also made available to a divorced wife. Sec. 126 provides procedure for exhausting the remedy provided under Sec.125. Sec. (1) provides that proceedings under Sec.125 may be taken against any

64 Bhagwan Dutta v. Kamla Devi, 1975 Cr.L.J. 40 (SC)
65 Durga Singh Lodhi v. Prembhai, 1990 Cr.L.J. 2065 (MP)
66 Basant Kumari v. Sarat Kumar, 1982 Cr.L.J. 206 (Ori); Tarak Shaw v. Minto Shaw, 1984 Cr.LJ 206 (Cal)
person in any district (a) where he is, or (b) where he or his wife resides, or (c) where he last resided with his wife.

Sec. 127 empowers the Magistrate to alter or modify the order of the maintenance on of (i) a change in the circumstances of the party praying or receiving the maintenance, or (ii) any decision of competent civil court. The party entitled to alteration of the order, can always move to the Magistrate whenever there is a change of circumstances.

"Change of circumstances" covers change in primary circumstances as well as changes in other circumstances. The change may be in the circumstances of the paying party or of recurring party. Under this section, the wife can apply for increase of her maintenance. The opposite party can also apply for reduction or for cancellation of order on account of a civil court decree, i.e. for restitution for conjugal rights, invalidity of marriage, divorce, etc. Moreover an order of maintenance can be cancelled on the application of both parties that they have compromised.

Section 127 (3) exempts a husband from paying maintenance in three circumstances:

(a) The woman has remarried, after the divorce,
(b) The woman had received a customary sum payable on divorce.
(c) The women has (after obtaining divorce) voluntarily surrendered her right of maintenance.

Once a maintenance order is passed by a competent court it can be enforced under section 125 (3) and remains in force until there has been cancellation under section 125 (5) or modification under section 127 or cessation of conjugal relationship. Section 128 is merely supplementary to section 125 (3) which provides for enforcement of order. The condition for the enforcement of an order is the identity of the parties. Application for recovery of maintenance may be made either to the Magistrate who passed the original order or his successor or to a Magistrate having jurisdiction over the place where the person resides.

After having analysed legislative provisions on maintenance to Muslim women, it becomes imperative to find out judicial behaviour on the issue. It is
well known that the Islamic maintenance law, which is most elaborate on the subject, continues to be the rule of decision where the parties are Muslims. But perusal of the law and the judicial dicta reveals that the relationship between the provisions of the new code and the principles of the Islamic law has not been made clear, thus resulting into a lot of judicial controversy. More confusion has been introduced by the provisions pertaining to maintenance right of divorcees till remarriage or death. This provision is clearly conflicting with the principles of Islamic maintenance law which mandates a Muslim husband to maintain his divorced wife only till her Iddat period. However, there is no dispute regarding the maintenance to Muslim married wife and widow, but maintenance to divorced Muslim woman has remained a controversial issue for the last forty years. Therefore, it becomes important to know how the courts have interpreted the various provisions of law for providing maintenance to divorced Muslim women. Judicial attitude regarding maintenance to Divorced Muslim women may be studied under the following heads:

(i) Pre-shah Bano Approach.
(ii) Shah Bano Approach.

(i) Pre-Shah Bano Approach:
The Muslim Women's right to maintenance arises upon marriage and ends with the expiration of Iddat. It was also the position under the code of Criminal Procedure 1898. Section 488 of the said code which was analogous to present section 125, provided for the wife's right to claim maintenance during continuance of her marital status. The adverse impact of this provision was that the husband could easily defeat wife's claim for maintenance by pronouncing triple talak. In such circumstances wife could claim maintenance until the expiry of Iddat and not beyond it. In order to remove the anomalous situation, Parliament introduced a new criminal procedure code 1973, which entitled a divorced woman to claim maintenance so long as she remains unmarried and is unable to maintain herself. At the time when
the Bill was at the anvil of the Parliament, a hue and cry was raised by the Muslim members of Parliament against this provision. In order to give a sob to the orthodox and conservative opinion a provision under section 127 was included which provided for the cancellation of the order of maintenance on the payment of the sum which under any customary or personal law applicable to the parties was payable on such divorce. This provision, namely, section 127 (3) (b), was the subject of interpretation in two earlier decisions of the Supreme Court before the Shah Bano's case\(^68\) was decided. Before section 127 (3) (b), section 125 was challenged that the former husband is liable to provide maintenance up to Iddat period and not beyond it.

In Khurshid Khan v. Husnabanu\(^69\), the learned counsel for the husband argued that, a divorced wife under the Muslim law was entitled to maintenance only during the period of Iddat. Bombay High Court rejected the argument and held that section 125 of the Code of Criminal Procedure was applicable to all divorced wives irrespective of their religion or cast.

Later in the same year, M.S. Nesargi, J. asserted in U.H. Khan v. Mahboobunisa\(^70\), that the Criminal Procedure Code was a law of land and not of any community. In case of conflict between the law made by legislature and the personal law, the former was to prevail.

Through the Kerala High Court Mr. Justice Khalid in Kunhi Moyin v. Pathumma\(^71\) held that the payment of maintenance during Iddat or the payment of due Mahr Section 127 (3) (b) would not 'exonerate' the Muslim husband from the liability towards wife under section 125 of Cr.P.C. Speaking on behalf of the Divison Bench, Mr. Justice Khalid highlighted the 'Social purpose of the legislation' as under:

> "In considering the social welfare legislation, the court will be justified in straining the language a little to achieve the object of enactment. If the

\(^{68}\) AIR 1985 SC 945.
\(^{69}\) 1976 Cr.L.J. 1584 (Bom). Bench consisted of Vaidya and Rege. J.J. and the judgment was delivered by Vaidya J.
\(^{70}\) 1976 Cr.L.J. 395 (Ker)
\(^{71}\) 1976 KLT 87.
object of enactment can be achieved only by the martyrdom of few husbands, we will boldly do so and would not shirk our duty in effectuating the object of the enactment.\textsuperscript{72}

Allahabad High Court through Mr. Justice Deoki Nandan got an opportunity to decide the constitutional validity of section 125 and 127 (2), (3) and (4) in \textit{Iqbal Ahmad Khan v. State of U.P}\textsuperscript{73} and held:

"The constitutionality of section 125 cannot be questioned on the basis of right to freedom of religion as contained in Articles 25 and 26 of the constitution. The history of the applicability of Mohammedan law shows that payment/non payment of maintenance to one's wife could never be regarded as a matter of religion."

The question as to whether section 125 of the Code of Criminal Procedure, applies to Muslims or not came up before the Supreme Court in \textit{Fuzlunbi v. K.Khader Vall}\textsuperscript{74}, Holding that divorced Muslim wife was entitled to apply for maintenance under section 125, the court observed that sections 125-128 were part of secular code, deliberately designed to protect destitute women, who were victims of neglect during marriage and after divorce. It was rooted in the State responsibility for the welfare of the weaker sections of women and children and not confined to members of one religion, but to whole community of womanhood.

In \textit{Mst. Zohra Khatoon v. Mohd. Ibrahim}\textsuperscript{75}, the question before the court was that whether a Muslim wife who has obtained divorce from her husband under Dissolution of Muslim Marriage Act, 1939 entitled to claim maintenance under section 125 Cr.P.C. Answering to this question Allahabad High Court was of the view that clause (b) of explanation to section 125 (1) of the Cr.P.C would apply only if the divorce proceeds from the husband, that is

\textsuperscript{72} \textit{Id}. at 92.
\textsuperscript{73} 1960 Cr.L.J. (NOC) 80 All.
\textsuperscript{74} AIR 1980 SC 1730.
\textsuperscript{75} AIR 1981 SC 1243.
to say the said clause would not apply unless the divorce was given unilaterally by the husband or was obtained by the wife from the husband. Supreme Court, through S. Murtaza Fazal Ali, A.D. Koshal and Varadarajan JJ., reversed the decision of the High Court and held that a woman 'who has obtained divorce' from her husband would be treated as a 'wife' and entitled for maintenance under section 125 (1) (b) of Cr.P.C and the relevant observations are as follows:—

"Manifest that clause (b) of explanation to section 125 (1) envisages all the three recognised modes of divorce (under Islamic law), whether a wife divorced unilaterally by the husband or where she obtains divorce, she continues to be a wife for the purpose of getting maintenance under section 125 of the Code."

Thus, in the light of instant pronouncement the wife who has obtained divorce through 'Khula' 'Mubarat' and under any provisions of the dissolution of Muslim Marriage Act, 1939 is entitled to get maintenance under section 125 as the definition of the 'wife' very much includes those women, 'who have obtained divorce' within the ambit of 'wife'.

In Mohd. Yameen v. Shamim Bano76, the husband opposed the grant of maintenance made to his wife under the code. The husband opposed the grant of maintenance made to his wife under the code. The husband had divorced his wife; his objection was that under his Personal Law, she had no right to claim maintenance after divorce. The court however, negatived this plea and held that explanation (b) to section 125 (1) which clearly provides for maintenance to a divorced wife, is not in any case opposed to the Personal Law of the Mohammedans and therefore, even a Mohammedan divorced wife is entitled to claim maintenance under the provisions of this Code.

K. Sukumaran, J of Kerala High Court held in Habeebulla v. Shakeela77, that section 125 did not make any distraction between persons belonging to different religions or casts and was applicable to all persons

76 (1984) Cr.L.J. 1297 (All)
77 1984 Cr.L.J. 1962 (Ker).
belonging to all religions and had no relationship with the personal law of the parties. Thus, secular validity of section 125 Cr. P.C is unquestionable.

Section 125 is applicable to all persons belonging to any caste, religion, community or nationality. It is immaterial as to whether the claimant or non-claimant is Hindu, Muslim, Christian, or Parsi. It is also not necessary that both should belong to the same religion or community. It is clear that if personal law of any person is in conflict with the provisions of section 125, it is the latter which will have overriding effect. In the context of section 125 a question arises whether the payment of Mahr would absolve the liability of the husband under section 125.

In *Rukhsana Parveen v. Shaikh Mohd. Hussain* the Bombay High Court held that where a Muslim husband had paid to his wife Mahr and maintenance for the period of Iddat, application by the divorced wife under section 125 is not maintainable. In other words the payment of Mahr and maintenance for Iddat period would absolve the husband from the liability to maintain his wife. Similar views were expressed by the Andhra Pradesh High Court in *Quyum Khan v. Noorunnisa*.

On the other hand in *Kunhi Moyin v. Pathumma* Khalid J, While excluding Mahr and amount payable during Iddat from the scope of the term ‘sum payable under customary law expressed an apprehension that this section may be pressed into service by some ingenious husband to defeat the provisions contained in section 125 of the code. A similar interpretation was given by Kerala High Court in *Mohmmed v. Sainabi* in which it was held that the amount payable in lieu of Mahr and other household articles belonging to her would not absolve the husband of any liability to maintain her divorced wife. This controversy was resolved by the

78 1977 Cr.L.J. 1041  (Bom). Bench consisted of Chandurkar and Shah JJ and the judgment was delivered by Chandurkar, J.
80 1978 Cr.L.J. 1476 (AP).
82 1976 K.L.T 711
In the instant case, the husband divorced his wife in July 1962. A compromise was made in respect of a flat in Bombay and amount payable to her by way of mahr money (Rupees 5,000/- and Iddat money Rs. 180/-). However, few years later, the wife finding herself in financial straits and unable to maintain herself filed an application before Magistrate for maintenance under section 125 Cr. P.C. The Magistrate awarded a monthly allowance of Rs. 400/- for her. On appeal this order was set aside by Bombay High Court. On appeal to the Supreme Court by the aggrieved wife, Krishna Iyer, J, while allowing the wife’s appeal observed:

“The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate that rate unless it is a reasonable substitute. The legal sanctity of the payment is certified by the fulfillment of the social obligation, not by a ritual exercise rooted in costume.”

The Court held that although husband had discharged his obligation in respect of the mahr amount of Rs. 5,000/- and Iddat allowance of Rs. 180, he could not be absolved in his obligation under section 125 of the code. In *Fuzlunbi v. K. Khadar Vali* the Supreme Court discussed in detail whether mahr was a sum payable on divorced or not. The Court observed:

“Section 125-127 from a secular code deliberately designed to protect destitute women, who are victims of neglect during marriage and after divorced. It is rooted in the State’s responsibility for the welfare of the weaker sections of women and children and is not confined to members of one religion or region, but the whole community of womanhood. Whatever the facts of a particular case, the code, by enacting Sections 125 to 128 charges the court with the human obligation of

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83 AIR 1979 SC 362. Bench consisted of V.R. Krishna Iyer, V.D. Tulzapurkar and R.S. Pathak, JJ and the judgment was delivered by Krishna Iyer, J.
84 *Id.* at 365
85 AIR 1980 SC 1730
enacting maintenance or its just equivalent to ill-used wives and castaway ex-wives, unless the women has received voluntarily a sum, at the time of divorce, sufficient to keep her going according to the circumstances of the parties. The payment of an amount, customary or other, contemplated by the measure must inset the intent of preventing destitution and providing a sum which is more or less the present worth of the monthly maintenance allowance the divorcée may need until death or remarriage overtake her."\textsuperscript{86}

The Court further observed:

"The quintessence of mahr, whether is prompt of deferred, is clearly not a contemplated quantification of a sum of money in lieu of maintenance upon divorced. Indeed, dower, focuses on martial happiness and is an incident of connubial joy. Divorce is farthest from the thought of the bride and the bridegroom when mahr is promised. Moreover, dower may be prompt and is payable during marriage and cannot, therefore, be a recompense for divorce too distant and unpleasant for the bride and bridegroom to envision on the nuptial bed. The language of section 127 (3) b) appears to suggest that payment of the sum and the divorce should be essentially the parts of the same transaction so as to make one the consideration for others. Such customary divorce on payment of a sum of money among the so called lower castes are not uncommon. At any rate the payment of money contemplated by section 127(3)(b) should be so linked with the divorce as to become, payable only in the event of the divorce. Mahr as understood in Mahammdan law cannot, under any circumstances, be considered as consideration for divorce or a payment made in lieu of loss of connubial relationship."\textsuperscript{87}

The Supreme Court in \textit{Bai Tahira's case}\textsuperscript{88} and \textit{fuzlunbi's case}\textsuperscript{89} held that the husband was not absolved from the obligation to maintain his divorce wife except on the proof of payment of a sum

\textsuperscript{86} Ibid
\textsuperscript{87} Id. at 1736
\textsuperscript{88} Supra Note 82 at 362
\textsuperscript{89} Supra Note 84 at 1730
stipulated by customary or personal law whose quantum was: more or less sufficient to do duty for maintenance allowance”. These Judgments create an impression that if Mahr actually paid was considerable and sufficient in the opinion of the court to provide decent maintenance to appellants it would not have awarded any further sum under section 125 Cr.P.C 1973. But if the former is inadequate, the Court has power to award maintenance under section 125.

However, in Mohd Ahmed Khan v. Shah Bano Begum 90 Supreme Court bench consisting of Murtaza Fazal Ali and A Varadarajan JJ. could not appreciate the view in aforesaid cases. They held that both cases were not correctly decided and were in direct contravention of the plain and unambiguous language of section 127 (3) (b) of the code of criminal Procedure 1973 and hence they requested that Bano’s case be referred to a larger bench. Thus the case was heard by the larger Bench91 on the request of the two justices of the supreme court and court observed that provisions of section 125(1) Cr.P.C is very clear and precise and admits no doubt. In the scheme of the provision the cast, the religion and the personal law of the spouse or spouses have no relevance, but unfortunately, the outcome of the Shah Bano’s case cannot be taken on satisfactory footing. Its result is worse than Bai Tahira and Fuzlunbi’s case. Shah Bano’s case raised an unprecedented controversy and become a fertile ground of Politics. Thus, the impact of sections 125-127 of the Criminal Procedure Code, 1973 on the maintenance rights of muslim ex-wives have been the subject of scrutiny through Indian Judiciary. Supreme Court could not appreciate the scope and connotation of Section 127 (3) (b). Section 127 (3)(b) came into being as safeguard to Muslim husband, diluting the effect of section 125 of Cr. P.C that the divorcee is entitled to maintenance till

her remarriage or death. Shah Bano's case is being discussed in detail under the next sub-head.

(ii) Shah Bano's Approach

Supreme Court decision in Shah Bano Begum's case \(^{92}\) is very important on the issue of maintenance of Muslim divorcee. The scope and connotation of Section 125 and 127 (3) (b) of Cr. P.C 1973 are attempted to be determined Mohammad Ahmed Khan and Shah Bano Begum were married in accordance with Islamic law in 1932. A Mahr of 3000/- Rupee was agreed upon, although apparently none of this was paid over to Shah Bano at the beginning of the marriage. Three sons and two daughters were born out of this marriage. After 43 years of marriage, Khan turned out Shah Bano from their home situated at Indore. In April, 1978 Shah Bano filed a petition in the court of the Judicial Magistrate (First Class) Indore, under the Code of Criminal Procedure 1973 (Cr.P.C.) for maintenance of Rs. 500 per month. Shah Bano and Khan were still married at that time and both Islamic law and Cr. P.C (Sec. 125) mandate that a husband must pay to his wife maintenance if she is unable to maintain herself. The amount asked for was Rs. 500 monthly as the same was the maximum limit which Magistrate can grant under Sec 125 of Cr.P.C. Shah Bano requested the maximum in light of her claim that her husband, a practicing advocate, earns not less than Rs. 5000/- per month.

On November, 6, 1978 Khan divorced Shah Bano by irrevocable Talaq. His defence in the ongoing proceeding was that he had already paid Maintenance of Rs. 200/- a monthly to Shah Bano for about two years and that he had deposited Rs. 3000 in the court by way of mahr during the period of `Iddat' relieving him of all further obligations. Khan argued that the pronunciation of irrevocable talaq and payment of the complete mahr terminated the marriage contract, severing his relations with Shah Bano and making her a stranger to him, one to whom he no longer had any financial

\(^{92}\) Supra Note 89.
obligations under Muslim Personal Law. Relying on Sec. 127 (3) (b) Cr. P.C., he contended that his payment of mahr fulfilled the requirement of the payment of "the whole sum which, under any customary or personal law applicable to the parties, was payable on such divorce," which is a sufficient ground for a Magistrate to cancel an order for maintenance made under Sec. 125 Cr. P.C.

In August 1979, sixteen months after Shah Bano had filed her petition, the Magistrate directed Khan to pay Shah Bano the sum of Rs. 25/- monthly as maintenance. Shah Bano filed a revisional application at the High Court of Madhya Pradesh, requesting an increase in the amount of maintenance. In July, 1980 the High Court enhanced the amount to Rs 179.20 per month. Mohd. Ahmed Khan appealed the High Court decision to the Supreme Court of India by way of special leave. The following were the questions for consideration before the Supreme Court:

(a) Admittedly, the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good/bad, indifferent or for no reason at all, but does it mean that Muslim Law does not impose any obligation on him to maintain his wife?

(b) The husband's obligation to maintain his wife during Iddat is recognized, but does it mean that the mere fact that he had paid something by way of maintenance during Iddat, absolve him forever from the duty of maintaining his divorced wife thereafter?

(c) Is dower a sum payable under Muslim personal law as a sum “payable on divorce” within the meaning of section 127(3) (b)?

The Supreme Court while answering the first question observed that the Aiyats of the Holy Quran had imposed an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife In support of this view point, the court referred to two Quranic Verses;

"For divorced women
Maintenance (Should be provided)
On a reasonable (Scale).
This is a duty on the righteous".93

"Thus doth God
Make clear his signs
To you; in order that ye may understand."\textsuperscript{94}

The correctness of the translation was disputed by the appellant and the intervener All India Muslim Personal Board to the extent of the word “Mata’ used in verse 241 means ‘provision’ and not ‘maintenance’; but this point of dispute was not conceded by the court and the court found that this ‘distinction without a difference’.

Supreme Court relied on the translation of the verse 241 and 242, by Zafrullah Khan\textsuperscript{95}:

“For divorced women also there shall be provision according to what is fair. This is an obligation on the righteous. Thus does Allah make his comments clear to you that you may understand?\textsuperscript{96}"

The translation of verses 240 to 242 in the meaning of the Quran was relied upon by the court;

“240-241 Those of you, who shall die and leave wives behind them, should make a will to the effect that they should be provided with a year’s maintenance and should not be turned out of their homes. But if they leave their homes of their accord, you shall not be answerable for whatever they choose for themselves in a fair way; Allah is all powerful, All-wise. Likewise, the divorced women should also be given something in accordance with the known fair standard. This is an obligation upon the God fearing people.”

Besides the above, the court cited the translation of the verses 241 and 242 by various renowned scholars\textsuperscript{97}. In view of the court, the perusal of verses (240, 241 and 242) of the Quran, establishes that Quran imposes

\begin{itemize}
\item \textsuperscript{94} Ibid
\item \textsuperscript{95} Ibid
\item \textsuperscript{96} Ibid
\end{itemize}
obligation on the husband to provide maintenance provision for the divorced wife.

The correctness of the translation of these Aiyats is not in dispute except that, the word 'Mata' in Aiyat No. 241 means 'provisions' and not 'maintenance'. The main controversy in the famous Shah Bano case was the meaning and interpretation of the word ‘Mata’ in Surah 11, Aiyat 241 of the Quran. Danial Latifi, Ld. counsel for Shah Bano strongly pleaded that the word ‘Mata’ in Aiyat 241 has the same meaning as in Aiyat i.e. mata means maintenance. On the other side. Mohammad Ahmed Khan, lawyer Mr. Yunis Saleem for Muslim personal Law Board, Mr. S.A.H. Rizvi, edidor, radiance weekly and Mr. Shahbuddian as an intervener strongly asserted that ‘ Mata’ did not mean maintenance because the ‘ Mata’ in Arabic involves just a single or one time transaction. So that word ‘Mata’ includes food, raiment and such other things given to women on divorce, and its nearest English equivalent is the word ‘provision’. Lastly the Supreme Court settled the controversy (Whether mata means provision or maintenance) by saying that this is a distinction without difference. On the question whether there is any conflict between the Muslim Personal Law and the provisions of Code of Criminal procedure, the court observed;

"Since the Muslim personal Law limits the husband's liability to provide for the maintenance of his divorced wife to the period of Iddat, does not contemplate or countenance the situation envisaged by section 125, it would be wrong to hold that Muslim husband, according to his personal law, is not under an obligation to provide maintenance, beyond the period of Iddat, to his divorced wife who is unable to maintain herself. The true position is that, if the divorced wife is able to maintain herself, the husband liability to provide maintenance for her cases with the expiration of the period of Iddat. If she is unable to maintain herself, she is entitled to take recourse of section 125 of the code. Therefore there is no conflict between Muslim Personal Law and the provision of section 125."98

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98 Supra Note 89 at 950
The court also examined the question as to whether, under Muslim Personal Law, any sum is payable to the wife on divorce which becomes a customary payment within the meaning of section 127 (3) (b) Criminal Procedure Code, Chandrachud J. observed that mahr was not a consideration for marriage but an obligation imposed upon the husband as a mark of respect for his wife, and was, therefore, not a sum payable on divorce. In his words:

"But, the fact that deferred Mahr is payable at the time of the dissolution of marriage, cannot justify the conclusion that it is payable 'on divorce' Even assuming that, in a given case, the entire of Mahr is of the deferred variety payable on the dissolution of marriage by divorce, it cannot be said that it is an amount which is payable on divorce, Divorce may be convenient or identifiable point of time at which the deferred amount has to be paid by the husband to the wife. But, the payment of the amount is not occasioned by the divorce, which is what is, meant by the expression 'on divorce' which occurs in section 127 (3) (b) of the code. If Mahr is an amount which the wife is entitled to receive from the husband in consideration of the marriage, that is the very opposite of the amount being payable in consideration of divorce. Divorce dissolves the marriage. Therefore, no amount which is payable in consideration of the marriage can possible be described as an amount payable in consideration of divorce. The alternative premises that Mahr is an obligation imposed upon the husband as a mark of respect for the wife is wholly detrimental to the stance that it is an amount payable to the wife on divorce. A man may marry women for love, looks, learning or nothing at all. And, he may settle a sum upon her as a mark of
respect for her. But he does not divorce her as a mark of respect. Therefore, a sum payable to the wife out of respect cannot be a sum payable "on divorce."\(^{99}\)

The facts in Shah Bano are similar to those in Bai Tahira and Fuzlunbi. In each case the divorced wife received a payment of Mahr that was inadequate to maintain her. However in Bai Tahira and Fuzlanbi it was the wife who appealed to the Supreme Court, requesting that an order of maintenance, be reinstated. In the light of these judgments, the lower courts upheld Shah Bano's maintenance order, and it was her husband that appealed to the Supreme Court, calling for the order to be cancelled. Instead of letting the narrower ruling of Bai Tahira stand, the appeal permitted the court to go beyond that holding and, after examining all the relevant information, reach a broader, conclusive decision.

The most important change was that concerning Mahr. In Bai Tahira the court found that the payment of Mahr, as customary discharge, was within cognizance of Cr. P.C., Sec. 127. The important question for the court was therefore whether or not the amount of Mahr was adequate, since if it was sufficient the husband would not have to pay maintenance under Sec. 125. In both Bai Tahira and Fuzlanbi cases it was found that the amount was not adequate. The Mahr paid to Shah Bano-Rs 3000 - was less than that paid to Bai Tahira, and so this ground alone would have been sufficient to charge her former husband with continued payment of maintenance under Sec. 125. Nevertheless, the court in Shah Bano held that it had been in error in its earlier judgment and that mahr does not fall within the meaning of Sec. 127 Cr. P.C. The court held that mahr is not a sum, which, under Muslim personal Law, is payable on divorce. The court emphasized that mahr is paid in consideration of marriage and that, while part of it is often deferred until the dissolution of a marriage, the conclusion that therefore it is payable on divorce is unjustified. Mahr is not necessary consideration for a marriage, but

\(^{99}\) Id. at 952
it is a payment that is an integral part of the marriage contract, one that is implied even if it is not expressed in the contract itself. As such, the court found that it cannot be considered a sum payable on divorce.

The consequences of the court's ruling appear to be far-reaching. Sec. 127 (3) (b) Cr. P.C. is no longer available to Muslim men as a means of being relieved of maintenance payments ordered under sec. 125. This holds true even where the mahr is sufficient to allow the divorce to maintain her adequately, which would not be the case had the court stood by its holding in Bai Tahira. However the difference is not as dramatic as it may first appear. Maintenance will only be granted under Sec 125 (1) if the women cannot maintain herself. Clearly, if the mahr payment to the wife at the divorce is sufficient to allow her to maintain herself she will not qualify for maintenance under Sec 125. In this respect Bai Tahira and Shah Bano reach the same ends by different means.

As discussed earlier, in order to ensure an easy and speedier enforcement of the wives' right to maintenance certain provisions were incorporated in the Code of Criminal Procedure, 1898. These provisions were made applicable to all the Indian wives irrespective of any religion or caste. The said Code continued to apply up to 1974 when it was replaced by a new Code with some important changes, as necessitated by the passage of time, to make the procedural law more efficient. Provisions relating to maintenance were retained with some significant modifications bearing far reaching consequences. Under the old provisions of the maintenance 'wife' did not include a divorced wife, therefore in a number of cases where the courts ordered maintenance to the Muslim wife, defeat this right of unilaterally divorce. It was to alleviate the plight of divorced women who had not remarried and were unable to maintain themselves that it was felt necessary to amend law. The legislation was intended to serve a social purpose by removing financial hardship of destitute divorced women and preventing vagrancy. An amendment was made in Section 125(1) of the new Code that (b) 'wife' includes a woman who has been divorced by or obtain a divorce from
her husband and has not married. The Muslim opposed this provision as being repugnant to traditional Shariat Law, and to mollify Muslim sentiment it was provided in section 127(3)(b) that, where an order had been made by the Magistrate under Section 125 in favour of a divorced woman, the court shall cancel the order if it is proved that “she has received, whether before or after the divorce, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce”. The Muslims understood this provision as exempting them from maintaining their divorced wives once full payment of dower was proved. But the Supreme Court of India interpreted otherwise. In **Bai Tahira v. Ali Hussain Fissali**, AIR 1979 SC 362, Krishna Iyer J., formulated the rule of interpretation that liquidated sum paid at the time of divorce must be a reasonable and not an illusory amount and would release the quondam husband from continuing liability only if the sum paid was realistically sufficient to maintain the ex-wife and salvage her from destitution.

In Shah Bano’s case, the Apex Court approved its earlier decisions given in Bai Tahira and Fuzlunbi’s case and held that Mahr is not the amount payable by the husband to the wife on divorce. But unfortunately, Shah Bano judgement made this name sound so loud that its echo was heard all over India. The subject, maintenance of Muslim wife after divorce with which the said criminal appeal was concerned, generated wide discussion from every level of people. Supreme Court has tried to justify its view on the basis of Quranic provisions. Supreme court neither interpreted this contrary to the shariat nor did it attempt to give a new dimension to its meaning but had been awarding maintenance for poor aged divorcée by giving a generous meaning to the word mata occurring in 241 and set this controversy at rest for ever. But the Muslim leaders, particularly the Ulema, took great offence and opposed the Supreme Court judgment tooth and nail and maintained that it is blatant interference in the Muslim personal law. According to them the Shariat law is divine and cannot be interfered with. The controversy snowballed into a major political problem as thousands of Muslims took to
street and demonstrated against the Supreme Court decision. Ultimately Shah Bano herself, the beneficiary of the ruling, later rejected and dissociated herself from it and called for the withdrawal of the judgment. Under these circumstances, to pacify conservative Muslim sentiment the legislature stepped into pass the Muslim Women (Protection of Rights on Divorce) Act, 1986. Once again, not only Muslim husband but whole community has snatched what the legislation had given to Indian divorced Muslim Women. The approach of legislatures and judiciary after the Shah Bano’s case is being discussed in detail in the next Chapter.