

VS.

UNION OF INDIA
Respondent

CORAM: G.B. PATTANAİK, S. REJENDRA BABU, D.P. MOHAPATRA, DORAISWAMY RAJU AND SHIVARAJ V. PATIL, JJ.

MUSLIM LAW - MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986 - SECTION 3 & 4 - CONSTITUTION - ARTICLE 14, 15 & 21 - Act enacted after the decision of this court in Mohd. Ahmed Khan Vs. Shah Bano Begum & Ors. ((1985) 2 SCC 556 = 1985 (1) SCALE 767) - Under Section 3 divorced woman is entitled to reasonable and fair provision and maintenance within the period of 'iddat' by her former husband - Whether the Act is constitutionally valid - Dismissal of the writ petitions, Held,

A. In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and woman. Our society is male dominated both economically and socially and woman are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life - a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on consideration other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question. (Para 21).

B. A careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. It was stated that Parliament seems to intend that the divorced woman gets sufficient means of livelihood, after the divorce and therefore, the word 'provision' indicates that something is provided in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her cloths, and other articles. The expression "within" should be read as "during".

because words cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.. (Para 29).

C. As on the date the Act came into force the law applicable to Muslim divorced women is as declared by this Court in Shah Bano's case. In this case to find out the personal law of Muslim with regard to divorced women's rights, the starting point should be Shah Bano's case and not the original texts or any other material-all the more so when varying versions as to the authenticity of the source are shown to exist. Hence, we have refrained from referring to them in detail. That declaration was made after considering the Holy Quran, and other commentaries or other texts. When a Constitution Bench of this Court analysed Suras 241-242 of Chapter II of the Holy Quran and other relevant textual material, we do not think, it is open for us to re-examine that position and delve into a research to reach another conclusion. We respectfully abide by what has been stated therein. All that needs to be considered is whether in the Act specific deviation has been made from the personal laws as declared by this Court in Shah Bano's case without mutilating its underlying ratio. We have carefully analysed the same and come to the conclusion that the Act actually and in reality codified what was stated in Shah Bano's case. The learned Solicitor General contended that what has been stated in the Objects and Reasons in Bill leading to the Act is a fact and that we should presume to be correct. We have analysed the facts and the law in Shah Bano's case and proceeded to find out the impact of the same on the Act. If the language of the Act is as we have stated, the mere fact that the Legislature took note of certain facts in enacting the law will not be of much materiality. (Para 33).

D. Thus the provisions of the Act depriving the divorced Muslim women of such right to maintenance from her husband and providing for her maintenance to be paid by the former husband only for the period of iddat and thereafter to make her run from pillar to post in search of her relatives one after the other and ultimately to knock at the doors of the Wakf Board does not appear to be reasonable and fair substitute of the provisions of Section 125 CrPC. Such deprivation of the divorced Muslim women of their right of maintenance from their former husbands under the beneficial provisions of the Code of Criminal Procedure which are otherwise available to all other women in India cannot be stated to have been effected by a reasonable, right, just and fair law and, if these provisions are less beneficial than the provisions of Chapter IX of the Code of Criminal Procedure, a divorced Muslim woman has obviously been unreasonably discriminated and got out of the protection of the provisions of the general law as indicated under the Code which are available to Hindu, Buddhist, Jain, Parsi or Christian women or women belonging to any other community. The provisions prima facie, therefore, appear to be violative of Article 14 of the Constitution mandating equality and equal protection of law to all persons otherwise similarly circumstanced and also violative of Article 15 of the Constitution which prohibits any discrimination on the ground of religion as the Act would obviously apply to Muslim divorced women only and solely on the ground of their belonging to the Muslim religion. It is well settled that on a rule of construction a given statute will become 'ultra vires' or 'unconstitutional' and, therefore, void, whereas another construction

which is permissible, the statute remains effective and operative the court will prefer the latter on the ground that legislature does not intend to enact unconstitutional laws. We think, the latter interpretation should be accepted and, therefore, the interpretation placed by us results in upholding the validity of the Act. It is well settled that when by appropriate reading of an enactment the validity of the Act can be upheld, such interpretation is accepted by courts and not the other way. (Para 34).

E. While upholding the validity of the Act, we may sum up our conclusions: 1) a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously included her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act. 2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period. 3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance. 4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India. (Para 37).

Referred: Mohd. Ahmed Khan Vs. Shah Bano Begum & Ors. (1985) 2 SCC 556 = 1985 (1) SCALE 767; Bai Tahira Vs ali Hussain Fidaalli Chothia ((1979) 2 SCC 316); Fuzlunbi Vs. K. Khader Vali & Anr. ((1980) 4 SCC 125); Aga Mahomed Jaffer Bindaneem Vs. Koolsom Bee Bee & Ors. (24 IA 196); Olga Tellis Vs. Bombay Municipal Corporation, (1985(3) SCC 545 = 1985 (2) SCALE 5); Maneka Gandhi Vs. Union of India (1978 (1) SCC 248).

Approved: Arab Ahemadhia Abdulla and etc. Vs. Arab Bail Mohmuna Saiyadbhai & Ors. Etc. (AIR 1988 (Guj.) 141); Ali Vs. Sufaira ((1988) 3 Crimes 147); K.Kunhashed Hazi Vs. Amena (1995 Cr. L.J. 3371); K. Zunaideen Vs. Ameena Bagumi ((1998) II DMC 468); Karim Abdul Shaik vs Shenaz Karim Shaik (2000 Cr. L.J. 3560); Jaitunbi Mubarak Shaikh vs. Mubarak Fakruddin Shaikh & Anr. (1999 (3) Mh. L.J. 694); Kaka vs Hassan Bano & Anr. (II (1998) DMC 85 (FB)).

Overruled: Umar Khan Bahamam vs Fathimnurisa (1990 Cr. L.J. 1364); Abdul Rashid vs Sultana Bagum (1992 Cr. L.J. 76); Abdul Hag vs Yasima Talat (1998 Cr. L.J. 3433); Md. Marahim vs Raiza Begum (1993 (1) DMC 60).

Rajendra Babu, J.- The constitutional validity of the Muslim women (Protection of Rights on Divorce) Act, 1986 (hereinafter referred to as 'the Act') is in challenge before us in these cases.

2. The facts in Mohd. Ahmed Khan vs. Shah Bano Begum & Ors. (1985) 2 SCC 556, are as follows.

3. The husband appealed against the judgement of the Madhya Pradesh High Court directing him to pay to his divorced wife Rs. 179/- per month, enhancing the paltry sum of Rs. 25 per month originally granted by the Magistrate. The parties had been married for 43 years before the ill and elderly wife had been thrown out of her husband's residence. For about two years the husband paid maintenance to his wife at the rate of Rs. 200/- per month. When these payments ceased she petitioned under Section 125 CrPC. The husband immediately dissolved the marriage by pronouncing a

triple talaq. He paid Rs. 3000/- as deferred mahr and a further sum to cover arrears of maintenance and maintenance for the iddat period and he sought thereafter to have the petition dismissed on the ground that she had received the amount due to her on divorce under the Muslim law applicable to the parties. The important feature of the case was that the wife had managed the matrimonial home for more than 40 years and had borne and reared five children and was incapable of taking up any career or independently supporting herself at that late stage of her life-remarriage was an impossibility in that case. The husband, a successful Advocate with an approximate income of Rs. 5,000/- per month provided Rs. 200/- per month to the divorced wife, who had shared his life for half a century and mothered his five children and was in desperate need of money to survive.

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

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

this Court proceeded to observe that the general propositions reflected in those statements did not deal with the special situation where the divorced wife was unable to maintain herself. In such cases, it was stated that it would be not only incorrect but unjust to extend the scope of the statements referred to in those text books in which a divorced wife is unable to maintain herself and opined that the application of those statements of law must be restricted to that class of cases in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife. This Court concluded that these Aiyats (the Holy Quran, Chapter II, Suras 241-242) leave no doubt that the Holy Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teaching of the Holy Quran. On this note, this Court concluded its judgement.

6. There was a big uproar thereafter and Parliament enacted the Act perhaps, with the intention of making the decision in Shah Bano's case ineffective.

7. The Statement of Objects & Reasons to the bill, which resulted in the Act, reads as follows:

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

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

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

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

defaulting relatives also do not have the means to pay the shares of the defaulting relatives the Magistrate would order the State Wakf Board to pay the maintenance ordered by his or the shares of the relatives who are unable to pay.”....

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

- 1) A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.
- 2) Liability of Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.
- 3) A divorced Muslim woman who has not remarried and who is not able to maintain herself after iddat period can proceed as provided under Section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death according to Muslim law from such divorced woman including her children and parents. If any of the relatives being unable to pay maintenance, the Magistrate may direct the State Wakf Board established under the Act to pay such maintenance.
- 4) The provisions of the Act do not offend Articles 14, 15 and 21 of the Constitution of India.

38. In the result, the writ petition Nos. 868/96, 1001/86, 1055/86, 1062/86, 1236/86, 1259/86 and 1281/86 challenging the validity of the provisions of the Act are dismissed.

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