

Rahamathulla Vs. Piyare and Others

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Court : Chennai

Decided On : Apr-11-1996

Reported in : 1996CriLJ4322; II(1996)DMC295

Judge : M. Karpagavinayagam, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 123, 125, 125(1) and 127

Appeal No. : Crl. Revision Case No. 467 of 1993

Appellant : Rahamathulla

Respondent : Piyare and Others

Advocate for Def. : S. Manikumar, Adv.

Advocate for Pet/Ap. : S.S. Kumar, Adv.

Judgement :

ORDER

1. An important question of law, that too, of general importance is as to whether a minor child of divorced Muslim wife is entitled to claim maintenance under Section 125 of the Code of Criminal Procedure, 1973, from its father even after the child attained the age of more than two years. In other words, the important question of law is whether a divorced woman can claim maintenance from her former husband

for the child born to her through that husband after the child attained the age of two years under Section 125, Cr.P.C., despite the provisions of Section 3(b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short 'the Act of 1986').

2. The petitioner/husband has presented this revision before this Court, challenging the order dated 16-2-1993, passed in Crl. R. C. No. 62 of 1992, on the file of Principal Sessions Judge, Cuddalore, granting maintenance of Rs. 150/- per month to the 2nd respondent herein, minor Yashmin, by setting aside the order dated 12-3-1992, passed in M.C. No. 4 of 1991, on the file of Judicial Magistrate No. 1, Ulundurpet, dismissing the petition filed by the 1st respondent herein Mrs. Piyare, the divorced wife of the petitioner, claiming maintenance for herself and for her child, the 2nd respondent herein.

3. The 1st respondent Piyare, originally filed a petition under Section 125, Cr.P.C., on 9-4-1991, in M.C. No. 4 of 1991, on the file of Judl. Magistrate No. 1, Ulundurpet, on her behalf and on behalf of her child, aged about 3 years, the 2nd respondent herein, claiming maintenance @ Rs. 350/- p.m. and Rs. 150/- p.m. respectively. On 12-3-1992, this application was dismissed by the learned Magistrate, as not maintainable.

4. Challenging this order, the wife, the 1st respondent herein, on behalf of both the respondents herein filed Crl.R.C. No. 62 of 1992 before the Prl. Sessions Court, Cuddalore, in the year 1992. By order dated 16-2-1993, the Principal Sessions Judge, party allowed the revision, holding that though the wife, being a divorced Muslim Woman, is not entitled to claim maintenance, under the Act of 1986, the child of three years born to the wife through her former husband is entitled for the award of maintenance, and directing the petitioner/husband to pay the maintenance of Rs. 150/- p.m., to the child, the 2nd respondent herein from the date of the petition presented in M.C. No. 4 of 1991, before the learned Judicial Magistrate No. 1, Ulundurpet. Hence, this revision by the husband, the petitioner.

5. The short facts would be summarised as follows :-

The wife Piyare, the 1st respondent herein married the petitioner Rahamathulla/husband on 31-8-1986. The marriage was performed, according to Islamic rites in the presence of Wahab Pallivasal Jamads of Ulundurpet. For some years thereafter, both the petitioner and the 1st respondent lived happily as husband and wife. Of this wedlock, the child Yashmin, the 2nd respondent herein was born to them in the year 1988. Since the husband/petitioner was not satisfied with the 'sreedhana' provided by the family of the wife/1st respondent at the time of marriage, he demanded for more money and jewels, even after the child was born. When the wife was not able to meet his demands as her parents were not in an affluent circumstances, the petitioner/husband started ill-treating the 1st respondent/wife. He finally snatched away all the jewels worn by the wife and drove her and the child, aged about 3 years. Then the respondents herein had to take shelter under the parents of 1st respondent. Finding it very difficult to maintain themselves, the wife issued a legal notice to the husband, claiming maintenance, for which the petitioner/husband sent a reply, containing false allegation. Thereafter, the husband married another woman and has been living with her. In such a circumstance, the wife filed the petitioner claiming maintenance at Rs. 350/- for herself and Rs. 150/- for her child.

6. This petition was resisted by the husband/petitioner, contending that the parties are Muslims governed by the personal law, that the petitioner/husband divorced his wife Piyare, even on 6-1-1991 and the same was also communicated to the wife by registered post on 7-1-1991, that since 'talaqnama' was duly made and served on the wife as per the Muslim law, the wife who is a divorcee is not entitled for any maintenance under Section 125, Cr.P.C. and that therefore, the petition for maintenance was not maintainable, in view of the provisions of the Act of 1986. It was also contended by the husband, as regards the child, the 2nd respondent herein, that maintenance could be claimed only upto the age of two years of the child, as per the Act of 1986, and as the petition was presented on behalf of the child at the age of three years of the child, the child also is not entitled to get maintenance.

7. In the enquiry conducted on the petition under Section 125, Cr. P.C., by the learned Magistrate, on behalf of the wife/1st respondent herein, she was examined

at P.W. 1 and one Amanulla was examined as P.W. 2. On the side of the husband/petitioner herein, no witness was examined, but the copy of 'talaknama' and the acknowledgment card of the wife for the receipt said talaknama, were marked as Exs. R1 and R2.

8. On consideration of evidence, oral and documentary, adduced by both the parties, the learned Magistrate has come to the following conclusions :-

(i) The wife admits that she received the 'talaqnama' letter dated 6-1-1991 on 10-1-1991, and so the divorce was effected on 10-1-1991 as per the Islam Act. As such, under the Act of 1986, a divorced wife is entitled only for Iddat amount and she cannot maintain the petition under section 125, Cr.P.C.

(ii) As per the Act of 1986, the child is entitled for maintenance only for two years from the date of its birth. But this petition has been filed on behalf of the child only after the child attained the age of three years. So, the child is also not entitled to maintenance.

9. On these conclusions, the learned Magistrate dismissed the petition, as the petition was not maintainable. Aggrieved at this order made by the lower Court, the wife and child have preferred the revision in Crl. R.C. No. 62 of 1992, on the file of Principal Sessions Court, Cuddalore.

10. The Sessions Court, after consideration of the points raised on either side, gave the findings, which are as follows :-

(a) The parties are Muslims. Talaqnama notice was duly communicated and was received by the wife. So, the wife becomes divorcee. The divorced Muslim Women cannot claim maintenance under Section 125, Cr.P.C., in view of Section 3 of the Act of 1986.

(b) The Act of 1986, of course provides, maintenance for the children upto the age of two years. But under Section 125, Cr.P.C., the child is to be maintained by the parents till the child attains, majority. Therefore, the Muslim child aged more than two years is definitely entitled to claim maintenance, from its father under Section 125, Cr. P.C. Though the child was admittedly three years, while the petition under

Section 125, Cr.P.C., was presented in the instant case, the daughter, the 2nd respondent herein, is entitled to maintenance at Rs. 150/- p.m., from the date of the petition from her father, the petitioner herein.

11. On these conclusions, the revision was dismissed as regards the wife and was allowed as regards the claim for the child. Challenging this order dated 16-2-1993, in CrI. R.C. No. 62 of 1992, on the file of the Sessions Court, Cuddalore, the husband has come before this Court, in this revision.

12. Let me decide the above referred question, as to whether the child aged about more than two years is entitled to maintenance, under Section 125, Cr.P.C., notwithstanding the Act of 1986.

13. Mr. S. S. Kumar, learned counsel for the petitioner/husband has raised an interesting question, which could be summarised as below :-

The cardinal principle enunciated by the Legislatures in Act 25 of 1986 is that the child born out of the divorced wedlock is entitled to maintenance from the father till it reaches the age of two. Admittedly, the child in the instant case, crossed the age of two, when the matter reached the Lower Court. Therefore, the learned Sessions Judge is not correct, in awarding maintenance by ignoring the cardinal principles of Mahommedan Law, while revising an appropriate order passed by the learned Judicial Magistrate No. 1, Ulundurpet, dismissing the maintenance claim for both wife and child.

14. There is no dispute regarding the fact that the 1st respondent/wife is a divorcee and by challenging the finding that she is not entitled to maintenance given by the learned Judicial Magistrate by his order dated 12-3-1992, which was confirmed by the Sessions Court, by order dated 16-2-1993, no revision has been filed by the wife. So, the short question that arises for consideration in this revision is whether the Muslim child aged more than two years can claim maintenance through her mother, a divorced Muslim woman, from the father under Section 125, Cr.P.C., despite the provisions under Section 3(b) of the Act of 1986.

15. Mr. S. Manikumar, learned counsel appearing for the respondents elaborated, argued and contended that there is no bar in the Act 25 of 1986, for claiming maintenance for the child aged more than two years, under Section 125, Cr.P.C., and that there is no conflict or repugnancy between Section 125 of Cr.P.C., and the Act 25 of 1986, in regard to the claim of maintenance by the children, aged above two years. He would effectively in his (sic) way say, that a plain reading of the preamble of the Act 25 of 1986 would disclose that this Act of 1986 would not be applicable to the children aged above two years, and as such, the petition filed on behalf of the child, claiming maintenance under Section 125, Cr.P.C., at the age of three years, through her mother, is maintainable, and that the order of the Sessions Court is in accordance with law, and as such, he presses into service his submission to confirm the finding of the Sessions Court, granting maintenance to the child. In order to substantiate his submissions, learned counsel Mr. S. Manikumar, cited number of authorities, which I shall refer in detail later.

16. Nevertheless, it has become relevant for me to quote Section 3 of the Act of 1986, which reads as under :-

'3. Mahr or other properties of Muslim woman to be given to her at the time of divorce :-

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

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

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

This Section clearly provides as to the quantum of the amount as maintenance, a divorced woman can get from her former husband. As such, a divorced Muslim woman is not entitled to seek remedy after Section 125, Cr.P.C., after introduction

of this Act 25 of 1986. Similarly, the child also is entitled to maintenance from its father, only up to the age of two years under this Act.

17. Admittedly, in the instant case, the petition on behalf of the child was not filed under the relevant provisions of the Act 25 of 1986 and the same has not been filed, when the child was under the age of two years. In the absence of the specific provisions contained in Section 3 of the Act of 1986, prohibiting the claim of child, after two years of its birth, under another other provisions, it cannot be taken to mean that a Muslim divorcee, on behalf of the child of three years cannot seek remedy under Section 125, Cr.P.C.

18. Section 125, Cr.P.C., reads as follows :-

'Section 125(1) If any person having sufficient means neglects or refuses to maintain -

(a)

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

(c)

(d)

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 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 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

Explanation - For the purpose of this chapter :-

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

A plain reading of the above provisions would disclose that the legitimate minor child, unable to maintain itself, who has not attained the majority is entitled to claim maintenance from its father who is having sufficient means and has neglected or refused to maintain such child.

19. Section 2(a) of the Act of 1986, defines 'divorced woman', which means, a Muslim woman, who was married according to Muslim law and has been divorced by or has obtained divorce from her husband in accordance with Muslim Law. Section 3 of the Act of 1986 would show, that notwithstanding anything contained in any other law, for the time being in force, a divorced woman, shall be entitled to maintenance for her child, where she herself maintains the child born to her through her former husband for a period of two years from the date of birth of such child. Therefore, Section 3(b) of the Act, cannot be said to create any bar for the Muslim woman, who is divorced, to claim maintenance for her child, since the intention of the Legislatures appears to be that irrespective of any other law, the divorced Muslim woman, who is maintaining the child, after her divorce is entitled to claim maintenance from her former husband for the child up to the age of two years of the child. It does not take away the right of the minor child under Section 125, Cr.P.C., to claim maintenance from its father. Thus, the conjoint reading of Section 3(b) of the Act of 1986 and Section 125, Cr.P.C., would make it clear, that the provision of Section 125, Cr.P.C., is neither diluted nor made redundant by Section 3(b) of the Act of 1986. In other words, the harmonious construction of these two provisions, leads to an irresistible conclusion, that the Muslim minor child has to be maintained by its father, if the conditions required under Section 125, Cr.P.C., are fulfilled.

20. The proper maintenance of the child is imperative. In the paramount interest of the child, laws compelling the father to maintain his child, are to be construed liberally so as to embrace all beneficial legislation in favour of the child. The welfare of the child is a paramount consideration, the child may be of any class, caste or creed. Section 125 of the Cr.P.C., entitles even the illegitimate minor child

to claim maintenance and it is the bounden duty of the father to maintain the child, whether the marriage is subsisting or not and whether the child was born from the wedlock or otherwise. The maintenance of the child being an imperative factor, the Legislature while enacting the Act of 1986, making provision for protection of rights of Muslim Women, has not taken away the right of the minor child to claim maintenance even after divorce. Thus, the right of the Muslim minor child under Section 125 of the Cr.P.C., is not taken away by Section 125 of the Act of 1986, or is not confined to claiming maintenance only up to the attainment to age of two years.

21. At this juncture, it is relevant to note the preamble, contained in the Act of 1986, which is as follows :-

'An Act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto'.

In view of the above preamble, the rights conferred under the relevant Sections of the Act of 1986, only on the divorced women, and not on anybody else. When such is the position, the right to claim maintenance for children under Section 125, Cr.P.C., cannot be said to have been affected by any of the provisions of the Act, including the provisions of Section 3(1)(b) of the Act, 25 of 1986.

22. The main contention of learned counsel for the petitioner is with regard to the maintenance awarded to the daughter, the 2nd respondent herein, after she crossed the age of two years, viz., at the age of three years. A close reading of Section 3(1)(b) of the Act, 1986, would disclose that it provides with regard to the maintenance of Muslim women. Of-course clause (b) says, that where she herself maintains the child born to her, through her former husband, the maintenance is to be paid by her former husband for the child for a period of two years, from the date of its birth. This refers to the Muslim Women, not the children. As such, the right claimed for maintenance by a Muslim Women, is governed only under Section 3 of the Act of 1986, which has an overriding effect of any other provisions, including Cr.P.C. But, in so far as the right of maintenance to the child is concerned, Section 3 of the Act, 1986, does not contemplate the maintenance, that too, after two

years, and so, it will not have any overriding effect on the provisions of other Act. As such, Section 125, Cr.P.C., cannot be said to be superseded, by the provisions of the Act, 25 of 1986.

23. When the learned counsel for the petitioner was asked to point out any prohibition under the provisions of Act, 1986, for the claim of maintenance of the child, against the father, under Section 125, Cr. P.C., he could point out only Section 3 of the Act 25 of 1986. This prohibition is only against the divorced Muslim women, but not against the children. As referred to earlier, the preamble of the Act, shows that the said Act was promulgated to protect the rights of Muslim Women who have been divorced and to provide for matters connected therewith or incidental thereto. The word 'incidental thereto' has nothing to do with the provisions relating to the maintenance of children. This means, the right of the Muslim women, relating to mahr etc.

24. Yet another contention put forward by the learned counsel for the petitioner is that there is a repugnancy between the Act 25 of 1986 and Section 125, Cr.P.C., and as such, the special Act would alone prevail. I am of the view, that this submission lacks substance. As discussed earlier, there is absolutely no provision in the Act of 1986, prohibiting the children of divorced Muslim Women from claiming maintenance from the father, after the children attained the age of two years. Therefore, the question of repugnance does not arise. Suppose, the Legislature intended to lay down Law in respect of the children of above two years also, in the very same Act, it would as well have provided as regards the children of above two years. But, there is no such provision in the Act. Therefore, the Act is not exhaustive, in so far as the children of above two years are concerned. As such, there is absolutely no repugnancy or conflict between the Act 25 of 1986 and Section 125, Cr.P.C., in so far as the children of above two years are concerned. In other words, the provisions of Section 125, Cr.P.C., are intact and unaffected for being resorted to, when once such children have crossed the age of two years.

25. It is not in dispute that it is a Muslim Personal Law that prevails over the other Laws, wherever there is a contrary provision in the Mahommedan Law on the subject. That was the reason as to why the Apex Court has in Shah Banu Case,

held that there was no conflict between the Muslim Personal Law and Section 125, Cr.P.C., and that the provisions in Criminal Procedure Code, were applicable to the Muslim women. This decision necessitated the Legislature to bring the enactment of the new Act 25 of 1986. The objects and reasons for enacting such an Act, as well as the preamble of the Act, make it abundantly clear that the rights conferred on the Muslim women under Muslim Law are protected, and the question of maintenance of children as such was not involved in that controversy. The object of the new Act, was not in any manner to regulate the obligation of the Muslim father to maintain the children.

26. Ofcourse that Section 3(1)(b) of the Act of 1986, deals with non-obstantee clause 'notwithstanding anything contained in any other law for the time being in force' and clause (b) provides that 'divorced women' shall to be entitled to the payment of maintenance for her children from her former husband for a period of two years, from the date of birth of such children, where the maintains such children'. This may mean, that divorced women in her own right, may not be entitled to claim or receive payment of maintenance for the children, maintained by her for a period, beyond what is contemplated in Section 3(1)(b) of the Act, 1986.

27. The question in this case is entirely different. It is about the right or entitlement of the child to be maintained by the father and the Muslim father's obligation to maintain it. In fact, under Section 370 of the Mahomadan Law a Muslim father is bound to maintain his daughters until they are married. This obligation is absolute, except in cases, where the father is poor and incapable of earning by his own labour. So, a careful reading of the relevant provisions of the Act 25 of 1986 and Section 125, Cr.P.C., would make it clear that the two provisions apply to and cover different situations and there is no conflict between the two. The new Act deals with the obligation of the husband, to maintain his divorced wife during the Iddat period and the children for two years from the date of their birth, when they are in the custody of the mother. In other words, at least for two years, the mother has to necessarily maintain them. That was why, provision has been made under Section 3(1)(b) of the Act of 1986, that the husband shall pay to the children through the divorced wife for a period of two years from the date of the birth of the said children in respect of maintenance and also means that the father will have

no right to claim custody, as that may not be in the interest of children. In other words, a Muslim husband may claim the custody of the children, after two years of their birth, to fulfil his obligation to maintain. In the instant case, the petitioner admittedly, did not claim the custody of the child, and as such, he cannot certainly refuse to maintain the child, just because the child is in the custody of his divorced wife.

28. These provisions contemplate, the divorced wife's right to claim maintenance in respect of the children, under the Act, and this has got nothing to do with the independent right of the children to be maintained by the father, even under the relevant sections of the Mahomedan Law. Therefore, the right of the children is separate and independent of the right of divorcy wife to claim maintenance on behalf of the children for two years from the date of its birth under the new Act. Consequently, such a right of the child cannot certainly be affected by the provisions of Section 3(1)(b) of the Act, 1986.

29. Section 125, Cr.P.C., provides maintenance for both the legitimate and illegitimate minor children. There is nothing in Section 125, Cr.P.C., which exempts Muslim parents from maintaining legitimate or illegitimate minor child. When under Section 125, Cr.P.C., an order of maintenance of even illegitimate minor child has been passed against the Muslim father, it cannot be reasonably held, that a Muslim father is not liable to pay maintenance to his legitimate minor child aged above two years, under the provisions of Section 125, Cr.P.C., after he has divorced his wife, through whom the child was born.

30. As per the Muslim Law, once Talaqnama has been communicated, she ceased to be a wife and she becomes a divorcee. That was why, to protect her rights, Act has been enacted to provide for the maintenance during Iddat period, by the husband and from various other sources, including wakf board for the other period. But, as far as the child is concerned, the child is child ever and can never cease to be the child, whether it is legitimate or illegitimate. This is imperative, even as per the personal law, which is in consonance of the provisions of Section 125, Cr.P.C.

31. The Act of 1986 is lamentably silent as to the future of the minor children who have crossed the age of two years. In a welfare society, it can never be the intention of the legislature that the minor children of a divorced Muslim women should be thrown in to the dust bin or to the charity of the pedestrians for their survival. As there is no provision in the Act of 1986 in respect of the child of above two years, the Mother as a natural guardian of such a minor child shall have to necessarily fall back upon the allembicing and beneficial provisions of Section 125, Cr.P.C. Thus, it is clear from the comparison of the provisions of Section 125, Cr.P.C., and the provisions of Act 25 of 1986, a minor child which has crossed the age of two years is not precluded from claiming maintenance from its father, as the child is unable to maintain itself.

32. Section 4 of the Act of 1986 also throw some light. Under this Section, it makes provision for paying maintenance to a divorced Muslim women by her relatives (not former husband) as mentioned in the said section or by the Wakf Board where the divorced woman has not remarried and is unable to maintain herself after the iddat period. But this section as well does not make any provision for maintenance of the child by the former husband after two years from the date of birth of the child. Therefore, while the scheme of the Act, read as a whole, makes it clear that so far as a divorced Muslim Woman is concerned, her right to maintenance against her former husband is limited to iddat period, and the said Act virtually does not deal with the right of maintenance of a child from its father. Therefore, in the case of the child, there is no prohibition for invoking the provisions of Section 125, Cr.P.C.

33. It is also evident to notice, that the right of maintenance is enjoyed by a child under S. 125 Cr.P.C., as its own right, but under S. 3 of the Act 25 of 1986, maintenance of a child for two years by its father is not a right of the child, but is a part of the right of the divorced woman, where she herself maintains the child. In other words, maintenance for the child can be claimed under S. 125 Cr.P.C., from its father, irrespective of the question as to who maintains the child. But the claim of maintenance for the child under S. 3(1)(b) of the Act of 1986, arises not to the child, but to the mother of the child and that too, where she herself maintains the child and not otherwise. The right to claim maintenance for the child under S. 3 of

the Act of 1986, for a period of two years from the date of birth of the child is available only to the mother, who maintains the child. That right is available to her, as part of her own right. She cannot claim this right on behalf of the child, where the child is not maintained by her, under S. 3 of the Act of 1986. Therefore, the right of the child to claim maintenance under S. 125 Cr.P.C., either by itself or through its mother, remains intact, in spite of the right of the mother under S. 3 of the Act of 1986, to claim maintenance for the child for a period of two years from the date of its birth.

34. In the present case, the child was born in 1988 and on 9-4-1991 the application for maintenance has been filed, i.e., when the child was aged about three years. So, I am unable to persuade myself to agree with the contention of Mr. S. S. Kumar, the learned counsel for the petitioner/husband. On the contrary, the submissions made by Mr. S. Manikumar, learned counsel for the respondents, are worthy of acceptance, in view of the above discussion.

35. To substantiate his contentions, learned counsel appearing on behalf of the respondents, placed for my perusal, the following decisions of the other High Courts as well as the Apex Court. Let us now have a quick look at the case law available on this subject.

36. In *Said Alavi v. Safia*, 1987 (2) KLT 271, Sankaran Nair, J. of Kerala High Court, stated that 'a child can claim maintenance under S. 125 Cr.P.C. even after coming into force of the Act of 1986. The preamble to the Act shows, that the Act, deals with the right of Muslim women, and not children'. The Kerala High Court in *A. Abdul Gafoor Kunju v. Avva Ummal Pathumma Beevi*, , has further stated that 'a divorced Muslim wife is not entitled to invoke S. 127, Cr.P.C., but the right of the Muslim daughter, however, has remain unaffected'.

37. In *Shaik Mahboob Hasha v. Shaik Karimunnisa Begum*, (1989 Cri LJ 2295), Bhaskar Rao, J. of Andhra Pradesh High Court has observed as follows :-

'There is absolutely no repugnancy between the two (S. 125, Cr.P.C. and the Act of 1986) in so far as children aged above 2 years concerned. It, therefore, follows that it cannot even hold that there is implied repeal of S. 125 Cr.P.C., as regards

the children of above 2 years. Consequently, the provisions of S. 125 Cr.P.C. are intact and unaffected for being resorted to when once the children have crossed the age of 2 years.'

38. In *Siraj Sahebji Mujawar v. Smt. Roshan Siraj Mujawar*, : AIR1990 Bom344 , the High Court of Bombay has held as below :-

'Under the Muslim Law so far as the children out of the dissolved wedlock are concerned the father's obligation to maintain them is absolute in terms, so long as he is in a position to do so and the children have no independent income of their own. Section 3(1)(b) of the 1986 Act contemplates the divorcee wife's right to claim maintenance in respect of her children and this has nothing to do with the independent right of the children to be maintained by the father under the Muslim Law. That right of the children is separate and independent of the divorcee wife's right to claim maintenance. Naturally, therefore, such a right cannot certainly be affected by the provisions of S. 3(1)(b) of the new Act'.

39. In *M. A. Hameed v. Arif Jan*, , Bhaskara Rao, J. of Andhra Pradesh High Court, has expressed the similar view as follows :-

'There is no provision under the Act of 1986, taking away the right of the child to claim maintenance under S. 125 Cr.P.C.'

40. In *Ghanchi Husen Umar Udiya v. Ghanchanbai Marum Daud Jadia* 1990 (3) Crimes 732, J. U. Mehta, J. of Gujarat High Court has observed that the right conferred by clauses (a), (b), (c) and (d) of S. 3 are conferred on the divorced women and not to anybody else. In that view of the matter, the right to claim maintenance for children under S. 125 Cr.P.C., has not been affected by any of the provisions of the Act, including the provisions of S. 3(b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986.

41. In this context, it will be appropriate to extract the observations of the Gauhati High Court in the case of *Mrs. Rupsan Begum v. Md. Abdus Sattar* :

'From the plain reading of the provisions of Act 25 of 1986, it is clear that provisions of sub-sec. (1)(b) of S. 3 providing reasonable and fair provision of

maintenance of minor child to made and paid to the divorced Muslim women by her former husband for a period of two years from the date of birth of the child is a right of Muslim divorced women and is incidental to the divorce and the said provision, in no way comes in conflict with the provisions of S. 125 Cr.P.C. providing maintenance of minor child'.

42. It will be also necessary to notice the observation of the Calcutta High Court in *Md. Murtaza v. Smt. Kausar Parvin* , that it is clear from a comparison of the provisions of S. 125 Cr.P.C. and the provisions of the Muslim Women Act of 1986 that a minor child crossing the age of 2 years is not precluded from claiming maintenance from the father, if it can be shown that the child is unable to maintain itself.

43. In *Syed Iqbal Hussain v. Syed Nasemunnissa Begum* 1991 (3) Crimes 678, the Andhra Pradesh High Court, while dealing with the similar case has held as follows :-

'The provisions of S. 125 Cr.P.C., are not repugnant to the Act and that the children of divorced wife and husband who cross the age of two years are entitled to maintenance under S. 125 of Cr.P.C. That the right of child to claim maintenance under S. 125 Cr.P.C. is not taken away by S. 3 of the Act, but it has given additional safeguard to the children'.

44. In the case of *Dolna Khatoon v. Jamaluddin Ahmed* 1992 CWN 714, the Calcutta High Court has held that the maintenance of the minor daughter cannot in any manner be stifled with the filing of the application under S. 127, Cr.P.C. r/w Ss. 3 and 7 of the Act of 1986. The same Calcutta High Court had further occasion to deal with similar case in *Abubakkar v. Mst. Ohidunnessa Bibi* and observed that the right of the child to claim maintenance under S. 125 Cr.P.C., either by itself or through its mother acting on its behalf remains intact in spite of the right of the mother under S. 3 of the Act 25 of 1986 to claim maintenance for the child for a period of two years from her former husband, where she herself maintains the child.

45. In *G. M. Jeelani v. Shanswar Kulsum*, Iyyapu Panduranga Rao, J. of Andhra Pradesh High Court, has observed as hereunder :-

'Since the minor daughter is seeking maintenance under S. 125 of Cr.P.C., by virtue of the first explanation appended to S. 125 Cr.P.C., she is entitled to maintenance till she attains majority as per the provisions of Indian Majority Act, 1875. As such, I find that the minor daughter is entitled to maintenance till she attains majority as per the provisions of Indian Majority Act, 1875'.

46. The Bombay High Court in *Wahid Rajjak Sawar v. Shahanaz Wahid Sawar* (1994 (2) DMC 4), stated that 'needless, therefore, to mention that right of the minor to claim maintenance under S. 125 Cr.P.C. is in no way affected by this order'. In the case of *Soyab Mohammad v. Rashida Bano Munni* (2) 1994 DMC 611, the Rajasthan High Court has held that the right claimed for maintenance by a Muslim woman is governed by S. 3 of the Act, which has overriding effect to any other provision. But so far as the right of maintenance of children is concerned, since the section does not contemplate the maintenance to the children, it will not have overriding effect on the provisions of other Act. Section 125, Cr.P.C., provides for maintenance of children and that provision cannot be said to be superseded by the provisions of the Act'.

47. In *Mst. Noor Jehan v. State of Maharashtra*, , the Bombay High Court has held that 'on the date of filing of application claiming maintenance under S. 125 Cr.P.C. admittedly the child baby was more than two years old The right conferred on the minor child under S. 125 Cr.P.C., cannot be said to have been taken away by the provisions contained in S. 3(b) of the Act of 1986'. While dealing with similar issue, the Orissa High Court in *Begum Bibi v. Abdul Rajak Khan*, has observed that 'provisions of S. 125 of Cr.P.C., are not repugnant to the Act, and children of divorced wife and husband who cross the age prescribed in S. 3(1)(b) are entitled to maintenance under S. 125 Cr.P.C. Right to claim such maintenance is not taken away under S. 3 of the Act, and on the contrary gives additional safeguard to the children'.

48. The evidence adduced by PWs 1 and 2 in this case would reveal, that the child was born to PW 1, the 1st respondent herein, through her former husband, the

petitioner herein and the child is in the custody of its mother and that PW 1 has no sufficient means to maintain the child. The peculiar feature in this case is that the petitioner/husband did not produce any substantive evidence, either by examining himself or by examining other witnesses on his side, to challenge the evidence adduced on the side of wife, in relation to the claim of maintenance for the child. The evidence of PW 1, would further disclose that the petitioner/husband is having means to maintain the child. It is not the case of the husband that the wife/1st respondent has means to maintain the child.

49. In view of the above conclusions arrived at, that the Muslim child aged above two years is definitely entitled to claim maintenance under S. 125 Cr.P.C., from its father and the father is bound to maintain his child, the order of maintenance as passed by the Sessions Court, cannot be said to be bad in law. After having considered the whole gamut of case, I have no hesitation to confirm the order of the Sessions Court, in awarding maintenance of Rs. 150/- p.m., to the 2nd respondent Yashmin, from the date of petition filed in M.C. No. 4 of 1991 dated 9-4-1991, on the file of Judicial Magistrate No. 1, Ulundurpet.

50. In that view of the matter, the revision filed by the petitioner/husband, which has no merits, is dismissed and the order of the principal Sessions Judge, Cuddalore, dated 16-2-1993 in CrI R.C. No. 62 of 1992, directing the petitioner/husband to pay a sum of Rs. 150/- p.m., to the 2nd respondent herein towards maintenance is confirmed.

51. Petition dismissed.