

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

THURSDAY, THE 2ND DAY OF JULY 2015/11TH ASHADHA, 1937

WP(C) .NO. 31299 OF 2008 (S)

PETITIONER(S) :

1. KHURAN SUNNATH SOCIETY & OTHERS
ITS CENTRAL COMMITTEE EXECTUVE MEMBER
DR.M.ABDUL JALEEL, PUTTEKKAD, FEROKE
KOZHIKODE DISTRICT.
2. HUMANIST CENTRE, REPRESENTED BYITS
PRESIDENT, SRI. K.V.SYED MUHAMMED, PULLIYILANGADI
P.O., ANAKKAYAM, MANJERI
MALAPPURAM DISTRICT.
3. C.V.ABDUL SALAM, AGED 44 YEARS,
S/O. MAYIN, PANALIL HOUSE, P.O. KAPPAD
KOZHIKODE DISTRICT 673 304
4. M.C. RABIA, AGED 59 YEARS,
W/O. K.K. ABDUL ALI, RESIDING AT, HIKAMAT HOUSE
KAPPAD POST, KOZHIKODE 673 304.
5. V.P. ZUHARA, AGED 58 YEARS, PRESIDENT,
NISA, MUSLIM WOMENS FORUM, CIVIL STATION
KOZHIKODE.

BY ADVS.SRI.K.RAMAKUMAR (SR.)
SRI.J.R.PREM NAVAZ

RESPONDENT(S) :

1. UNION OF INDIA AND ANOTHER
SECRETARY TO GOVERNMENT, MINISTRY OF LAW
GOVERNMENT OF INDIA, NEW DELHI.

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2. STATE OF KERALA, REPRESENTED BY
THE CHIEF SECRETARY, GOVERNMENT OF KERALA, SECRETARIAT
THIRUVANANTHAPURAM

ADDITIONAL RESPONDENTS IMPEADED:

3. ALL INDIA MUSLIM PERSONAL LAW BOARD,
76A/1, MAIN MARKET, OKHLA VILLAGE, JAMIA NAGAR,
NEW DELHI - 1210 025, REPRESENTED BY ITS
ASSISTANT GENERAL SECRETARY, MUHAMMED
ABDURAHIMAN QURAISHI.

IS IMPEADED AS ADDITIONAL RESPONDENT NO.3
VIDE ORDER DATED 07.06.2010 IN I.A. NO.6332/10.

4. K.H. ALIYAR, AGED 48 YEARS,
S/O. LATE HAMEED, KUTTIKATTUCHALIL HOSUE,
ADIMALY.

IS IMPEADED AS ADDITIONAL RESPONDENT NO.4 VIDE
ORDER DATED 13.7.2010 IN I.A. NO.8618 OF 2010.

5. GULZAR PANMANA, AGED 34 YEARS,
S/O.MALUHARUDEEN KUTTY, OASIS, PLANMANAMANYIL P.O.,
CHAVARA, KOLLAM DISTRICT.

IS IMPEADED AS ADDITIONAL RESPONDENT NO.5 VIDE
ORDER DATED 13.7.2010 IN I.A. NO.9377 OF 2010.

6. BEENAK.BAVA, AGED 47 YEARS, W/O.A.P.K.BHAVA,
41/1446, BAVAS BUILDING, KRISHNA SWAMY ROAD,
PULLEPPADY, ERNAKULAM, KOCHI - 682 035.

7. NAMITHA N.C., AGED 39 YEARS, W/O.MAHAROOF
KELATH, MANALA KARIMBAM POST, THALIPARAMBU
KANNUR DISTRICT, PIN - 670 142.

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ARE IMPEADED AS ADDITIONAL RESPONDENT NOS.6 AND 7
VIDE ORDER DATED 13.8.2012 IN I.A. NO.10445 OF 2012

8. SUBRAMANIAN SWAMY, S/O.LATE SITARAM SUBRAMANIAN
RESIDING AT A77, NIZAMUDDIN EAST, NEW DELHI- 110 013.

IS IMPEADED AS ADDITIONAL RESPONDENT NO.8 VIDE
ORDER DATED 7.11.2013 IN I.A. NO.14849 OF 2013.

9. 'JUSTITA' P.B.NO.833, MAVOOR ROAD, KOZHIKODE
REPRESENTED BY ITS SECRETARY FAIZAL P.,
S/O.AHAMMEDKUTTY NAHAR HOUSE, KUNNATHUPARAMBU
ARTS COLLEGE P.O., PANNIYANKARA VILLAGE,
KOZHIKODE PIN - 673 661.

IS IMPEADED AS ADDITIONAL RESPONDENT NO.9 VIDE
ORDER DATED 10.01.2014 IN I.A. NO.355 OF 2014.

10. K.P. ABDUL MAJEED, AGED 64, SON OF AHAMMAD,
RESIDING AT KURUVA AMSOM DESOM, VATTALLUR P.O.,
PERINTHALMANNA TALUK, MALAPPURAM DISTRICT.

IS IMPEADED AS ADDITIONAL RESPONDENT NO.10 VIDE
ORDER DATED 5.2.2014 IN I.A. NO.1857 OF 2014.

11. KERALA MUSLIM JAMATH COUNCIL (REGD),
STATE COMMITTEE REPRESENTED BY ITS GENERAL
SECRETARY, ADVOCARE A.POOKUNJ, S/O.HASANARU KUNJU
VALIYA CHENKILATH HOUSE, AVALUKUNNU P.O.,
ALAPUZHA.

IS IMPEADED AS ADDITIONAL RESPONDENT NO.11 VIDE
ORDER DATED 24.2.2014 IN I.A. NO.2520 OF 2014.

12. A.P. ABDUL KHADER MOULAVI, AGED 77 YEARS,
SON OF SAINUDEEN, GENERAL SECRETARY, KERALA NADUVAHUL
MUHJAHIDEEN, MUJAHID CENTRE, C.D. TOWER,
ARAYIDATHUPALAM, KOZHIKODE TALUK, KOZHIKODE DISTRICT
KERALA STATE PIN 673 004.

WP(C).NO. 31299 OF 2008 (S)

IS IMPEADED AS ADDITIONAL RESPONDENT NO.12 VIDE
ORDER DATED 24.2.2014 IN I.A. NO.2730 OF 2014.

13. T.MUHAMMED @ BAPPU MUSALIYAR,
S/O.LATE ABUBACKER MUSALIYAR, AGED 62 YEARS,
SECRETARY, SAMASTHA KERALA JAM-IYYATHUL ULAMA,
FRANCIS ROAD, KOZHIKODE.

IS IMPEADED AS ADDITIONAL RESPONDENT NO.13 VIDE
ORDER DATED 5.6.2014 IN I.A. NO.5438 OF 2014.

R,R3 BY ADV. SRI.P.K.IBRAHIM
R,R3 BY ADV. SMT.K.P.AMBIKA
R,R3 BY ADV. SMT.A.M.FASEENA
R, 5 BY ADV.P.S. ABDUL KAREEM
R,ADDL.R4 BY ADV. SRI.P.S.ABDUL KAREEM
R,ADDL.R4 BY ADV. SRI.O.ABDUL HAFEELU
R,ADDL.R6 BY ADV. SRI.P.S.ABDUL KAREEM
R,ADDL.R6 BY ADV. SRI.O.ABDUL HAFEELU
R,R1 BY ADV. SRI.P.PARAMESWARAN NAIR,ASG OF INDIA
RADDL 6 AND 7 BY ADV. SRI.M.R.HARIRAJ
RADDL 6 AND 7 BY ADV. SRI.P.A.KUMARAN
RADDL 6 AND 7 BY ADV. SMT.VINEETHA B.
RADDL 6 AND 7 BY ADV. SRI.NIRMAL V NAIR
RADDL 6 AND 7 BY ADV. SRI.ANISH JAIN
RADDL 6 AND 7 BY ADV. SMT.M.A.JINSA MOL
RADDL.8 BY ADV. SUBRAMANIAN SWAMY (PARTY-IN-PERSON)
RADDL 9 BY ADV. SRI.PULIKKOOL ABUBACKER
RADDL 9 BY ADV. SRI.M.M.ALIYAR
RADDL 9 BY ADV. SRI.M.B.SANDEEP
RADDL 9 BY ADV. SMT.R.PRIYA
RADDL 9 BY ADV. SRI.V.VISAL AJAYAN
RADDL9 BY ADV. SMT.B.DHANYA
R10 BY ADV. SRI.N.NANDAKUMARA MENON (SR.)
R10 BY ADV. SRI.P.K.MANOJKUMAR
R10 BY ADV. SRI.V.SHYAM
RADDL.11 BY ADV. SRI.SIRAJ KAROLY
RADDL.12 BY ADV. SRI.M.P.MOHAMMED ASLAM
RADDL.13 BY ADV. SRI.R.RAMADAS
R2 BY ADV. SRI.K.A.JALEEL, ADDL. ADVOCATE GENERAL
BY SENIOR GOVERNMENT PLEADER SHRI JOE KALLIATT
R1 BY ADV. SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
15.06.2015, THE COURT ON 02-07-2015 DELIVERED THE FOLLOWING:

WP(C).NO. 31299 OF 2008 (S)

APPENDIX

PETITIONER(S) ' EXHIBITS:

EXHIBIT P1 TRUE COPY OF THE STATEMENT GRANTING SHARES
UNDER DIFFERENT HEADS.

RESPONDENT(S) ' EXHIBITS:

NIL

TRUE COPY

P.S. TO JUDGE

“C.R.”

ASHOK BHUSHAN, C.J.

and

A.M. SHAFFIQUE, J.

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W.P(C) No.31299 of 2008

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Dated this the 2nd day of July, 2015

J U D G M E N T

Ashok Bhushan, C.J.

This Writ Petition filed as a Public Interest Litigation prays for the following reliefs:

“(a) To declare that the practice now followed by the Muslims based on Shariat, which is a Law under Article 13, in regard to inheritance of Muslim women is violative of Articles 14, 15, 19, 21 and 25 of the Constitution of India and therefore, void and unenforceable.

“(b) To issue such other writs, orders or directions as this Honourable Court may deem fit and proper in the circumstances of the case.”

2. Writ Petition has been filed by several petitioners. The 1st petitioner claims to be a Society, viz., Khuran Sunnath Society founded for the faithful and correct implementation of Quran. The 2nd petitioner claims to be an Organization working mainly for the

prevention of certain practices which are discriminatory and particularly against women. The 3rd petitioner is a Muslim by birth, a citizen of India and resident of Kerala who has only two daughters. The 4th petitioner is also a Muslim by birth who has three daughters. The 5th petitioner is the President of an Organization, viz., 'NISA', a progressive Muslim Women's Forum.

3. Petitioners plead in the Writ Petition that the Shariat law which is applicable with regard to succession in Muslim Community is based on misinterpretation of various Quranic principles. It is pleaded that there is discrimination on the ground of sex in so far as inheritance is concerned regarding females in Muslim Community, i.e., a female child does not get equal share to male child born to Muslim father. A female child gets less share as compared to her brother. Petitioners submitted that the misinterpretation of holy Quranic edicts as now

practiced in India leads to patent discrimination against female children alone, while the sons who succeed to their mother's or father's property need not share any portion of the inherited properties with anyone of the deceased's relatives other than spouse and parents of the deceased. It is further pleaded that among Shiyas and Sunnis also there is a distinction regarding succession. It is pleaded that if a deceased Muslim happens to leave only daughters, those daughters will not get a share equivalent to that of the share she would get if she was a male and will have to share the properties along with not so close relative of the deceased. At the same time if the deceased leaves only a male child, he takes the entire property needing to share it only with the spouse and parents of the deceased. It is submitted that it will lead to brazen discrimination among Indian citizens only on the ground of sex. Petitioners further submitted that Muslim

Scholars and legal experts have always given opinion that the Shariat law is not immutable and should receive change contextually responsive to social needs. It is further pleaded that various Muslim Countries including Pakistan, Egypt, Malaysia, etc., have introduced legislation to implement the true Quranic principles by changing the law on various subjects. It is further submitted that religious practices cannot be altered, Shariat certainly can be made more practicable and workable to adapt itself to the changing needs of the Society. Petitioners submitted that inequality meted out to women among Muslims in the matter of inheritance and succession will have to be removed and they should be given equal right in terms of the great constitutional principles under Articles 14, 15 and 25 of the Constitution of India. It is pleaded that Muslim Personal Law as followed in the present day carries discrimination based on gender in the matter of

inheritance which cannot have the acceptance of the constitutional principles enshrined in Articles 14, 15, 19, 21 and 25 of the Constitution of India. On the aforesaid pleadings petitioners have filed the Writ Petition.

4. In the Writ Petition counter affidavits have been filed by the respondents including counter affidavit by the Union of India, State of Kerala, Muslim Personal Law Board and other respondents. Respondent pleads that for succession and inheritance Muslims are governed by their Personal Law. Reference has been made to the enactment, Muslim Personal Law (Shariat) Act No.26 of 1937. It is submitted that the said Shariat Law has got statutory recognition which governs Muslim Personal Law.

5. In the counter affidavit filed by some of the respondents it is submitted that there is no misinterpretation of Quranic edicts and the Shariat is based on Quranic principles and other law. It is

submitted that in any view of the matter this issue cannot be entertained in a Public Interest Litigation and it has to be left to the wisdom of Legislature which is competent to enact law on the subject.

6. We have heard Shri K.Ramakumar, learned Senior Advocate, Shri N.Nagaresh, Assistant Solicitor General of India, Shri P.K.Ibrahim, and Shri M.R.Hariraj.

7. Before we proceed to consider the submissions of the learned counsel for the parties, it is useful to refer to certain portions of the pleadings in the Writ Petition to know as to on what basis and grounds petitioners have prayed for the reliefs sought.

8. In paragraph 5 the following is pleaded:

“The petitioners respectfully submit that the misinterpretation of holy Quranic edicts, as now practiced in India leads to patent discrimination against female children alone, while the sons who succeed to their mother's or father's property need not share any portion of the inherited properties with anyone of the deceased's relatives other than spouse and parents of the deceased.”

In paragraph 6 the following is pleaded:

“This it is submitted is patently discriminatory as there is discrimination not only between men and women but also between Shiyas and Sunnis in the implementation of the Shariat, which it is respectfully submitted is a clear deviation from the Quranic principles. The practice currently followed among large sections of Muslims in India is that if it is a daughter she has to share the property with other relatives in addition to close relatives like parents and spouse. If a deceased Muslim happens to leave only daughters, those daughters will not get a share equivalent to that of a share she would get if she was a male, and will have to share the properties along with not so close relatives of the deceased. At the same time if the deceased leaves only a male child, he take the entire property needing to share it only with the spouse and parents of the deceased. This it is submitted will lead to brazen discrimination among Indian citizens only on the ground of sex. It is submitted that this discrimination is not supported by Quranic principles.”

In paragraph 12 the following was pleaded:

“At any rate, noted Muslim Scholars and legal experts have always given opinion that the Shariat law is not immutable and should receive change contextually responsive to social needs. Various Muslim countries including Pakistan, Egypt, Malazia, etc., have introduced legislation to implement the true Quranic principles by changing the law on various subjects. This, it is submitted,

is perfectly permissible.....While religious practices cannot be altered, Shariat certainly can be made more practicable and workable to adapt itself to the changing needs of the society. To achieve this, it is obvious that the inequality meted out to women among the Muslims in the matter of inheritance and succession will have to be removed and they given an equal right in terms of the great Constitutional principles under Article 14, 15 and 25 of the Constitution of India.”

9. In the various grounds taken in the Writ Petition, petitioners also alleges discrimination based on gender and states that it is violative of Articles 14, 15, 19, 21 and 25 of the Constitution of India. In Grounds A, G & I the following was stated:

“A.The Muslim Personal Law as followed in the present day carries discrimination based on gender in the matter of inheritance. This has resulted from the misrepresentation of religious scriptures and such principles cannot have the acceptance of the constitutional principles enshrined in Articles 14, 15, 19, 21 and 25 of the Constitution of India.”

“G.....In the present day society the division of intestate property among the distant kins in preference to the wife and children of the deceased is resulting in situations where the wife and children find it difficult to

survive. In the earlier periods when the members of the family lived together the inheritance of the property by the brothers, parents and grandparents had little consequence. But the scenario has changed a lot and the application of the principles of Muslim Personal Law in the present day society is creating havoc than any good. The result of such an application is nothing but the deprivation of constitutional rights to the individuals.”

“I.....Several of the Muslim countries have made enactments to protect the rights of the individuals in the changed circumstances. It is also not uncommon in India that enactments were made in the field of Muslim Personal Law to protect the rights of the individuals. As the application of the Muslim Personal Law in Muslim Succession in several cases is resulting in great injustice, it is high time that appropriate actions are taken in the matter.”

Pleadings of the petitioner as noted above clearly indicate that petitioners are aggrieved by Muslim Personal Law and in fact they pray for a declaration that Muslim Personal Law based on Shariat is violative of Articles 15, 19, 21 and 25 of the Constitution of India.

10. The Muslim Personal Law, i.e., Shariat Law has been given statutory recognition by the Shariat Act. It is useful to quote Section 2 of the Act which is as

follows:

“2. Application of Personal Law to Muslims.-

Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).”

The preliminary objection which has been raised by learned counsel for the respondents is that issues which are raised are issues which cannot be allowed to be raised in a Public Interest Litigation. For challenging the personal law applicable to Muslims, a legislation has to be brought into by the competent legislature. Union of India in its counter affidavit in paragraph 13 has pleaded as follows:

“The subject “Personal Laws” is relatable to entry 5

in List III-Concurrent List of the Seventh Schedule to the Constitution of India and hence the Legislature, subject to the other provisions of the Constitution have necessary legislative competence to amend or modify matters falling under that entry. However, it has been the consistent policy of the Central Government not to interfere in the Personal Laws of the minority communities unless the necessary initiatives for such changes come from a sizeable cross section of such communities themselves. Hence, no changes in the Muslim Personal Law (Shariat) Application Act, 1937 (26 of 1937) would be considered appropriate as there is no such demand from the community concerned. Now, with amendments and modifications in personal laws of other religions, women have been given a share in the ancestral property. The purpose and object of the right of inheritance of women and the share determined in their favour are based on various considerations, prominent among them is the rights and responsibilities imposed by Islam on different persons. Any attempt to change this determined share will disturb the entire harmony maintained among the other legal heirs recognized in Islamic law and will undo its own entity to preserve its religion, culture, language, etc., that are held to be fundamental right of the Constitution of India. Further right to freedom of thought, conscience and religion is a human right recognized in the Universal Declaration of Human Rights 1948. Article 18 of the Universal Declaration of Human Rights 1948 states that "everyone has the right to freedom of thought, conscience

and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

Entry 5 of List III of the 7th Schedule of the Constitution of India contains the following entry:

“5. Marriage and divorce; infants and minors, adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.”

11. On the Personal Law thus both the State Legislature and Parliament have competence to make the law. The Apex Court in **Mohd. Ahmed Khan v. Shah Bano Begum and others** (AIR 1985 SC 945) had occasion to consider the 1937 Act in the context of Sections 125 and 127 of the Code of Criminal Procedure. In paragraph 11 of the judgment, the following was observed by the Apex Court:

“11. The whole of this discussion as to whether the right conferred by Section 125 prevails over the personal law

of the parties, has proceeded on the assumption that there is a conflict between the provisions of that section and those of the Muslim Personal Law. The argument that by reason of Section 2 of the Shariat Act, XXVI of 1937, the rule of decision in matters relating, inter alia, to maintenance "shall be the Muslim Personal Law" also proceeds upon a similar assumption. We embarked upon the decision of the question of priority between the Code and the Muslim Personal Law on the assumption that there was a conflict between the two because, in so far as it lies in our power, we wanted to set at rest, once for all, the question whether Section 125 would prevail over the personal law of the parties, in cases where they are in conflict."

The Apex Court further in paragraph 14 held that there is no conflict in Section 125 and Muslim Personal Law. The following was laid down in paragraph 14:

"14. These statements in the text books are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself. One must have regard to the entire conspectus of the Muslim Personal Law in order to determine the extent, both in quantum and in duration, of the husband's liability to provide for the maintenance of an indigent wife who has been divorced by him. Under that law, the husband is bound to pay Mahr to the wife as a mark of respect to her. True, that he may settle any

amount he likes by way of dower upon his wife, which cannot be less than 10 Dirhams, which is equivalent to three or four rupees (Mulla's Mahomedan Law, 18th Edition, para 286, page 308). But, one must have regard to the realities of life. Mahr is a mark of respect to the wife. The sum settled by way of Mahr is generally expected to take care of the ordinary requirements of the wife, during the marriage and after. But these provisions of the Muslim Personal Law do not countenance cases in which the wife is unable to maintain herself after the divorce. We consider it not only incorrect but unjust, to extend the scope of the statements extracted above to cases in which a divorced wife is unable to maintain herself. We are of the opinion 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. We are not concerned here with the broad and general question whether a husband is liable to maintain his wife, which includes a divorced wife, in all circumstances and at all events. That is not the subject matter of Section 125. That section deals with cases in which, a person who is possessed of sufficient means neglects or refuses to maintain, amongst others, his wife who is unable to maintain herself. Since the Muslim Personal Law, which limits the husband's liability to provide for the maintenance of the 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 the Muslim husband, according to his personal law, is not under

an obligation to provide maintenance, beyond, the period of iddat, to his divorced wife who is unable to maintain herself. The argument of the appellant that, according to the Muslim Personal Law, his liability to provide for the maintenance of his divorced wife is limited to the period of iddat, despite the fact that she is unable to maintain herself, has therefore to be rejected. The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the -expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to. Section 125 of the Code. The outcome of this discussion is that there is no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself."

In the context of Parliament Bill which led to the Code of Criminal Procedure, 1973, the Honourable Minister for Home Affairs made the following speech as extracted by the Apex Court in paragraphs 27. Paragraphs 27 and 28 of the judgment are quoted as below:

"27. It is contended on behalf of the appellant that the proceedings of the Rajya Sabha dated December 18, 1973 (volume 86, column 186), when the bill which led to the Code of 1973 was on the anvil, would show that the intention of the

Parliament was to leave the provisions of the Muslim Personal Law untouched. In this behalf, reliance is placed on the following statement made by Shri Ram Niwas Mirdha, the then Minister of State, Home Affairs :

"Dr. Vyas very learnedly made certain observations that a divorced wife under the Muslim law deserves to be treated justly and she should get what is her equitable or legal due. Well, I will not go into this, but say that we would not like to interfere with the customary law of the Muslims through the Criminal Procedure Code. If there is a demand for change in the Muslim Personal Law, it should actually come from the Muslim Community itself and we should wait for the Muslim public opinion on these matters to crystallise before we try to change this customary right or make changes in their personal law. Above all, this is hardly the place where we could do so. But as I tried to explain, the provision in the Bill is an advance over the previous situation. Divorced women have been included and brought within the ambit of clause 125, but a limitation is being imposed by this amendment to clause 127, namely, that the maintenance orders would cease to operate after the amounts due to her under the personal law are paid to her. This is a healthy compromise between what has been termed a conservative interpretation of law or a concession to conservative public opinion and liberal approach to the problem. We have made an advance and not tried to transgress what are the personal rights of Muslim women. So this, I think, should satisfy Hon. Members that whatever advance we have made is in the right direction and it should be welcomed."

28. It does appear from this speech that the Government did not desire to interfere with the personal law of the Muslims through the Criminal Procedure Code. It wanted the Muslim community to take the lead and the Muslim public opinion to crystallise on the reforms in their personal law. However, we are not concerned with the question whether the Government did or did not desire to

bring about changes in the Muslim Personal Law by enacting Sections 125 and 127 of the Code. As we have said earlier and, as admitted by the Minister, the Government did introduce such a change by defining the expression 'wife' to include a divorced wife. It also introduced another significant change by providing that the fact that the husband has contracted marriage with another woman is a just ground for the wife's refusal to live with him. The provision contained in section 127(3)(b) may have been introduced because of the misconception that dower is an amount payable "on divorce". But, that cannot convert an amount payable as a mark of respect for the wife into an amount payable on divorce."

Referring to Article 44 of the Constitution of India, the following was laid down in paragraph 32:

"32. It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India". There is no evidence of any official activity for framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and,

unquestionably; it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.

12. Learned counsel for the petitioners have referred to two judgments of the Apex Court in support of their submissions. The first judgment relied is **Mary Roy v. State of Kerala** ([1986] 2 SCC 209). In the above case the Apex Court had occasion to consider provisions of the Travancore Christian Succession Act, 1092 as to whether Sections 6, 3 and 2(cc) stood wholly repealed on extension of Succession Act, 1925 to the State of Travancore Cochin by the 1951 Act.

Although submission was raised that the said provision of Travancore Christian Succession Act is unconstitutional and void being violative of Article 14 of the Constitution, the Apex Court did not proceed to consider the said submission and held that the 1925 Act superseded the provisions of Travancore Christian Succession Act. The following was laid down in paragraph 8:

“8. We are, therefore, of the view that on the coming into force of Part-B States (Laws) Act, 1951 the Travancore-Cochin Succession Act, 1092 stood repealed and Chap.2 of Part.5 of the Indian Succession Act, 1925 became applicable and intestate succession to the property of members of the Indian Christian community in the territories of the erstwhile State of Travancore was thereafter governed by Chap.2 of Part.5 of the Indian Succession Act, 1925. On this view, it becomes unnecessary to consider whether S.24, 28 and 29 of the Travancore Christian Succession Act, 1092 are unconstitutional and void. We, therefore, allow the writ petitions and declare that intestate succession to the property of Indian Christians in the territories of the former State of Travancore is governed by the provisions contained in Chap.2 of Part.5 of the Indian Succession Act, 1925. There will be no order as to costs.”

13. Similarly in the judgment in **John Vallamattom v. Union of India** ([2003] 6 SCC 611) provision of Section 118 of the Succession Act, 1925 imposing restriction on Christian alone in the matter of bequest to religious and charitable uses came up for consideration. The Apex Court held the said provision as unconstitutional. But before parting with the case observation was made in paragraph 44 that the Parliament has to step in for framing common Civil Code in the Country. The following was observed in paragraph 44:

“44. Before I part with the case, I would like to state that Art.44 provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid provision is based on the premise that there is no necessary connection between religious and personal law in a civilised society. Art.25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Art.25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that

marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Arts.25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within the ambit of Arts.25 and 26 is a suspect legislation. Although it is doubtful whether the American doctrine of suspect legislation is followed in this country. In Smt. Sarla Mudgal, President, Kalyani and Ors. v. Union of India and Others (1995 (2) KLT 45), it was held that marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined under Arts.25 and 26 of the Constitution. It is a matter of regret that Art.44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.”

14. From the discussion as above, it is clear that for modifying the personal law a declaration is sought by petitioners that Shariat Law regarding inheritance of Muslim women violates Articles 14, 15, 19, 21 and 25. These are the issues which are to be taken by the Legislature. The said issues are not the issues which can be adjudicated by this Court in a Public Interest Litigation. In this context it is useful to refer to a

short judgment of the Apex Court where the petitioners filed the Writ Petition under Article 32 of the Constitution of India reported in **Maharshi Avadhesh v. Union of India** ([1994] Suppl. 1 SCC 713) where the Apex Court held with regard to prayer of the petitioner in the Writ Petition that the respondents be directed not to enact Shariat Act in respect of those affecting dignity and rights of Muslim Women. The Court observed that those are matters for Legislature. The following was laid down by the Apex Court:

“This is a petition by a party in person under Article 32 of the Constitution. The prayers are two-fold. The first prayer is to issue a writ of mandamus to the respondents to consider the question of enacting a common Civil Code for all citizens of India. The second prayer is to declare Muslim Women (Protection of Rights on Divorce) Act, 1986 as void being arbitrary and discriminatory and in violation of Article 14 and 15 Fundamental rights and Articles 44, 38 and 39 and 39A of the Constitution of India. The third prayer is to direct the respondents not to enact Shariat Act in respect of those adversely affecting the dignity and rights of Muslim women and against their protection. These are all matters for legislature. The Court cannot legislate in these matters. The

Writ Petition is dismissed.”

15. In view of the forgoing discussion, we are of the considered opinion that the issues raised in the Writ Petition cannot be adjudicated in proceedings under Article 226 of the Constitution of India in this Public Interest Litigation. It is for the Legislature to consider the issues raised and frame a competent legislation.

With the above observation, the Writ Petition is dismissed.

**ASHOK BHUSHAN,
CHIEF JUSTICE.**

**A.M. SHAFFIQUE,
JUDGE.**

VSV