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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 1878 OF 2019

1. Mrs. Lubna D/o. Nafees Ahmed

Aged: 29 years, Occ. Household

2. Ayesha Siddiqua Shoebur Rahman

Aged: 5 years, Occ. Nil

Both are R/o. House No.602,
Belbaug, Tal.Malegaon, Dist.- Nashik

..Petitioners

Vs.

1. Mr. Shoebur Rahman Mohd. Altamash

Aged: 34 years, Occ. Business

R/o. Lane No.15, Nayapura,
Tal. Malegaon, Dist. Nashik

2. The State of Maharashtra

..Respondents

Ms. Saima Ansari for Petitioners.

Mr. R. M. Pethe, APP for State/Respondent No.2.

CORAM : M. S. KARNIK, J.

DATE : SEPTEMBER 16, 2022.

ORAL JUDGMENT :-

1. A claim was made by the petitioners for maintenance under the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereafter 'the Act' for short) against the respondent no.1. Not being satisfied with the amount of maintenance granted by the trial Court and as upheld by the revisional Court, the present writ petition is filed under Article 227 of the Constitution of India for enhancement of the maintenance amount.

2. On 28 June, 2019, notice was issued to the respondents, returnable on 09 July, 2019. The respondent no.1 did not appear though he was duly served. The respondent no.2 is the

State of Maharashtra. The respondents were duly served with the notice. On 22 July, 2019, the following order was passed:-

“In spite of service, none appears for contesting respondent. To give one more opportunity to contesting respondent to cause his appearance and put forth the contentions, stand over to 16.08.2019. Ad-interim relief, if any granted earlier, to continue till then.”

3. Then on 01 April, 2022, the following order came to be passed:-

“1. None present for the Respondent no.1 though duly served. By way of indulgence and final opportunity, stand over to 19.04.2022.”

4. The respondent no.1 has not appeared to contest this writ petition despite granting adequate opportunity to appear in the present case.

5. The facts of the case in a nutshell are stated hereafter:-

The petitioner no.1 - Ms. Lubna married respondent no.1-Mr. Shoebur on 08 July, 2012 as per the Muslim rites and rituals. Out of the said wedlock, the petitioner no.2 - Ayesha was born. Lubna alleged that she was tortured physically and mentally by Shoebur at her matrimonial home. On 15 May, 2013, Lubna came back to her maternal residence. In the 9th month of her pregnancy, Lubna alleged that Shoebur obtained her signatures on some document which was in Marathi. The said document was in the nature of a Divorce Deed. Though an averment is made that the divorce deed has been obtained fraudulently, learned counsel for Lubna submitted that she accepts the factum of a divorce as in any case the claim is for maintenance under Section 3(2) of the Act.

6. Lubna filed Criminal Misc. Application No. 911 of 2013 for maintenance under Section 3(2) of the Act on 09 December,

2013, before the Judicial Magistrate First Class, Malegaon (hereafter 'trial Court' for short).

7. The trial Court granted maintenance of Rs.8,000. According to Lubna, the amount of maintenance granted by the trial Court was inadequate and therefore, Criminal Revision Application No. 21 of 2016 came to be filed before the Sessions Court at Malegaon, District Nashik. The revisional Court for the following reasons, dismissed the revision application:-

"

REASONS

This revision is filed for enhancement of the maintenance. The grounds have been taken that the respondent is running a power loom and he has sufficient means to pay more amount and prayer is there that the reasonable and fair provision of Rs. 20 lacs be awarded and maintenance of Rs. 500/- per month be enhanced to Rs. 10,000/- per month.

Section 397 of the Code of Criminal Procedure, 1973 provides to verify the legality and correctness of the order passed by the trial Court. Whether the said order is perverted or not is to be seen. If the said order is perverted or if there is any procedural lacuna and correctness is to be seen.

This revision is filed as if it is an application for enhancement of maintenance on the ground that the said amount was not sufficient and respondent is having sufficient means to pay. This is to be noted that the trial Court has granted the amount after hearing both sides and after giving an opportunity. Therefore, it cannot be said that there is any perversity and hence, no interference is required. Accordingly I answered Point No.1 in the negative and pass the following order.

ORDER

1. Revision petition is dismissed.
 2. No order as to costs.
- (Dictated and pronounced in open Court.)"

8. Aggrieved by the orders passed by the trial Court as well as the revisional Court, the petitioners preferred the present writ petition for enhancement of the maintenance amount.

9. Heard learned counsel for the petitioners.

10. The order passed by the revisional Court, though passed in exercise of the revisional jurisdiction, is a cryptic order. I find that except for observing that “the trial Court has granted the amount after hearing both the sides and after giving an opportunity and therefore, there is no perversity in the order so as to warrant interference”, the revisional Court has not at all dealt with the submissions advanced on behalf of the petitioners for enhancement. In ordinary course, I would have set aside the order passed by the revisional Court and remitted the matter back to the revisional Court for a decision afresh on merits. However, in the facts of the present case, so as to not cause any further agony to the petitioners, and particularly when despite service of notice, the respondent no.1 has failed to appear and contest the present petition, I proceed to decide the writ petition on merits.

11. The Muslim Women (Protection of Rights on Divorce) Act, 1986 was enacted 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. Section 3 of the said Act provides for the entitlement of a divorced woman making a reasonable and fair provision of maintenance.

12. The application was made by the petitioners before the trial Court under sub-section (2) of Section 3. Section 3 of the said Act, which has a direct bearing on the controversy, reads thus:-

“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;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and

(d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorized by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be.

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that—

(a) her husband having sufficient means, has failed or neglected to make or pay her within the iddat period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her, make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as it and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such mahr or dower or the delivery of such properties referred to in clause (d) of

sub-section (1) the divorced woman:

Provided that if the Magistrate finds it impracticable to dispose of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974), and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code."

13. The petitioners averred that the respondent no.1 runs a power loom business and earns Rs.1 lakh per month. It is further averred that the petitioner no.1 does not have any income to maintain herself and her minor daughter-the petitioner no.2. The petitioner no.1 contends that her parents are old, suffering from various ailments and that it is the respondent no.1 who has obtained divorce from her. The learned counsel for the petitioners submitted that the amount of maintenance mentioned in the document when the divorce was obtained, was not accepted willingly, but under compulsion. The amount of Rs.8,000/- is a meagre amount and not sufficient to meet the daily needs of the petitioners.

14. The respondent no.1 in his reply before the trial Court contended that the maintenance amount was decided at the time of the divorce and the same was already paid to the petitioner no.1. The maintenance amount of Rs.8,000/- was

given to the petitioner no.1 as maintenance of iddat period. The petitioner no.1 accepted the terms and conditions of the talaqnama and signed the divorce deed. Thereafter, the petitioner no.2 was born. The petitioner no.1 refused to hand over the custody of petitioner no.2-Ayesha to the respondent no.1. It is stated that the respondent no.1 is ready and willing to take care and look after Ayesha. According to the respondent no.1, he is doing labour work and earning Rs.3,000/- to Rs.4,000/- per month.

15. During the course of the trial, the petitioner no.1 adduced her oral evidence at Exhibit 13. The medical papers and xerox copy of the Talaqnama was filed. The respondent no.1 filed his evidence affidavit at Exhibit 22.

16. There is no dispute on the factum of divorce as in any case an application has been filed by the petitioner no.1 under sub-section (2) of Section 3 of the said Act. Sub-section (1) (a) of Section 3 provides that a divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. Sub-section (1) (b) of Section 3 provides that where a divorced woman herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance has to be made and paid by her former husband for a period of two years from the respective dates of birth of such children. We are essentially concerned with sub-sections 1(a) and (b) of Section 3. According to the petitioner no.1, the respondent no.1 owns a power loom business and also a two storied RCC house at Nayapura. The fact that the respondent no.1 owns the two storied RCC house at Nayapura

is admitted by the respondent no.1 in his cross-examination. However, so far as the ownership of the power loom factory is concerned, the respondent no.1 admitted to owning the power loom factory, when he was working with his father. However, in the cross-examination, it is further stated by him that he has now become independent. It is the case of the respondent no.1 that he is earning only Rs. 4,000/- to Rs. 5,000/- per month. There is nothing on record to indicate the income of the respondent no.1, nor any documents are produced by the respondent no.1 to show his earnings.

17. The trial Court observed that the respondent no.1 has not produced any document to show that he has separated from his father and not running the power loom factory. The trial Court found that the respondent no.1 is financially sound and though the fact of income is within the knowledge of the respondent no.1, he failed to fairly disclose his income before the Court. The trial Court observed that the respondent no.1 having not disclosed his income before the Court, has not discharged his burden as per Section 106 of the Indian Evidence Act. An adverse inference therefore was drawn against the respondent no.1 and the trial Court presumed that the respondent no.1 is financially sound and able to make reasonable and fair provision. The trial Court having observed thus, in paragraph 21 held that an additional amount of Rs. 1,00,000/- (Rs. One Lakh only) will be sufficient, as reasonable and fair provision for the petitioner no.1 herein. This amount was in addition to Rs. 8,000/- that was granted to the petitioner no.1 at the time of the execution of Talaqnama (Exhibit 18).

18. Section 3 of the Act was a subject matter of consideration before the Supreme Court in **Danial Latifi and another vs. Union of India**¹. The relevant paragraphs 27, 28 and 29 read thus: -

"27. Section 3(1) of the Act provides that a divorced woman shall be entitled to have from her husband, a reasonable and fair maintenance which is to be made and paid to her within the iddat period. Under Section 3(2) the Muslim divorcee can file an application before a Magistrate if the former husband has not paid to her a reasonable and fair provision and maintenance or mahr due to her or has not delivered the properties given to her before or at the time of marriage by her relatives, or friends, or the husband or any of his relatives or friends. Section 3(3) provides for procedure wherein the Magistrate can pass an order directing the former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may think fit and proper having regard to the needs of the divorced woman, standard of life enjoyed by her during her marriage and means of her former husband. The judicial enforceability of the Muslim divorced woman's right to provision and maintenance under Section (3)(1)(a) of the Act has been subjected to the condition of husband having sufficient means which, strictly speaking, is contrary to the principles of Muslim law as the liability to pay maintenance during the iddat period is unconditional and cannot be circumscribed by the financial means of the husband. The purpose of the Act appears to be to allow the Muslim husband to retain his freedom of avoiding payment of maintenance to his erstwhile wife after divorce and the period of iddat.

28. 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 some needs. In other words, at the time of divorce the Muslim

1 (2001) SCC 740.

husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles. The expression "within" should be read as "during" or "for" and this cannot be done 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 maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere has Parliament provided 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.

29. The important section in the Act is Section 3 which provides that divorced woman is entitled to obtain from her former husband "maintenance", "provision" and "mahr", and to recover from his possession her wedding presents and dowry and authorizes the Magistrate to order payment or restoration of these sums or properties. The crux of the matter is that the divorced woman shall be entitled to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband. The wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations : (1) to make a "reasonable and fair provision" for his divorced wife; and (2) to provide "maintenance" for her. The emphasis of this section is not on the nature or duration of any such "provision" or "maintenance", but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, "within the iddat period". If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both "reasonable and fair provision" and "maintenance" by paying these amounts in a lump sum to his wife, in addition to having paid his wife's mahr and restored her dowry as per Sections 3(1) and 3(1)(d) of

the Act. Precisely, the point that arose for consideration in *Shah Bano* case was that the husband had not made a "reasonable and fair provision" for his divorced wife even if he had paid the amount agreed as mahr half a century earlier and provided iddat maintenance and he was, therefore, ordered to pay a specified sum monthly to her under Section 125 CrPC. This position was available to Parliament on the date it enacted the law but even so, the provisions enacted under the Act are "a reasonable and fair provision and maintenance to be made and paid" as provided under Section 3(1)(a) of the Act and these expressions cover different things, firstly, by the use of two different verbs - "to be made and paid to her within the iddat period" it is clear that a fair and reasonable provision is to be made while maintenance is to be paid; secondly, Section 4 of the Act, which empowers the Magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives, contains no reference to "provision". Obviously, the right to have "a fair and reasonable provision" in her favour is a right enforceable only against the woman's former husband, and in addition to what he is obliged to pay as "maintenance"; thirdly, the words of *the Holy Quran*, as translated by Yusuf Ali of "mata" as "maintenance" though may be incorrect and that other translations employed the word "provision", this Court in *Shah Bano* case dismissed this aspect by holding that it is a distinction without a difference. Indeed, whether "mata" was rendered "maintenance" or "provision", there could be no pretence that the husband in *Shah Bano* case had provided anything at all by way of "mata" to his divorced wife. The contention put forth on behalf of the other side is that a divorced Muslim woman who is entitled to "mata" is only a single or one time transaction which does not mean payment of maintenance continuously at all. This contention, apart from supporting the view that the word "provision" in Section 3(1)(a) of the Act incorporates "mata" as a right of the divorced Muslim woman distinct from and in addition to mahr and maintenance for the iddat period, also enables "a reasonable and fair provision" and "a reasonable and fair provision" as provided under Section 3(3) of the Act would be with reference to the needs of the divorced woman, the means of the husband, and the standard of

life the woman enjoyed during the marriage and there is no reason why such provision could not take the form of the regular payment of alimony to the divorced woman, though it may look ironical that the enactment intended to reverse the decision in *Shah Bano* case, actually codifies the very rationale contained therein."

19. Drawing support from the law laid down by the Supreme Court in **Danial Latifi and another** (supra), in my opinion, the amount of maintenance granted by the trial Court cannot be said to be reasonable and fair and needs to be enhanced. The petitioner no.1 claimed an amount of Rs. 20 lakhs in her application. There is evidence on record to indicate that the respondent no.1 was working with his father and that they owned the power loom factory. The respondent no.1 is the owner of the two storied RCC structure. The petitioner no.1 is without any source of income and is living with her parents. In such circumstances, in my opinion, having regard to the object of the said Act, in the facts of the present case, a reasonable and fair provision of maintenance to be paid to the petitioner no.1 would be a sum of Rs.10 Lakhs.

20. In so far as the petitioner no.2 is concerned, the respondent no.1 has not disputed the paternity of the child and the trial Court has observed that in the cross-examination, the respondent no.1 admitted that he has not paid any maintenance to the child-Ayesha till date. The provisions of sub-section (1)(b) of Section 3 provides that when a divorced woman 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. It provides that a divorced woman

is entitled for a reasonable and fair provision of 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. Ayesha was born on 15 May, 2013. In my opinion, considering the overall circumstances, the amount of Rs.500/- per month granted by the trial Court is grossly inadequate and the same needs to be enhanced to Rs. 2,500/- per month.

21. In this view of the matter, the order passed by the revisional Court calls for interference. The maintenance granted by the Courts below needs to be enhanced. The writ petition is allowed in the following terms with no order as to costs.

ORDER

i. The order dated February 4, 2016 passed by the trial Court stands modified as under:-

A. The respondent no.1-Shoebur shall pay Rs.10,00,000/- (Rupees Ten Lakhs only) to the petitioner no.1-Lubna as reasonable and fair provision towards maintenance.

B. The respondent no.1-Shoebur shall pay an amount of Rs. 2,500/- (Rupees Two Thousand Five Hundred only) per month to the petitioner no.1-Lubna as maintenance of the petitioner no.2-Ayesha i.e. from 28 May, 2013 to 27 May, 2015 in terms of Section 3(1)(b) of the said Act.

C. The arrears to be paid within a period of 12 weeks from the date of uploading of this order.

ii. The rest of the order passed by the trial Court is maintained.

[M.S. KARNIK, J.]