IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice A.T.M. Afzal, Chief Justice
Mr. Justice Mustafa Kamal
Mr. Justice Latifur Rahman
Mr. Justice Mohammad Abdur Rouf
Mr. Justice Bimalendu Bikash Roy Choudhury.

CIVIL APPEAL NO.130 OF 1997

(From the judgment and order dated January 9, 1995 passed by the High Court Division, Dhaka in Civil Revision No.2067 of 1992)

Md. Hefzur Rahman ..... Appellant

=Versus=

Shamsun Nahar Begum & another ..... Respondents

For the Appellant	:	Mr. Md. Hannan, Senior Advocate, instructed by Mr. Md. Ataul Haque, Advocate-on-Record.
For Respondent No.1	:	Mrs. Rabeya Bhuiyan, Advocate, instructed by Mr. Chowdhury Md. Zahangir, Advocate-on-Record.
Respondent No.2	:	Not represented.
Amicus Curiae	:	Mr. A.W. Bhuiyan, Acting Attorney General, instructed by Mr. Md. Sajjadul Huq, Advocate-on-Record.
For opinion on Islamic Law	:	Moulana Obaidul Haque, Khatib Baitul Mukarram National Mosque, Moulana Mohiuddin Khan, Editor of "Monthly Madina".

INTERVENERS (FIRST GROUP)

For the Appellant :

1. Mr. Shamsuddin Ahmed, Advocate -- For self
2. Mr. M.G. Bhuiyan, Advocate-on-Record -- For self
3. Mr. M. Nawab Ali Advocate-on-Record -- For Bangladesh Legal Aid & Service Trust (BLAST)
4. Mvi. Md. Wahidullah Advocate-on-Record -- For Rokeya Begum, housewife

For the Respondent :

1. Mr. Md. Fazlul Karim, Senior Advocate, instructed by Mr. Sharifuddin Chaklader, Advocate-on-Record. -- For Seema Zahur, Advocate Member, Bangladesh Jatiya Mohila Ainjibi Samity.

2. Mr. Shafique Ahmed, Advocate -- For Salma Sobhan, Executive Director, Ain O Salish Kendra (ASK)

3. Mr. Alimuzzaman Chowdhury, Advocate, instructed by Mr. M.G. Bhuiyan, Advocate-on-Record -- For Khan Md. Shahid, Chief Co-ordinator, on behalf of Madaripur Legal Aid Association.

INTERVENERS (SECOND GROUP)

For the Appellant :

1. Mr. Nazrul Islam, Advocate, instructed by Mr. Md. Nawab Ali, Advocate-on-Record. -- For self and as Secretary General, Islamic Law Research Centre & Legal Aid

2. Mr. A.B.M. Nurul Islam Senior Advocate -- For self.

For the Respondent :

1. M/s. Syed Ishtiaq Ahmed, Dr. Kamal Hossain, M. Amir-Ul-Islam with Ms. Tanya Amir, Advocate (with the leave of the Court), Dr. M. Zahir, Senior Advocates, instructed by Mr. Md. Aftab Hossain, Advocate-on-Record -- For
   a) Maleka Begum, Chief Gender Development Cell
   b) Mrs. Rokeya Kabir, Executive Director Bangladesh Nari Progoti Sangstha
   c) Dr. Mizanur Rahman, Professor, Department of Law, Dhaka University and Dr. Abrar, Professor Political Science Dhaka University.
   d) Begum Ivy Rahman, Jatiya Mohila Sangstha (JMS)
   e) Ms. Salma Khan, Chairperson, The Committee on the Elimination of Discrimination Against Women (CEDAW)

2. Ms. Sigma Huda, Advocate (with leave of the Court), instructed by Mr. Md. Aftab Hossain, Advocate-on-Record -- For
   a) The Coalition Against Trafficking in Women, Bangladesh (CATW) represented by its Co-ordinator Shaheen Akhtar Munir, Advocate And Ain-O-Unnayan

Sangstha, represented by its Secretary Mrs. Sigma Huda, Advocate

b) The Coalition of Environmental NGOs, represented by its. Chairman Ms. Khushi Kabir.

c) Bangladesh Society for the Enforcement of Human Rights, represented by its Secretary General, Mrs. Sigma Huda, Advocate.

d) Association Of Development Agencies in Bangladesh (ADAB) represented by its Director, Mr. Shamsul Huda.

e) Sammilito Nari Samaj represented by its member Sultana Aktar Ruby, Advocate.

f) Ms. Rashida Begum, Trainer, Nijera Kori.

Date of hearing : The 12th, 13th, 14th, 15th, 19th, 20th & 21st July, 23rd August, 20th, 21st October, 1st, 2nd, 3rd and 4th November, 1998.

JUDGMENT

A.T. M: AFZAL, CJ.-

وَلِلْمُطَلَّقَتِ مَتَاعٌ بِالْمَعْرُوفِ ط
حَقًّا عَلَى الْمُتَّقِينَ

The Holy Qur-an
Sura (II) Baqara
Ayat 241

২৪১। তালাক প্রাপ্তা নারীদিগকে প্রথামত (ইদ্দত পর্যন্ত) ভরণ পোষণ করা সাবধানীদের কর্তব্য।

(অনুবাদ- কুরআনুল করীম (প্রথম খন্ড) ইসলামিক ফাউন্ডেশন, বাংলাদেশ, অনুদিত, ষষ্ঠ মুদ্রণ জ্যৈষ্ঠ, ১৩৮৭, আগষ্ট ১৯৮০)

241. For divorced women
Maintenance (should be provided)
On a reasonable (scale)
This is a duty
On the righteous.

(The Glorious Kur'an - Translation and commentary by ABDALLAH YOUSUF ALI)

In this defendant-husband's appeal by leave, the main question raised for consideration is whether the High Court Division's interpretation of and decision following the aforesaid Ayat "that a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of iddat for an indefinite period, that is to say, till she loses the status of a divorcee by remarrying another person", is supportable or not both on merit as well as in the facts and circumstances of the case. We have had a prolonged hearing of the appeal in course of which we heard the learned Counsel for the parties, Mr. Abdul Wadud Bhuiyan, learned Acting Attorney General (as amicus curiae), two distinguished Alims and a host of interveners representing individuals, non-Government women and other legal organizations and also perused written arguments submitted by them. After considering everything, I have come to the conclusion that the interpretation and decision given by the High Court Division as above are not supportable both on merit as also in the facts and circumstances of the case. I shall now proceed to the reasons but before that a brief account of the facts of the case.

The plaintiff-respondents filed Family Court Suit No.60 of 1988 in the Family Court and the Court of Assistant Judge, Daudkandi, Comilla on 2.11.1988 for realisation of dower money of Tk.50,001/- and for maintenance of each of the plaintiffs, mother and son. Plaintiff-respondent No.1 and the defendant-appellant were married on 25.3.1985 at a dower money of Tk.50,001/-. Plaintiff-respondent No.2, a son, was born in the wedlock on 15.12.1987. The defendant-appellant (husband) divorced plaintiff-respondent No.1 (wife) on 10.8.1988.

The defendant-appellant in his written statement expressed his willingness to pay the dower money claiming that he had already paid Tk.30,000/-. He stated that he had already sent a number of money orders to plaintiff No.1 before divorce towards her maintenance and maintenance of the minor son. So they are no longer entitled to any more maintenance, as claimed.

Plaintiff No.1 examined 4 P.Ws. including herself and the defendant-appellant examined 3 D.Ws. including himself and both sides produced a good number of papers and documents.

The Family Court by judgment and order dated 30-10-90 decreed the suit for Tk.89,000/-, including Tk.3,000/- to plaintiff No.1 as maintenance during the iddat period @ Tk.1,000/- per month.

From December 1990 the defendant-petitioner was directed to pay to plaintiff No.1 Tk.1,000/- per month towards maintenance of plaintiff No.2, with a further direction to pay the decretal amount within one month, failing which to realise the amount through Court.

In Family Appeal No.2 of 1991, preferred by the appellant, the learned District Judge, Comilla by judgment and decree dated 20.4.1992 reduced the amount of Tk.1,000/- to Tk.600/- per month in respect of maintenance of plaintiff No.2 but did not reduce the amount of maintenance of plaintiff No.1. The learned District Judge deleted Tk.2,000/- claimed to have been spent by plaintiff No.1 at the time of the birth of plaintiff No.2, holding that the Family Court Ordinance did not provide for realisation of any such amount. The total decretal amount was reduced from Tk.89,000/- to Tk.72,600/-. The defendant-appellant was directed to pay the reduced decretal amount to plaintiff No.1 within 30 days of the receipt of the case record by the Family Court.

The appellant preferred Civil Revision No.2067 of 1992 against the judgment and decree of the learned District Judge and obtained a Rule and stay on 30.8.1992 from the High Court Division.

At the hearing of the civil revision before a Division Bench the defendant-appellant was not represented by his engaged Advocate.

The learned Judges of the High Court Division found in the impugned judgment that the parties did not adduce any evidence upon which the amount of monthly maintenance can be determined and fixed, but the Court was not precluded from determining the amount. The defendant is a typist in the Ministry of Finance and in his deposition and written statement he did not refute the claim of maintenance at the rate of Tk.1,000/- per month for each of the plaintiffs. Calling in aid their personal knowledge the learned Judges held that each of the plaintiffs is entitled to get from the petitioner an amount of Tk.1,000/ per month as maintenance commensurate with the status and means of the defendant. It was therefore held that the lower appellate Court illegally reduced the amount abruptly without assigning any reason.

The learned Judges then *suo motu* addressed themselves to a legal query as to whether plaintiff No.1 (wife) could have claimed maintenance beyond the period of *iddat*. After quoting Sura Baqara verses 240-242 and from Hedaya, Baillie and Verses from Sura Yunus, Sura Qamar, Sura Al Imran and observing that like statutes, the Quran prescribes a literal construction of its verses, the learned Judges referred to the case of *Aga Mahomed Jaffer Bindanim vs. Koolsoom Beebee and others*, ILR 25 (Cal) 9 and held that the dictum of the Privy Council pronounced a hundred years ago in 1897 AD that it would be wrong for the Court to attempt to put their own construction on the Qur'an in opposition to the express rulings of commentators of great antiquity and high authority cannot be followed on three grounds, first, the learned Judges of the Privy Council were non-muslims, secondly, the interpretation is in conflict with Article 8(1A) of the Constitution of Bangladesh which indicates that Quranic injunctions shall have to be followed strictly and without any deviation and thirdly, the dictum is in derogation of Sura Baqara Verse 121. Relying on observations from the case of *Most. Rashida Begum vs. Shahan Din and others*, PLD 1960 (Lahore) 1142, the learned Judges agreed with the view that if the interpretation of the Holy Quran by the commentators who lived thirteen or twelve hundred years ago is

considered as the last word on the subject then the whole Islamic society will be shut up in an iron cage and not allowed to develop along with the time. The learned Judges therefore came to the conclusion that a Civil Court has the jurisdiction to follow the law as in the Holy Quran disregarding any other law contrary thereto even though laid down by the earlier jurists or commentators of great antiquity and high authority and followed for a considerable period. Thereafter the learned Judges considered the literal meaning of the First Part of Verse 241 of Sura Baqara and finally held that a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of iddat for an indefinite period till she loses the status of a divorcee by re-marrying another person.

The learned Judges by the impugned judgment dated 3 January, 1995 restored the judgment and decree of the Family Court with the modification that plaintiff Nos.1 and 2 shall get maintenance at the rate of Tk.1,000/- each per month from the defendant till plaintiff No.1 and plaintiff No.2 respectively remarries or attains majority.

Mr. Md. Hannan, learned Counsel for the appellant, raised several points seeking leave to appeal from the impugned judgment and leave was granted to consider his submissions as follows :

(1) that as long as a *suo motu* judicial exercise is *per incuriam* (perhaps the learned Counsel meant 'incidental') and does not affect either party to a suit adversely, the defendant can have no legitimate grievance against such exercise, but if the *suo motu* exercise is beyond the frame of the suit and the decision after the exercise saddles the defendant with an added liability which even the plaintiffs did not claim in the suit, the exercise is without jurisdiction and assumes the character of judicial excess.

(2) that the learned Judges of the High Court Division have no authority and jurisdiction to impose their personal views on the defendant at an added cost and liability to him.

(3) that the *suo motu* exercise was all the more unacceptable, as it was done behind the back of the appellant, without giving

him a notice of the learned Judges' intention to indulge in an exercise of this kind, so that he could refute the learned Judges' personal views.

(4) that the learned Judges have expressed their views without inviting expert opinion of lawyers and jurists of Islamic jurisprudence and without hearing the views of others who may have views contrary to the learned Judges.

(5) that the views on maintenance expressed by the learned Judges are wholly erroneous, contrary to Muslim Law and devoid of any reasoning and authority and

(6) that the reversal of the lower appellate Court's decree on maintenance is based neither on any evidence nor on any reasoning but on the personal knowledge of the learned Judges which can never be imported into a contentious suit and which is contrary to all judicial norms.

From the above it is clear that the aforesaid (main) decision of the High Court Division has been subjected to a two-fold attack — first, the decision is bad because it offends the principles of general or secular law and secondly, it is bad because it offends and is contrary to the personal law of the defendant i.e., Muslim Law. The interpretation given of Ayat 241 (Sura II) is — in any case, untenable and it has wrongly been made the basis of the decision which was bound to be wrong. I shall take up the second line of attack first for consideration.

It will be appropriate to begin with a statement of law, without any fear of contradiction and which is assumed by the learned Judges of the High Court Division themselves, that under the traditional Muslim Law a divorced wife is entitled to maintenance from her erstwhile husband only during the period of her *iddat*. The learned Judges noticed this provision from *Hedaya by Charles Hamilton* (Book IV, Chapter XV, Sec. 3, p.45) and *Digest of Mohammadan Law* (compiled and translated from authorities in the original Arabic) by *Neil B E Baillie* (Part Second, Book II, Chapter VII Section Sixth Pp 169-170). Any text-book on Mahomedan Law will corroborate this proposition vide, Mulla, *Principles of Mahomedan Law* (Fourteenth Ed.) para 279.

Dr. Paras Dewan in his *Muslim Law in Modern India*, 1982 Ed. p.130 says :

When a marriage is dissolved by divorce the wife is entitled to maintenance during the period of *iddat* ..... On the expiration of the period of *iddat*, the wife is not entitled to any maintenance under any circumstances. Muslim Law does not recognise any obligation on the part of a man to maintain a wife whom he had divorced.

Indeed this has been the Muslim Law since the days of Prophet Muhammad (Allah's Peace be upon him) and the respondents and the interveners supporting them have not been able to show one instance from the early days of Islam till the date of the impugned judgment where the view taken by the learned Judges as to maintenance has been upheld ever by any authority or Court in any Muslim society/country at any time during the last fourteen hundred years. The nearest that we have been able to come across was the decision of the Indian Supreme Court in the *Shah Bano* case, AIR 1985 (SC) 945, which, as is well-known, caused a great stir in that country and the result was that the Govt. of India had to bring about an enactment called "The Muslim women (Protection of Rights on Divorce) Act, 1986" by which prima facie the said decision was set at naught. It is to be observed that in the said case the Indian Supreme Court was considering an application for maintenance of a divorced Muslim woman filed under section 125 of the Code of Criminal Procedure, 1974 and particularly the provision in the said section which reads: 125(1)(a). "If any person neglects or refuses to maintain ..... his wife, unable to maintain herself" (underlined by me).

In considering the defence taken by the husband and the interveners including All India Muslim Personal Law Board on the basis of aforesaid personal law of the Muslims, the Court observed:

"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."

The Indian Supreme Court then considered the aforesaid Ayat 241 and 242 of the Sura Baqara and observed : These Ayats leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than Justice to the teachings of the Quran".

The *Shah Bano* decision was thus a limited one given in the context of section 125 Cr.P.C. and the impugned decision before us is a general one and it is agreed by all the parties that it is unique.

The question before us is whether by putting the interpretation on Ayat 241 (Sura Baqara) in the manner done by the learned Judges, the traditional Muslim Law as to maintenance of a divorced wife prevalent for centuries was lawfully and legitimately knocked down. During the hearing of the appeal several *Tafsirs* of the Holy Qur'an by renowned and famous commentators have been placed before us by the learned Advocates. Mrs. Rabeya Bhuiyan, learned Counsel, who supported the plaintiff's case or cause with commendable zeal cited Imam Shafei on Al Quran (11:241) commentary on the Holy Quran by Ibn Katheer (d 1373 AC· Damas Cus) Translated by Danial Latifi) and Tafsere Tabare Sharif, 4th Volume, Allama Abu Jafar Tabari (published by Islamic Foundation in 1993). In none of the *Tafsirs* there is support for the view taken by the learned Judges as to maintenance till remarriage.

On behalf of the Interveners supporting the respondents some translation of Ayat No.241 by some Authors and opinions by some authorities have been referred to where the meaning of the word *Mataa* has been given as maintenance. They have referred to the translation of Mohammad Asad and the Urdu translation by Shaikul Hind Allama Mahmood Hassan Deobandi. In his note to Ayat No. 241

Muhammad Asad says : "This obviously relates to women who are divorced without any legal fault on their part. The amount of alimony- payable unless and until they remarry- has been left unspecified since it must depend on the husband's financial circumstances - on the social consideration of the time".

Shaikul Hind in his Urdu translation qualified maintenance "as per provisions of law".

Baidavi in his commentary on the Holy Quran observes : "Maintenance is made obligatory so as to remove despair and grief caused to the woman by separation as a result of divorce. The quantum is to be determined by the Government authority".

Imam Qurtubi in his commentary observes that "payment of maintenance is ordered for the reason that disrespect has been shown against marital contract".

We shall notice that the interpretation of the particular Ayat 241 is difficult and hazardous because of the meanings attributed to the various words used therein; for example, the all- important word مَتَاعٌ -Mataa has been understood and interpretated in various senses. Although ABDAI.LAH YOUSUF ALI originally translated it as 'maintenance' and in the Bengali translation by the Islamic Foundation it is said to be ভরণ পোষণ (as quoted above) (it is however clearly qualified by saying ইদ্দত পর্যন্ত) there is formidable divergence of opinion over the meaning.

It has been brought to our notice that the translation of the Holy Qur-an by Abdallah Yusuf Ali (which was relied upon by the High Court Division to read 'maintennce' for the word *Mataa* in Ayat 241) has been revised and corrected by the Presidency of Islamic Researches, IFTA, call and guidance, under a Royal decree issued by the Custodian of the Two Holy Mosques. From the preface of the said revised translation of the Holy Qur-an it will appear how much care and pains have been taken in revising and correcting the work of Abdallah Yusuf Ali. In this revised Book the meaning of the word *Mataa* as occurring in Ayats Nos.236 and 241 is found to be the same, that is, "a suitable gift". Evidently, the High Court Division had not had the benefit of looking into the revised meaning of *Mataa* which is different from the original translation done by Abdallah Yusuf Ali.

In a well-chronicled Article on "Divorced Muslim Women in India" by Lucy Carrol produced by Mrs. Bhuiyan it has been pointed out that the usual word for maintenance is *Nafaqa*. This meaning is to be found in the Fatwai-Alamgiri (Indian Ed., 2nd Volume p.144) and has been attributed to as such by both the Alims who appeared before us.

The aforesaid Article reads :

"Reading the injunction contained in II:241 against the background of these verses, the Hanafi jurists concluded that the mataa (provision; gift) is only obligatory when the woman has been divorced before consummation in circumstances where no mahr has been set (i.e., in circumstances where, had the marriage been

consummated, she would have been entitled to the proper mahr or the mahr of her equals). It is, however, "laudable" to give the divorced woman a "present" in other cases as well. I.e., it is not contrary to, or prohibited by, Muslim law, even as narrowly interpreted by the Hanafi jurists, that the husband should make some "consolatory offering" to his divorced wife. The mandatory mataa or gift due to the woman divorced both before consummation and before an amount of mahr had been settled, is defined by the classical Hanafi jurists in terms of three items of clothing, the fabric of which depends on the economic position of the husband.

The other Sunni Schools and the Shias regard mataa as something (in addition to her mahr) that the husband is obliged to provide to his wife in every case of divorce by talaq. The fourteenth century Shafi jurist, Ibn Katheer (as translated and quoted by Danial Latifi), said of mataa in his commentary on the Quran:

> Said Abdur Rahman bin Zaid bin Aslam:- "When God revealed the Ayat 'reasonable provision is due from the kindly [II:236],' somesaid, 'if I wish to be kind I may pay and otherwise not.' Then God revealed this Ayat:- 'And for divorcees reasonable provision is due from the righteous [II:241].'"

And because of this Ayat a group of scholars hold *mataa* obligatory in all cases whether of divorce by delegation [talaq-i-tafwid] or of mahr paid or of those divorced before consummation or those [divorced] after consummation. So held Imam Al Shafi. God bless him and his."

The Board of Islamic Publications, Delhi in "The Meaning of the Quran" (Vol. I) translated Ayat 241 thus : Likewise, the divorced women should also be given something in accordance with the known fair standard. This is an obligation upon the God-fearing people.

The interveners (for respondent) have ultimately submitted that whatever meaning be attributed to the word *Mataa*, *i.e.*, maintenance, reasonable provision, suitable gift or whatever, it cannot be denied that the divorced woman is entitled to something after divorce which is an obligation cast upon the husband. Mr. Amirul Islam in particular upon citing some verses from the Holy Quran pointed out that as the revealation progressed the treatment to be meted out to divorced woman has been progressively made more equitable, humane and generous. The concept of Mataa therefore has an essential element of equity and humanity. Both Mr. Amirul Islam and Syed Ishtiaq Ahmed argued that maintenance for Iddat period only has lost relevance under the Muslim Family Laws Ordinance 1961 because divorce does not become effective until expiration of 90 days as provided under section 7(3) thereof.

That *Mataa* is something to which a divorced woman is entitled and which the former husband is under an obligation to pay seems to follow naturally from the Ayat itself. But the whole question is whether *Mataa* can be equated with maintenance as has been done by the High Court Division.We shall see whatever be the meaning of

Mataa it is certainly not maintenance as can be claimed within the meaning of maintenance under the Family Court Ordinance.

Mr. Md. Hannan, learned Counsel for the appellant, produced the Bengali version of the Ayat from TAFHIMUL QURAN by Syed Abul A'la Maududi which reads :

অনুরুপ ভাবে যে সব স্ত্রীকে তালাক দেয়া হয়েছে তাদেরকেও সংগতভাবে কিছু না কিছু দিয়ে বিদায় করা উচিত। এটা মুত্তাকীদের ওপর আরোপিত অধিকার।

Mr. Hannan in course of his submission laid great stress on the word مَعْرُوْفٌ মা'রুফ and submitted that the High Court Division totally failed to appreciate the meaning of the said word and put a whimsical meaning thereto. The true meaning of the word, he submits, is to be found in the annotation of verses 1-6 of Sura At- Talaq by Hajrat Moulana Mufti Muhammad Shafi (R.A.) in his Tafsire Ma' areful Quran (translated in Bengali by Moulana Mohiuddin Khan); the relevant portion reads thus :

ষষ্ঠ বিধান ঃ ইদ্দত সমাপ্ত হলে স্ত্রীকে রাখার সিদ্ধান্ত হোক অথবা মুক্ত করে দেয়ার, উভয় অবস্থাতে কোরআন পাক তা মারুফ অর্থাৎ যথোপযুক্ত পন্থায় সম্পন্ন করতে বলেছে। 'মারুফ' শব্দের অর্থ পরিচিত পন্থা। উদ্দেশ্য এই যে, যে পন্থা শরীয়ত ও সুন্নত দ্বারা প্রমাণিত এবং মুসলামানদের মধ্যে সাধারণভাবে খ্যাত, সেই পন্থা অবলম্বন কর। তা এই যে , বিবাহ রাখা এবং তালাক প্রত্যাহার করার সিদ্ধান্ত হলে স্ত্রীকে মুখে অথবা কাজে কর্মে কষ্ট দিও না, তার উপর অনুগ্রহ রেখো না এবং তার যে কর্মগত ও চরিত্রগত দুর্বলতা তালাকের কারণ হচ্ছিল, অতঃপর নিজেও তজ্জন্যে সবর করার সংকল্প কর, যাতে পুনরায় সেই তিক্ততা সৃষ্টি না হয়। পক্ষান্তরে মুক্ত করা সিদ্ধান্ত হলে তার বিদিত ও সুন্নত সম্মত পন্থা এই যে, তাকে লাঞ্ছিত ও হেয় করে অথবা গালমন্দ দিয়ে গৃহ থেকে বহিস্কার করো না; বরং সদ্ব্যবহারের মাধ্যমে বিদায় কর। কোরআনের অন্যান্য আয়াত দ্বারা প্রমাণিত আছে যে, তাকে কোন বস্ত্রজোড়া দিয়ে বিদায় করা কমপক্ষে মোস্তাহাব এবং কোন কোন অবস্থায় ওয়াজিবও। ফেকাহ্‌র কিতাবাদিতে এর বিবরণ পাওয়া যাবে।

The impugned judgment is unique in the sense that it gives no reason whatsoever for completely ignoring all the lessons and learning of fourteen hundred years and undertakes to declare the law upon the claim that "a Civil Court has the jurisdiction to follow the law as in the Quran disregarding any other law on the subject, if contrary thereto even though laid down by the earlier jurists or commentators may be of great antiquity and high authority and though followed for a considerable period." And what is this law in the Quran ? The learned Judges say — As we find it to mean by giving a literal construction and ordinary meaning to its words and phrases in as much the same way as we interpret an ordinary statute. This is the entire rationale of the impugned judgment.

In my opinion, this attitude, saying with respect, is not only legally wrong but morally despicable and, if I may go further, verge on sacrilege. The Quran is not a legal draftsman's work who is guided by Mr. Maxwell's rules of interpretation. The Quran was revealed by the Creator of all Maxwells and the person to whom it was revealed is the Maxwell of that sacred Book.

The Quran has been revealed in Arabic language and its Author says

إِنَّا أَنْزَلْنَاهُ قُرْآنًا عَرَبِيًّا لَعَلَّكُمْ تَعْقِلُونَ

(Sura Yusuf- Ayat-2)

অর্থাৎ, কুরআন, ইহা আমি অবতীর্ণ করিয়াছি আরবী ভাষায় যাহাতে তোমরা বুঝিতে পার।

Though Arabic was the common language of the whole of Arabia, it is accepted that the Quran was revealed in the dialect of the Quraish of Makkah. True it is that the Quran invites everyone to read it and get guidance and its verses are "easy to understand". It will be easy to understand for a person who has got command over the Arabic language. It is not necessarily so for a person who is reading Quran in a different language. For example, the import of the word *Mataa* should be understood in the sense the holy Prophet (Allah's peace be upon him) and his companions had understood it and not according to later day translations of the said word which are conflicting. The more important point, however, is that a verse of the Quran has to be understood not in isolation, and less with a shallow knowledge of language and certainly not with the interpretative techniques of man made laws but with the help of, first, the Prophet's (Allah's peace be upon him) teachings and practices and subsequently by the enunciations of Islamic jurists and scholars. The Hamiltons and Baillies did not give their own interpretations but compiled and translated the Muslim law from authorities in the original Arabic which came down from the early days of Islam. Therefore, it will be totally unwise to discard the views of Islamic Jurists and scholars altogether which held the field for centuries and to rely merely

upon one's own reading and understanding of a verse of the Quran for laying down a law on the basis thereof.

The learned Judges in doing so took inspiration from a verse in Sura Al Qamar which has been repeated four times in the said Sura and reads thus :

وَلَقَدْ يَسَّرْنَا الْقُرْاٰنَ لِلذِّكْرِ فَهَلْ مِنْ مُّدَّكِرٍ-

অর্থাৎ, আমি কুরআন সহজ করিয়া দিয়াছি উপদেশ গ্রহণের জন্য,

উহা হইতে উপদেশ গ্রহন করিবার কেহ আছে কি ?

Let us see from one of the Tafsirs what has been said by the Mufassirs about the said verse. Mufti Muhammad Shafi (R. A) in Tafsire Maa'reful Quran (translated in Bengali by Moulana Mahiuddin Khan) says :

ইজতিহাদ তথা বিধানাবলী চয়ন করার জন্যে কোরআনকে সহজ করা হয়নি ঃ আলোচ্য আয়াতে يَسَّرْنَا এর সাথে لِلذِّكْرِ সংযুক্ত করে আরও বলা হয়েছে যে, মুখস্ত করা ও উপদেশ গ্রহণ করার সীমা পর্যন্ত কোরআনকে সহজ করা হয়েছে। ফলে প্রত্যেক আলেম ও জাহেল ছোট ও বড় সমভাবে এর দ্বারা উপকৃত হতে পারে। এতে জরুরী হয় না যে, কোরআন পাক থেকে বিধানাবলী চয়ন করাও তেমনি সহজ হবে। বলা বাহুল্য, এটা স্বতন্ত্র ও কঠিন শাস্ত্র। যে সব প্রগাঢ় জ্ঞানী আলেম এই শাস্ত্রের গবেষণায় জীবনপাত করেন, কেবল তারাই এই শাস্ত্রে ব্যুৎপত্তি অর্জন করতে পারেন। এটা প্রত্যেকের বিচরণক্ষেত্র নয়।

কোন কোন মুসলমান উপরোক্ত আয়াতকে সম্বল করে কোরআনের মূলনীতি ও ধারাসমূহ পূর্ণরূপে আয়ত্ত না করেই মুজতাহিদ হতে চায় এবং বিধানবলী চয়ন করতে চায়। উপরোক্ত বক্তব্য দ্বারা তাদের ভ্রান্তি ফুটে উঠেছে। বলা বাহুল্য, এটা পরিস্কার পথভ্রষ্টতা।

In order to invoke the individual's right to interpret Quran the learned Judges have referred to PLD 1960 Lahore 1142 referred to before. In that case the learned Judge not only said that in understanding the Quran one can derive valuable assistance from the commentaries written by different learned people of yore, but also stated particularly about practical aspects which the learned Judges of the High Court Division completely missed. It reads :

"Ijtihad or exercise of judgment is a recognised source from which the laws of Islam are drawn..... Ijtihad by a single individual or by a few individuals was considered even by the Muslim Jurists as dangerous. They, therefore, preferred the exercise of the judgment by the consensus of opinion of the majority of the Mujtahids or an agreement of the Muslim Jurists of a particular age on a question of law. It was perhaps correct for the people of that age to confine Ijithad to a few Jurists because knowledge was not imported to other people so freely and so commonly, but at the present time, I think, this duty should be performed by the representatives of the people because as I have already stated the reading, understanding of the Quran and the application of its general principles is not the privilege of one or two persons but a right and a duty of all Muslims which should be exercised by the persons chosen by them for this purpose".

The impugned decision appears to be prima facie ill-considered and ill-conceived as it apparently failed to take into consideration not only the whole conspectus of Muslim law relating to marriage and divorce but even the various other Ayats on

divorce occurring in the same Sura *Baqara* and Sura *At Talaq* and *Al Ahjab*. The learned Judges held interpreting 'mataaoon bil maaroof' in Ayat 241 relying on YUSUF ALI that a divorcee is entitled to maintenance on a reasonable scale till her remarriage. The same phrase 'mataaoon bill maaroof' occurs in Ayat 236 which reads:

لَاجُنَاحَ عَلَيْكُمْ اِنْ طَلَّقْتُمُ النِّسَآءَ مَالَمْ تَمَسُّوْهُنَّ اَوْ تَفْرِضُوْا لَهُنَّ فَرِيْضَةً وَّمَتِّعُوْهُنَّ (ج) عَلَى الْمُوْسِعِ قَدَرُهٗ وَعَلَى الْمُقْتِرِ قَدَرُهٗ - (ج) مَتَاعًا بِالْمَعْرُوْفِ (ج) حَقًّا عَلَى الْمُحْسِنِيْنَ (٥)

The translation thereof by YUSUF ALI is as follows :

There is no blame on you
If ye divorce women
Before consummation
Or the fixation of their dower;
But bestow on them
(A suitable gift),
The wealthy
According to his means,
And the poor
According to his means;--
A gift of a reasonable amount
Is due from those
Who wish to do the right thing.

It will be seen that the meaning of 'mataaoon bil maaroof' given here is - "A gift of a reasonable amount". How do you then reconcile the two meanings of the same phrase? If the learned Judges are right in their interpretation then there is an obvious conflict between the said two Ayats (Naujubilla hi min Jalik).

The opening verses of Sura *At Talaq* also relate to divorce and consequent provisions and particularly verse no.6 may be referred to which reads : (translation by YUSUF ALI)

6. Let the women live (In *iddat*) in the same
Style as ye live,
According to your means:
Annoy them not, so as
to restrict them.
And if they carry (life
In their wombs), then
Spend (your substance) on them
Until they deliver
Their burden; and if
They suckle your (off spring)
give them their recompense:

It is significant that emphasis has been laid on the period of *Iddat* and in the opening verse of the said Sura it has been ordained (translation from YUSUF ALI) :

Prophet when ye
Do divorce women
Divorce them at their
Prescribed periods,
And Count (accurately)
Their prescribed periods
.....

There is a clear direction in respect of a pregnant woman who has been divorced and the direction is to bear her expenses till she has delivered. In the previous verse it has been stated that in the case of a pregnant woman her period of *Iddat* will be till delivery. It is therefore apparent that the maintenance has been related to the period of *Iddat*. The interpretation given by the

learned Judges is thus apparently in conflict with the aforesaid verse. I am sure the learned Judges will be the last persons to suggest that there are conflicting provisions in the Quran. Allah Aimighty, All- knowing proclaims in the Quran:

قُرْءَانًا عَرَبِيًّا غَيْرَ ذِي عِوَجٍ لَّعَلَّهُمْ يَتَّقُونَ -

(Sura JUMAR - Ayat 28)

অর্থাৎ, আরবী ভাষায় এই কুরআন বৈপরীত্য মুক্ত, যাহাতে মানুষ সাবধানতা অবলম্বন করে।

(অনুবাদ ইসলামিক ফাইন্ডেশন)

From the above, it is clear that the interpretation given by the learned Judges is not and cannot be acceptable because it brings conflict and even on the general criterion of interpretation as they also would not deny that a document should be read as a whole, the interpretation of the learned Judges must be rejected.

Mrs. Rabeya Bhuiyan, learned Counsel for the respondent and some of the interveners supporting the respondent have referred to some authorities where the word *mataa* has been interpreted as 'maintenance', 'reasonable provision'. They have also quoted from Professor Tahir Mahmood said to be one of the most eminent scholars of present day India which, however, do not support the meaning of the word *mataa* as understood by the learned Judges of the High Court Division. Mrs. Bhuiyan submits that Professor Tahir Mahmood in his book 'Personal Laws in Islamic Countries', (2nd Ed. 1995) P. 261-262 has given examples of different Muslim countries. *Mataa* has been translated into English as 'consolatory

gift', or 'compensation' or 'indemnity'. Mataa is thus basically different from regular maintenance of the divorcee.

There is also a reference to this subject in the written submission of an intervener, Bangladesh Legal Aid and Services Trust, filed in the form of a concise statement. It reads :

That according to Professor Tahir Mahmood has stated in the forthcoming book titled Shah Bano and the Muslim Women Act: a Decade on : The right of Divorced Muslim women to mataa, being published by women living under Muslim Law, for Grabels, France and Bombay, India, 1998 at pp.) a divorced wife is entitled to receive from her former husband what is called *mut'a*. This concept is referred to in the Quran (2:241) and has been rendered into English as 'consolatory gift'.

Extensive reference has been made by the respondent and the interveners supporting her to the application of *mataa* in different Muslim countries, such as Malayasia, Egypt, Jordan, Syria, Morocco, Lebanon, Algeria, Kuwait, Tunisia, Turkey, North Yemen etc.

The common feature which is to be found in the relevant provisions of all these countries is that *mataa* has been made a subject of legislation of the respective countries and invariably it has been subjected to certain conditions, namely, where a divorce has been made arbitrarily, without a just cause etc. Another invariable feature is that mataa was never considered as maintenance but something as a recompense for some blame on the part of the husband. And in no country there is found to be any provision of granting *mataa* for a lifetime or till remarriage of

the divorcee generally. For example, the Malayasian Law provides that a woman who has been divorced without just cause would be paid an amount that is fair and just. A woman who has been arbitrarily divorced by her husband may be awarded, by way of *mataa*, maintenance of one year in Jordan, two years in Egypt and three years in Syria payable in a lump sum or in instalments depending on the financial condition of the husband. In Tunisia and Turkey a married person, husband or wife, who insists on divorce against the wishes of the other spouse and without his or her fault, can be directed to suitably indemnify the other spouse. So, the wife also may be liable to pay *mataa*. I think that is very fair and highly equitable.

None of the examples cited supports or is anywhere near to the interpretation given in the impugned judgment in any manner. We are not considering a legislative provision granting *mataa* as a recompense but whether the High Court Division was right in interpreting Ayat 241 (Sura II). Mr. Fazlul Karim, learned Advocate, although appeared for an intervener supporting the wife submitted that the maintenance allowed by the High Court Division till re-marriage was abrupt and without any reason but he supports the provision of maintenance to a divorcee who is unable to maintain herself (as in the Indian case of Shah Bano).

Mrs. Bhuiyan submits that although the period of post divorce maintenance is not definitely agreed upon by all the authorities the fact of the existence of a reasonable provision, *mataa*, for women who are divorced irrevocably by their husbands is indisputable. She submits that the decision of the High Court

Division although, prima facie, too wide is justifiable, equitable and reasonable for the majority of women in our country who are divorced for no fault of their own, who are no longer of marriageable age and whose economic and educational backgrounds compel them to remain dependent on someone for survival. She submits that this Hon'ble Court can qualify the impugned decision and make observation to provide for a fair, just and reasonable provision for a reasonable period to remove the destitution or extreme hardship of such women who are not at fault in appropriate circumstances like the present case.

The line taken by the numerous interveners supporting the respondent echoes more or less the argument of Mrs. Bhuiyan with repeated emphasis that it is open to the Court, rather it is the duty of the Court to give innovative interpretation of the orthodox norms in the light of the changing notions of justice, equity and equality particularly when it involves maintenance of divorced Muslim wives who are often victims of easy divorce.

The question precisely raised in this appeal is not the right of the Court to give interpretation of Muslim law in the light of changing conditions and notions but whether the High Court Division correctly interpreted Ayat 241 (Sura II) and laid down a correct law setting at naught the age-old Muslim personal law that a divorced woman is entitled to maintenance from her husband during the period of *iddat* only. The respondent and her supporters could only show that in different Muslim countries legislative provision has been made in accordance with which *mataa* or recompense has been provided to divorced women under certain

circumstances even after the period of iddat. They have, however, not been able to show one instance from any jurisdiction where Ayat 241 has been interpreted to mean that maintenance is to be provided till remarriage. The High Court Division is at least honest to admit that it has not cared for any support for its decision from any authority or precedent. The learned Judges read the words of Ayat 241 and put a meaning to it according to their own wisdom which is unique and first of its kind. For the reasons stated above I feel no hesitation in rejecting their interpretation and in setting aside the resultant decision which automatically falls through.

The concern and anxieties expressed on behalf of the respondent and her supporters for the indigence and destitution of divorced muslim women of our country or for their being victims of whims and caprices of their husbands can always be met by appropriate legislation as they have done in India or in other Muslim countries referred to at length by the supporters. But these laws offer no justification for the impugned decision. Nor we are called upon in the context of the issue before us to consider how to bring the impugned decision in line with the present trends of law in other Muslim countries as noticed above.

The first objection as enumerated in points no.(1)(2)(3)(4) of the leave order above raised by the appellant against the suo motu decision is, in my opinion, more formidable than the second objection on merit. Indeed the decision is liable to be set aside on that ground alone as it is violative of the elementary rules and norms of civil procedure.

Admittedly the plaintiff wife neither made out any case in the plaint claiming maintenance till remarriage nor prayed for any relief specifically in that behalf. The learned Judges were quite aware of it and therefore posed themselves the question - 'whether the wife could have claimed maintenance beyond the period of iddat'.

Order VII rule 7 of the Code of Civil Procedure lays down :

> 7. Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

The law requires that the relief must be specifically claimed either simply or in the alternative. It is true that general or other relief which the Court may think just may be granted although not specifically asked for. But the essential conditions are that the averments in the plaint must justify such relief and the defendant must get an opportunity to contest such relief. In the name of granting general or other relief the Court can not and would not mount any surprise on the defendant and make him liable for something which does not arise out of the plaint and as such he had no occasion to answer the same. This is merely an extension of the principle of natural justice.

In the case of *Firm Sriniwas Vs. Mahabir Prasad* AIR 1951 (SC) 177 the Indian Supreme Court held : "The rule undoubtedly is that

the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet". The same Court in a later case, *Om Prakash Vs. Ram Kumar*, AIR 1991 (SC) 409, observed: "A party cannot be granted a relief which is not claimed, if the circumstances of the case are such that the granting of such relief would result in serious prejudice to the interested party and depirve him of the valuable rights under the statute".

The Pakistan Supreme Court has gone further and refused a decree to the plaintiff of some additional amount admitted by the defendant because the plaint was not amended. Construing Order VII rule 7 and Order II rule 2 of the Code of Civil Procedure it was laid down in *Secretary to Govt. Vs. Abdul Kutil*, PLD 1978 SC 242:

> By reading these provisions together, they seem to impose upon a plaintiff the uncompromisable obligation to include in the suit filed by him the whole of his claim to which he feels he is entitled and to that end pray for the specific relief which he claims either simply or in the alternative, leaving of course the general or other relief which may always be given to him by the Court. The expression "general or other relief" has been judicially construed to mean the grant of mesne profits: *Raghu Mahton V. Bullak and others* AIR 1953 Pat. 289, the award of interest on the sum found due to the plaintiff *Rup Ram V. Harphul* AIR 1921 Lah. 125, or a decree for accounts in a suit for the recovery of money, *Sheo Dutt and others V. Pushi Ram and others* AIR 1947 All 229. However, where a plaintiff claims a larger relief than the one to which

he is found entitled he cannot be granted the same without first amending his plaint : *Putta Kannaya Chetti and others* AIR 1918 Mad. 998 and *Fazal Din and others V. Milkha Singh* AIR 1933 Lah. 193.

The High Court Division would have been within its rights if it were content by expressing its own opinion on the law and leave it at that but it could not foist its opinion on the defendant making him liable for payment of such maintenance to the plaintiff which she never claimed and thus the defendant had no opportunity to meet such claim. And to that extent the impugned decision of the High Court Division must be held to have been made without jurisdiction.

Before the High Court Division it is the defendant who took a revision against the judgment and decree passed by the learned District Judge and its jurisdiction was to see if there was any error of law committed by the Subordinate Court resulting in an error in the decision occasioning failure of justice. This error of law must have to be found within the framework of the suit and not beyond. The learned Judges themselves acknowledged that their *suo motu* query was beyond the suit and thus it was a self-confessed exercise of acting without jurisdiction.

The defendant was admittedly absent at the hearing of the revision before the High Court Division. The worst that could happen to him was that the Rule could have been discharged for default or on merit and the appellate judgment and decree would have been maintained in that case. But if the learned Judges

entertained some bright and innovative ideas about some verses of the Quran hitherto not known for saddling the defendant with more liability than the plaintiff had claimed and received, then was it not necessary and/or elementary that the defendant ought to have been put on notice again ? It was like enhancing the sentence of an accused in exercise of revisional jurisdiction in a criminal case. Could any tribunal do it without putting him on prior notice? This is exactly what has been done by the High Court Division which, to say the least, was unfortunate.

What is, however, more surprising and in fact shocking was that the learned Judges thought it appropriate to give a decision of such a far-reaching effect upsetting the age-old established and traditional Muslim personal law without hearing anybody, not to speak of any expert in Islamic Jurisprudence. It has been noticed how difficult the subject is, not to speak of the sensitivity it generates in the Muslim community. The High Court Division dealt with the matter very casually as if it was disposing of a Lawazima matter without the need of any assistance. This was never the practice of a superior Court which ever acted in such a light-hearted way in a serious matter like this nor should it ever do it for the sake of, if not anything else, it.. own credibili y.

The learned Attorney General submitted very strongly against the cavalier manner in which a serious question of law has been disposed of by the High Court Division and we cannot agree more with his submission. The learned Counsel for the respondent and

some of the interveners although tried to support the judgment on merit but they also had no satisfactory answer to the present objections raised by the appellant. Mr. Fazlul Karim, learned Advocate, feeling the difficulty, prayed for allowing the plaintiff-wife to amend her plaint and a re-hearing of the suit. At this stage, the question does not arise.

The learned Judges' interference with the appellate decree reducing the amount to Tk.600/- per month for the maintenance of the son was legally bad on principle, for, the plaintiffs never complained against the said reduction. The defendant was the petitioner before the High Court Division. The trial Court allowed maintenance to both the plaintiffs @ Tk.1000/- per month. The learned District Judge in appeal reduced the amount in the case of plaintiff no.2 (son) only but maintained that of plaintiff no.1 (wife). But the learned Judges of the High Court Division wrongly observed that the District Judge reduced the amount of maintenance to Tk.600/- per month "for each of the opposite parties". This goes to show further how casually the matter was handled by the High Court Division. The impugned judgment is liable to be set aside in any case.

For the reasons stated above, the appeal is allowed and the impugned judgment and order of the High Court Divsion are set aside. There will be no order as to costs.

C.J.

MUSTAFA KAMAL, J.: Will a divorced Muslim woman get maintenance only upto the period of iddat or for an indefinite period till she loses the status of divorcee by re-marrying another person, is the central issue in this appeal by leave by the defendant-appellant, along with some other issues.

Plaintiff-respondent No.1 Shamsun Nahar Begum and her minor son plaintiff-respondent No.2 Shawn Miah filed Family Suit No.60 of 1988 in the Family Court, Daudkandi, Comilla against the appellant as defendant stating *inter alia* that the appellant married plaintiff No.1 on 25-3-85 by a registered Kabinnama fixing the amount of dower at Tk.50,001/-. Plaintiff No.1 was a worker in a garment factory before her marriage at a monthly wage of Tk.3,000/-. Besides giving golden ornaments, furniture, wristwatch etc. worth Tk.66,000/- by her guardian at the time of marriage plaintiff No.1 gave the appellant Tk.50,000/- from her own and her brother's savings for building a house at the appellant's village home. The appellant constantly pressurised plaintiff No.1 to extract more money from her and used to ill-treat her. He used to take away her monthly salary and used to run the household with her income. In the Kabinnama he falsely inserted a clause stating that Tk.2,000/- of the dower money had already been paid. Before her marriage with him the appellant had already married and had two daughters by his first marriage. He suppressed this fact and married her by practising deceit. When plaintiff No.1 conceived she was forced to leave her job to please the appellant. He pressed plaintiff No.1 to bring Tk.50,000/- more from her guardian and when plaintiff No.1 refused the appellant beat her and keeping

all the ornaments and other articles mentioned above in his custody drove her out from the conjugal home on 15-4-87 during her pregnancy. Plaintiff No.1 has been living at Village Charpara, Upazila Daudkandi at her father's house ever since. The appellant had not bothered to inquire about her welfare at any time thereafter. Plaintiff No.1 gave birth to a son, plaintiff No.2, on 15-12-87 at her father's village home. The appellant started living with his former wife and children enjoying and utilising the plaintiff's furniture and other articles. The appellant has not paid her dower money yet. The appellant is bound to pay Tk.20,000/- from April, 1987 upto November, 1988, as maintenance for herself at the rate of Tk.1,000/- per month and Tk.12,000/- as maintenance for her minor son for one year at the rate of Tk.1,000/- per month. On 13-8-88 plaintiff No.1 received a registered notice from the appellant purporting to divorce her on 10-8-88. Plaintiff No.1 did not receive any notice from the Union Parishad or Pourashava Chairman constituting an Arbitration Board. The notice not being in accordance with section 7 of the Muslim Family Laws Ordinance, 1961 is ineffective and illegal. Plaintiff No.1 is still the legally married wife of the appellant and she retains the status of his married wife. Thereafter the plaintiffs prayed for a declaration that the notice of divorce dated 10-8-88 is illegal and for realisation of a total claim for Tk.1,48,001/- detailed in the Schedule.

In his written statement defendant-appellant Md. Hefzur Rahman admitted the marriage on 25-3-85 through the mediation of one M.A. Jalil, husband of the elder sister of plaintiff No.1,

with whom the couple started to live after the marriage. The appellant alleged an illicit relationship between M.A. Jalil and plaintiff No.1. He gave sordid details of this relationship in his written statement. He alleged that on the 11th May, 1987 plaintiff No.1, M.A. Jalil and his wife took away from the appellant's subsequently rented house furniture, cash money, ornaments etc. worth Tk.38,800/-. The appellant was insulted when he protested. On 15-12-87 plaintiff No.2 was born to plaintiff No.1 and the appellant admitted that he was the father of the child. The appellant regularly sent money by money order for the maintenance of both the plaintiffs. On 1-5-88 the appellant took plaintiff No.1 to a rented house at Mothertek, Dhaka. On 16-6-88 he took the plaintiffs to Chittagong at his own house. On 1-7-88 plaintiff No.1 fled away from Chittagong with an unknown man and again started living with M.A. Jalil. When the mischief of plaintiff No.1 became intolerable to the appellant he divorced her on 10-8-88 under section 7 of the Muslim Family Laws Ordinance, 1961 and served a copy of the notice of divorce to the Administrator of Dhaka Municipality. The divorce had become effective on the expiry of 3 months from the notice and from that date the appellant has no relationship of husband and wife with plaintiff No.1. Yet the appellant sent money by money order for the maintenance of plaintiff No.2 and is still doing so. Plaintiff No.1 never served in a garment factory as a worker, never gave him articles worth Tk.66,000/- and the appellant never asked for Tk.50,000/- for building a house at his village home. Plaintiff No.1 agreed to marry him knowing full well that the appellant had a permanently

sick wife and that this was the reason for his second marriage. It is not true that on 15-4-87 the appellant drove away plaintiff No.1 after retaining her articles in his custody. Plaintiff No.1 has already realised Tk.2,000/- from her dower money. The defendant has already paid Tk.48,000/- by way of gold ornaments and cash to plaintiff No.1 towards payment of the remaining dower money. Plaintiff No.1 is not entitled to any amount of dower or maintenance any more.

Plaintiff No.1 examined 4 P.Ws. including herself and the defendant-appellant examined 3 D.Ws. including himself and both sides exhibited a number of documents. The Family Court framed 7 issues. The allegations and counter-allegations of respondent No.1 and the appellant against each other were not adverted to at all and it was straightaway found by the Family Court that the divorce was admitted by plaintiff No.1 in her deposition and that the appellant also admitted that plaintiff No.2 was his son and was prepared to pay the remaining dower money of Tk.48,000/- to plaintiff No.1. As such plaintiff No.1 was entitled to Tk.3,000/- as maintenance for 3 months during the period of iddat at the rate of Tk.1,000/- per month. The Family Court found that the appellant sent money to plaintiff No.1 by money order for her maintenance before the divorce. The Family Court decided that plaintiff No.2 was entitled to maintenance from December, 1987 at the rate of Tk.1,000/- per month. Plaintiff No.1 spent Tk.2,000/- at the time of the birth of plaintiff No.2 which she was entitled to recover from the appellant. She was also entitled to the balance dower

money. As such the Family Court decreed the suit on 30-10-90 for payment of Tk.89,000/- to the plaintiffs comprising of :

i)	Maintenance of plaintiff No.2 for December, 1987 ..	Tk. 1,000.00
ii)	Maintenance for 1988 ..	Tk.12,000.00
iii)	Maintenance for 11 months of 1990 ..	Tk.11,000.00
iv)	Maintenance for iddat period of plaintiff No.1 ..	Tk. 3,000.00
v)	Balance dower money ..	Tk.48,000.00
	Total	Tk.89,000.00

From December, 1990 the appellant was directed to pay to plaintiff No.1 Tk.1,000/- per month towards maintenance of plaintiff No.2, further directing realisation of decretal amount within one month, failing which realisation of the amount through Court.

In Family Appeal No.2 of 1991, preferred by the defendant-appellant, the learned District Judge, Comilla by judgment and decree dated 20-4-92 reduced the amount of Tk.1,000/- to Tk.600/- per month in respect of maintenance of plaintiff No.2 but did not reduce the amount of maintenance of plaintiff No.1 during the period of iddat. The learned District Judge deleted Tk.2,000/- claimed to have been spent by plaintiff No.1 at the time of the birth of plaintiff No.2, holding that the Family Courts Ordinance, 1985 did not provide for realisation of any such amount. The total decretal amount was reduced from Tk.89,000/- to Tk.72,600/-. The defendant-appellant was directed to pay the reduced decretal amount to plaintiff No.1 within 30 days of the receipt of the case record by the Family Court.

The plaintiff-respondents did not prefer any revisional application but the defendant-appellant preferred Civil Revision No.2067 of 1992 in the High Court Division against the judgment and decree of the learned District Judge and obtained a Rule and stay on 30-8-92. The grounds taken were only two, namely, (i) both the Courts below illegally granted maintenance for the child since December, 1987 ignoring that the cause of action as stated in the plaint arose on 23-10-88 and thus a sum of Tk.6,600/- as past maintenance for plaintiff No.2 has been decreed illegally and (ii) the direction of the lower appellate Court to pay the entire decretal amount of Tk.72,600/- within 30 days is not equitable. Reasonable instalments should have been given.

At the hearing of the Rule before a Division Bench of the High Court Division the learned Advocate for the defendant-appellant (petitioner therein) did not appear. The learned Judges of the High Court Division by their impugned judgment and order dated 9-1-95 did not advert to the grounds taken by the appellant. Upon hearing the learned Advocate for the present respondents (opposite parties therein), the learned Judges turned to the amount of Tk.600/- per month as maintenance granted to respondent No.2 and found that the parties did not adduce any evidence upon which the amount of monthly maintenance could be determined and fixed, maintaining that the Court (i.e., the High Court Division) was not precluded from determining the amount. The defendant-appellant is a typist in the Ministry of Finance and in his deposition and written statement he did not refute the claim of maintenance at Tk.1,000/- per month for each of the plaintiffs.

Calling in aid their personal knowledge the learned Judges held that each of the plaintiffs is entitled to get from the defendant-appellant an amount of Tk.1,000/- per month as maintenance commensurate with the status and means of the defendant-appellant. It was thereafter held that the lower appellate Court illegally reduced the amount abruptly without assigning any reason.

Then the learned Judges of the High Court Division *suo motu* addressed themselves to a legal query as to whether plaintiff No.1 could have claimed maintenance beyond the period of iddat. Quoting Sura Al-Baqarah Ayats 240-242, Hedaya, Baillie, Sura Yunus (10:47), Sura Al-Qamar (54), Sura Al Imran (3:7) and observing that like statutes, the Holy Quran prescribes a literal construction of its basic and fundamental verses, the learned Judges referred to the dictum of the Privy Council in the case of Aga Mohammed Jaffer Bindavim vs. Koolsoom Boebee and others, ILR25(Cal)9, namely, that their Lordships "do not care to speculate on the mode in which the text quoted from the Koran which is to be found in Sura II, verse 240 is to be reconciliated with the law as laid down in the Hedaya and by the author of the passage quoted from Baillie's Imamea. But it would be wrong for the Court on a point of this kind to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority" and held that this dictum pronounced a hundred year ago in 1887 cannot be followed on three grounds, first, the learned Judges of the Privy Council were non-Muslims, secondly, the interpretation is in conflict with Article 8(1A) of the Constitution of Bangladesh and

thirdly, the decision is in derogation of Sura Al-Baqarah Verse 121. Relying on an observation from the case of Most. Rashida Begum vs. Shaham Din and others, PLD1960(Lahore)1142, the learned Judges agreed with the view that if the interpretation of the Holy Quran by the commentators who lived thirteen or twelve hundred years ago is considered as the last word on the subject then the whole Islamic society will be shut up in an iron cage and not allowed to develop along with the time. The learned Judges therefore came to the conclusion that a Civil Court has the jurisdiction to follow the law as in the Holy Quran disregarding any other law contrary thereto even though laid down by the earlier jurists or commentators of great antiquity and high authority and followed for a considerable period. Thereafter the learned Judges considered the literal meaning of the First Part of Ayat 241 of Sura Al-Baqarah(2) reproducing word for word the English translation of the said part of the Ayat from 'The Dictionary and Glossary of the Koran' by John Penrice and immediately held that a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of iddat for an indefinite period till she loses the status of a divorcee by re-marrying another person.

The learned Judges thereafter restored the judgment and decree of the Family Court with the modification that plaintiff Nos.1 and 2 shall get maintenance at the rate of Tk.1,000/- each per month from the defendant-appellant till plaintiff No.1 and plaintiff No.2 remarries or attains majority respectively.

Leave was granted from the said impugned judgment of the High Court Division to consider the submission of Mr. Md. Hannan, learned Counsel for the defendant-appellant, that as long as a *suo motu* judicial exercise is *per incuriam* and does not affect either party to a suit adversely, the defendant-appellant can have no legitimate grievance against such exercise, but if the *suo motu* exercise is beyond the frame of the suit and the decision after the exercise saddles the defendant-appellant with an added liability which even the plaintiffs did not claim in the suit, the exercise is without jurisdiction and assumes the character of judicial excess. The learned Judges of the High Court Division have no authority and jurisdiction to impose their personal views on the appellant, at an added cost and liability to him. The *suo motu* exercise was all the more unacceptable, as it was done behind the back of the appellant, without giving him a notice of the learned Judges' intention to indulge in an exercise of this kind, so that he could refute the learned Judges' personal views. The learned Judges have expressed their views without inviting expert opinion of lawyers and jurists of Islamic jurisprudence and without hearing the views of others who may have views contrary to the learned Judges.

Secondly, leave was granted to consider the submission of Mr. Hannan that the views on maintenance expressed by the learned Judges are wholly erroneous, contrary to Muslim Law and devoid of any reasoning and authority.

Lastly, leave was granted to consider the submission of Mr. Md. Hannan that the reversal of the lower appellate Court's decree

on maintenance is based neither on any evidence nor on any reasoning but on the personal knowledge of the learned Judges which can never be imported into a contentious suit and which is contrary to all judicial norms.

This appeal was heard at two stages. Besides the learned Advocates for the appellant and respondents, several interveners representing some non-governmental organisations (NGOs) and several learned Advocates on their own behalves intervened to address us on the issue of maintenance, the second ground on which leave was granted. We also invited several scholars on Islamic jurisprudence and prominent Ulemas for our own enlightenment to give their opinion on only the second point of leave, of whom only two, Moulana Obaidul Huq, Khatib of Baitual Mukarram National Mosque and Moulana Muhiuddin Khan, Editor of "Monthly Madina" appeared and addressed u . We also issued a notice upon the learned Attorney General to assist us in this appeal. Mr. Abdul Wadud Bhuiyan, the then learned Additional Attorney General, appeared on behalf of the learned Attorney General and made his submissions. We heard all of them at length and set down the appeal for judgment. On the day fixed for judgment, before the judgment was pronounced, fell on the Court an avalanche of NGOs, represented by some senior & prominent learned Advocates, submitting applications for a re-hearing. We postponed the delivery of judgment and re-heard the matter. Learned Advocates for the scores of intervener-NGOs and some new learned Advocate-interveners were again heard at length. Learned Advocate for the

respondents then gave a reply. The names of all those whom we have heard appear on the title-page of this judgment.

The first and the last points on which leave was granted are matters confined to the parties to the suit and are not in any way matters on which any third party-intervener can have any manner of *locus standi* to address us. In fact on those two grounds we did not invite any opinion from anyone and did not permit any third party-intervener to intervene either, although some of the learned Advocates for some of the interveners on their own made their submissions on those points as well. We shall leave those submissions out of our consideration and consider the first and the last grounds on which leave was granted on the submissions of the learned Advocates for the appellant and the respondents only.

Mr. Md. Hannan, learned Advocate for the defendant-appellant only reiterated on the first point of leave what was stated above in the leave granting order whereas Mrs. Rabeya Bhuiyan, learned Advocate for the respondents, only submitted that the Court has power *ex debito justiciae* to alter the decree in order to do justice between the parties and to give any other relief or reliefs as the plaintiffs are entitled to, as prayed for in the plaint.

In the plaint itself, plaintiff No.1 did not claim maintenance for herself from the date of divorce upto remarriage. She claimed maintenance for herself at the rate of Tk.1,000/- per month from April, 1987 upto November, 1988, in total Tk.20,000/-. The month of November, 1988 is the end of the three-month period after divorce in August, 1988. Both the Courts below concurrently

found that she was divorced on 10-8-88 notice whereof was admittedly received by her on 13-8-88 and that she was entitled to 3 months' maintenance at the rate of Tk.1,000/- per month during the period of iddat only. Both the Courts below obviously understood the law to be that a divorced Muslim woman is entitled to maintenance for 3 months during the period of iddat only. The plaintiff-respondents themselves did not raise any contention in the Courts below or in the High Court Division that the period of maintenance is by law upto the period of remarriage. The learned Judges of the High Court Division did not give any reason as to why a *suo motu* exercise was necessary in the facts and circumstances of this case. A reasonless judgment justifies the appellant's submission that the learned Judges held some personal views on maintenance from before and took this revisional case as an opportunity to convert their views into a judge-made law binding upon the parties to the suit (and upon future litigants) without their knowledge, behind their back and against the principles of natural justice. With regard to the fact that the learned Judges did not invite any eminent jurist of Islamic jurisprudence, we hold that it is not obligatory for them to do so, but if any such assistance is sought for and obtained that would enure to the benefit of the Court. The Court is not bound by such opinion but such opinion enriches the Court's materials upon which to draw its own conclusions, whether the Court agrees with the opinion or not.

The learned Judges were deciding a family dispute under the Family Courts Ordinance, 1985, section 6(4)(g) of which provides

that the plaint shall contain inter alia the relief which the plaintiff claims. An appeal lies under section 17 of the said Ordinance to the Court of District Judge. The High Court Division interferes in revision under section 115 of the Code of Civil Procedure when the lower appellate Court appears to have committed any error of law resulting in an error in the decision occasioning failure of justice. In such a case the High Court Division may make such order in the case as it thinks fit. The High Court Division did not say in the impugned judgment that the lower appellate Court committed any error of law on the point of maintenance. If plaintiff No.1 did not claim maintenance till re-marriage, what error of law the lower appellate Court committed in granting in full the maintenance for 3 months claimed by plaintiff No.1 ? If the plaintiffs erred in law in not making a proper prayer for maintenance till re-marriage, it was a case of sending the suit back on remand to the trial Court to enable the plaintiffs to amend the plaint and to allow the appellant to submit an additional written statement. Bypassing the plaint and the judgments of both the Courts below the High Court Division could not confer a substantive gratuitous relief upon plaintiff No.1 enhancing unilaterally the liability of the appellant without affording him an opportunity to defend himself against a new case. The new reliefs given are by no means ancillary or consequential reliefs in the nature of "any other relief or reliefs to which the plaintiffs are entitled to". Those are substantive reliefs based on a new interpretation of law. Giving the plaintiffs a substantive relief beyond the frame of the suit is beyond the

jurisdiction of the revisional court and is a sad case of judicial excess defying all judicial norms and trampling the judicial procedure. No notice was given to the parties of the learned Judges' intention to consider a question of law *suo motu*, the parties (even the wife-respondent) were not heard in the matter and the impugned judgment took both the parties by surprise. The wife-respondent must have taken it as a windfall and the husband respondent took it as a bolt from the blue. There was no prayer for amendment of the plaint, not even in this Court. If in revisional jurisdiction the High Court Division rides roughshod over both substantive and procedural law then a litigant does not know what will happen to his case, what course will it take and what relief will ultimately emerge. This is a travesty of justice, as we know it. The *suo motu* exercise in the manner it was done, besides being without jurisdiction was an act of extreme judicial indiscretion. We disapprove of this type of exercise in no uncertain terms.

On the last point of granting leave, i.e., the amount of maintenance granted to the child, plaintiff-respondent No.2, the lower appellate Court found that neither the plaintiff nor the defendant adduced any evidence as to how much is necessary to defray the expenses of a child (who is now 11-years old). The lower appellate Court held that the Family Court made a guesswork. Even taking into account the escalating price of goods, the guess-estimated amount of Tk.1,000/- per month seems to be excessive. Taking into account expenses for purchase of milk for the child, his clothings and treatment, a monthly payment of Tk.600/- for

respondent No.2 seems to be appropriate, the lower appellate Court held. The High Court Division by the impugned judgment observed that the appellant did not repudiate in his written statement the claim of maintenance in the plaint at the rate of Tk.1,000/- per month for each of the plaintiff-respondents. Under the circumstances the learned Judges called in aid their personal knowledge and held that each of the plaintiffs is entitled to get from the appellant an amount of Tk.1,000/- per month as maintenance commensurate with the status and means of the appellant. The lower appellate Court acted illegally in reducing the amount abruptly without assigning any reason whatsoever, the High Court Division held.

Mr. Md. Hannan submits that the lower appellate Court has given reasons and the reduction in amount was not made abruptly. The appellant is a steno-typist in the Ministry of Finance and the learned Judges of the High Court Division did not consider that he has to support a wife and two daughters with his meagre income. Mrs. Rabeya Bhuiyan did not specifically reply to this submission either in her oral or written submissions.

We do not understand why the learned Judges considered this matter at all in the absence of the appellant when the only two points raised by the appellant in the civil revision were the alleged granting of past maintenance to respondent No.2 by the two Courts below and the alleged inequity in directing the appellant to pay the decretal amount of Tk.72,600/- within 30 days. The appellant did not raise the question of quantum of maintenance to respondent No.2 at all. The learned Judges were not considering a

revisional application filed by the plaintiff-respondents against reduction of the amount of maintenance to be paid to respondent No.2. The enhancement of maintenance to respondent No.2 was again a gratuitous relief beyond the scope of the Rule issued. The learned Judges were acting, as it at will, oblivious of the jurisdiction they were sitting in, they could pass any order they thbught fit. We find that the reduction not being a bone of contention between the parties in the Rule, was interfered with by the learned Judges acting in excess of jurisdiction. The judgment and decree of the lower appellate Court will therefore remain unaffected.

Since we have held that the impugned judgment has been passed in excess of jurisdiction, our judgment could have been concluded here, but we prefer to continue to deal with the second point on which leave has been granted, because to leave it unattended is to allow a lurking uncertainty in the law of maintenance and also because elaborate oral and written submissions on this matter have been made by the parties, the interveners, the invitees and the amicus curiae.

We are thankful to all them for their able and diligent assistance and for having reminded us that we cannot travel beyond Shariat on this point. In particular, our attention has been drawn to section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 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 mubara'at, 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)."

We have also been rightly reminded of Article 8(1) of the Constitution which says that "The principles of absolute trust and faith in the Almighty Allah .... shall constitute fundamental principles of state policy" and of Article 8(1A) of the Constitution which says that "Absolute trust and faith in the Almighty Allah shall be the basis of all actions".

In our discussion on the second point on which leave was granted, we shall use the revised and edited English translation of the Holy Quran by Allama Abdullah Yusuf Ali, published by King Fahd Holy Quran Printing Complex, Medina in 1410 Hijri. The original translation (first edition in 1934) was revised and edited by the Presidency of Islamic Researchers, IFTA, Call and Guidance and it is stated in the Preface that as many as four successive Committees have checked up the revised and edited translation both in respect of adopting the most accurate expression and in updating the Notes.

First of all, we would like to dispel some of the basic assumptions on which the learned Judges have proceeded to discuss the topic of maintenance. The learned Judges stated after quoting Sura Al Imran 3:7,

> "Thus according to Quran as quoted above its verses are easy to understand. That is to say Quran prescribes rule of literal construction of its verses. This rule is a universal one. The first and elementary rule of construction is that it is to be assumed that the words

and phrases have been used in a statute in their ordinary meaning and that every word in a statute is to be given a meaning."

It is true that in several Ayats of several Suras, Allah has revealed that He has made the Holy Quran easy to understand and remember and that the Holy Quran makes things clear. But it does not follow from this that the Holy Quran prescribes a rule of literal construction of its Ayats. Easy understanding does not mean that it is also easy to interpret the Holy Quran. Easy to understand and easy to interpret are not the same thing. If it is easy to interpret why should there be four Schools of thought in Islam ? "Easy understanding" can never be a rule of construction of a Revealed Book. The Holy Quran is not a Book of law in the sense Salmond's Jurisprudence is and one cannot call in aid the rules of construction of statutes, as propounded by Maxwell, Craise or Crawford, in the interpretation of the Holy Quran. The Holy Quran has its own rules of construction, which, for the sake of brevity, we are not elaborating. We can easily understand Sura Kaferun 109:6 ---*Lakum Deenokum Waliya Deen*. (To you be your Way/And to me mine.) But in interpreting it we have to take into account the meaning of the word 'Deen'. For example, the first part of Ayat 19 of Sura Al Imran (3) says, *Innallazina Indallahe Al Islam* -- (The Religion before Allah/Is Islam (submission to His Will) and Ayat 85 of the same Sura says, "If anyone desires/A religion other than Islam (submission to Allah)/Never will it be accepted/Of him; and in the Hereafter/He will be in the ranks/Of those who have lost." A "Deen" (way, religion) of unbelievers and of those who do not submit to His Will is not a "Deen" at all in

the Revelation of Allah. A 'Deen' of believers submitting to His Will and accepting a code of life and conduct which is true, just and beautiful and which leads to a permanent abode in the heaven is a 'Deen' acceptable to Allah. Literal interpretation of Sura Ayat 109:6 will result in a wrong interpretation, meaning that the religion of believers and unbelievers are all to be treated at par by the Muslims.

Then comes the question of competence or incompetence of persons to interpret the Holy Quran. There are also several attributes qualifying a person to interpret the Holy Quran. In Sura Baqarah(2) it has been revealed in Ayat 2 that "This is the Book;/In it is guidance sure, without doubt,/To those who fear Allah (*Hodallil Mottaqin*)." Those who do not fear Allah will not get any guidance from the Holy Quran and for them it is not possible to interpret the Holy Quran correctly. In the same Sura, in keeping with Ayat 6 thereof, Ayat 7 reveals that in respect of unbelievers "Allah hath set a seal/On their hearts and on their hearing./And on their eyes is a veil...." Hence there can be no question of an unbeliever or a non-Muslim interpreting the Holy Quran so as to make the interpretation a binding law on Muslims and even if he or she does so it will not be acceptable to the Muslims. The learned Judges discarded the previously-quoted dictum of the Privy Council in ILR25(Cal)9 because they decided the issue before them in accordance with the laws propounded by Muslim jurists "rather than independently". In other words, the learned Judges recognised the right of whom they themselves called "non-

Muslims" to interpret the Holy Quran independently of Muslim jurists, which is an absolutely untenable proposition.

The learned Judges of the Privy Council rightly refrained themselves from putting their own construction on the Holy Quran because they were non-Muslims. They abstained from opposing the express ruling of commentators of great antiquity and high authority because they were not qualified to do so. A person who ventures to interpret the Holy Quran (1) shall be a *Muttaqi* (2) must have a wide knowledge of Hadith in connection with the Prophet's(S) interpretation of the Holy Quran and with the statements of his *sahabis* (companions) and their successive companions (3) have a knowledge about those parts of the Holy Quran which have been repealed or substituted (4) have a knowledge about the significance of each Ayat (5) have a knowledge about *Ilmul Kirat* (6) have a profound knowledge of the Arabic language, grammar, diction etc. as the Holy Quran was revealed in the Arabic language (7) must have a through knowledge of all the major commentaries and works of different Schools of thought, (8) must be a *faqih* and other qualifications as well, not necessarily limited to and special preserves of Ulemas. All these qualifications follow either from the Holy Quran or from Hadith and dedicated and knowledgable Muslim interpreters of the Holy Quran. We do not question the competence of the learned Judges of the High Court Division or of the learned Advocates who addressed us to interpret the Holy Quran, but we ourselves are not sure about our own competence in the matter and are approaching the subject by force of circumstances with a great deal of trepidation

in our hearts, lest we commit mistakes unknowingly, for which we beg Almighty Allah's forgiveness in advance.

The learned Judges have conferred on the Civil Courts "the jurisdiction to follow the law as in the (Holy) Quran disregarding any other law on the subject, if contrary thereto even though laid down by the earlier jurists or commentators may be of great antiquity and high authority and though followed for a considerable period." This conferment of jurisdiction in the manner it has been done is unacceptable because it gives the believers and non-believers alike an equal jurisdiction to decide whether a law laid down by earlier jurists or commentators of great antiquity and followed for a considerable period is contrary to the Holy Quran or not. It gives a blank cheque to all Judges of the Civil Court to interpret the Holy Quran according to their own individual understanding and make it into a binding law. Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 provides that in deciding certain matters including maintenance "the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)." '*Shariah*' is an Arabic word meaning the Path to be followed. Literally it means 'the way to a watering place'. The Holy Quran is the first primary source of Shariah. The second primary source of Shariah is the Sunnah. The Prophet(S) never spoke or acted from his own imagination but told what Allah had revealed unto him. In Sura An-Najm (53:4-5), the Holy Quran bears testimony to this statement : "Nor does he say (aught)/Of (his own) Desire./It is no less than/Inspiration sent down to him:" In Sura An-Nahl (16:44) the Holy Quran says : "(We

sent them) with Clear Signs/And Scriptures/And We have sent down/Unto thee (also) the Message;/That thou mayest explain clearly/To men what is sent/For them, and that they/May give thought." The explanation of the Holy Quran by the Prophet (S) either by way of elucidation or by way of preaching or practice is a guide to the interpretation of the Holy Quran. The secondary sources are *Ijma*, *Qiyas* and *Ijtihad*. *Ijma* owes its origin to the following Ayat of the Holy Quran in Sura An Nisaa (4:59) : "O ye who believe!/Obey Allah, and obey the Messenger,/And those charged/With authority among you./If ye differ in anything/Among yourselves, refer it/To Allah and His Messenger,/If ye do believe in Allah/And the Last Day:/That is best, and most suitable/For final determination." *Qias* is analogical deduction to come to a logical decision on an issue of law. It must be based on Quran, Sunnah and Ijma. If there is no indication as to the right answer, it should be sought by *Ijtihad* which literally means to exert, and in Islamic Jurisprudence means an exertion with a view to forming an independent judgment on a legal question. The learned Judges' conferment of jurisdiction on Civil Courts is in the manner of bestowing an authority upon all individual Judges to interpret the Holy Quran all by themselves without the aid of Sunnah, Ijma or Qiyas and to ignore Sunnah, Ijma or Qiyas if their own individual understanding of the Holy Quran is contrary to established precedents. The Holy Quran thus loses security in all its Ayats and Suras. The Holy Quran has been thrown into the lap of judge to judge, court to court, to be tossed about freely according to individual understanding, irrespective of whether they are

competent to interpret the Holy Quran independently or not. This is an invitation to anarchy, pernicious in effect. We do not approve of this direction and expressly repudiate it.

We do not subscribe to the opinion that the doors of interpretation of the Holy Quran or re-opening of issues settled by Ijma are closed. In this respect we agree with the learned Judges of the High Court Division. Revelation is not opposed to reason. It rather appeals to reason. In Sura An-Nahl (16:125) the Holy Quran says, "Invite all to the Way/Of thy Lord with wisdom/And argue with them/In ways that are best/And most gracious .... ." In re-interpreting the Holy Quran or in re-opening a settled point by Ijma, two conditions, in our opinion, should be present, viz., (1) a valid reason or reasons for re-interpretation (2) it must be based on the Holy Quran and Sunnah by those who are competent to do it.

It has been argued by some of the learned Advocates of some of the later group of interveners supporting the rebpondents that there is no established law at all that maintenance is limited to the period of iddat only. That this is well-established law throughout the last 1400 years has been acknowledged by the learned Judges in the impugned judgment by quoting from Hamilton's translation of Hedaya and Baillie's Digest of Mohammadan Law. Apart from submitting some *tafsirs* and some memoranda of some Boards of Ulemas from Kerala, India and Sri Lanka the said learned Advocates could not produce a single piece of judgment from any jurisdiction during the last 1404 years showing the established law to be different.

It has been argued that for 1400 years women had no forum to put their point of view on maintenance. This is not true. The Prophet (S), the Khalifas(R), later the Kazis and during the colonial days upto the promulgation of the Family Courts Ordinance, 1985, the Civil Courts had taken up complaints of various nature from women, either appearing personally or through Counsels. No woman is on record to have claimed maintenance till re-marriage relying upon Ayat 241 of Sura Al Bagarah(2). Even in the instant suit plaintiff No.1 claimed maintenance for 3 months only, commensurate with her period of iddat.

Relying upon the case of Most. Rashida Begum vs. Shahin Din and others, PLD1960(Lahore)1142, it has been argued that Hadith as a second primary source of Shariah is of questionable character, because, first, the Prophet(S) himself discouraged compilation and writing down of his own sayings during his lifetime and ordered its destruction, secondly, the subsequent compilation did not start before the expiry of 100 years after his death after which the question of its authenticity, trustworthiness and dependability became a legitimate and complex issue and lastly, even Imam Abu Hanifa (R) (born 80 Hijri and death 150 Hijri) used only about 17 or 18 traditions in deciding the points raised before him.

Unfortunately, the learned Judges of the Lahore High Court failed to note the replies thereto, already available at the time of pronouncement of the judgment on 21-7-60. First, the Prophet (S) discouraged the written compilation of his sayings in his lifetime, lest the Muslims regard it as another holy book, at par

with the Holy Quran. The Prophet(S) was conscious of his rank in the Revelations of Allah as a Messenger, an Apostle, a Warner, giver of good news to a people who believe, a mortal and so on. Secondly, the compilation started a century after the death of the Prophet(s), because distortions and fake sayings started to creep in. The learned Judges of the Lahore High Court should have remembered that no other human being on earth has been so painstakingly and systematically investigated, researched and documented as the Prophet(s). To discard the Sunnah is to consign the labour, patience, sincerity and methodical and systematic exercise of centuries of compilers to the dustbin of history which will be a delight to those who wish to wreck the second primary source of Shariah from within. Thirdly, the fiction about Imam Abu Hanifa(R) is attributed to Ibn Khaldun who did not project it as his own view. He has stated it to be the version of some unknown person. Later the so-called Orientalists picked that fable up and Joseph Schacht in his book An Introduction to Islamic Law propounded his theory thereon that the ancient schools of Islamic law were independent of the traditions (Sunnah). Subhi Mahmasani wrote about Imam Abu Hanifa(R) in The Philosophy of Islamic Jurisprudence at p. 43, as follows :-

> "Abu Hanifa (R) was very careful regarding the choice of the traditions. He accepted only those traditions which are narrated through reliable chains. Inspite of this his companions and his students have narrated fifteen *Masanid* from him. The Chief *Qadi* Abu Al-Mu'ayyad Khawarzami has compiled all of them in one volume. For this reason we reject what Abu Ibn Khaldun and some others have stated that only seventeen traditions have been narrated by Abu Hanifa."

It has also been argued that for so long there was a conspiracy to interpret the Holy Quran against women and that the patriarchal attitude of the society precluded women from getting an equitable interpretation of the Holy Quran. The judiciary was and still is male-dominated. It is time now to re-interpret the Holy Quran keeping in view the interests of women in the context of vastly changed social milieu.

We are simply astonished to hear this argument. It would be wholly wrong to view the controversy in this appeal from the viewpoint of women's rights or male chauvinism or from the point of view of cut and dried secular statutory laws, divorced from Allah. The family laws of Islam are not enforceable by statutes alone. The topmost priority and an *a priori* condition are that men and women must have fear of Allah in their hearts (*taqwa*) and an environment conducive to the observance of Allah's laws. Notice what has been stated in the beginning of Sura An-Nisaa(4), Ayat 1:-

> "O Mankind ! fear/Your Guardian Lord,/Who created you/From a single Person,/Created, out of it,/His mate, and from them twain/Scattered (like seeds)/Countless men and women;/Fear Allah, through Whom/Ye demand your mutual (rights) ..."

"Fear Allah your Lord" runs through the threads of Islamic Family law. One has to purge oneself from alien thoughts and ideas propounded by humans and be prepared to observe laws revealed by the Almighty Allah spontaneously with fear of Allah in one's mind. We should get our perspectives right. Both male and female are Allah's creations, Sura Az-Zumar (39) says in Ayat 6, "He created you (all)/From a single Person:/Then created, of like nature,/His mate;...". Allah's creation is in pairs and it is impossible to

conceive of the creation of a man without woman and vice versa. Each woman is either the wife, mother, sister or other relation of a man and so is a man either a husband or father or brother or other relation of a woman. A society will be rendered absolutely unworkable without co-operation between man and woman. According to Ayat 10 of Sura Al-Hujurat (49), "The Believers are but/A single Brotherhood." All believer women therefore are sisters of believer men and all believer men are brothers of believer women. There is no adversarial relationship or relationship of hatred and competitiveness between them. As per Ayat 71 of Sura Al-Tauba(9), "The Believers, men/And women, are protectors,/One of another:...". Ayat 103 of Sura Al-Imran(3) enjoins upon all believers, men and women, to hold together, to remain united, "And hold fast,/All together, by the Rope/Which Allah (Stretches out/For you), and be not divided/Among yourselves." There can be no question, therefore, of a male-dominated interpretation of the Holy Quran or a male-dominated judiciary pronouncing against the interests of women. The Imams, jurists and others kept the Holy Quran as their guide-book while interpreting it. Most of us do not know the real name of Imam Abu Hanifa (R). His real name is Hazrat No'man ibne Sabet(R). A few women asked him once a question, if men can keep four women as wives, then why a woman cannot keep four husbands ? The Imam was plunged into a great difficulty. His exalted daughter Hanifa told him, "Father, I will give a solution to this problem, provided you agree to be known after my name." The Imam agreed and then the daughter asked the women to bring the milk of four kinds of animals like lamb, goat, camel and dumba.

When they brought it she mixed it up and then [illegible] separate the milk. The women went away by saying that [illegible] answer. Abandoning the centuries-old practice of being known as the son of his father, Hazrat No'man ibne Sabet(R) came to be known thereafter as Abu Hanifa(R), Father of Hanifa. That is also the spirit with which the Imams, tafsirkars, judges and other exalted persons of high authority decided issues and to accuse now that they were conspirators and biased against women is to display a high feat of ignorance. These types of accusations will only gladden and pamper those who have a global agenda to discredit and disavow the past heritage of Muslims from within.

We shall go back to the learned Judges' method of interpretation. They have isolatedly picked up Ayat 241 of Sura Al-Baqarah(2) and translating each Arabic word thereof into English with the aid of an Arabic-English dictionary came to their conclusion. This method of interpretation of a subjectmatter of law and legal rights by way of an isolated and literal interpretation of a single Ayat of a single Sura of the Holy Quran, divorced from its context and without bringing together all the Ayats of all the Suras together connected with the subject for a consolidated consideration, is against the principle of interpretation of the Holy Quran and is prohibited in the Holy Quran itself. In Ayats 90-93 of Sura Al-Hijr (15), there is a stern warning against such maneuvering interpretations : "(90) (Of just such wrath)/As We sent down/On those who divided/(Scripture into arbitrary parts)./(91) (So also on such)/Who have made Quran/Into shreds (as they please)./(92) Therefore, by thy Lord,/We

will, of a surety,/Call them to account./(93) For all their deeds."

The learned Judges ought to have brought together all the Ayats of all the connected Suras, discussed the subject "in its various aspects" comprehensively and then come to a conclusion, keeping in view (1) the consistency of Allah's Revelation, as stated in the Holy Quran in Ayat 23 of Sura Az-Zumar (39): "Allah has revealed/(From time to time)/The most beautiful Message/In the form of a Book,/Consistent with itself,/(Yet) repeating (its teaching/In various aspects). ...." (2) the absence of any contradiction or discrepancy in the Holy Quran, as stated in the Holy Quran in Ayat 82 of Sura An-Nisaa (4) : "Do they not ponder on/The Qur-an?/Had it been from other/Than Allah, they would surely/Have found therein/Much discrepancy."

When a divorce proceeds from the husband, it is called talaq, when effected by mutual consent, it is called Khula or Mubara'at, according as the terms are. The Muslim Family Laws Ordinance, 1961 has given statutory recognition to a wife's right of divorce (*talaq-i-tafwiz*) in exercise of her delegated power to divorce, as also to dissolution of marriage otherwise than by talaq. There are different modes of talaq according as the pronouncement of talaq is by the husband. In the case of *Talaq Ahsan* (most proper), a single pronouncement is made during a *tuhr* (period between menstruations) followed by abstinence from sexual intercourse upto three following menstruations, at the end of which talaq becomes absolute. In the case of *Talaq Hasan* (proper), three pronouncements are made during successive *tuhrs*, there being no

sexual intercourse during any of the following three *tuhrs*. In the case of *Talak-ul-bidaat* or *Talak-i-badai* (which is popularly called Bain talaq in Bangladesh), either three pronouncements are made during a single *tuhr* in one sentence or three separate sentences or a single pronouncement is made during a *tuhr* clearly indicating an intention to dissolve the marriage irrevocably. This form of talaq is not recognised by the Shafi and Shia Schools of thought, but the Muslim Family Laws Ordinance, 1961 recognises "pronouncement of talaq in any form whatsoever", section 7(1).

It has been variously argued by some learned Advocates for some of the latter group of interveners supporting the respondents that there is no nexus between iddat and maintenance. Nothing could be further from the truth in this bald assertion. There is a clear and unambiguous connection in the Holy Quran between talaq and iddat on the one hand and between iddat and maintenance on the other.

Iddat (a period of waiting, a prescribed period) is a concept distinctive and unique in Quranic jurisprudence, like of which is not to be found in any other known system of jurisprudence. The question of iddat for women arises on other occasions as well, as on the death of husband, on periods of abstinence from sexual intercourse and on periods of abandonment of prayers and fasting by women, but it arises also when there is a pronouncement of talaq. The purpose of iddat after divorce is four-fold, first, to allow the parties to reconciliate and to give the divorce a go by in the cases of Talaq Ahsan or Talaq Hasan, secondly, to ascertain whether the woman is carrying any offspring of her husband in the

womb or not, so that the legitimacy of the child remains beyond dispute, thirdly, to prevent re-marriage of the woman during the period of iddat in order not to forestal reconciliation and to avoid future controversies on legitimacy and fourthly, to make arrangements for the maintenance of the woman during the period of iddat.

The relevant Suras and Ayats of the Holy Quran on iddat, reconciliation, maintenance and *mata'a* after pronouncement of talaq are to be found in Sura Al-Baqarah (2:228-237, 241), Sura At-Talaq (65:1-6) Sura Al-Ahzab 33:49 and Sura An-Nisaa (4:35). The Holy Quran divides divorced women into 6 categories :- (1) those divorced before consummation of marriage, but without fixation of dower (*mahr*) (2) those divorced before consummation of marriage, but after fixation of dower (3) those divorced after consummation of marriage but not bearing any offspring in the womb at the time of divorce (4) those bearing an offspring in the womb at the time of divorce (5) those who, at the option of the father, would give suck to the child after divorce and (6) those who by mutual consent and after due consultation with the husband would give the child to a foster mother.

Separate provisions have been made in the Holy Quran for no or separate periods of iddats and maintenance for each of the above categories of divorced women. There is no period of *iddat* and no maintenance is to be provided to the first category who are divorced before consummation of marriage, but without fixation of dower. The authority for this proposition is Ayat 236 of Sura Al-Baqarah (2) as follows :

"There is no blame on you/If ye divorce women/Before consummation/Or the fixation of their dower;/But bestow on them/(A suitable gift),/The wealthy/According to his means,/And the poor/According to his means;-/A gift of a reasonable amount/Is due from those/Who wish to do the right thing."

The contents of the said Ayat are repeated in Sura Al-Ahzab (33:49) as follows :-

"O ye who believe !/When ye marry believing women,/And then divorce them/Before ye have touched them,/No period of 'Iddat/Have ye to count/In respect of them;/So give them a present,/And release them/In a handsome manner."

For the second category of divorced women, those divorced before consummation of marriage but after fixation of dower, there is no provision for observing iddat for any length of time and no provision for maintenance either. They are only to be paid half of the dower due to them. The authority for this proposition is contained in Ayat 237 of Sura Al-Baqarah (2) which is as follows :

"And if ye divorce them/Before consummation,/But after the fixation/Of a dower for them,/Then the half of the dower/(Is due to them), unless/They remit it/Or (the man's half) is remitted/By him in whose hands/Is the marriage tie,/And the remission/(Of the man's half)/Is the nearest to righteousness./And do not forget/Liberality between yourselves./For Allah sees well/All that ye do."

It is to be noted that in respect of the above two categories of divorced women the Holy Quran does not enjoin upon the parties to effect any reconciliation either. The divorce takes effect immediately after the pronouncement of divorce and in the case of the first category all that is due to them is a suitable gift (*Mataaum-Bil-Ma'aruf*) of a reasonable amount according to the means of the husband. In the case of the second category of women

the half of the dower is due to the divorced women, unless remitted.

In the case of the third category of women the period of iddat has been precisely fixed in Ayat 4 of Sura At-Talaq (65) as follows:-

> "Such of your women/As have passed the age/Of monthly courses, for them/The prescribed period, if ye/Have any doubt, is/Three months, and for those/Who have no courses/(It is the same):/For those who are pregnant,/Their period is until/They deliver their burdens:/And for those who/Fear Allah, He will/Make things easy for them."

Door is left open for reconciliation in the case of Talaq Ahsan or Talaq Hasan. Ayat 35 of Sura An-Nisaa(4) says,

> "If ye fear a breach/Between them twain,/Appoint (two) arbiters,/One from his family,/And the other from hers;/If they seek to set things aright,/Allah will cause/their reconciliation/For Allah hath full knowledge,/And is acquainted/With all things."

During the whole period of iddat the divorced women shall remain in their houses unless they are turned out for being guilty of some open lewdness. The authority for this proposition is Ayat 1 of Sura At-Talaq (65) as follows:-

> "O Prophet ! When ye/Do divorce women,/Divorce them at their/Prescribed periods,/And count (accurately)/Their prescribed periods:/And fear Allah your Lord:/And turn them not out/Of their houses, nor shall/They (themselves) leave,/Except in case they are/Guilty of some open lewdness,/Those are limits/Set by Allah: and any/Who transgresses the limits/Of Allah, does verily/Wrong his (own) soul:/Thou knowest not if/Perchance Allah will/Bring about thereafter/Some new situation."

If we take a literal construction of Ayat 1 of Sura At-Talaq(65) divorced women are only entitled to remain in their

houses during the period of iddat. There are no express words in that Ayat providing for their food, clothing and medical expenses. Assistance has been taken from Ayats 6 and 7 of Sura At-Talaq(65) to shed light on what is fully meant by providing for accommodation only in Ayat 1. Ayats 6 and 7 say,

> "6. Let the women live/(In 'iddat') in the same/Style as ye live,/According to your means:/Annoy them not, so as/To restrict them./And if they are pregnant, then/Spend (your substance) on them/Until they deliver/Their burden: and if/They suckle your (offspring),/Give them their recompense:/And take mutual counsel/Together, according to/What is just and reasonable./And if ye find yourselves/In difficulties, let another/Woman suckle (the child)/On the (father's) behalf."

> "7.(Let the man of means/Spend according to/His means: and the man/Whose resources are restricted,/Let him spend according/To what Allah has given him./Allah puts no burden/On any person beyond/What He has given him./After a difficulty, Allah/Will soon grant relief."

That the women would live in iddat in the same style as the husband lives according to their means led the jurists to come to a consensus that divorced women of the third category shall live at the expense of the husband during the period of iddat. The husband will meet all her expenses, i.e., he will maintain her.

For the fourth category of divorced women, those who bear an offspring in their womb at the time of divorce, the period of iddat is extended upto the delivery as we have seen in Ayat 4 of Sura At-Talaq(65), quoted before, and the husband is to maintain the divorced women till delivery as is clear from Ayats 1, 6 and 7 of Sura At-Talaq(65), quoted before.

For the fifth category of women, i.e., those who, at the option of the father, would give suck to the child the period of

iddat is over after delivery, but the maintenance continues after the period of iddat. There is a clear provision to bear the cost of food and clothing of both the mother and the child on equitable terms for two whole years, if the mother would give suck to the child.

For the sixth category of women who by mutual consent and after due consultation decide on weaning and give their child to a foster-mother, an obligation has been cast upon the husband to pay the foster-mother on equitable terms. The authority for this proposition is contained in Ayat 6 of Sura At-Talaq(65), previously quoted, and more fully in Ayat 233 of Sura Al-Baqarah (2) as follows :

> "The mothers shall give suck/To their offspring/For two whole years,/For him who desires/To complete the term./But he shall bear the cost/Of their food and clothing/On equitable terms./No soul shall have/A burden laid on it/Greater than it can bear./No mother shall be/Treated unfairly/On account of his child,/An heir shall be chargeable/In the same way./If they both decide/On weaning,/By mutual consent,/And after due consultation./There is no blame on them,/If ye decide/On a foster-mother/For your offspring/There is no blame on you,/Provided ye pay (the foster mother)/What ye offered,/On equitable terms,/But fear Allah and know/That Allah sees well/What ye do."

The same provision is contained in Ayat 6 of Sura At-Talaq(65), quoted before, in a condensed form. Reading therefore the Quranic texts together it is very difficult for us to accept the submission that there is no nexus between iddat and maintenance. This is not what the learned Judges said themselves in the impugned judgment.

Nor do we find anything in Sura Al-Baqarah (2:228), as held by the learned Judges in the impugned judgment that "Quran directs

a woman who is divorced to undergo a period of iddat elsewhere (Second Sura Baqarah, Verse 228) and herein (i.e., in Ayat 241) Quran directs a man to give maintenance in case he divorces his wife." Ayat 228 of Sura Al-Baqarah(2) is as follows :-

> "Divorced women/Shall wait concerning themselves/For three monthly periods./And it is not lawful for them/To hide what Allah/Hath created in their wombs,/If they have faith/In Allah and the Last Day./And their husbands/Have the better right/To take them back/In that period, if/They wish for reconciliation./And women shall have rights/Similar to the rights/Against them, according/To what is equitable;/But men have a degree/Over them/And Allah is Exalted in Power,/Wise."

Ayat 228 is about the period of iddat, non-concealment of pregnancy, reconciliation, and a degree of men over women and we have not found in that Ayat what the learned Judges have found. On the contrary, Sura At-Talaq (65:1) asks men not to turn the divorcee women out of their houses and asks women not to leave their houses. Only if a woman is guilty of some open lewdness, the husband can turn her out of their house, in which case she will undergo the period of iddat elsewhere. The learned Judges have totally misread Ayat 228 of Sura Al-Baqarah(2).

It has been pointed out by some learned Advocates on behalf of some interveners supporting the respondents that section 3 of the Muslim Family Laws Ordinance, 1961 provides that the provisions of this Ordinance shall have effect notwithstanding any law, custom or usage. This means that the provisions of this Ordinance will prevail over section 2 of the Muslim Personal Law (Shariat) Application Act, 1937. Section 7 of the Ordinance has been referred to and it has been argued that this section has done

away with the concept of iddat altogether and consequently, maintenance can no longer be connected with iddat.

Upon perusal of section 7, we find the situation to be the opposite. Section 7(1) provides that any man who wishes to divorce his wife shall, as soon as may be, after the pronouncement of talaq in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife. Section 7(3) says, "Save as provided in sub-section (5), a talaq, unless revoked earlier, expressly or otherwise, shall not be operative until the expiration of ninety days from the day on which notice under sub-section (1) is delivered to the Chairman." Section 7(5) provides, "If the wife be pregnant at the time talaq is pronounced, talaq shall not be effective until the period mentioned in sub-section (3) or the pregnancy, whichever be later, ends." Where is the doing away of iddat ? The principle of revocation of divorce, finality of divorce of a non-pregnant woman after three menstrual courses, or of a pregnant woman till delivery coincide with the periods mentioned in section 7(3) and 7(5). The Muslim Family Laws Ordinance, 1961 when interpreted in the light of Articles 8 and 8(1A) of the Constitution preserves iddat as laid down in the Holy Quran.

Then comes Ayat 241 of Sura Al-Baqarah(2) where the key words are *"Mataaum-Bil-Ma'aruf"*. In its original form (first edition in 1934) the said Ayat was translated into English by Allama Abdullah Yusuf Ali as follows :

> "For divorced women/Maintenance (should be provided)/On a reasonable (Scale)/This is a duty/On the righteous."

words *Mataaum-Bil-Ma'aruf* have been used in both Ayats 236 and 241 and as Ayat 241 has been revealed in elucidation of Ayat 236, it cannot be that the same words will carry two different meanings in two separate Ayats, one a one-off payment of a gift as a duty and the other a payment of maintenance on a reasonable scale as an obligation. The revised and edited translation has appropriately done away with this anomaly.

The legal meaning of the word "maintenance" in Anglo-Saxon Jurisprudence is contained in Black's Law Dictionary, 6th Edition, as follows:-

> "Sustenance, support, assistance, aid. The furnishing by one person to another, for his or her support, of the means of living, or food, clothing, shelter etc. particularly where the legal relation of the parties is such that one is bound to support the other, as between father and child, or husband and wife ..... While term primarily means food, clothing and shelter, it has also been held to include such items as reasonable and necessary transportation or automobile expenses, medical and drug expenses, utilities and household expenses."

In Bangla we use the word 'maintenance' as equivalent to খোরপোষ or ভরণপোষণ. In Arabic the root word of the word maintenance is *Nafaqatun*, a noun. It's verb is *Nafaqa*. In past tense the verb is *Anfaqa*. The imperative verb is *Anfiq* (singular), *Anfiqa* (double) and *Anfequ* (plural). The word *'Anfequ'* has been used in Sura Talaq (65:6), where women have been given the right to live in the same style in iddat as their husbands live according to their means. The word "*Yonfequ*" (present indefinite tense in plural) has been used in Ayat 7 of Sura At-Talaq(65:7) following the verse on the maintenance of non-pregnant and pregnant divorced women :-

"Let the man of means/Spend according to/His means: and the man/Whose resources are restricted,/Let him spend according/To what Allah has given him....".

The word '*rizq*' is used in *Sura Baqarah* (2:233) wherein men have been directed to bear the cost of food and clothing for two whole years if divorcee mothers have to give suck to their offspring.

The word '*Nafaqa*' has other meanings as well as is clear from the meaning given to it by Hans Wehr in A Dictionary of Modern Written Arabic, edited by J. Milton Cowan (Third Printing, 1974) as "to spend, expend, lay out, disburse, to use up, consume, spend, exhaust, waste, squander, dissipate, ...support, bear the cost of maintenance, to provide means of support, bear the cost of S.O.'s (subject of) maintenance." Dr. Rohi Baalbaki in his Arabic-English dictionary Al-Mawrid, a standard work of great repute, gives the dictionary meaning of *Nafaqa inter alia* as follows :-

"expense, cost, charge, expenditure, outlay, money spent." (Tenth Edn., 1997)

No such word denoting cost of maintenance in all its imperativeness like *Anfequ* or denoting livelihood as *rizq* has been used in Ayat 241, as in the Ayats and Suras providing for maintenance to women during the period of iddat. The words used in both Ayats 236 and 241 of Sura Al-Baqarah(2) are '*Mataa'aum-Bil-Ma'aruf*'. The learned Judges themselves relied on the dictionary meaning of the word '*Mataaun*' from the Dictionary and Glossary of the Koran by John Penrice as follows :-

"house-hold stuff, utensils, goods, chattels, provision, convenience."

To bear the cost of maintenance is far from *'Mataaun'*, even when the learned Judges' own reliance on John Penrice is complete.

In Hans Wehr's aforequoted dictionary *'mata'a'* is given the meaning *inter alia* as "to give as compensation to a divorced woman." The plural of *mataa's* is *Amti'a* which means in the same dictionary "enjoyment, pleasure, delight, gratification; object of delight; necessities of life; chattel, possession, property, goods, wares, commodities, merchandise, furniture, implements, utensils, household effects, baggage, luggage, equipment, gear, useful article, article of everyday use, things, objects, stuff, odds and ends etc." Again in Al-Mawrid, Dr. Baalbaki gives the meaning of the word *'mata'a'* as "effects, goods, wares, chattels, (personal) property, personalty, belongings, possessions, equipment, gear, supplies, baggage... etc.", but never maintenance or livelihood as in the case of *'nafaqa'* or *'rizq'*.

The word *'Ma'aruf'* is given the meaning in Hans Wehr's Dictionary as "known, well-known, universally accepted, generally recognised, conventional, that which is good, beneficial or fitting, good, benefit; fairness, equity, equitableness, kindness, friendliness, amicability, beneficence, favour rendered, courtesy, mark of friendship ... etc." In Al-Mawrid *Bil-Ma'aruf* is given the meaning as "amicably, in a friendly manner, with kindness". John Penrice gives the meaning as "known, recognised, honourable, good, befitting, kindness." Therefore the word *'Ma'aruf'* cannot be given the meaning of a "reasonable scale". It may be a reasonable amount, but not a reasonable scale.

Mataa'um-Bil-Ma'ruf in its Arabic meaning in the Holy Quran cannot mean "maintenance on a reasonable scale". If amplified, it means a compensation in the form of a presentation of some means of enjoyment which is an article of everyday use and which can take the shape of a dress, money, chattel, property or any other means of enjoyment according to prevalent practice. That even the Prophet(S) was not asked to provide maintenance were he to set free from marriage bond any of his wives is clear in Ayat 28 of Sura Al-Ahzab(33) as follows :-

> "O Prophet! say/To thy Consorts:/"If it be that ye desire/The life of this world,/And its glitter,-then come!/I will provide for your/Enjoyment and set you free/In a handsome manner."

As for Sunnah, the Prophet (S) himself divorced a wife named Zaonia with a parting gift of a pair of dresses (Bukhari Sharif, Bengali translation by Shaikhul Hadis Maulana Azizul Huq, 6th Volume, p.227, published ..13 Hijri). The Prophet(S) directed a man named Hafs Ibne Mugira to pay *mata'a* to his divorced wife Fatema even though he lamented that he had no means to pay it. The Prophet(S) said, you have to pay *mata'a* even though it is a quarter to one kilo of dates. (*Assunatul Kubra* by Imam Baihaki Vol. 7 (out of 10), p. 257). The Sahabis of the Prophet(S), the Tabeyis, the Imams of all the four schools of thought in Islam, and the recognised commentators from th rd century Hijri upto the 15th century Hijri have never deviated from the following propositions with regard to *mata'a*:-

1. *Mata'a* is a parting gift to divorced women as a comfort and solace for the trauma they suffer from divorce.

2. As it is a presentation denoting Godliness, courtesy, equity, handsomeness and reasonableness, no limit has

been fixed in its payment. It has been left to the pleasure and means of the husband.

3. Since *mata'a* is a presentation, the future life of the wife or her post-divorce financial position has not been made a subjectmatter of consideration while giving *mata'a*.

4. *Mata'a* is a temporary one-off gift and is not a matter to be given repeatedly or at intervals.

5. *Mata'a* has never been judicially enforceable because it is a gift. A valid gift, once made, is judicially enforceable, but no one can compel another to make a gift through a process of law. There are however opinions in favour of the view that divorced women described in Ayat 236 of Sura Al-Baqarah(2) can maintain an action for *mata'a* in a court of law, as *mata'a* is a legal due, not a mere gift, in such cases.

These are in short the established Ijma on *mata'a* for the last 1400 years and we do not find any reason from the impugned judgment why this long-established ijma should be broken. Dr. Abdul Karim, a former Professor of Baghdad University and a famous jurist says in his *Al Wajiz fee Usulil Fiqh* at pp. 186-187:

> "Among separate opinions if there is a consensus on a particular matter, then it is not permissible to create such a third flow of opinion which creates dissension in the consensus for it amounts to breaking of an established ijma and is not permissible." (English translation is ours).

We, therefore, find that the learned Judges' re-opening of an issue which is established in the Holy Quran itself, by the Hadith of the Prophet(S), by the Sahabis and Tabeyis, by the opinion of the four Imams of four schools of thought and by commentators during the last 1400 years was unwarranted, uncalled for, impermissible and without any rhyme or reason. The learned Judges in the impugned judgment and some of the learned Advocates for some of the interveners supporting the respondents have taken the

original English translation of Ayat 241 of Sura Al-Baqarah(2) of the Holy Quran by Allama Abdullah Yusuf Ali to be the Holy Quran itself and have interpreted the Holy Quran by laying emphasis on and interpreting the English words used in it and have not cared to interpret the said Ayat by using the Arabic text. A translation of the Holy Quran is not the Holy Quran and by treating a translation to be so the learned Judges committed the greatest blunder.

If left a destitute after divorce, the divorced women, under Islamic dispensation, is entitled as of right to claim maintenance from their opulent prescribed relations. If not so available, the State is bound to maintain them. Those who do not find solution to the problems of destitute women after divorce within Shariat may usefully explore a compulsory realisation of Zakat by the State and will soon find that there will be a dearth of recipients of Zakat.

The learned Judges' conclusion that under Ayat 241 maintenance is to be paid to divorced women for an indefinite period until remarriage or till they lose their status as divorcees has taken even some of the learned Advocates of some of the interveners for the respondents by surprise and they have conceded that this is an abrupt conclusion without any reason. One of them has however submitted that maintenance till remarriage is not a novel concept falling down from nowhere. Several *tafsirkars* have understood Ayat 241 to be so. We have also been referred to the Report of the Family Laws Commission of the Government of Pakistan, presided over by Abdur Rashid, C.J., and published in

the Pakistan Gazette Extraordinary on 20-6-56. The report, recommending that the proposed matrimonial court shall be empowered to order that a husband has to pay maintenance to the divorced wife for life or till remarriage, commented that a large number of middle-aged women, who are being divorced without rhyme or reason, should not be thrown on the street without a roof over their heads and without any means of sustaining themselves and their children. That report is not an interpretation of Ayat 241 and in any case the Muslim Family Laws Ordinance, 1961 which was enacted to give effect to some of the recommendations of that Committee, did not enact that recommendation in the Ordinance. The *tafsirkars* referred to have given their individual opinions, which have never been crystallized into an Ijma. We may profitably quote from the eminent jurist Gazi Shamsur Rahman's বিধিবদ্ধ ইসলামী আইনের ভাষ্য (Commentaries on codified Islamic Law) at p. 611 as follows :-

> " অতএব উপরোক্ত আলোচনা হইতে পরিষ্কার বুঝা যায় যে, তালাকদাতা স্বামী তালাকপ্রাপ্তা স্ত্রীর খোরপোষ তাহার ইদ্দাতকাল সমাপ্ত হওয়া পর্যন্ত বহন করিতে বাধ্য । এই বিষয়ে সকল মাযহাবের সকল যুগের ফকীহগণ একমত । "
>
> ("So it emerges from the above discussion that a husband divorcing his wife is bound to maintain her only upto the completion of her iddat period. All *faqihs* of all ages of all schools of thought are unanimous on this point." (English translation is ours).

Maintenance upto re-marriage has been sought to be justified, in the absence of any reason in the impugned judgment, by some learned Advocates of some of the interveners supporting the

respondents on the ground of (1) a humane, just, equitable and fair approach as an obligation upon the righteous and (2) on equitable doctrine.

It has been urged that the word 'mata'a' has been used in the Holy Quran at least in 14 places (2:36; 3:14; 24:29; 28:61; 33:53; 40:39; 43:33-35; 57:20; 80:24-32; 33:28; 2:40; 2:241; 33:49 and 2:236), referring to and quoting from a booklet entitled "A Way to Islam" with a commentary from an undisclosed source on the cover page of the book describing the book as "inspiring and demanding" written by the author-Judge of the impugned judgment Mr. Justice Mohammad Gholam Rabbani and published during the pendency of this appeal for free distribution in October, 1998 by two NGOs, namely, Bangladesh Jatiya Mohila Ainjiby Samity (BJMAS) and Institute of democratic Rights (IDR). The BJMAS has entered appearance in this appeal as an intervener to support the impugned judgment. It has been argued from that book that 'mata'a' in those named Ayats means livelihood, enjoyment, anything connected with wealth, worldly belongings, gold, silver, adornments, fruits, meal, conveniences, goods and chattels, provisions. Therefore the meaning of the word 'mata'a' in Ayat 241 of Sura Al-Baqarah(2) cannot but be provision or maintenance, as written in the said book, as also in the argument advanced.

The conclusion reached in the argument is in the nature of a forced conclusion, because 'provision' in the sense of legal, formal and regular supply of necessities of life and livelihood at intervals, as in the case of maintenance, was never the meaning of *mata'a* in any of the named Ayats. Nor *mata'a* means maintenance, as

we have seen earlier. If this meaning is given it will run counter to Ayats 233, 236 and 237 of Sura Al-Baqarah(2) and Ayats 6 and 7 of Sura At-Talaq(65). It is plainly inhuman, unjust, inequitable and unfair to impose on a man the burden of maintaining a divorced woman whom either he has not even touched or from whom he receives no consideration after divorce. Marriage in Islam is a contract both religious and social in nature and after the contract ends, the only consequential benefits are those described earlier and a forced and laboured interpretation will lead to discrepancies and contradictions with the aforesaid Suras and Ayats.

Pleading next that no controversy should be created on the meaning of *mata'a* and reading Suras and Ayats 2:229, 231 and 232, and 65:2 in the light of Sura 2:106, it has been argued that while the Holy Quran repeats itself, it betters and makes progressive provisions to meet the challenges of time. "Part with them on equitable terms" (65:2), 'set them free' (2:231) and other Suras and Ayats, it is argued, are signs in the Holy Quran and are guidelines for applying the equitable doctrine. *Mata'a* should be regarded as comparable to pension and retirement benefit. It can be done by way of "making a gift" (we are quoting from the learned Advocate's written submission) of a house and property, agricultural land, fruit-bearing trees etc. which will generate a continuing income for the hapless divorcee.

The second argument is contradictory to the first. Having asserted first that under the principle of a humane, just, equitable and fair approach as an obligation upon the righteous, the word '*mata'a*' in Ayat 241 cannot but mean provision

maintenance, it is now argued that controversies apart, 'mata'a' can be a 'gift' of an income-generating property. Surely one can make a 'gift' to his divorced wife of a generous amount or a substantial property if he wishes, but still it will be a 'gift' which one cannot compel another to make through a process of law. Both branches of this particular submission do not therefore lead to the conclusion that *mata'a* means maintenance.

Some Muslim countries have enacted laws to provide for compensation to the wife in the case of arbitrary repudiation by the husband. If Ayat 241 had spoken of *mata'a* as a compensation for arbitrary divorce, what was the necessity of enacting laws to remedy these ills ? And where are the words "arbitrary divorce" in Ayat 241 ? These laws are therefore outside of the scope of Ayat 241. Laws in Muslim countries like Syria, Jordan and Egypt make an arbitrary divorce on the part of the husband a condition precedent to payment of compensation to wife, the amount of compensation varying from country to country, but not exceeding maintenance for three years, as in the case of Syria. Jordan and Egypt grant maintenance for 1 year and 2 years respectively. The point to note here is that in these statutory laws, no liability has been imposed upon men even in a case of arbitrary divorce, to provide maintenance to divorced women for an indefinite period till re-marriage. Only in Tunisia, if any material or moral injury is caused to either spouse as a result of divorce (not when the husband arbitrarily divorces his wife) an injured woman may receive an allowance, liable to revision upwards or downwards, for her lifetime or until she marries. These statutory laws are not

sources of Quranic jurisprudence and will therefore have no effect on the interpretation of Ayat 241.

Under the strict interpretation of the word *mata'a* all that can be given is three pieces of cloth sufficient for a divorced woman to pray. The maximum that can be given is half of the dower money fixed. But, of course, instances have been provided to us that Hazrat Hasan Bin Ali (R) gave his divorced wife 10,000 Dirhams in those days. It is our understanding that the Holy Quran has left the quantum of *mata'a* to the Godliness, sense of justice, equity and fairness on the part of the husband, since it is a voluntary payment.

Another strict interpretation is that Ayat 241 is related to only those women who have been described in Ayat 236 of Sura Al-Baqarah (2), because of the context in which Ayat 241 was revealed, as described earlier. It is argued that Ayat 241 is an elaboration of Ayat 236 and is therefore limited to those divorced women who are described in Ayat 236. The literal view (Tafsir Ibne Kasir, a disciple of Imam Shafi) is that the presentation of a suitable gift is obligatory in the case of all divorced women and not merely in the case of women referred to in Ayat 236 of Sura Al-Baqarah (2). The counter-argument is that if it is so, then the women who have been divorced before consummation but whose dower has been fixed will not only get half of the dower but also a suitable gift which is contrary to the provisions of Ayat 237 of Sura Al-Baqarah (2). To obviate this difficulty the Moroccan Law provides, "every husband shall have the obligation to provide *mata'a* for his divorcee if divorce proceeded from him, according

to his affluence and her means, except the women for whom a dower was specified and was divorced prior to consummation." We are not concerned with this controversy because in any view of the matter *mata'a* is a voluntary gift payable by the righteous. A righteous man will please Allah and if righteous men make a voluntary gift to all kinds of divorced women it is for Allah to consider whether they have acted righteously or not. Righteousness and *mata'a* go hand in hand.

We have been urged by some learned Advocates to view the re-interpretation of the Holy Quran from the angle of social justice. We would humbly suggest them to re-direct their focus on social justice from the Islamic point of view and ponder over the following observations made by the eminent jurist Gazi Shamsur Rahman in his previously-quoted book at p. 611, as follows :-

"ইসলামী আইনে প্রত্যেক বালেগ ও বুদ্ধিমান ব্যক্তিকে স্বতন্ত্র সত্তা হিসাবে স্বীকৃতি প্রদান করা হইয়াছে । তাহাদের দায়িত্ব ও কর্তব্য তাহারা নিজেরাই বহন ও পালন করিবে, সে নারী হউক অথবা পুরুষ । প্রত্যেকের ভরণপোষণের দায়িত্ব তাহার নিজের । কেবল ব্যতিক্রম স্বামী-স্ত্রীর ভরণপোষণের এবং অভিভাবক তাহার অধীনস্তদের ভরণপোষণের জন্য দায়ী, অধীনস্তগণ বালেগ ও আত্মনির্ভরশীল না হওয়া পর্যন্ত । এই সমাজে পিতা-মাতা যেমন বালেগ পুত্র-কন্যার ভরণপোষণ করিতে বাধ্য নহে, তেমন তালাকদাতা স্বামীও তাহার পরিত্যক্তা স্ত্রীর ভরণপোষণ করিতে বাধ্য নহে । বিবাহ বন্ধন যেমন নারী-পুরুষকে স্বামী-স্ত্রীতে পরিণত করিয়া তাহাদের মধ্যে পারস্পরিক দায়িত্ব ও কর্তব্যের সৃষ্টি করে, তেমনি তালাক বা বিবাহ-বিচ্ছেদ স্বামী-স্ত্রীর বন্ধন ছিন্ন করিয়া তাহাদেরকে পূর্বের অবস্থায় নিয়া যায় এবং তাহারা দুইজন সম্পর্কহীন স্বতন্ত্র ব্যক্তিতে পরিণত হয় এবং তাহাদের মধ্যকার দায়িত্ব ও কর্তব্যেরও পরিসমাপ্তি ঘটে । ....."

(The Islamic law recognises each adult and intelligent person as separate entities. They will carry and observe themselves their own responsibilities and duties, whether they be males or females. Each one is responsible for his/her maintenance. The only exceptions are the responsibilities of the husband to maintain his wife and those of the guardians to maintain their wards till they are adults and can maintain themselves. As in this society parents are not bound to maintain their adult sons and daughters, so

also a man divorcing his wife is not bound to maintain his repudiated wife. As a marriage bond converts a pair of man and woman into husband and wife and creates mutual responsibilities and duties towards each other, so also a talaq or severance of marriage ties breaks the bond between husband and wife and urges them back to their pre-marriage situation and the two turn into two separate persons having no mutual relationship with each other and there is an end to their mutual responsibilities and duties....."

After the second hearing of the appeal was concluded on 4-11-98 and we reserved the appeal for judgment we found in a daily newspaper "The Daily Star" on 5-11-98 in the editorial page under "Opinion" column an Article written by the learned author Judge of the impugned judgment entitled "Muslim law : Maintenance of a Divorced Woman". The learned author Judge, knowing full well that his judgment was subjudice under appeal and that the appeal was being heard in this Division, thought it fit and proper to justify the impugned judgment and to say that he understood that three objections were now being raised against it and after noting those objections he replied to the same. We leave it to the learned author-Judge himself to ponder whether a comment on a subjudice matter at a time when the matter was being heard by this Division and was kept reserved for judgment will not attract the mischief of contempt of Court as a direct interference with and influencing the judgment of this Court. He will also ponder whether such conduct is in keeping with judicial propriety. He will also ponder as to whether his judgment was a self contained one, or else why should it need supplementation ? The article itself is an admission that the impugned judgment is an incomplete and inadequate judgment which does not answer objections to the views

expressed in the impugned judgment. Further, if all the learned Judges of the High Court Division start following the example of the learned author-Judge, it should be a matter of concern to the learned author-Judge himself as to what will happen to judicial discipline in future. In our not-so-short experience as Judges and lawyers we have not ever found any learned Judge committing such act of indiscretion. It is our earnest hope that the learned Judge will desist from committing such an act in future.

In the result, the appeal is allowed without any order as to costs. The impugned judgment and order of the High Court Division are set aside.

J.

LATIFUR RAHMAN, J:- I am adding few lines in support of the main Judgment. The judgment of the High Court Division is devoid of any justifiable reasons, based on no sources of Islamic Law, such as, the Holy Quran, Sunnah, Ijma and Qiyas and is also against the pronounced opinion propounded by the Muslim jurists of great antiquity and high authority for the last fourteen hundred years.

The broad question that comes up for consideration in this appeal preferred by the former husband-appellant is, whether a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of Iddat for an indefinite period, namely, till she looses the status of a divorcee by remarrying another person.

The family court granted maintenance to the divorced wife for the period of Iddat, namely, three months at the rate of Tk.1000/- per month. On appeal the maintenance during the period of iddat of three months was maintained. In revision, the High Court Division, of course, awarded maintenance to the divorced wife till remarriage.

Before the High Court Division no one appeared on behalf of the present appellant to support the Rule. Even the divorced-respondent accepted the maintenance during the period of Iddat. After hearing the learned Advocate of the respondent, the learned Judges suo-moto took up the quention whether the divorced wife could claim maintenance beyond the period of Iddat. At the first place, this exercise of such an important matter should not have been made at all by the Judges as there was no argument on this point by any of the parties. Secondly, such an important matter should not have been considered by the learned Judges themselves to the prejudice of a party without any notice to the parties and being unaided by any help from any amicus curaie or from any authority on Islamic law. It seems that the learned Judges of the High Court Division primarily accepted the English version of the translation of Verse No.241 of Surah Baquara of Abdullah Yousuf Ali. Abdullah Yousuf Ali translated the meaning of "Mataaon bil-maaroff" in Verse No.241 of Surah Baquara as "maintenance should be provided on a reasonable scale". It appears that for arriving at a conclusion that a divorced woman is entitled to maintenance beyond the period of Iddat for an indefinite period till she remarries neither any Quaranic

injunction nor any guidance from the last fourteen hundred years by Muslim Jurists was sought for other than adopting the English translation of Abdullah Yousuf Ali. This exercise of such an important matter which touches at the fundamental of Islamic law ought to have been considered in the light of Quaranic injunctions and other sources of Islamic law.

The basic source of Islamic law is the Holy Quran, the divine book revealed to the Holy Prophet. The other sources are "Sunnah" which means the practice and the precedents of the Holy Prophet. As a source of law hadis is as binding as the principles of the Holy Quran. Ijma as a source of law has been established by agreement and consensus amongst highly qualified Muslim Scholars of antiquity. Qiyas is the last source of Islamic Law. This is reasoning by analogy. In comparison with other three sources of Islamic Law it is less important. If there is no guideline from the Holy Quran then one depends upon the usage of the Prophet. If that also fails, then one should follow Ijma and finally his own reasons. It is very surprising that in the judgment of the High Court Division none of the sources of Islamic Law was taken note of, but a literal translation was adopted of verse No.241 of Surah Baquara only and on that basis such a great issue of Islamic Law which governed the field for the last fourteen hundred years was discarded. It is really strange that the learned Judges even did not care to take note of correct translation of the Arabic phraseology from any recognized Arabic dictionary. Abdullah Yousuf Ali translated the word "Mattaa" which appears in the Holy Quran, Verse 241 as

"maintenance", whereas the usual word for maintenance is "Nafaqa". Famous Arabic dictionary such as, 'Al-Manjid' and 'Al Magrib' had translated "Mattaa" as wearing clothes(minimum one set) house-hold stuffs, small capital and ordinary goods given to women after divorce. Thus it appears that inner meaning of "Mattaa" has not been correctly derived from any Arabic dictionary and rightly appreciated by the learned Judges who wrongly arrived at the conclusion that in the context of Verse No.241 of Surah Baquara it means maintenance. Whereas it is not maintenance at all in Arabic meaning. The learned Judges of the High Court Division did not give any attention to the real translation of the two Arabic words "Mattaa" and "Nafaqa" and wrongly held that a divorced woman is entitled to maintenance till she remarries. The Bengali translation of verse Nos. 241 and 242 of Surah Baquara as translated by King Fahad Quranic Publishing Project, Medina, reads as follows:-

আর তালাক প্রাপ্ত নারীদের জন্য প্রচলিত নিয়ম অনুযায়ী খরচ দেওয়া পরহেজগারদের উপর কর্তব্য। এইভাবেই আল্লাহ তায়ালা তোমাদের জন্য স্বীয় নির্দেশ বর্ননা করেন যেহেতু তোমরা তা বুঝতে পারো।

These verses as quoted above only reflect that Allah has given direction to righteous people ~~(gyÕvwKg)~~ and this has nothing to do with the maintenance of a divorced wife during the period of Iddat.

In Verse No.241 of Surah Baquara, the word '~~gyZvj vkvZ~~ তালাকপ্রাপ্তাকে' is very significant which indicates "সদ্য তালাক প্রাপ্তা মহিলারা"। Reading Verse 241 along with the preceding Verses of Surah Baquara, I understand of giving 'Mattaa" to a divorced woman who

has been divorced immediately/recently and this has got nothing to do with the divorced woman whose period of Iddat has not yet been over. As I understand the term 'Mattaa' from Arabic translation, it means certain benefits, privileges and gifts in any form by whatsoever name you call is incumbent or the 'righteous' as enjoined by Allah in the Holy Quran. 'Mattaa' is given once at a time at the time of divorce.

The learned Judges of the High Court Division who are Muslims discarded the decision of the Privy Council in the case of Aga Mohammed Jaffar Bindanim Vs. Koolsoom Beebee, I.L.R. 25 Calcutta-449 on the ground, inter alia, that the learned Judges were non-Muslims; that Article 8(1A) of the Constitution of Bangladesh speaks of absolute trust and faith in Almighty Allah which shall be the basis of all actions and that Second Surah Baquara, Verse 121 indicates continuous study of the Quran which is in conformity with the dynamic, progressive and universal character of Islam. It is indeed surprising and shocking to note that the Muslim Judges of today deviated and in reality failed to understand and locate the sources of Muslim Law and gave a wrong interpretation of maintenance of a divorced woman according to their whims and caprice without following any pronouncements of Muslim scholars of the past. As a matter of fact, in the Privy Council decision the British Judges decided the law on the basis of the pronouncements made by the Muslim Jurists, whereas the Muslim Judges of today gave their independent opinion by disregarding the Muslim Jurists of the past. This judgment is wholly untenable in accordance with the established principles

of Muslim law. Thus, it appears that the reasonings on which the dictum of the Privy Council was discarded are fallacious. The Judgment of the High Court Division is full of contradictions and anomalies as the learned Judges in one breath said that no one knows the hidden meaning of the revealed book except Allah and at the same time they understood the inner meaning and only accepted the English translation of the verse of the Holy Quaran by Abdullah Yousuf Ali and gave their own interpretations by ignoring the interpretation given by the recognized Islamic scholars of the past. As a matter of fact I do not find any basis of the learned Judges' interpretation, other than the only English translation of Abdullah Yousuf Ali. Can it be the basis of such an important interpretation of a verse of the Holy Quran?

Under the Mohammadan Law marriage is a civil contract and not a sacrament. The rights and obligations are created immediately on the contract of marriage. Even after divorce, namely, cessation of marriage it is incumbent for the woman whose marriage is dissolved by divorce to wait for a certain period which is called "Iddat", a period of waiting, during which they will abstain from marrying another person. This abstinence is imposed to ascertain as to whether she is pregnant by the former husband so as to avoid confusion to parentage after divorce. The duration of Iddat of the woman is subject to menstruation in three courses. When marriage is dissolved by death, the duration of Iddat is 4 months and 10 days. The waiting period for a pregnant woman is 4 months and 10 days or until delivery which ever period is longer. Thus during this period of Iddat under the

law, a divorced woman is entitled to maintenance as she is precluded from taking a second husband.

In the Holy Quran there is no clear direction for payment of maintenance to a divorced woman. Verse 228 of Surah Baquara translated in Bengali reads as follows:-

" এবং তালাকপ্রাপ্তগন নিজেদের জন্য তিন শাতু পর্যন্ত অপেক্ষা করবে" ।

This is a direction of Allah as contained in the Holy Quran. Iddat is a period of waiting. After divorce the marriage tie between the husband and wife is dissolved and after the dissolution of marriage there remains no obligation between the parties outside the contract of marriage, but due to the period of Iddat outside the contract of marriage an obligation for payment of maintenance has been created according to Muslim Law. I have already reiterated earlier that in verse 241 of Surah Baquara the word "মুত্তাল্লাকা" means a woman who got immediate divorce and this has no reference to the period of 'Iddat'. The learned Judges of the High Court Division, of course, took note of Verse 228 of Surah Baquara but did not consider verse 228 along with verse 241 of Surah Baquara. Verse "Al-Talaque" has been revealed by Allah 2/3 years after verse Baquara. This verse was also not taken note of by the High Court Division. The learned Judges did not care to read other verses in the Holy Quran to arrive at a correct interpretation of giving maintenance to a divorced woman after the expiry of the period of 'Iddat".

It is not proper and advisable to interpret one verse in a disjointed manner and to ascertain the real meaning of one verse only without reference to other verses on the same subject.

There are several judicial pronouncements that after divorce the wife is entitled to maintenance during the period of Iddat. In the case of Rafiza Khatoon Vs. Omar Gani and others, 9 DLR(1957) 455 a learned Single Judge of the High Court of Dhaka held "in this case she is only entitled to three months maintenance under the Mohammadan Law for the 'Iddat' period". In the case of Most. Marium Vs. Kadir Box, A.I.R. 1929(Oudh) 527, Stuart, Chief Justice held that "Marium is entitled to maintenance during the period of Iddat and not after that period was expired. She is thus entitled to the maintenance for three months". In that decision the English Judge took note of several decisions of British-India wherein it was held that a divorce wife is entitled to maintenance during the period of Iddat. Reference may be made to the decision, the petition of Din Mohammad, ILR, Allahabad Series(1883) Volume(V)-226 wherein Mahmood,J. has quoted from Hedaya where Iddat has been defined as "the term of probation incumbent upon a woman in consequence of the dissolution of marriage after carnal connexion; the most approved definition of iddat is the term by the completion of which a new marriage is rendered lawful".

The learned and illustrious Judge had also quoted Hedaya wherein it has been clearly stated as follows:-

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

has also quoted that all Muslim Scholars, Jurists and Shahabis were unanimous on this point that a divorced woman is entitled to maintenance during the period of Iddat only. If any one gives a contrary opinion today that would be against Ijma and would not be accepted in accordance with Muslim law and Shariat. He has further quoted that Imam Abu Hanifa, Imam Abu Yousuf and Imam Mohammad were of the view that pregnant woman is entitled to maintenance till she delivers the child and a divorced woman is only entitled to maintenance during the period of "Iddat".

Mrs. Rabeya Bhuiyan, learned Advocate appearing for the appellant placed before us some changes in Islamic law in Malaysia, Egypt and other Muslim countries. In Malaysia, where Shafi law is followed, a divorced wife is entitled to "mataa" in addition to iddat maintenance and mahr. The amount awarded under this head are not large, but the Malaysian wife is also entitled to a division of matrimonial property on divorce. The latter derives this benefit from Malaysian customary law which has been incorporated into Malaysian Muslim Law.

Mrs.Rabeya Bhuiyan has also pointed out before us the legislations on this point in other Muslim countries such as Morocco, Iraq, Turkey,Libya, Tunisia, Syria and Algeria. Through rational and progressive interpretation of Islamic principles maintenance has been awarded to poor Muslim women who are divorced and deserted. Under Mohammadan Law maintenance during the period of Iddat is incumbent upon a former husband. A divorced wife can legally and lawfully realise maintenance for the period of Iddat. But the right to "Mattaa" loosely used as

maintenance beyond the period of Iddat may be statutorily provided for the poorer women who are destitute and are suffering in the hand of unjust and cruel husbands. It can be argued that for giving benefits to Muslim women laws may be made as has been made in several Muslim countries and the beneficial legislation will not be against Muslim personal law and will be in consonance with the ideas of justice, tolerance and compassion that the Holy Quran enjoins upon all righteous and true Muslims.

In her written submission, Mrs.Rabeya Bhuiyan has frankly admitted that the decision of the High Court Division appears to be too wide, but as in our country many women are divorced by their husbands without any fault of their part some legislation may be made for the good of Muslim women community in Bangladesh. According to her, many divorced women in our country suffer as they have no economic and educational background to support them. She urges this Division to make observation to provide for a fair, just and reasonable legislation to remove the extreme hardship of divorced women in our society. Such statutory recognition of benefits and privileges for a divorced woman will not be in conflict with Muslim Law.

J.

MOHAMMAD ABDUR ROUF, J. :- I have had the privilege of going through the judgment proposed to have been delivered by my learned brothers. I fully agree with the reasonings and the conclusion drawn by them in alowing the appeal. I do not propose to add anything more.

J.

BIMALENDU BIKASH ROY CHOWDHURY, J :- I have had the advantage of reading the erudite judgments of my learned brothers. I entirely agree with their reasoning and with their conclusions on the general or secular aspects of the case but would like to add a further ground in support. Plaintiff No.1 Shamsun Nahar Begum never appealed against the decree of the original court nor did she take any appeal therefrom. She did not also prefer any revision. In such circumstances the learned Judges of the High Court Division had no jurisdiction to give her any further relief beyond what was granted by the first two courts below.

The question of entitlement of a divorcée to maintenance till her remarriage or death under Verse 241 of Sura Al-Baqarah is novel and to my mind difficult. It is not essentially necessary to decide it in this appeal. I would therefore refrain from expressing any opinion thereon.

Accordingly I too would allow the appeal.

J.

THE 3RD DECEMBER, 1998
APPROVED FOR REPORTING.