IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

WEDNESDAY, THE 8TH DAY OF MARCH 2023 / 17TH PHALGUNA, 1944

CRL.MC NO. 6659 OF 2022

AGAINST THE ORDER DATED 04.08.2022 IN CMP NO.92/2022

OF FAMILY COURT, ATTINGAL

PETITIONER/RESPONDENT:

BY ADV V PHILIP MATHEWS

RESPONDENTS/STATE & PETITIONER:

1 **STATE OF KERALA**
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM., PIN - 682031

BY ADV M.DINESH

SRI SAIGI JACOB PALATTY-SR.GOVERNMENT PLEADER

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 08.03.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

(CR)

ALEXANDER THOMAS & ZIYAD RAHMAN A.A, JJ.

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Crl.MC No.6659 of 2022

(arising out of the order dated 04.08.2022 in CMP No.92/2022 on the file of the Family Court, Attingal)

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Dated this the 8th day of March, 2023

O R D E R

ALEXANDER THOMAS, J.

The case set up in the above Criminal Miscellaneous case, filed under Sec.482 of the Code of Criminal Procedure 1973, is to the effect that R-2 herein is the daughter of the petitioner herein and R2 is now aged 20 years and that due to family disputes, the petitioner herein and his wife (mother of R2) are living apart. Further that, R-2 has filed Annexure-A Memorandum of Maintenance Claim, as MC No.154/2021 before the Family Court, Attingal, under Sec.125 of Cr.P.C, in which the petitioner herein has been arrayed as the sole respondent therein and the claim therein is that the Family Court may order that the respondent therein (petitioner herein) shall pay maintenance to the applicant therein (R-2 herein) at the rate of Rs.25,000/- per month. Further, the interim relief in Annexure-A

petition is for an order from the Family Court, so as to direct the petitioner herein (respondent therein) to pay interim maintenance at the rate of Rs.25,000/- per month to the applicant therein (R-2 herein). The Family Court has passed the impugned Annexure-D interim order dated 04.08.2022 in CMP No.92/2022 in MC No.154/2021, directing that, considering the facts and circumstances disclosed in this petition as well as the age of the parties and the financial capacity of the parties and the liability of the respondent therein (petitioner herein), the petitioner herein (respondent therein) shall pay interim maintenance at the rate of Rs.4000/- per month to the applicant therein (R2 herein), which shall be paid on the 10th of every month.

2. Being aggrieved by the abovesaid proceedings, the petitioner herein (respondent therein) has preferred the instant Criminal Miscellaneous case, under Sec.482 of CrPC, seeking for quashment of the impugned Annexure-D interim order dated 04.08.2022 etc.

3. Heard Sri.V.Philip Mathews, learned counsel appearing for the petitioner, Sri.M.Dinesh, learned counsel appearing for R-2

herein and Sri.Saigi Jacob Palatty, learned Prosecutor appearing for R-1 State.

4. The above Crl.MC came up for consideration before the learned Single Judge of this Court on 28.09.2022, on which day this case was admitted and an interim order dated 28.09.2022 was passed in Crl.MA No.1/2022 in this Crl.MC, ordering that the execution of the impugned order in MC No.154/2021 on the file of the Family Court, Attingal will stand stayed till 10.11.2022. Later, the learned Single Judge, in exercise of the powers under the proviso to Sec.3 of the Kerala High Court Act, has passed an order dated 06.12.2022, referring this case for determination by a Division Bench, in view of the apparent conflict of views of two Division Bench decisions. It is stated in the said reference order that the petitioner has contended that a learned Single Judge of this Court, in the decision in **Mohammed** v. **Kunhayisha** [2003 (3) KLT 106], has held that a major Muslim unmarried daughter is not entitled to claim maintenance from her parents unless her invalidity to maintain herself is attributable to physical or mental abnormality or injury, as conceived in Section 125(1)(c) of the CrPC and that mere status as an

unmarried daughter will not entitle such an unmarried major daughter to claim maintenance from her father, in terms of Sec.125 of the CrPC. Further, it is also noted in the reference order that a Division Bench of this Court, in the decision in **Cholamarakkar & Anr.** v. **Pathummamma @ Pathumma & Anr.** [2008 (3) KHC 973 (DB)], has also upheld the abovesaid legal position, that a major Muslim Unmarried daughter, can claim maintenance from her father in terms of Sec.125 of the Cr.PC, only if her inability to maintain herself is attributable to physical or mental abnormality or injury, as conceived in Clause c of subsection 1 of Sec.125 of the CrPC. Further, it is noted in the reference order that, per contra, counsel for the respondent herein (claimant) has placed reliance on another Division Bench decision of this Court in the decision, **Yousaf v. Rubeena** [(2010 (4) KLT 1 (DB)] (rendered as per judgment dated 08.09.2010 in Mat. Appeal No.653/2010), that a Muslim father, who has sufficient means to pay maintenance, has the liability under Muslim personal law to pay maintenance to his major unmarried daughter when she is not able to maintain herself and that the statutory provisions in Sec.125 of the Cr.PC, which is a piece of secular law,

applicable to all communities, would not, in any manner, extinguish, alter, modify or obliterate the liability under the Muslim Personal Law. Accordingly, the learned Single Judge, in the afore reference order rendered on 06.12.2022 in this case, has opined that apparently there may be conflict in the abovesaid two decisions of the Division Bench of this Court in **Cholamarakkar's case** supra [2008 (3) KHC 973 (DB)] as well as in **Yousaf's case** supra [(2010 (4) KLT 1 (DB)]. In that view of the matter, the learned Single Judge has ordered, in exercise of the powers under the proviso to Sec.3 of the Kerala High Court Act, that this case be referred to a Division Bench of this Court for determination. It is on this basis that the above Criminal Miscellaneous case has come up for consideration before us.

5. We have heard both sides *in extenso* and have considered the rival submissions as well as the pleadings and materials on record.

6. One of the submissions made by Sri.V.Philip Mathews, learned counsel appearing for the petitioner herein, is to the effect that the decision of the Division Bench of this Court in **Cholamarakkar's**

case supra [(2008 (3) KHC 973 (DB)] was rendered in the factual context of a case regarding the applicability or otherwise of Sec.125 of the CrPC, in the case of a claim put forward by a major Muslim unmarried daughter, whose inability to claim maintenance was not on account of physical or mental abnormality or injury, as conceived in Clause c of subsection 1 of Sec.125 CrPC. It is pointed out that the said decision in **Cholamarakkar's case supra** was concerned mainly with a claim of such a Muslim major unmarried daughter preferred under Sec.125 of the Cr.PC. Further, it is pointed out that, whereas the case in **Yousaf's case** supra**,** [2010 (4) KLT 1) (DB)] was not a claim under Sec.125 of the CrPC, as can be seen from a mere reading of paragraph 10 thereof and that though, certain aspects of Sec.125 of the CrPC are discussed therein, the claim was essentially before the Family Court, based on Muslim Personal law and as to whether a Muslim father has liability to pay maintenance to his major unmarried daughter, going by the stipulations in the Muslim personal law and that this aspect of the matter is all the more clear from a reading of para 4 of the said decision. On this basis, the counsel for the petitioner would contend that, in substance, there is no conflict in

the views rendered by the two Division Bench decisions, inasmuch as the former case is concerning a claim under Sec.125 of the Cr.PC, wherein it is well settled that a major Muslim unmarried daughter can claim maintenance from her father under Sec.125 of the CrPC, only if her invalidity or inability to maintain herself is attributable to physical or mental abnormality or injury, as conceived under Sec.125(1)(c) of the Cr.PC. Whereas, the latter decision in **Yousaf's case** supra was primarily concerning the applicability of a claim of such a major Muslim unmarried daughter, going by the stipulations in Muslim personal law.

7. We will now deal with the major case laws on the abovesaid aspects.

Noor Saba Khatoon v. Muhammed Quasim [(1997) 6 SCC 233] (Noor Saba's case, for short).

8. The main point considered in the aforesaid Two-Judge Bench decision of the Apex Court in **Noor Saba's case** supra was relating to the right of minor Muslim children, staying with their divorced mother, to claim maintenance under Sec.125 Cr.PC from their Muslim father, having sufficient means, till they attain majority or in

the case of females until they get married and as to whether such a right is, in any manner, affected by Sec.3(1)(b) of the Muslim Women (Protection of Rights on Divorce), Act, 1986. The Apex Court held that the right of such minor Muslim children, to claim maintenance from their father under Sec.125 of the CrPC, is not, in any manner, affected by Sec.3(1)(b) of the Muslim Women (Protection of Rights on Divorce), Act, 1986 and the said provision in the 1986 Act provides additional maintenance to the divorced mother for maintaining her infant child for a fosterage period of two years from the date of birth of the child and the said provision is independent of the right of the minor children, who are unable to maintain themselves, to seek maintenance under Sec.125 of the CrPC from their father. It was held that the said right of the minor children was absolute under Sec.125 of CrPC as well as under Muslim Personal law. It was also held therein that the benefit of Sec.125 of the CrPC is available irrespective of religion and it will be unreasonable, unfair and inequitable to deny the said benefit of maintenance to minor children only on the ground of their being born of Muslim parents etc. It has been thus conclusively held, in para 8 thereof, that the provisions in Sec.3(1) of

the aforesaid 1986 Act has nothing to do with the independent right and entitlement of minor Muslim children to be maintained by their Muslim father in terms of Sec.125 of the CrPC and that the provisions of Sec.125 of CrPC and Sec.3 (1)(b) of the 1986 Act are two provisions which apply and cover different situations and that there is no conflict, much less a real one, between the two etc. It has already been held by a learned Single Judge of this Court, in the case in **Muhammed v. Kunhayisha** (2003) 3 KLT 106], that the aforesaid dictum laid down by the decision of the Apex Court in **Noor Saba's case** supra [(1997) 6 SCC 233], cannot, in any manner, be made applicable to decide the issue of the liability of a Muslim father to pay maintenance to his major Muslim unmarried daughter and that the said issue has to be decided independently and *de hors* the dictum laid down by the Apex Court in **Noor Saba's case** supra. The abovesaid view, rendered in the afore Single Bench verdict of this Court in **Muhammed's case** supra (2003 (3) KLT 106), has been reiterated by a Division Bench of this Court, in the case in **Cholamarakkar and Anr. v. Pathumma** [(2008) 3 KHC 97 (DB)]. Hence, the decision of the Apex Court in **Noor Saba's case**

supra may not be of any aid to decide the present issue arising in this case, regarding the liability of a Muslim father to pay maintenance to his major Muslim unmarried daughter.

Muhammed vs. Kunhaysia (2003 (3) KLT 106) (Muhammed's case, for short) & **Cholamarakkar and Anr. vs. Pathummamma @ Pathumma & Anr. 2008 (3) KHC 973 (DB)**. (Cholamarakkar's case, for short).

9. The factual claims in the aforesaid Single Bench verdict in **Muhammed's case** supra as well as in the Division Bench decision in **Cholamarakkar's case** supra pertains to the claim of a major unmarried Muslim daughter for maintenance, raised against her father, by invoking the provisions contained in Sec.125 of the CrPC. In those decisions, this Court has held that, in view of the restrictions contained in Clause (c) of sub section 1 of Sec.125 of the CrPC, a major Muslim unmarried daughter can claim maintenance against her Muslim father under Sec.125 of the Cr.PC only if her inability to maintain herself is attributable to a physical or mental abnormality or injury and not otherwise. As mentioned herein above, it has been held by this Court in those decisions that the ratio decidendi laid down by

the Apex Court in **Noor Saba's case** supra, [(1997) 6 SCC 233], cannot be of any aid to decide the abovesaid issue relating to the entitlement of a major Muslim unmarried daughter to seek maintenance against her father, under Sec.125 of CrPC inasmuch as **Noor Saba's case** supra was mainly concerned with the right of minor Muslim children to claim maintenance under Sec.125 of CrPC, against their Muslim father and as to whether such entitlement and right under Sec.125 of Cr.PC is, in any manner, restricted or obliterated by the provisions contained in Sec.3(1)(b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 etc. We are in conformity with the said views rendered by this Court in the above decisions in **Muhammed's case** supra and **Cholamarakkar's case** supra**.**

10. Sec.125 of the CrPC reads as follows:

> ***"Sec.125. Order for maintenance of wives, children and parents.*** (1) *If any person having sufficient means neglects or refuses to maintain-*
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> (a) *his wife, unable to maintain herself, or*
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> (b) *his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or*
>
> (c) *his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or*
>
> (d) *his father or mother, unable to maintain himself or herself,*
>
> *a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly*

allowance for the maintenance of his wife or such child, father or mother, at such monthly rate [xxxxx], as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

[Provided further that a Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time, direct.

Provided also that an application for the monthly allowance for the interim maintenance and expenses for proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.]

***Explanation**.- For the purposes of this Chapter,-*

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

(b) " wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

[(2) Any such allowance for the maintenance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.]

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

> *Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:*
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> *Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.*
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> *Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.*
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> *(4) No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.*
>
> *(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."*

11. The Division Bench of this Court in **Cholamarakkar's case** supra has considered the scope and meaning of the word 'injury' appearing in Sec.125 (1)(c) of the CrPC and has referred to the provisions contained in Sec.44 of the IPC, which defines 'injury', as can be seen from a reading of paragraph no.6 of **Cholamarakkar's case** supra. It may be pertinent to refer to paragraph nos. 6,7,8 & 10 of the Division Bench decision in **Cholamarakkar's case** supra which reads as follows:

"6. The word 'injury' is defined under S.44 of the Indian Penal Code, which reads as follows:

*"**S.44: "Injury".-**The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property".*

'Injury' has been defined in the Blacks Law Dictionary (5th Edition) as "any wrong or damage done to another, either in his person, rights, reputation or property; the invasion of any legally protected interest of another". It is the case of the petitioners that dispute on the paternity of the second petitioner by the respondent has affected the reputation of the child and hence she could not get any marriage alliance and she is still remains unmarried. It is also indirectly pleaded that the child is hence unable to maintain herself. Placing heavy reliance on the observations in Noor Saba Khatoon v. Mohammed Quasim. (1997 (2) KLT 363 (SC) = AIR 1997 SC 3280), it is submitted that under S.125 Cr.P.C, an unmarried female child is entitled to get maintenance. The observation referred to above appears in paragraph 11 of the judgment of the Supreme Court and the same is extracted below.

"Thus our answer to the question posed in the earlier part of the opinion is that the children of Muslim parents are entitled to claim maintenance under S.125 Cr.P.C. for the period till they attain majority or are able to maintain themselves, whichever is earlier, and In case of females, till they get married, and this right is not restricted, affected or controlled by divorcee wife's right to claim maintenance for maintaining the infant child/children in her custody for a period of two years from the date of birth of the child concerned under S. 3(1)(b) of the 1986 Act. In other words S.3(1)(b) of the 1986 Act does not in any away affect the rights of the minor children of divorced Muslim parents to claim maintenance from their father under S.125 Cr.P.C. till they attain majority or are able to maintain themselves or in the case of females, till they are married".

(emphasis placed by counsel on the words underlined).

7. There cannot be any dispute that a legitimate or illegitimate child, who is not a married daughter, who is suffering from any physical or mental abnormality or injury and thus unable to maintain itself, is entitled to maintenance from the parent, in case the parent is having sufficient means. The loss of reputation is mental injury causing adverse impact on the capacity of a child to maintain itself. But the further question is even without any such mental injury, whether the daughter who is unable to maintain itself and who remains unmarried is entitled to claim maintenance based on the observation of the Supreme Court in Noor Saba Khatoon's case. In order to analyze the above position, it will be fruitful to refer to the position regarding maintenance in the old Code as appearing under S.488. To the extent relevant, S.488(1) Cr.P.C. reads as follows:

"If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs".

Whether legitimate or illegitimate, if a child is unable to maintain itself it was entitled to get maintenance in case the parent is having sufficient means, under the 1898 Code. In Nanak Chand v. mChandra Kishore Aggarwal & Ors. (1969 KLT SN 14 (C.No.27) SC = AIR 1970 SC 446) it has been held that the 'child' under S.488 of the old Code does not mean a minor son or daughter. It is used in conjunction with parentage and the expression is not to be understood in terms of the age. Hence the children even after attaining majority, if unable to maintain themselves, were entitled to claim maintenance. When the Code was amended in 1973, the statute itself took note of the fate of children who are unable to maintain themselves even after attaining majority and introduced a provision in

express terms under S.125(1)(c). However, the entitlement under the 1973 Code is subject to certain restrictions in the case of those who attained majority: (1) the child is not a married daughter; (2) the child is unable to maintain itself on account of physical or mental abnormality or injury. Thus the physical or mental abnormality or injury leading to the inability to maintain itself is a precondition for a child who has attained majority and also in the case of an unmarried daughter to claim maintenance from the parents.

8. In Noor Saba Khatoon's case, the Supreme Court considered the liability of a Muslim father to pay maintenance to his children under S.3(1)(b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986vis-a-vis the entitlement to claim maintenance under S.125 Cr.P.C. The contention was that liability of a Muslim father was only to provide maintenance for a period of two years from the birth of the children. It is in that context, the Supreme Court held that beyond the age of two years also, the children born to Muslim parents who are unable to maintain themselves are entitled to claim maintenance under S.125 Cr.P.C. The issue as to the right to claim maintenance after attaining majority but before marriage of female children did not arise before the court and hence not considered also. We find that the question was considered by a Single Bench of this Court in Muhammed v. Kunhayisha (2003 (3) KLT 106) wherein it has been rightly held as follows:

"The language of S.125, according to me, does not at all permit a construction that the status of a major daughter as an unmarried person can by itself be construed as "physical or mental abnormality or injury" sufficient to bring her case within the sweep of S.125(c).

Whatever be the religion of the parties, the language of the Statute does not permit an unmarried major daughter to be brought within the purview of S.125(c) on that sole reason/ground of her being an unmarried daughter. She has to prove further that she is unable to maintain herself and such inability to maintain herself is attributable to physical or

mental abnormality or injury, if any, which she is afflicted with. If the intention of the Legislature were to grant maintenance to unmarried female children, solely on the ground that they are unmarried female children, nothing prevented the Legislature from making express provisions imposing liability on the parents to provide maintenance to their female children till they are married. Their disability - if that be one, of remaining unmarried alone was definitely not reckoned by the Legislature as sufficient to entitle them claim maintenance under S.125 Cr.P.C. That evidently is the reason why the Parliament which must be presumed to have been conscious of the rights of the unmarried daughters under the Hindu and Mohammedan personal law (statutory and customary) to claim maintenance from their parents till they are married, did not choose to confer such right on them under S.125 Cr.P.C. Under S.125 Cr.P.C a major unmarried daughter is not entitled to claim maintenance from her parents unless her inability to maintain herself is attributable to her physical or mental abnormality or injury and that her mere status as an unmarried daughter whatever be her religion does not entitle her to claim maintenance under S.125 Cr.P.C."

However, the said decision does not deal with the evolution of S.125. As we have already discussed above, placing reliance on Nanak Chand's case, while enacting 1973 Cr.P.C, a deviation is consciously made by the Parliament from 1898 Code. Coming to 1973 Code, unless the child satisfies the precondition of the inability being on account of any physical or mental abnormality or injury, the child who has attained majority and an unmarried daughter are not entitled to get maintenance. The married daughter has been expressly excluded also from the claim for maintenance from parents; it is the husband who is to maintain her. Therefore, the observation in Noor Saba Khatoon's case regarding the entitlement for maintenance to unmarried daughters of a Muslim parent will not help the petitioners. That observation regarding entitlement of the females for maintenance till they are married

can only be read and understood as entitlement for maintenance in the case of female children till they are married, in case they are unable to maintain themselves on account of any physical or mental abnormality or injury.

10. As we have already held above, S.125 Cr.P.C gives an unambiguous picture regarding entitlement of unmarried daughters restricting the scope of inability to maintain themselves on account only of mental or physical abnormality or injury. Placing reliance on the decision of the Supreme Court in Lt. Col. P.R.Chaudhary v. Municipal Corporation of Delhi ((2000) 4 SCC 577), it is further contended that interpretation of law even by way of any obiter by the Supreme Court cannot be brushed aside on the mere assertion that it does not confirm to statutory provisions. The observation of the Supreme Court in Noor Saba Khatoon's case regarding entitlement for maintenance to unmarried daughters is not an interpretation of law by the Supreme Court on the scope and ambit of S.125 Cr.P.C. The Supreme Court only considered the entitlement of Muslim children who are unable to maintain themselves beyond the age of two years. In that context, laying down the law that the liability to pay maintenance under the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986 is not limited to two years of age, the Supreme Court held that in the case of children, they are entitled to claim maintenance till they attain majority in case they are unable to maintain themselves and in the case of females, till they are married meaning thereby that in the case of those married daughters, the liability is only of their husbands and in the case of those unmarried, the parents are liable till they are married if such unmarried children are unable to maintain themselves on account of any physical or mental abnormality or injury. The observation made by the Apex Court is thus not the interpretation of law by the Supreme Court on the point. Any observation made by the Supreme Court interpreting the legal provision and laying down the legal position is

> *certainly binding on all courts in India. But a general observation made without reference to the statutory provision has no binding value. It will be profitable to refer to the decision of the Supreme Court itself on such observations, in Director of Settlements A.P. & Ors. v. M.R. Apparao and another (2003 (1) KLT SN 35 (C.No.48) SC = (2002) 4 SCC 638). The relevant portion as appearing at para 7 of the judgment reads as follows:*
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> *"A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. An"obiter dictum" as distinguished from a ratio decidendi is an observation by the Court on a legal question suggested in a case before it but not arising in such manner as to require a decision, Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Art. 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case".*
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> *In the instant case, the entitlement of an unmarried daughter after attaining the age of majority and belonging to Muslim community was not an issue either raised or decided by the court and hence the observation under reference has no authority as a binding precedent."*

12. It has thus been held by the Division Bench of this Court in **Cholamarakkar's case** supra that the physical or mental abnormality or injury, leading to an inability to maintain herself, is a pre-condition for a child who has attained majority and also in the case of an unmarried daughter to claim maintenance from the

parents.

13. After hearing both sides, we are in concurrence with the abovesaid reasoning given by the Division Bench of this Court in **Cholamarakkar's case** supra**,** that the pre-conditions conceived in Sec.125(1)(c) of the CrPC will have to be fulfilled, in order to enable a major unmarried Muslim daughter to claim maintenance from her father. However, it has to be crucially noted herein that both these decision in **Muhammed's case** supra as well as in **Cholamarakkar's case** supra**,** has not, in any manner, considered the impact of the provisions contained in the Muslim Personal Law, regarding the entitlement of a major Muslim unmarried daughter to claim maintenance from her father.

State of Haryana & Others v. Smt. Santra [(2000) 5 SCC 182] (Santra's case for short).

14. It has been interalia held by the Apex Court in paragraph 40 of the aforesaid decision in **Santra's case** [(2000) 5 SCC 182], (page 196) that under Muhammedan Law, a father is bound to maintain his sons, until they have obtained the age of puberty and is also bound to maintain his daughters, until they are married etc. It

may be pertinent to refer to paragraph 40 of **Santra's case** supra [(2000 5 SCC 182], p.196, which reads as follows:

> *"40, Similarly, under the Mohammedan law, a father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. [See: Mulla's Principles of Mohammedan Law (19th Edn.), p. 300.] But the statutory liability to maintain the children would not operate as a bar in claiming damages on account of of medical negligence in not carrying out the sterilisation operation with due care and responsibility. The two situations are based on two different principles. The statutory as well as personal liability of the parents to maintain their children arises on account of the principles that if a person has begotten a child, he is bound to maintain that child. Claim for damages, on the contrary, is based on the principle that if a person has committed a civil wrong, he must pay compensation by way of damages to the person wronged."*

Jagdish Jugtawat v. Manju Lata & Ors. [(2002 5 SCC 422] (**Jagdish Jugtawat's,** case for short).

15. The said case concerned a claim made by a Muslim mother on behalf of her as well as her minor unmarried daughter under Sec.125 of the CrPC, in which her husband (father of the child) was respondent therein. The Family Court, by order dated 22.07.2000 granted maintenance @ Rs.500/- per month. The husband filed a Revision Petition before the High Court, assailing the order of the Family Court, on the ground that the daughter was

entitled for maintenance only till she attains majority and not thereafter. Considering the said objection, the learned Single Judge of the High Court accepted the legal position that under Sec.125 of the CrPC, a minor daughter is entitled to claim maintenance from her parents only till she attains majority, but declined to interfere with the order passed by the Family Court ,taking cue from Sec.20(3) of the Hindu Adoptions and Maintenance Act, 1956, under which the right of maintenance is given to a minor daughter till her marriage. The learned Single Judge held that the Court is not inclined to interfere with the order, in order to avoid multiplicity of proceedings, as the daughter is otherwise entitled to claim maintenance under the Hindu Adoptions and Maintenance Act, even after she crosses majority and so long as she is unmarried and not able to maintain herself. The High Court specifically opined that the impugned order, not in favour of the father, does not result in miscarriage of justice and on the other hand interfering with the impugned order would create great inconvenience to the daughter, as she would be forced to file another petition under Sec.20(3) of the Hindu Adoptions and Maintenance and Act, 1956 for maintenance and that in order to avoid

multiplicity of litigations, the impugned order does not warrant interference. The abovesaid verdict of the High Court was impugned before the Apex Court, which resulted in the aforesaid verdict in **Jagdish Jugtawat's case** supra **[**(2002 (5) SCC 422)]. In the said decision, the 3 Judge Bench of the Apex Court agreed with the reasoning of the High Court, that the daughter is entitled for maintenance under Sec.125 of the CrPC only till she attains majority. However, the Apex Court, in paragraph no.4 of the said decision, has held that the daughter is entitled for maintenance from her parents even after attaining majority till her marriage, which is statutorily embodied in Sec.20(3) of the Hindu Adoptions and Maintenance Act and that no interference is called for with the view taken by the learned Single Judge of the High Court in not interfering with the impugned order therein, so as to avoid multiplicity of litigations. Sec.20 of the Hindu Adoptions and Maintenance Act, 1956 provides as follows:

> *"Sec.20. Maintenance of children and aged parents.—(1) Subject to the provisions of this section a Hindu is bound, during his or her life-time, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.*
>
> *(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as*

> *the child is a minor.*
>
> *(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property. Explanation.—In this section "parent "includes a childless step-mother."*

Abhilasha Vs. Parkash & Ors (AIR 2020 SC 4355) (Abhilasha's case, for short)

16. The aforesaid decision has been rendered by a Three-Judge Bench of the Apex Court. Therein, the mother of the appellant daughter had filed an application under Sec.125 of the Cr.PC before the Judicial First Class Magistrate's Court, claiming maintenance on her behalf as well as on behalf of her two sons as well as the appellant daughter, in which the father was arrayed as a respondent. The Judicial Magistrate's Court, as per Judgment dated 16.02.2011, dismissed the application under Sec.125 of the CrPC of the applicants 1, 2 & 3 therein and allowed the claim for applicant No.4 therein (appellant before the Apex Court) for grant of maintenance, but only till she attains the majority age of 18 years. Being aggrieved thereof, all the four applicants therein had filed Criminal Revision Petitions before the Sessions Court concerned and the Criminal Revision

Petitions were dismissed with the only modification that the Revision Petitioner No.4 therein (appellant daughter before the Apex Court shall be entitled for maintenance till 26.04.2005, ie, till she attains the age of majority). Therein, the Sessions Court noted that, going by the provisions contained in Sec.125 of the Cr.PC, the children who attained majority are entitled for maintenance, if by reason of any physical or mental abnormality or injury, they are unable to maintain themselves. The Sessions Court held that the Revision Petitioner No.4 therein (appellant daughter) before the Apex Court is not suffering from any physical or mental abnormality or injury and therefore, she is entitled for maintenance only till she attains the majority age of 18 years and not thereafter. These decisions of the Courts below were challenged by filing application before the High Court under Sec.482 of the Cr.PC and the High Court, as per the impugned decision had dismissed the said petition filed under Sec.482 of the CrPC, stating that there is no illegality or infirmity in the impugned decisions of the learned Magistrate and the learned Sessions Court concerned. The matter was been taken up before the Apex Court by the appellant daughter. It may be pertinent to refer to paras 25, 27 to 34 of the

decision of the Three-Judge Bench of the Apex Court in **Abhilasha's case** supra, which reads as follows:

> *"**25.** In Classical Hindu Law prior to codification, a Hindu male was always held morally and legally liable to maintain his aged parents, a virtuous wife and infant child. Hindu Law always recognised the liability of father to maintain an unmarried daughter. In this context, we refer to paragraph 539 and 543 of Mulla - Hindu Law - 22nd Edition, which is as follows:-*
>
> *"539. Personal liability: liability of father, husband and son.- A Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters, and his aged parents whether he possesses any property or not. The obligation to maintain these relations is personal in character and arises from the very existence of the relation between the parties.*
>
> *Section 18 and 20 of the Hindu Adoptions and Maintenance Act, 1956 deal with the question of maintenance of wife, children and aged parents. Reference may be made to the notes under those sections.*
>
> *543. Daughter. - (1) A father is bound to maintain his unmarried daughters. On the death of the father, they are entitled to be maintained out of his estate.*
> ***27.** Section 20(3) of Hindu Adoptions and Maintenance Act, 1956 is nothing but recognition of principles of Hindu Law regarding maintenance of children and aged parents. Section 20(3) now makes it statutory obligation of a Hindu to maintain his or her daughter, who is unmarried and is unable to maintain herself out of her own earnings or other property.*
> ***28.** Section 20 of Hindu Adoptions and Maintenance Act, 1956 cast a statutory obligation on a Hindu to maintain his daughter who is unmarried and unable to maintain herself out of her own earnings or other property.*
> *As noted above, Hindu Law prior to enactment of Act, 1956 always obliged a Hindu to maintain unmarried daughter, who is unable to maintain herself. The obligation, which is cast on the father to maintain his unmarried daughter, can be enforced by her against her*

father, if she is unable to maintain herself by enforcing her right under Section 20.

29.*We may also notice another judgment of this Court in Noor Saba Khatoon v. Mohd. Quasim, (1997) 6 SCC 233 : (AIR 1997 SC 3280), which was a case under Section 125 Cr.P.C. A Muslim wife with her two daughters and a son filed an application claiming maintenance under Section 125 Cr.P.C. The trial court allowed the maintenance to the wife and children from her husband. The husband after divorcing the wife filed application in the trial court seeking modification of the order in view of the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The trial court modified the order insofar as the grant of maintenance of wife was concerned but maintained the order of maintenance to each of the three minor children. The husband challenged the order by means of revision, which was dismissed by the Revisional Court. An application under Section 482 Cr.P.C. was filed in the High Court. The High Court accepted the claim of husband and relying on provision of Section 3(1)(b) of the Act, 1986 held that a Muslim wife is entitled to claim maintenance from her previous husband for her children only for a period of two years from the date of birth of the child concerned. The High Court held that minor children were not entitled for maintenance under Section 125, Cr.P.C. A special leave to appeal was filed questioning the judgment. This Court dealing with Section 125 Cr.P.C. as well as Act, 1986held that effect of a beneficial legislation like Section 125 Cr.P.C. cannot be allowed to be defeated except through clear provisions of a statute. This Court held that there is no conflict between the two provisions.*

30. *This Court noticed the provisions of Section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986 and Section 125 Cr.P.C. It is relevant to refer to the following observations made by this Court in paragraph 7 of the above judgment:*

"7....Under Section 125, CrPC the maintenance of the children is obligatory on the father (irrespective of his religion) and as long as he is in a position to do so and the children have no independent means of their own, it remains his absolute obligation to provide for them. Insofar as children born of Muslim parents are concerned there is nothing in Section 125 CrPC which

exempts a Muslim father from his obligation to maintain the children. These provisions are not affected by Clause (b) of Section 3(1) of the 1986 Act and indeed it would be unreasonable, unfair, inequitable and even preposterous to deny the benefit of Section 125 CrPC to the children only on the ground that they are born of Muslim parents. The effect of a beneficial legislation like Section 125 CrPC, cannot be allowed to be defeated except through clear provisions of a statute. We do not find manifestation of any such intention in the 1986 Act to take away the independent rights of the children to claim maintenance under Section 125 CrPC where they are minor and are unable to maintain themselves. A Muslim father's obligation, like that of a Hindu father, to maintain his minor children as contained in Section 125 CrPC is absolute and is not at all affected by Section 3(1) (b) of the 1986 Act. ....."

31. *The provision of Section 20 of Act, 1956 cast clear statutory obligation on a Hindu to maintain his unmarried daughter who is unable to maintain herself.*

The right of unmarried daughter under Section 20 to claim maintenance from her father when she is unable to maintain herself is absolute and the right given to unmarried daughter under Section 20 is right granted under personal law, which can very well be enforced by her against her father. The judgment of this Court in Jagdish Jugtawat (supra) laid down that Section 20(3) of Act, 1956 recognised the right of a minor girl to claim maintenance after she attains majority till her marriage from her father. Unmarried daughter is clearly entitled for maintenance from her father till she is married even though she has become major, which is a statutory right recognised by Section 20(3) and can be enforced by unmarried daughter in accordance with law.

32. *After enactment of Family Courts Act, 1984, a Family Court shall also have the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX of Cr.P.C. relating to order for maintenance of wife, children and parents. Family Courts shall have the jurisdiction only with respect to city or town whose population exceeds one million, where there is no Family Courts, proceedings under Section 125 Cr.P.C. shall have to be before the Magistrate of the First Class. In an area where the Family Court is not established, a suit or proceedings*

> *for maintenance including the proceedings under Section 20 of the Act, 1956 shall only be before the District Court or any subordinate Civil Court.*
>
> ***33.*** *There may be a case where the Family Court has jurisdiction to decide a case under Section 125 Cr.P.C. as well as the suit under Section 20 of Act, 1956, in such eventuality, Family Court can exercise jurisdiction under both the Acts and in an appropriate case can grant maintenance to unmarried daughter even though she has become major enforcing her right under Section 20 of Act, 1956 so as to avoid multiplicity of proceedings as observed by this Court in the case of Jagdish Jugtawat (supra). However the Magistrate in exercise of powers under Section 125 Cr.P.C. cannot pass such order.*
>
> ***34.*** *In the case before us, the application was filed under Section 125 Cr.P.C. before Judicial Magistrate First Class, Rewari who passed the order dated 16.02.2011. The Magistrate while deciding proceedings under Section 125 Cr.P.C. could not have exercised the jurisdiction under Section 20(3) of Act, 1956 and the submission of the appellant cannot be accepted that the Court below should have allowed the application for maintenance even though she has become major. We do not find any infirmity in the order of the Judicial Magistrate First Class as well as learned Additional Magistrate in not granting maintenance to appellant who had become major."*

17. Incidentally, it is to be also noted that the Apex Court in **Abhilasha's case** supra has also referred to the provisions of Muslim Personal law, by placing reliance on the aforecited decision of the Apex Court in **Santra's case** supra [(2000) 5 SCC 182, para 40] as can be seen from a reading of paragraph no.26 of **Abhilasha's case** supra. Para 26 of **Abhilasha's case** supra reads as follows:

> *"**26.** Muslim Law also recognises the obligation of father to maintain his daughters until they are married. Referring to Mulla's Principles of Mohammedan Law, this Court in State of Haryana and Others v. Santra (Smt.), (2000) 5 SCC 182 : (AIR 2000 SC 1888) in paragraph 40 held:-*
>
> *"40. Similarly, under the Mohammedan Law, a father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. [See: Mulla's Principles of Mohammedan Law (19th Edn.) page 300]....."*

18. So, it can be seen from a reading of the abovesaid verdict of the Apex Court in **Abhilasha's case** supra that, in view of the restrictions in Sec.125 of the Cr.PC, the claim of the daughter for securing maintenance from her father, even after completing the majority age of 18 years, was repelled. However, the Apex Court has specifically held, in para 33 of **Abhilasha's case** supra, that a Family Court has jurisdiction to decide a case both under Sec.125 of the CrPC as well as under Sec.20 of the Hindu Adoptions and Maintenance Act, 1956 and that therefore, the Family Court can exercise jurisdiction in respect of both the claims and in appropriate case, can grant maintenance to an unmarried daughter, even though she has become a major enforcing her right under Sec.20 of the 1956 Act, so as to avoid multiplicity of proceedings, as observed by the Apex Court in **Jagdeesh Jugtawat's case** supra. In other words, the Three-Judge

Bench of the Apex Court, in para 33 of **Abhilasha's case** supra, has specifically reiterated and relied on the considered views rendered by the earlier Three-Judge Bench of the Apex Court, in **Jagdish Jugtawat's case** supra**,** [(2002 5 SCC 422], para 40 thereof, that in such cases, where claims are maintainable under both Sec.125 of the Cr.PC as well as under the Adoption and Maintenance Act, then, in order to avoid multiplicity of proceedings, the latter claim could be examined by the Family Court concerned. However, the Apex Court in Abhilasha's case supra has further specifically held that such an option is available only to the Family Court concerned and not in a case where the claim under Sec.125 of the Cr.PC has been preferred before the jurisdictional Magistrate's Court concerned. It may be noted that in para 32 thereof, the Apex Court has noted that where there is no Family Court, proceedings under Sec.125 Cr.PC shall have to be made before the judicial First Class Magistrate Court concerned and where the Family Court is not established, a suit of proceedings for maintenance, including proceedings under Sec.20 of the Hindu Maintenance and Adoption Act, 1956, shall be only before the District Court or any subordinate civil court concerned. Since the claim in

Abhilasha's case supra was preferred before the jurisdictional Magistrate's Court concerned and not before the Family Court, it was held that the option to examine the claim under the Hindu Adoption and Maintenance Act, 1956, is not available to the Judicial Magistrate's Court concerned.

Yousaf v. Rubeena, [(2010 4 KLT 1] (DB).

19. A reading of the abovesaid decision of the Division Bench may initially give an impression as if the claim therein was under Sec.125 of the CrPC, in view of the factual aspects stated in paragraph Nos.1, 7, 8 & 9 thereon. But a careful reading of the said decision, more particularly paragraphs 4 & 10 thereof, would make it clear, beyond the shadow of any doubt, that the actual claim made in the said case before the Division Bench, i.e., the case arising out of Matrimonial Appeal No.653/2010 was not in relation to a claim for maintenance under Sec.125 of the CrPC, but the claim therein was made by a major unmarried Muslim daughter against her father, by invoking the provisions contained in Muslim personal law, more particularly clause/paragraph 370 of Chapter IX of Mulla's Principles of Muhammedan Law. In that case, the respondents therein

(daughters), after they attained the age of majority had staked their claim for maintenance. It is clear from para 4 thereof that in that case, the respondents therein (daughters), after they attained majority, had put up a claim for maintenance, on the premise that they are entitled for maintenance from the appellant father under Muslim personal law, which is applicable to the parties. The provisions contained in clause/paragraph 370 of Chapter IX of Mulla's Principles of Muhammedan Law are referred to in para 7 of the said decision. In para 8 thereof, their Lordships of the Division Bench has held that, in view of the abovesaid provisions of the Muslim Personal Law, it is beyond any controversy that Muslim daughters are entitled for maintenance from their father until they are married and in that case, the respondents therein were not married and nothing was tangible from the pleadings or evidence that the daughters were employed or have any assets or were earning any income to maintain and support themselves and hence, the Division Bench held that it is inescapable that major unmarried Muslim daughters, who are unable to maintain themselves, like the respondents therein, are entitled to claim maintenance from their

father, who is capable of providing maintenance to them.

Ismail vs. Fathima (2011 (4) KLT 40) (DB).

20. The entitlement of a Muslim unmarried daughter, whether she is minor or major, to claim maintenance from her father has also been considered in the aforecited decision of the Division Bench of this Court in Ismail's case supra. It may be pertinent to refer to paragraph Nos.7 and 9 of the decision of the Division Bench of this Court in **Ismail's case** supra [(2011 4 KLT 40] (DB), which reads as follows:

> *"7. We extract S.2 of the Muslim Personal Law (Shariat) Application Act below: "2. Application of Personal Law to Muslims.-Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)." (emphasis supplied)*
> *9. There is no semblance of doubt on the question that the Muslim father has the obligation to pay maintenance to his unmarried adult daughter. The text by Mulla under the heading "Maintenance" in paragraphs-369 and 370 which we extract below makes the position crystal clear:"*
> *369. Maintenance defined-"Maintenance" in this Chapter includes food, raiment and lodging.*
> *370. Maintenance of children and grand children-(1)*

> *A father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. But he is not bound to maintain his adult sons unless they are disabled by infirmity or disease. The fact that the children are in the custody of their mother during their infancy (S.352) does not relieve the father from the obligation of maintaining them.*
>
> *(a)But the father is not bound to maintain a child who is capable of being maintained out of his or her own property.*
>
> *(2) If the father is poor, and incapable of earning by his own labour, the mother, if she is in easy circumstances, is bound to maintain her children as the father would be.*
>
> *(3) If the father is poor and infirm, and the mother also is poor, the obligation to maintain the children lies on the grandfather, provided he is in easy circumstances.*
>
> *A Muslim father is hence undoubtedly liable under his personal law to pay maintenance to his unmarried daughter – whether major or minor.*

21. The specific factual scenario considered in this case, was as to whether a major Muslim unmarried daughter can claim marriage expenses from her father, as part of her claim for maintenance. The Division Bench specifically held therein, in para 12 thereof that the obligation of a Muslim father to maintain his unmarried daughter, whether major or minor, must be understood realistically and it must include all expenses for the complete discharge of the duty of a father to the daughter and it must and does include all necessary expenses for the physical and mental well-being of the child. It was also held, in para 15 thereof, that the right to seek

marriage expenses can certainly be included in the concept of maintenance, which a father is liable to provide for his unmarried daughter. But, it was further held therein that the entitlement is only for a reasonable amount and is available to only an unmarried daughter, who does not have the means of her own to meet the marriage expenses and such a right is only against her father, who had the requisite means etc.

Pertinent provisions of the Muslim Personal Law (Shariat) Application Act, 1937 as well as the Muslim Personal Law (Shariat) Application (Kerala Amendment) Act, 1963.

22. The provisions contained in Sec.2 of the Muslim Personal Law (Shariyat) Application Act, 1937 (Central Act 26 of 1937) has already been referred to herein above, while quoting paragraph No.7 of the decision of the Division Bench of this Court in Ismail's case supra. Both sides have also invited our attention to the provisions contained in the Muslim Personal Law (Shariat) Application (Kerala Amendment) Act, 1963) (State Act, 1963) that Sec.1(2) of the Muslim Personal Law (Shariat) Application Act, 1937 (Central Act, 26 of 1937), mandates that the said Act will extend to the whole of India,

except the the State of Jammu & Kashmir. Since the princely states of Travancore and Cochin did not form a part of the territories of British India, the said Act, in regard to its application to the present territories of the State of Kerala, had applied only to the territories of the erstwhile Malabar District of Madras Province of the then British India. In other words, since the princely states of Travancore and Cochin did not form part of the then British India, the Act may not have then applied thereto. Even if that be so, it is not as if the Muslim Personal Law, will be applicable, only if it is backed by a Statute. To avoid a legal vacuum and in the absence of a contrary statutory prescription, the Muslim Personal Law, being followed by customary practice, could govern the field, especially to the extent it is in consonance with the principles of justice, equity and good conscience. This view is supported by the analogical application of the legal principles laid down by the Division Bench of this Court in para 21 of ***Jacob Kuruvila*** *v.* ***Merly Jacob*** (2010 (1) KLT 503). Later, the provisions under Sec.1(2) of the abovesaid Act was substituted by Act 48 of 1959 by inserting the words, "*except the territories which immediately before the 1st November 1956 were comprised in Part B*

States" with effect from 01.02.1960. Sec.3 of the Muslim Personal Law (Shariat) Application (Kerala Amendment), Act 1963 (State Act, 42 of 1963) provided for the substitution of a new Section to the Central Act, 26 of 1937 and the same reads as follows:

> *"**Sec.3**. Substitution of a new section for S.2, Central Act, 26 of 1937.- For S.2 of the said Act, the following section shall be substituted, namely:- "2. Application of personal law to Muslims.- Notwithstanding any custom or usage to the contrary, in all questions regarding intestate succession. special property of females including personal property inherited or obtained under contract or gift or any other provision of personal law. marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties and wakis. (other than charities and charitable insti- tutions and charitable and religious endowments) the rule of decision in cases where the parties were Mulslims, shall be the Muslim Personal Law (Sharlat)."*

23. Sec.4 of the abovesaid State Act, (42 of 1963) provided for repeal, which stipulated that the Muslim Personal Law (Shariat) Application (Madras Amendment) Act, 1949, as in force in the Malabar District, referred to in Subsection 2 of Sec.5 of the States Reorganisation Act, 1956 (Central Act 37 of 1956) will stand repealed. Sec.4 thereof reads as follows:

> *"**Sec.4.** Repeal.—The Muslim Personal Law (Shariat) Application (Madras Amendment) Act, 1949 (Madras Act XVIII of 1949), as in force in the Malabar disrict referred to in sub-section (2) of section 5 of the States Reorganisation Act, 1956 (Central Act 37 of 1956), is*

hereby repealed. ”

24. The abovesaid provisions of the State Act (42 of 1963) was published in the Kerala Gazette, Extraordinary No.135 dated 12.12.1963 and the said Act received the assent of the President of India on 04.12.1963. So, it can be seen that, on and with effect from 12.12.1963, the provisions contained in Sec.2 of the Central Act was slightly modified, on certain aspects, in its applicability to the State of Kerala. However, the relevant aspect of the matter, as it concerns this case, is that the provisions of maintenance, in its applicability to Muslims, will be regulated by Muslim Personal Law even within the territory of the State of Kerala.

Pertinent provisions of the Muslim Personal Law on the Issue of Maintenance

25. The Division Bench of this Court, in para 7 of **Yousaf's case** supra [2010 (4) KLT 1 (DB)] as well as in para 9 of **Ismayil's case** supra [2011 (4) KLT 40], has referred to the stipulations of clause/para 370 of Chapter XIX of Mulla's Principles of Muhammadan Law, which reads as follows :

*“**370: Maintenance of children and grandchildren**:- (1) A father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are*

> *married. But he is not bound to maintain his adult sons unless they are disabled by infirmity or disease. The fact that the children are in the custody of their mother during their infancy (S.352) does not relieve the father from the obligation of maintaining them (a). But the father is not bound to maintain a child who is capable of being maintained out of his or her own property.*
>
> *(2) If the father is poor, and incapable of earning by his own labour, the mother, if she is in easy circumstances, is bound to maintain her children as the father would be.*
>
> *(3) If the father is poor and infirm, and the mother also is poor, the obligation to maintain the children lies on the grandfather, provided he is in easy circumstances."*
>
> (emphasis supplied)

26. The Apex Court, in para 9 of the decision in **Noor Saba's** case supra [(1997) 6 SCC 233], has referred to the effect of the provisions in Sec.125 of the Cr.P.C, as referred to in the text book "Statute Law relating to Muslims in India (1995 Edition)" **authored by Prof.Tahir Mahmood**, which reads as follows :

> *"9. Prof. Tahir Mahmood, in his book Statute-Law relating to Muslims in India (1995 Edn.), while dealing with the effect of the provisions of Section 125 CrPC on the 1986 Act and the Muslim Personal Law observes at p. 198:*
>
> "These provisions of the Code remain fully applicable to the Muslims, notwithstanding the controversy resulting from the *Shah Bano case* and the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986. *There is nothing in that Act in any way affecting the application of these provisions to the children and parents governed by Muslim law.…*
>
> As regards children, the Code adopts the age of minority from the Majority Act, 1875 by saying: 'Minor means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875) is deemed not to have attained his majority.' — [Explanation to Section 125(1), clause (*a*).] *Ordinarily, thus, every Muslim child below 18 can invoke the CrPC law to obtain maintenance from its parents if they 'neglect or refuse' to maintain it despite 'having sufficient means*'….
>
> ***
>
> *By Muslim law, maintenance (nafaqa) is a birthright of children and an absolute liability of the father. Daughters are entitled to maintenance till they get married if they are bakira (maiden), or till they get remarried if they are thayiba (divorcee/widow). Sons are entitled to it till they attain bulugh if they are normal; and as long as necessary if*

> *they are handicapped or indigent*. Providing maintenance to daughters is a great religious virtue. The Prophet had said:
>
> 'Whoever has daughters and spends all that he has on their upbringing will, on the Day of Judgment, be as close to me as two fingers of a hand.'
>
> If a father is poverty-stricken and cannot therefore provide maintenance to his children, while their mother is affluent, the mother must provide them maintenance subject to reimbursement by the father when his financial condition improves."
>
> (emphasis supplied)

27. Now, we will deal with the matters for answering the present reference.

Reference Issue

A reading of the decisions of this Court in **Muhammed's case** supra [2003 (3) KLT 106] and that in **Cholamarakkar's case** supra [2008 (3) KHC 973 (DB)], would make it clear that those decisions dealt with claims of major unmarried Muslim daughters, for maintenance from her father, whereby the provisions contained in Sec.125 of the Cr.P.C was invoked. The claimant daughters therein, had attained majority and though they were unmarried, the claimants did not have any case that they suffered from any physical or mental abnormality or injury, as conceived in clause (c) of sub-section 1 of Sec.125 of the Cr.P.C. Going by the provisions contained in Sec.125 of the Cr.P.C, a major unmarried son/daughter, could claim maintenance only if he/she suffers from physical or mental

abnormality or injury, as contemplated in Sec.125(1) of the Cr.P.C. Hence, the claimants were held to be not entitled for maintenance under Sec.125 of the Cr.P.C. Whereas, the case considered by the Division Bench in **Yousaf's case** supra [2010 (4) KLT 1 (DB)] (Mat.Appeal No.653/2010), was in relation to claims of unmarried Muslim daughters, for maintenance from their father, by invoking the aforequoted stipulations in Muslim Personal Law and that aspect of the matter is clear from a reading of paras 4 & 10 of the decision in **Yousaf's case** supra [2010 (4) KLT 1 (DB)]. The Division Bench in para 7 thereof, has considered the stipulations in Muslim Personal Law and has held that a Muslim father has the liability to maintain a major Muslim unmarried daughter, so long as she is not able to maintain herself and the said right arises out of the Muslim Personal Law. This is of course, subject to the financial capability of the Muslim father. The Division Bench in **Yousaf's case** supra [2010 (4) KLT 1 (DB)] has also considered the provisions contained in Sec.125 of the Cr.P.C and has repelled the contentions raised by the father therein that, the provisions contained in Sec.125 of the Cr.P.C., which is a secular piece of law, will not obliterate and distinguish the

liability of a Muslim father, under Muslim Personal Law. In other words, it has been categorically held by the Division Bench of this Court in **Yousaf's case** supra [2010 (4) KLT 1 (DB)], that the claims for maintenance in Muslim Personal Law are not, in any manner, dependent or subservient to the provisions contained in Sec.125 of the Cr.P.C.

28. In the light of the above aspects, we are of the view that, technically, there is no conflict of views in the decisions of the Division Bench of this Court in **Cholamarakkar's case** supra [2008 (3) KHC 973 (DB)] as well as in **Yousaf's case** supra [2010 (4) KLT 1 (DB)], as the former was in relation to claim under Sec.125 of the Cr.P.C and the latter was a claim in relation to Muslim Personal Law. However, the crucial aspects relating to avoidance of multiplicity of proceedings, as envisaged in the verdicts of the Apex Court in cases as in para 4 of **Jagdish Jugtawat's case** supra [(2002) 5 SCC 422] as well as para 33 of **Abhilasha's case** supra [AIR 2020 SC 4355], have not been adverted to in the decisions as in **Muhammed's case** supra [2003 (3) KLT 106] and **Cholamarakkar's case** supra [2008 (3) KHC 973 (DB)].

29. The Three-Judge Bench verdicts of the Apex Court in para 4 of **Jagdish Jugtawat's case** supra [(2002) 5 SCC 422] as well as para 33 of **Abhilasha's case** supra [AIR 2020 SC 4355], have clearly held that, even if a claim under Sec.125 of the Cr.P.C is liable to be repelled and if the claim is otherwise maintainable under the Personal Law, as enunciated in the Hindu Adoption & Maintenance Act, etc., then to avoid multiplicity of proceedings, the Family Court can consider the latter claim, even if it is bound to dismiss the former claim. The Apex Court in para 26 of **Abhilasha's case** supra [AIR 2020 SC 4355], has also referred to Muslim Personal Law provisions in that regard and the same reads as follows :

> *"**26**. Muslim Law also recognises the obligation of father to maintain his daughters until they are married. Referring to Mulla's Principles of Mohammedan Law, this Court in State of Haryana and Others v. Santra (Smt.), (2000) 5 SCC 182 : (AIR 2000 SC 1888) in paragraph 40 held:-*
> *"40. Similarly, under the Mohammedan Law, a father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. [See: Mulla's Principles of Mohammedan Law (19th Edn.) page 300]....."*"

The simple rationale for this, as enunciated in the verdicts of the Apex Court, is that otherwise the claimant, who has knocked the doors of the Court, for maintenance under Sec.125 of the Cr.P.C., will have to again approach the Family Court with the latter plea, if the former

plea is found to be rejected or not maintainable. So, the approach taken by the Apex Court is clearly to the effect that, hyper-technical approach need not be resorted to in such matters, where such matters relate to maintenance claims and if the claim is otherwise maintainable, as stated above, then the Family Court, which has jurisdiction in that regard, can entertain such claims, without having to drive the litigant to file a fresh claim. Of course, this option is available only where the claim is made before the Family Court, since the Family Court will have jurisdiction to consider claims not only under Sec.125 of the Cr.P.C, but also claims as in the Hindu Adoption & Maintenance Act as well as Muslim Personal Law, etc. The abovesaid approach, initially enunciated in **Jagdish Jugtawat's case** supra [(2002) 5 SCC 422], has been reiterated by the Apex Court in **Abhilasha's case** supra [AIR 2020 SC 4355].

30. In the instant case, the claim has been made by the respondent herein before the Family Court. Hence, in answer to the reference issue, we would hold that, for a major unmarried Muslim daughter, who is not suffering from any physical or mental abnormality or injury, as envisaged in clause (c) of sub-section 1 of

Sec.125 of the Cr.P.C., a claim made before the Family Court under Sec.125 of the Cr.P.C., will not be maintainable. However, in case the claimant appears to be otherwise eligible for maintenance, in terms of Muslim Personal Law, then the Family Court need not drive the litigant to file a fresh claim and with the wholesome objective of avoidance of multiplicity of proceedings in maintenance claims, the Family Court can entertain the maintenance plea, under Muslim Personal Law. We answer the reference accordingly.

Factual issues in this case :-

31. It is true that, in this case, the respondent herein/claimant, has completed the age of majority and is an unmarried Muslim daughter of the petitioner herein. However, the claimant has no case that, she suffers from any physical or mental abnormality or injury, as conceived in Sec.125(1) (c) of the Cr.P.C. Therefore, the present claimant is not entitled to make a claim under Sec.125 of the Cr.P.C. But the claim has been made before the Family Court. Hence, going by the abovesaid perspective, the Family Court need not drive the litigant claimant to file a fresh claim under Muslim Personal Law and on the other hand, with the wholesome objective to

avoid multiplicity of proceedings, as envisaged in the aforecited rulings of the Apex Court, can entertain the claim of the respondent herein under Muslim Personal Law.

32. Sri.V.Philip Mathews, learned counsel appearing for the petitioner herein (father), would submit that the perspectives of adjudication, both in terms of the standard of pleadings, appreciation of evidence, etc., in a claim for maintenance under the Hindu Adoption & Maintenance Act or under Muslim Personal Law, made before a Family Court, is substantially different from that in a claim before the said Court made under Sec.125 of the Cr.P.C., as the latter claim is to be tried on a summary basis, whereas, the former claim is to be tried as a suit. Further, the learned counsel for the petitioner would also urge that the claim under the Hindu Adoption & Maintenance Act is a statutory claim, as the claim is under the provision of an enactment made by the competent Legislature. Whereas, the claim made under Muslim Personal Law cannot be said to be statutory, as it is raised in terms of the provisions of Muslim Personal Law, etc.

33. It may be true that the perspectives to be taken in a

summary proceedings, as in Sec.125 of the Cr.P.C, will be significantly different from that in claims which are to be tried as if it is a suit. However, we note that the Apex Court, in the decision in ***Rajnesh** v. **Neha & Anr.*** [(2021) 2 SCC 324], has held that, since maintenance claims to wife, children and parents, etc., are contained in overlapping statutes and remedy of maintenance is available in both secular laws as well as in personal laws, there is a need for framing guidelines under Article 142 of the Constitution of India, laying down the uniform and consistent standards and for ensuring timely disposal of applications, making maintenance under all the applicable statutes. The final directions rendered in that judgment are contained in Part VI thereof, (see paras 127 to 134 thereof). In para 128 of **Rajnesh's case** supra [(2021) 2 SCC 324], the Apex Court has ordered that, to overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings, it has become necessary to issue directions in that regard, so that there is uniformity in the practice followed by the Family Courts/District Courts/Magistrate Courts throughout the country. Further, it has been ordered, in para 129 thereof, that the affidavit of Disclosure of

Assets and Liabilities, annexed as enclosures I, II and III of that judgment, as may be applicable, shall be filed by both parties in all maintenance proceedings, including pending proceedings before the Family Court/District Court/Magistrate Court concerned, as the case may be, throughout the country. Therefore, these guidelines will have to be complied with by the competent court, like Family Courts/District Courts/Magistrate Courts, in maintenance cases, arising out of various enactments and personal laws, like Sec.125 of the Cr.P.C, Domestic Violence Act, Hindu Marriage Act, Hindu Adoption and Maintenance Act, Muslim Personal Laws, etc. Of course, the adjudication in summary proceedings, resorted to in Sec.125 of the Cr.P.C, will be substantially different from that in claims to be entertained by the Family Court under the Hindu Adoption and Maintenance Act, Muslim Personal Law, etc., which have to be tried as a suit. Prior to the enactment of legislations, as in the Hindu Marriage Act, 1955 and the Hindu Adoption and Maintenance Act, 1956, those subject matters therein were regulated by the Personal Laws applicable to the Hindu religion. The provisions of the Hindu Marriage Act, Hindu Adoption and

Maintenance Act, etc., have codified the various provisions in the Personal Law or may have appropriately modulated the same.

34. We have already referred to the provisions contained in Sec.2 of The Muslim Personal Law (Shariat) Application Act, 1937, as amended by the Kerala Amendment Act, 1963, whereby the Legislature has engrafted an obligation that, claims, as in maintenance of Muslims, would be regulated by Muslim Personal Law. So, it is not as if a claim for maintenance under Muslim Personal Law is completely non-statutory in nature. It is true that the fine-tuned provisions of the Muslim Personal Law may not be codified in a Statute. But the Muslim Personal Law (Shariat) Application Act, 1937, as amended by the Kerala Amendment Act, 1963 (State Act 42 of 1963), will impose a statutory obligation, so as to regulate maintenance claims of Muslims on the basis of Muslim Personal Law. So, merely because the alternate claim of the respondent herein is under Muslim Personal Law, it will not make such a claim non-statutory, merely on the ground that the provisions in Muslim Personal Law has not been exhaustively codified in a Statute. Accordingly, we are of the view that, though the claim of

the respondent herein, under Sec.125 Cr.P.C., is not maintainable, for the reasons stated hereinabove, the Family Court need not drive the respondent herein, who is a young lady aged just about 20 years, to again file a fresh claim, by invoking Muslim Personal Law. There is an obligation for the Family Court to ensure that multiplicity of proceedings, in cases of this nature, is avoided, as enunciated in the aforecited rulings of the Apex Court. The vast majority of the claims are made by women and children, who belong to the weaker sections of the society. Hence, the abovesaid wholesome objective, enunciated by the Apex Court, so as to avoid multiplicity of proceedings, should be borne in mind by the Family Courts. Of course, such an option is not available to a Court, like the Judicial First Class Magistrate Court, for the reasons already stated hereinabove. Hence, we are of the view that the Family Court may entertain the pleas of the respondent herein, as a claim for maintenance under Muslim Personal Law. We are told that a claim under Sec.125 of the Cr.P.C is reckoned as an M.C (Miscellaneous Case), whereas a claim under the Hindu Adoption and Maintenance Act or under the Muslim Personal Law, is to be reckoned as an Original Petition (O.P) before the Family Court.

The Family Court may re-number the case as an original petition.

35. Sri.M.Dinesh, learned counsel appearing for the respondent herein, would submit, on the basis of instructions of his party, that his party would immediately take steps to ensure that proper pleadings are put in place, for consideration of the claim for maintenance under Muslim Personal Law, by styling it as an "O*riginal Petition*". The Family Court may also ensure that the requisite guidelines laid down by the Apex Court in **Rajnesh's case** supra [(2021) 2 SCC 324], to the extent that it is applicable for a claim under Muslim Personal Law, should also be observed by both sides, more particularly, the affidavit of Disclosure of Assets & Liabilities, etc., as envisaged in para 129 of the said decision (see Enclosure I to the judgment). The Family Court may ensure that the claim of the respondent herein, for maintenance under Muslim Personal Law, may be considered and disposed of without much delay, preferably within eight months or, at any rate, within 10 months from the date of production of a copy of the judgment, if that is feasible.

36. Earlier, we had passed an order dated 25.01.2023 in this Crl.M.C., wherein it was ordered that the interim stay granted in this

case, which had already expired, will not be extended further.

37. We had requested both sides to make submissions to regulate the interim maintenance, pending disposal of the main matter before the Family Court.

38. Sri.V.Philip Mathews, learned counsel appearing for the petitioner (father), has submitted, on the basis of instructions of his party, that the petitioner is now in extreme financial distress and various other disabilities and would submit that, though his party had apprised him that he can now afford an interim maintenance of only upto Rs.1,000/- per month, the learned counsel will advise the party to pay interim maintenance at least @Rs.1,500/- per month, pending disposal of the main matter.

39. Per contra, Sri.M.Dinesh, learned counsel appearing for the respondent herein (daughter), would submit that the case of the petitioner (father), as if he is impoverished and has no means to pay the interim maintenance is not correct and that this Court may not vary the interim maintenance already granted by the court below, which is Rs.4,000/- per month.

40. After hearing both sides, it is ordered, in the interest of

justice, that, in case the petitioner pays an interim maintenance @Rs.2,000/- per month, then he will be at liberty to file an application before the Family Court, seeking modification of the present interim order granted by the said court.

41. We have already held that the claim of the respondent herein, under Sec.125 of the Cr.P.C, is not maintainable. Hence, it is ordered that the petitioner will pay interim maintenance to the respondent herein @Rs.2,000/- per month, for the period from August, 2022 onwards and thereafter, can seek for modification of the impugned Annexure-D interim order. Hence, needless to say, the coercive warrant proceedings issued if any by the Family Court for enforcement of the impugned Annexure-D interim order, will not be maintainable and will stand re-called.

42. Sri.V.Philip Mathews, learned counsel appearing for the petitioner has also invited the attention of this Court to page 175 in Chapter-VII of the text book "*Outlines of Muhammadan Law*", Fifth Edition, 2008, Oxford University Press, authored by Asaf A.A.Fyzee, dealing with maintenance, which reads as follows :

"Children and descendants

A father is bound to maintain his sons until they attain puberty, and his

> *daughters until they are married. He is also responsible for the upkeep of his widowed or divorced daughter. The father is not bound to provide separate maintenance for a minor son who refuses to live with him without reasonable cause, nor is an unmarried daughter entitled to separate maintenance unless the circumstances are such as to justify her in staying away. But the father's obligation is not lessened by the child being in the hidanat (custody) of the mother. An adult son need not be maintained unless he is infirm.*
>
> *If the father is poor, the mother is bound to maintain the children. And, failing her, it is the duty of the paternal grandfather. Thus grandchildren and other lineal descendants also possess rights of maintenance."*

43. By placing reliance on the abovesaid text book, the learned counsel for the petitioner would urge that an unmarried Muslim daughter, who is staying away from her father, is not entitled to separate maintenance, unless circumstances are such as to justify her staying away. In that regard, the learned counsel for the petitioner would submit that, admittedly, the case of the respondent herein is that she is living separately from the petitioner (father) and she has not urged any reasons as to justify her staying away from her father and hence, she is not entitled for maintenance, etc.

44. Per contra, Sri.M.Dinesh, learned counsel appearing for the respondent, would point out that the specific case of the respondent (daughter) is that the petitioner is either re-married or living with a lady other than the respondent's mother and that the respondent's mother and the respondent were forced to live

separately from the father, as he did not permit them to reside with him, etc. We need not get into these aspects and it is for the parties to urge such versions before the Family Court.

45. Sri.V.Philip Mathews, learned counsel for the petitioner, has also placed reliance on some of the provisions of another text book, titled "*Sunni Code of Muslim Personal Law applied by Courts of Justice in India*" compiled by Sri.M.M.Aliyar, especially Sec.81 under Chapter VII thereof.

46. Per contra, Sri.M.Dinesh, learned counsel appearing for the respondents, would point out that the abovesaid text book, cannot be said to be authoritative, inasmuch as the afore relied on provisions appears to be distinctly different from the corresponding provisions relied on by the Apex Court in decisions as in **Yousaf's case** supra [2010 (4) KLT 1 (DB)], **Ismayil's case** supra [2011 (4) KLT 40] as well as **Noor Saba's** case supra [(1997) 6 SCC 233]. Further, the learned counsel for the respondents would also point out that it is noted in the penultimate paragraph of the foreword given in the above book that, the acceptance of the qualification, referred to in the said book by the Muslim community in the country and by

different religious organizations and significantly by the Legislature of the country, is yet to be awaited, etc. We need not get into these rival submissions, except to say that it is for the parties to urge such aspects, if relevant before the Family Court.

47. Annexure-D interim order may be treated as an interim order passed by the Family Court in the claim under Muslim Personal Law.

With these observations and directions, the above Crl.M.C will stand disposed of.

Sd/-
ALEXANDER THOMAS, JUDGE

Sd/-
ZIYAD RAHMAN A.A, JUDGE

Nsd
vgd

APPENDIX OF CRL.MC 6659/2022

PETITIONER'S ANNEXURES

ANNEXURE-A	**PHOTOCOPY OF THE PETITION M.C.NO. 154/2021 FILED BY THE 2ND RESPONDENT BEFORE THE FAMILY COURT, ATTINGAL.**
ANNEXURE-B	**PHOTOCOPY OF THE PETITION CMP.NO.92/2022 FILED BY THE 2ND RESPONDENT BEFORE THE FAMILY COURT, ATTINGAL.**
ANNEXURE-C	**PHOTOCOPY OF THE OBJECTION FILED BY THE PETITIONER IN CMP.NO.92/2022 IN M.C.NO.154/2021 ON THE FILE OF THE FAMILY COURT, ATTINGAL.**
ANNEXURE-D	**CERTIFIED COPY OF THE ORDER DATED 04/08/2022 IN CMP.NO.92/2022 IN M.C.NO.154/2021 OF THE FAMILY COURT, ATTINGAL.**