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Maintenance payable to a divorced Muslim woman

CASE NAME	**Mohd. Ahmed Khan (Appellant) v. Shah Bano Begum (Respondent)**
CITATION	**MANU/SC/0194/1985**
COURT	**India** Level of Court: **Supreme Court, on appeal** Name of judge(s): Y. V. Chandrachud, C.J., D. A. Desai, E. S. Venkataramiah, O. Chinnappa Reddy and Ranganath Misra, JJ.
SUMMARY OF FACTS	• The husband (appellant) was married to the wife (respondent) in 1932. In 1975 the husband drove the wife out of the matrimonial home. **In April 1978, the wife filed a petition against the husband under Section 125 of the Criminal Procedure Code 1973** (hereinafter referred to as the 'Code'/ 'CrPC') in the court of the learned Judicial Magistrate (First Class), Indore. She asked for **maintenance at the rate of Rs. 500 per month**. **On November 6, 1978 the husband divorced wife by an irrevocable *talaq*. His defence was that she had ceased to be his wife by reason of the divorce granted by him.** He therefore claimed to be under no obligation maintenance for her since he had already paid maintenance to her at the rate of Rs. 200 per month for about two years and that, he had deposited a sum of Rs. 3000 in the court by way of dower during the period the of *iddat*. **In August, 1979 the learned Magistrate directed appellant to pay a princely sum of Rs. 25 per month to the respondent by way of maintenance.** In July, 1980 in a **revisional application** filed by the respondent, the **High court of Madhya Pradesh enhanced the amount of maintenance to Rs. 179.20 per month.** • The husband has filed this appeal by **special leave before the Supreme Court.**
LEGAL REASONING	**1) Whether the payment of mehar by the husband on divorce is sufficient to absolve him of any duty to pay maintenance to the wife.** *"...there is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under Section 125 and that, Mahr is not a sum which, under the Muslim Personal Law, is payable on divorce."* (para 32) The Court reached the above conclusion in support of the ruling in *Bai Tahira* where Justice Krishna Iyer held that "...***The payment of illusory amounts*** **(referring to '*mehar*')** ***by way of customary or personal law***

	requirement will be considered in the reduction of maintenance rate but cannot annihilate that rate unless it is a reasonable substitute." (p.82, Bai Tahira). **2) Whether there is any provision in the Muslim Personal Law under which a sum is payable to the wife 'on divorce'** Referring to the views put forth by the learned scholars (Mulla, Tyabji and Paras Diwan), the Court concluded that *"These statements in the text book are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself."* (para 16) *"The sum settled by way of Mahr is generally expected to take care of the ordinary requirements of the wife, during the marriage and after. But these provisions of the Muslim Personal Law do not countenance cases in which the wife is unable to maintain herself after the divorce. We consider it not only incorrect but unjust, to extend the scope of the statements extracted above to cases in which a divorced wife is unable to maintain herself. We are of the opinion that the application of those statements of law must be restricted to that class of cases, in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife"* (para 16) *"Since the Muslim Personal Law, which limits the husband's liability to provide for the maintenance of the divorced wife to the period of iddat, does not contemplate or countenance the situation envisaged by Section 125, it would be wrong to hold that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance, beyond the period of iddat, to his divorced wife who is unable to maintain herself."* (para 16) The Court concluded that **the liability of the husband to pay maintenance to the wife extends beyond the *iddat* period if the wife does not have sufficient means to maintain herself.** **3) Whether Section 125 of the Code applies to Muslims.** Referring to Section 125 of the Code, the Court said: *"The religion professed by a spouse or by the spouses has no place in the scheme of these provisions. Whether the spouses are Hindus or Muslims, Christians or Parsis, pagans or heathens is wholly irrelevant in the application of these provision. The reason for this is axiomatic, in the sense that Section 125 is a part of the code of Criminal Procedure, not of the Civil Laws which define and govern the right and obligations of the parties belonging to particular religions, like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act."* (para 7) *"Clause (b) of the Explanation to Section 125(1), which defines 'wife' as including a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope."* (para 7) ***"'Wife' means a wife as defined, irrespective of the religion professed by her or by her husband. Therefore, a divorced Muslim woman, so long as she has not remarried, is a 'wife' for the purpose of Section 125. The statutory right available to her under that section is unaffected by the provisions of the personal law applicable to her."***

	(para 9) **4) Whether Section 125 would prevail over the personal law of the parties, in cases where they are in conflict.** The Court in answering this question, gave the example of the Islamic Law regarding polygamy: *"It is too well-known that "A Mahomedan may have as many as four wives at the same time but not more. If he marries a fifth wife when he has already four, the marriage is not void, but merely irregular".*[1] *The explanation confers upon the wife the right to refuse to live with her husband if he contracts another marriage, leave alone 3 or 4 other marriages."* and held-*"It shows, unmistakably, that **Section 125 overrides the personal law, if is any there conflict between the two.**"* (para 11) **5) Whether there is any conflict between the provisions of Section 125 and those of the Muslim Personal Law on the liability of the Muslim husband to provide for the maintenance of his divorced wife.** *"The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to Section 125 of the Code. The outcome of this discussion is that **there is no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.**"* (para 16)
CONCLUSION	Dismissing the appeal, the Court held: **1) The payment of *mehar* by the husband on divorce is not sufficient to absolve him of the duty to pay maintenance to the wife.** **2) The liability of the husband to pay maintenance to the wife extends beyond the *iddat* period if the wife does not have sufficient means to maintain herself.** **3) Section 125 of the Code applies to all citizens irrespective of their religion** **4) Section 125 overrides the personal law, if is any there conflict between the two.** **5) There is no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.**
RESOURCES	**Reference to Sections 125 and 127 (3) (b) of the Code** The wife had filed a suit for maintenance under section 125 of CrPC. The husband built his defence on Section 127(3)(b) of CrPC.

1 See Mulla's Mahomedan Law, 18th Edition, paragraph 255, page 285, quoting Baillie's Digest of Mahomedan Law; and Ameer Ali's Mahomedan Law, 5th Edition, Vol. II, page 280.

	ISLAMIC SCRIPTURES: **Verses (Aiyats) 241 and 242 of the Quran** show that according to the Prophet, there is an obligation on Muslim husbands to provide for their divorced wives. (See 'The Holy Quran' by Yusuf Ali, Page 96). The translation of Aiyats 240 to 242 in 'The Meaning of the Quran' (Vol. I, published by the Board of Islamic Publications, Delhi) reads thus: **Aiyats 240-241** *"Those of you, who shall die and leave wives behind them, should make a will to the effect that they should be provided with a year's maintenance and should not be turned out of their homes. But if they leave their homes of their own accord, you shall not be answerable for whatever they choose for themselves in a fair way ; Allah is All-Powerful, All-wise. 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."* **Aiyat 242** *"Thus Allah makes clear His commandments for you :It is expected that you will use your common sense."* The Hon'ble Court after studying the Scriptures was of the opinion: *"These Aiyats 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."* (para 25)
LANDMARK PRECEDENTS	**On whether Section 125 of CrPC applies to Muslims** ● *Bai Tahira v. Ali Hussain Fidaalli Chothia*[2] and *Fuzlunbi v. K. Khader Vali*[3] Those decisions took the view that the divorced Muslim wife is entitled to apply for maintenance under Section 125. The Supreme Court in the present case quoted with approval the above decisions and clarifying an error in the ruling of *Bai Tahira* added that *"Mahr, not being payable on divorce, does not fall within the meaning of that provision (Section 127(3)(b) of CrPC)"* (para 33). The Court was of the view that **the payment of *mehar* does not absolve the husband's duty to pay maintenance to his wife under Section 127(3)(b) of the Code.** **On whether Section 125 of the Code is applicable to Muslim women** ● *Nanak Chand v. Shri Chandra Kishore Agarwala*[4] Sikri, J.(in *Nayak Chand*), *while pointing out that the scope of the Hindu Adoptions and Maintenance Act. 1956 and that of Section 488 was different, said that Section 488* (of CrPC 1898) *was "applicable to all persons belonging to all religions and has no relationship with the personal law of the parties"*. (para 8) Affirming *Nayak Chand*, the Court in the present case upheld that **Section 488 of the CrPC 1898** (which is replicated in substance as Section 125 of

2 MANU/SC/0402/1978
3 MANU/SC/0508/1980
4 1970CriLJ522

	CrPC 1973) **is applicable to all the citizens irrespective of their religion, thereby concluding that Section 125 of the Code is applicable to Muslim women.** Further precedents had been discussed in the present case; however, they are not directly in point with the legal questions at hand.
ISLAMIC EXPERTS/ AUTHORS CITED	**On the wife's claim for maintenance after divorce** ● **Mulla's Mahomedan Law** (18th Edition, para 279, page 302) :- At page 302, the learned author notes: *"Where an order is made for the maintenance of a wife under Section 488 of the Criminal Procedure Code* (Section 488 of CrPC 1898 which is replicated substantially as Section 125 of CrPC 1973) *and the wife is afterwards divorced, the order ceases to operate on the expiration of the period of iddat. The result is that a Mahomedan may defeat an order made against him under Section 488 by divorcing his wife immediately after the order is made. His obligation to maintain his wife will cease in that case on the completion of her iddat."* ● **Tyabji's Muslim law** (4th Edition, para 304, pages 268-269) contains the statement that : *On the expiration of the iddat after talaq, the wife's right to maintenance ceases, whether based on the Muslim Law, or on an order under the Criminal Procedure Code.* ● **Paras Diwan's** (Muslim Law in Modern India, 1982 Edition, page 130): *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.* **All the authors are of the view that the position in Islamic Law is that 'the divorced wife is entitled to maintenance from the husband only upto the *iddat* period.' The learned judges in the present case were of the opinion: "*These statements in the text book are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself.*"** (para 16) ***'We consider it not only incorrect but unjust, to extend the scope of the statements extracted above to cases in which a divorced wife is unable to maintain herself'*** *(para 16).* **On the meaning of *'mehar'*** • **Mulla's principles of Mahomedan Law** (18th Edition, page 308) vide para 285 defines *'mehar'*: *"a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage."* • Dr. Paras Diwan in his book, "**Muslim Law in Modern India**" (1982 Edition, page 60) criticised the definition given by Mulla on the ground that:

	Mahr is not payable "in consideration of marriage" but is an obligation imposed by law on the husband as a mark of respect for the wife, as is evident from the fact that non-specification of Mahr at the time of marriage does not affect the validity of the marriage. To both the meanings cited above, **the Court said that *mehar* is neither "*consideration of marriage*" nor paid by the husband "*as a mark of respect for the wife*" :** *"If Mahr is an amount which the wife is entitled to receive from the husband in consideration of the marriage, that is the very opposite of the amount being payable in consideration of divorce. Divorce dissolves the Marriage. Therefore no amount which is payable in consideration of the marriage can possibly be described as an amount payable in consideration of divorce. The alternative premise that Mahr is an obligation imposed upon the husband as a mark of respect for the wife, is wholly detrimental to the stance that it is an amount payable to the wife on divorce. A man may marry a woman for love, looks, learning or nothing at all. And he may settle a sum upon her as a mark of respect for her. But he does not divorce her as a mark of respect. Therefore, a sum payable to the wife out of respect cannot be a sum payable 'on divorce'."* (para 27)
COMMENTARY	The legal questions that arose in *Shah Bano* are not unique to this case, however, the controversy that the case created makes it a landmark decision in Islamic jurisprudence. What caused this controversy is extremely interesting because unlike its precedents, *Bai Tahira* and *Fuzlunbi,* the judgment did not confine itself to Section 125 but went on to interpret the provisions of the Quran. This is evident from para 1 of the judgment where the Court observes: "it is *alleged that the 'fatal point in Islam is the 'degradation of woman' 'Selections from Kuran' Edward William Lane 1843, Reprint 1982, page xc (Introduction). To the Prophet is ascribed the statement, hopefully wrongly, that 'Woman was made from a crooked rib, and if you try to bend it straight, it will break ; therefore treat your wives kindly.'* What might have infuriated the Muslim community in India is the fact that the Court took on the task of interpreting the *Shariat Law*. This might have been perceived as "interference" in their personal laws. The *obiter* stressed on the importance of a uniform Civil Code in the country[5] and the radical Islamists raised a hue and cry that the judgment suggested that the legislative laws should prevail over the *Shariat* Law. *Shah Bano* ruling was flawless in its *ratio descendi* but rather insensitive in its *obiter*- the latter could be, and indeed was, misused in a manner that was provocative for many sections of the Muslims of India. For this reason it raised a big controversy which later became political and eventually led to the enactment of the Muslim Women (Protection of Rights on Divorce) Act 1986[6] .[7] The Muslim Women Act furnishes a penal law and applies to the Muslims of all schools of law "notwithstanding anything contained in any other law for the time being in force." Section 5 of the 1986 Act gives the divorced couple

5 Article 44 in the Indian Constitution reads: The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

6 Hereinafter referred to as the Muslin Women Act.

7 Tahir Mahmood, *The Muslim Law of India*, Third edn, LexisNexis (A divison of Reed Elsevier India Pvt Ltd), New Delhi, p.120.

	an "option to be governed by the provisions of Sections 125-128 of the CrPC 1973", which they can jointly exercise at the first hearing of the case.[8] According to Professor Fyzee, *"The Shah Bano judgment had led to a realization on the part of the Muslim religious leaders that their religious law on divorced women's rights needed codification. A popular movement followed and Parliament passed the Muslim Women Act providing for the enforcement of divorced Muslim women's rights to seek their unpaid dower and bridal property from the former husband as also maintenance from him, her own relatives and the State Wakf Board, through speedy proceedings before the magistrates."*[9] As a result of the decision in *Shah Bano's* case, the decision in *Mst. Zohra Khatu v. Mohd. Ibrahim*[10] was reheard and decided in 1985/1986 and the judgment is reported in AIR 1986 SC 587.[11] A number of writ petitions had been filed in 1986-87 challenging the Constitutional validity of the Muslim Women Act, on the plea that it had over-ruled the *Shah Bano* decision in an entirely un-Constitutional way. Interpreting the Act in tune with the *Shah Bano* ruling, the Supreme Court has now decided in *Danial Latifi v. UOI*[12] that the Act is Constitutionally valid and has not superseded the ratio of the S*hah Bano* decision.[13]

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8 Id

9 Asaf A.A. Fyzee, *Cases in the Muhammadan Law of India, Pakistan and Bangladesh,* Second edn, edited and revised by Tahir Mahmood, Oxford University Press, New Delhi, p. 161.

10 AIR 1981 SC 1243

11 M Hidayatullah and Arshad Hidayatullah (eds), *Mulla's Principles of Mahomedan Law*, 19th edn, *Twenty First Reprint*, 2010, p.241.

12 (2001) 7 SCC 740

13 *Supra*, note 9