

CASE ANALYSIS:

MOHD. AHMED KHAN V. SHAH BANO BEGUM AND ORS.¹

BY: MAYANK

INTRODUCTION

The Supreme Court in this revolutionary case dealt with the issue of maintenance to be given to an aggrieved divorced Muslim woman by her husband after the divorce. The supreme court referred to the holy Quran as the authoritative text with a great emphasis on the friction between Section 125 Code of Criminal Procedure Code and Muslim Personal Law. While the appeal of the husband to not provide maintenance was denied, the same received substantial resistance and was claimed to be against the Islamic law. The then Government declared the law to only be valid in the *iddat* period. The case was later upheld by the apex court in further decisions.

FACTS OF THE CASE

Shah Bano was promised Rs.200 as maintenance per month by her ex-husband since after she was driven out of her house in 1975, the same got stopped in April 1978.



In 1978, she filed for a maintenance petition in the local court for rs500 per month as maintenance.



Subsequently, the husband gave her irrevocable talaq on November 6th, 1978 and used it as a defence to not pay maintenance.



Further, he contended that the amount of Rs 200 per month was paid for about two years and an additional amount of Rs 3000 had been deposited as dower in court for the period of *iddat*.

¹ 1985 AIR 945, 1985 SCR (3) 844



The magistrate, in August 1979, directed the husband to pay a sum of Rs 25 per month as maintenance



A revisional application filed in high court increased the maintenance to Rs 179. 20 per month. The same was challenged by the husband in the supreme court as a special leave petition to the high court's decision.

ISSUES

1. Whether Section 125 of the Criminal Procedure Code will apply to Muslims.
2. Whether the mere payment of Mehr by the husband on divorce is sufficient enough to rid him of any duty to pay maintenance to the wife thereafter.

ANALYSIS OF THE JUDGEMENT

With 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.

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)

The Supreme Court in the present case quoted **Bai Tahira v. Ali Hussain Fidaalli Chothia**² and **Fuzlunbi v. K. Khader Vali**³ as these decisions took the view that the divorced Muslim wife is entitled to apply for maintenance under Section 125. The apex court further clarified 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.

Justice Sikri, in **Nanak Chand v. Shri Chandra Kishore Agarwala**⁴ pointed out that the scope of the Hindu Adoptions and Maintenance Act 1956 and that of Section 488 was different, and opined 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 Nanak Chand, the Court in the present case upheld that **Section 488 of the CrPC 1898** (which is replicated in substance as Section 125 of 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.

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)

² MANU/SC/0402/1978

³ MANU/SC/0508/1980

⁴ 1970CriLJ522

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 textbook 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" 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 there is any 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)

DIRECTIONS OF THE COURT

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 there is any 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.

AFTERMATH

- The Shah Bano judgement attracted a lot of opposition with authoritative bodies being against the decision for the reason of it being against the provisions of Islamic law.
- This led to enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 which provided Muslim women receiving a large, one-time payment from their husbands during the period of *iddat*, instead of a maximum monthly payment of ₹500 - an upper limit which has since been removed.
- The case had again spurred the debate on the Uniform Civil Code in India but the pressure exerted by orthodox Muslims caused women's organizations and secularists to cave in.
- The validity of the Muslim Women Act was challenged in *Danial Latifi & Anr v. Union Of India*⁵ which in a nutshell provided that the husband provide maintenance till the wife remarries and not just limit it to the *iddat* period.

⁵ ((2001) 7 SCC 740 : 2001 CriLJ 4660)