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MOHD. AHMED KHAN

v.

B

SHAH BANO BEGUM AND ORS.

April 23, 1985

[Y.V.CHANDRACHUD, C.J., D.A. DESAI, O. CHINNAPPA REDDY,
C E.S. VENKATARAMIAH AND RANGANATH MISRA, JJ.]

Muslim Personal Law—Concept of divorce—Whether, on the pronouncements of "talaq" and on the expiry of the period of iddat a divorced wife ceases to be a wife.

D *Code of Criminal Procedure Code, 1973 (Act II of 1974) Sections 125(1) (a) and Explanation (b) thereunder, Section 125 (3) and the Explanation, under the proviso thereto and section 127 (3) (b), scope and interpretation of—Correctness of three J udges.' Bench decision reported in (1979) 2 SCR 75 and (1980) 3 SCR 1127 to the effect that section 125 of the code applies to Muslims and divorced Muslim wife is entitled to maintenance—Whether there is any conflict between the provisions of section 125 and that of the Muslim Personal Law on the*
E *liability of the Muslim husband to provide for the maintenance of his divorced wife.*

Code of Criminal Procedure, 1973, section 127 (3) (b) read with ection 2 of the Shariat Act XXVI of 1937—Whether section 127 (3) (b) debars payme.t of maintenance to a divorced wife, once the Mahr or dower is paid—Whether the liability of the husband to maintain a divroced wife is limited to the period of
F *"iddat".*

Nature of Mahr or dower—Whether Mehr is maintenance.

Under section 125 (1) (a), if any person, having sufficient means neglects or refuses to maintain his wife, unable to maintain herself, a Magistrate of the
G First class may, upon proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife at such monthly rate not exceeding five hundred rupees in the whole. Under Explanation (b) thereunder "wife" includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. Under the explanation below sub-section 3 of section 125, if a husband has contracted marriage with another woman or keeps a mistress it shall be considered to be a just ground for his
H wifes' refusal to live with him. Keeping this in view, if in the trial arising out of

an application made under section 125, and if the husband offers to maintain his wife on condition of living with him, the Magistrate may consider any of the grounds of the wife's refusal to live with her husband before ordering the maintenance. Under section 127 (3) (b), the Magistrate shall cancel the order passed by him under section 125, in favour of a woman who has been divorced by, or has obtained a divorce from her husband if the woman who has been divorced by her husband has received, whether before or after the date of the said order, the whole of the sum, which, under any customary or personal law applicable to the parties was payable on such divorce.

The appellant, who is an advocate by profession was married to the respondent in 1932. Three sons and two daughters were born of that marriage In 1975, the appellant drove the respondent out of the matrimonial home. In April 1978, the respondent filed a petition against the appellant under section 125 of the Code of Criminal Procedure, in the Court of the Judicial Magistrate (First class) Indore, asking for maintenance at the rate of Rs. 500 per month, in view of the professional income of the appellant which was about Rs. 60,000 per annum. On November 6, 1978, the appellant divorced the respondent by an irrevocable "talaq" and took up the defence that she had ceased to be his wife by reason of the divorce granted by him ; that he was, therefore, under no obligation to provide maintenance for her ; that he had already paid maintenance for her at the rate of Rs. 200 per month for about two years, and that, he had deposited a sum of Rs. 3,000 in the court by way of "dower or Mahr" during the period of "iddat". In August 1979, the Magistrate directed the appellant to pay a princely sum of Rs. 25 per month to the respondent by way of maintenance. 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. Hence the appeal by special leave by the husband. The view taken in the earlier two three Judges' Benches of the Supreme Court presided over by Krishna Iyer, J. and reported in [1979] 2 SCR 75, and [1980] 3 SCR 1127, to the effect that section 125 of the Code applies to Muslims also and that therefore, the divorced muslim wife is entitled to apply for maintenance was doubted, by the Bench consisting of Fazal Ali and Varadarajan, JJ., since in their opinion the said decisions required reconsideration by a larger Bench consisting of more than three judges as the decisions are not only in direct contravention of the plain and unambiguous language of section 127 (3) (b) of the Code which far from overriding the Muslim law on the subject protects and applies the same in case where a wife has been divorced by the husband and the dower specified has been paid and the period of iddat has been observed but also militates against the fundamental concept of divorce by the husband and its consequences under the Muslim law which has been expressly protected by section 2 of the Muslim Personal Law (Shariat) Application Act, 1937—an Act which was not noticed in the said two decisions.

Dismissing the appeals, the Court Held : (Per Chandrachud, C. J.)

1. The Judgments of the Supreme Court in *Bai Tahira* (Krishna Iyer, J., Tulzapurkar, J. and Pathak, J.) and *Fazlunbi* (Krishna Iyer, J, Chinnappa

A Reddy, J. and A.P. Sen, J.) are correct, except to the extent that the statement at page 80 of the report in *Bai Tahira* made in the context of section 127 (3) (b) namely, "payment of Mahr money, as a customary discharge is within the cognizance of that provision". Justice Krishna Iyer who spoke for the Court in both these cases, relied greatly on the teleological and schematic method of interpretation so as to advance the purpose of the law. These constructional techniques have their own importance in the interpretation of statutes meant to B ameliorate the conditions of suffering sections of the society. A divorced muslim wife is, therefore, entitled to apply for maintenance under section 125 of the Code. [865H, 866A-C]

2.1 Clause (b) of the Explanation to section 125 (1) of the Code, which defines "wife" as including a divorced wife, contains no words of limitation to C justify the exclusion of Muslim women from its scope. 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 married, is a wife for the purpose of section 125. [855A-B; 854B]

2.2 Under section 488 of the Code of 1893, the wifes' right to maintenance depended upon the continuance of her married status. Therefore, that right D could be defeated by the husband by divorcing her unilaterally as under the Muslim Personal Law, or by obtaining a decree of divorce against her under the other systems of law. It was in order to remove this hardship that the Joint Committee recommended that the benefit of the provisions regarding maintenance should be extended to a divorced woman, so long as she has not remarried after the divorce. That is the genesis of clause (b) of the Explanation to section 125 (1). Section 125 of the Code is truly secular in character. E Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. Whether the spouses are Hindus or Muslims, Christians or Parsis, Pagans or Heathens, is wholly irrelevant in the application of these provisions. 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 rights and obligations of the parties belonging to particular relations, like the Hindu Adoptions and Maintenance F Act, The Shariat, or the Parsi Matrimonial Act. It would make no difference as to what is the religion professed by the neglected wife, child or parent. [834D-E; 855E-G]

2.3 Neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves are the objective criteria which determine the applicability of section 125. Such provisions, which are G essentially of a prophylactic nature, cut across the barriers of religion. True, that they do not supplant the personal law of the parties but, equally, the religion professed by the parties or the state of the personal law by which they are governed, cannot have any repercussion on the applicability of such laws unless, within the framework of the Constitution, their application is restricted to a defined category of religious groups or classes. The liability imposed by section 125 to maintain close relatives who are indigent is founded upon the indi-

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viduals' obligation to the society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be clubbed with relation. [834G-H] A

That the right conferred by section 125 can be exercised irrespective of the personal law of the parties, is fortified, especially in regard to Muslims, by the provision contained in the Explanation to the second provise to section 125 (3) of the Code. The explanation confers upon the wife the right to refuse to live with her husband if he contracts another marriage leave alone, three or four other marriages, which a Mohomedan may have under the Islamic Law. Further it shows unmistakably, that section 125 overrides the personal law, if there is any conflict between the two [836B-C,F-G] B

Jagir Kaur v. *Jaswant Singh*, [1964] 2 SCR 73,84 ; *Nanak Chand* v. *Shri Chandra Kishore Agarwala*, [1970] 1 SCR 565 applied. C

3.1 The contention that, according to Muslim Personal Law the husband's liability to provide for the maintenance of his divorced wife is limited to the period of iddat. despite the fact that she is unable to maintain herself cannot be accepted, since that law does not contemplate or countenance the situation envisaged by section 125 of the Code. Whether a husband is liable to maintain his wife, which includes a divorced wife, in all circumstances, and at all events is not the subject matter of section 125. Section 125 deals with cases in which a person who is possessed of sufficient means neglects or refuses to maintain, amongst others, his wife who is unable to maintain herself. [838H, 851A-B D

3.2 One must have regard to the entire conspectus of the Muslim Personal Law in order to determine the extent, both in quantum and in duration, of the husband's liability to provide for the maintenance of an indigent wife who has been divorced by him. Under that law, the husband is bound to pay Mahr to the wife as a mark of respect to her. True, that he may settle any amount he likes by way of dower upon his wife, which cannot be less than 10 Dirhams, which is equivalent to three or four rupees. But one must have regard to the realities of life. Mahr is a mark of respect to the wife. 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. The application of those statements of law to the contrary in text-books on Muslim 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. [858D-G] E F

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3.3 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. Thus 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 H

who is unable to maintain herself. Aiyat No. 241 and 242 of 'the Holy Koran' fortify that the Holy Koran imposed an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teachings of Koran.

[859C-D; 862C-D]

3.4 Mahr is not the amount payable by the husband to the wife on divorce and therefore, does not fall within the meaning of section 127 (3) (b) of the Code and the facile answer of the All India Muslim Law Board that the Personal Law has devised the system of Mahr to meet the requirements of women and if a woman is indigent, she must look to her relations, including nephews and cousins, to support her is a most unreasonable view of law as well as of life. [863E-F, 866E-F]

3.5 It is true under the Muslim Personal Law, the amount of Mahr is usually split into two parts, one of which is called "prompt" which is payable on demand, and the other is called "deferred", which is payable on the dissolution of the marriage by death or by divorce. But, the fact that deferred Mahr is payable at the time of the dissolution of marriage, cannot justify that it is payable 'on divorce'. Even assuming that, in a given case, the entire amount of Mahr is of the deferred variety payable on the dissolution of marriage by divorce, it cannot be said that it is an amount which is payable on divorce.

[863B-G]

3.6 Divorce may be a convenient or identifiable point of time at which the deferred amount has to be paid by the husband to the wife. But, the payment of the amount is not occasioned by the divorce, which is what is meant by the expression 'on divorce', which occurs in section 127 (3) (b) of the Code. 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'. Thus, the payment of Mahr may be deferred to a future date as, for example, death or divorce. But, that does not mean that the payment of the deferred dower is occasioned by these events.]863D-G

Similarly, the provision contained in section 127 (3) (b) may have been introduced because of the misconception that dower is an amount payable 'on divorce.' But, that again cannot convert an amount payable as a mark of respect for the wife into an amount payable on divorce. [863H]

Hamira Bibi v. *Zubaida Bibi*, 43 Indian Appeal 294 ; *Syed Sabir Hussain* v. *Farzand Hasan*, 65 Indian Appeal 119 and 127 referred to.

OBSERVATION: A

(Article 44 of our Constitution has remained a dead letter. There is no evidence of any official activity for framing a common civil code for the country. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. B A beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.)

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 103 of 1981.

From the Judgment and Order dated 1. 7. 1980 of the Madhya Pradesh High Court in Crl. Revision No. 320 of 1979. D

P. Govindan Nair, Ashok Mahajan, Mrs. Kriplani, Ms. Sangeeta and *S.K. Gambhir* for the Appellant.

Danial Latifi Nafess Ahmad Siddiqui, S.N. Singh and *T.N. Singh* for the Respondents. E

Mohd. Yunus Salim and *Shakeel Ahmed* for Muslim Personal Law Board.

S.T. Desai and *S.A. Syed* for the Intervener Jamat-Ulema-Hind. F

The Judgment of the Court was delivered by

CHANDRACHUD,C.J. This appeal does not involve any question of constitutional importance but, that is not to say that it does not G involve any question of importance. Some questions which arise under the ordinary civil and criminal law are of a far-reaching significance to large segments of society which have been traditionally subjected to unjust treatment. Women are one such segment. '*Na stree swatantramarhati*" said Manu, the Law giver : The woman does not deserve independence. And, it is alleged that the 'fatal H

point in Islam is the 'degradation of woman'(1). 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.

This appeal, arising out of an application filed by a divorced Muslim woman for maintenance under section 125 of the Code of Criminal Procedure, raises a straightforward issue which is of common interest not only to Muslim women, not only to women generally but, to all those who, aspiring to create an equal society of men and women, lure themselves into the belief that mankind has achieved a remarkable degree of progress in that direction. The appellant, who is an advocate by profession, was married to the respondent in 1932. Three sons and two daughters were born of that marriage. In 1975, the appellant drove the respondent out of the matrimonial home. In April 1978, the respondent filed a petition against the appellant under section 125 of the Code in the court of the learned Judicial Magistrate (First Class), Indore asking for maintenance at the rate of Rs. 500 per month. On November 6, 1978 the appellant divorced the respondent by an irrevocable talaq.His defence to the respondent's petition for maintenance was that she had ceased to be his wife by reason of the divorce granted by him, to provide that he was therefore under no obligation maintenance for her, that 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 therespondent by way of maintenance. It may bem antioned that the respondent had alleged that the appellant earns a professional income of about Rs. 60,000 per year. 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 is before us by special leave.

Does the Muslim Personal Law impose no obligation upon the husband to provide for the maintenance of his divorced wife ? Undoubtedly, the Muslim husband enjoys the privilege of being

(1) 'Selections from Kuran'—Edward William Lane 1843, Reprint 1982, page xc (Introduction)

able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent. Indeed, for no reason at all. But, is the only price of that privilege the dole of a pittance during the period of iddat ? And, is the law so ruthless in its inequality that, no matter how much the husband pays for the maintenance of his divorced wife during the period of iddat, the mere fact that he has paid something, no matter how little, absolves him for ever from the duty of paying adequately so as to enable her to keep her body and soul together ? Then again, is there any provision in the Muslim Personal Law under which a sum is payable to the wife 'on divorce' ? These are some of the important, though agonising, questions which arise for our decision.

The question as to whether section 125 of the Code applies to Muslims also is concluded by two decisions of this Court which are reported in *Bai Tahira* v. *Ali Hussain Fidaalli Chothia*(1) and *Fazlunbi* v. *K. Khader Vali*.(2) Those decisions took the view that the divorced Muslim wife is entitled to apply for maintenance under section 125. But, a Bench consisting of our learned Brethren, Murtaza Fazal Ali and A. Varadarajan, JJ. were inclined to the view that those cases are not correctly decided. Therefore, they referred this appeal to a larger Bench by an order dated February 3, 1981, which reads thus :

> "As this case involves substantial questions of law of far-reaching consequences, we feel that the decisions of this Court in *Bai Tahira* v. *Ali Hussain Fidaalli Chothia & Anr.* and *Fazlunbi* v. *K. Khader Vali & Anr.* require reconsideration because, in our opinion, they are not only in direct contravention of the plain and an unambiguous language of s. 127(3)(b) of the Code of Criminal Procedure, 1973 which far from overriding the Muslim Law on the subject protects and applies the same in case where a wife has been divorced by the husband and the dower specified has been paid and the period of iddat has been observed. The decision also appear to us to be against the fundamental concept of divorce by the husband and its consequences

(1) 1979 (2) SCR 75
(2) 1980 (3)SCR 1127

A under the Muslim law which has been expressly protected by s. 2 of the Muslim Personal Law (Shariat) Application Act, 1937—an Act which was not noticed by the aforesaid decisions. We, therefore, direct that the matter may be placed before the Hon'ble Chief Justice for being heard by a larger Bench consisting of more than three B Judges."

Section 125 of the Code of Criminal Procedure which deals with the right of maintenance reads thus :

C "*Order for maintenance of wives, children and parents*

125. (1) If any person having sufficient means neglects or refuses to maintain—

(a) his wife, unable to maintain herself,

D

(b).....

(c) .....

(d) —...

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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 .....,at such monthly rate not exceeding five hundred rupees in the whole as such Magistrate think fit..... F

Explanation—For the purposes of this Chapter,—

(a).....

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

(2) .....

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(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 allowance 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 .....

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.

Explantion—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."

Section 127(3)(b), on which the appellant has built up the edifice of his defence reads thus:

"*Alteration in allowance*

127. (1) .....

(2) .....

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from her husband, the Magistrate shall, if he is satisfied that—

(a) .....

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which,

A under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,—

(i) in the case where such sum was paid before such order, from the date on which such order was made.

B

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman."

Under section 125(1)(a), a person who, having sufficient means, C neglects or refuses to maintain his wife who is unable to maintain herself, can be asked by the court to pay a monthly maintenance to her at a rate not exceeding Five Hundred rupees. By clause (b) of the Explanation to section 125(1), 'wife' includes a divorced woman who has not remarried. These provisions are too clear and precise to D admit of any doubt or refinement. 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 provisions. The reason for this is axiomatic, in the sense that section 125 is a part of the Code of Criminal Procedure, not of the E Civil Laws which define and govern the rights and obligations of the parties belonging to particular religions, like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion profes- F sed by the neglected wife, child or parent ? Neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves are the objective criteria which determine the applicability of section 125. Such provisions, which are essentially of a prophylactic nature, cut across the barriers of religion. True, that they do not supplant the personal law of the parties but, equally G the religion professed by the parties or the state of the personal law by which they are governed, cannot have any repercussion on the applicability of such laws unless, within the framework of the Constitution, their application is restricted to a defined category of religious groups or classes. The liability imposed by section 125 to maintain close relatives who are indigent is founded upon the H individual's obligation to the society to prevent vagrancy and

destitution. That is the moral edict of the law and morality cannot be clubbed with religion. 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. Section 125 is truly secular in character.

Sir James FitzJames Stephen who piloted the Code of Criminal Procedure, 1872 as a Legal Member of the Viceroy's Council, described the precursor of Chapter IX of the Code in which section 125 occurs, as 'a mode of preventing vagrancy or at least of preventing its consequences. *In Jagir kaur* v. *Jaswant Singh*,(1) Subba Rao, J. speaking for the Court said that Chapter XXXVI of the Code of 1898 which contained section 488, corresponding to section 125, "intends to serve a social purpose". In *Nanak Chand* v. *Shri Chandra Kishore Agarwala*.(2) Sikri, J., 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 was "applicable to all persons belonging to all religions and has no relationship with the personal law of the parties".

Under secton 488 of the Code of 1898, the wife's right to maintenance depended upon the continuance of her married status. Therefore, that right could be defeated by the husband by divorcing her unilaterally as under the Muslim Personal Law, or by obtaining a decree of divorce against her under the other systems of law. It was in order to remove this hardship that the Joint Committee recommended that the benefit of the provisions regarding maintenance should be extended to a divorced woman, so long as she has not remarried after the divorce. That is the genesis of clause (b) of the Explanation to section 125(1), which provides that 'wife' includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. Even in the absence of this provision, the courts had held under the Code of 1898 that the provisions regarding maintenance were independant of the personal law governing the parties. The induction of the definition of 'wife, so as to include a divorced woman lends even greater weight to that

(1) 1964 (2) SCR 73, 84.
(2) 1970 (1) SCR 565.

A conclusion. 'Wife' means a wife as defined, irrespective of the religion professed by her or by her husband. Therfore, 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 B applicable to her.

The conclusion that the right conferred by section 125 can be exercised irrespective of the personal law of the parties is fortified, especially in regard to Muslims, by the provision contained in the Explanation to the second proviso to section 125(3) of the Code. C That proviso says that if the husband offers to maintain his wife on condition that she should live with him, and she refuses to live with him, the Magistrate may consider any grounds of refusal stated by her, and may make an order of maintenance notwithstanding the offer of the husband, if he is satisfied that there is a D just ground for passing such an order. According to the Explanation to the proviso :

> "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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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". (See Mulla's Mahomedan Law,18th Edition, paragraph F 255, page 285, quoting Baillie's Digest of Moohummudan Law; and Ameer Ali's Mahomedan Law, 5th Edition, Vol. II, page 280). 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. It shows, unmistakably, that section 125 overrides the personal law, if is any there conflict between G the two.

The whole of this discussion as to whether the right conferred by section 125 prevails over the personal law of the parties, has proceeded on the assumption that there is a conflict between the provisions of that section and those of the Muslim Personal Law. H The argument that by reason of section 2 of the Shariat Act,

XXVI of 1937, the rule of decision in matters relating, *inter alia*, to maintenance "shall be the Muslim Personal Law" also proceeds upon a similar assumption. We embarked upon the decision of the question of priority between the Code and the Muslim Personal Law on the assumption that there was a conflict between the two because, in so far as it lies in our power, we wanted to set at rest, once for all, the question whether section 125 would prevail over the personal law of the parties, in cases where they are in conflict.

The next logical step to take is to examine the question, on which considerable argument has been advanced before us, 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 contention of the husband and of the interveners who support him is that, under the Muslim Personal Law, the liability of the husband to maintain a divorced wife is limited to the period of iddat. In support of this proposition, they rely upon the statement of law on the point contained in certain text books. In Mulla's Mahomedan Law (18th Edition, para 279, page 301), there is a statement to the effect that, "After divorce, the wife is entitled to maintenance during the period of iddat". At page 302, the learned author says :

> "Where an order is made for the maintenance of a wife under section 488 of the Criminal Procedure Code 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 secton 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

A Law, or on an order under the Criminal Procedure Code-"

According to Dr Paras Diwan :

> "When a marriage is dissolved by divorce the wife is entitled to maintenance during the period of iddat.... On
B 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."

(Muslim Law in Modern India, 1982 Edition, page 130)

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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.* One must have regard to the entire conspectus of the Muslim Personal Law in order to determine the extent both,
D in quantum and in duration, of the husband's liability to provide for the maintenance of an indigent wife who has been divorced by him. Under that law, the husband is bound to pay Mahr to the wife as a mark of respect to her. True, that he may settle any amount he likes by way of dower upon his wife, which cannot be less than 10 Dir-
E hams, which is equivalent to three or four rupees (Mulla's Mahomedan Law, 18th Edition, para 286, page 308).But, one must have regard to the realities of life Mahr is a mark of respect to the wife. 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 counte-
F nance 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 opinton 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
G destitution arising out of the indigence of the divorced wife. We are not concerned here with the broad and general question whether a husband is liable to maintain his wife, which includes a divorced wife, in all circumstances and at all events. That is not the subject matter of section 125. That section deals with cases in which, a person who is possessed of sufficient means neglects or refuses to
H maintain, amongst others, his wife who is unable to maintain

herself. 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. The argument of the appellant that, according to the Muslim Personal Law, his liability to provide for the maintenance of his divorced wife is limited to the period of iddat, despite the fact she is unable to maintain herself, has therefore to be rejected. 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.

A B C D

There can be no greater authority on this question than the Holy Quran, "The Quran, the Sacred Book of Islam, comprises in its 114 Suras or chapters, the total of revelations believed to have been communicated to Prophet Muhammed, as a final expression of God's will". (The Quran—Interpreted by Arthur J. Arberry). 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. The Arabic version of those Aiyats and their English translation are reproduced below :

E

F

Arabic version	*English version*
Ayat No. 241	For divorced women
WA LIL MOTALLAQATAY	Maintenance (should be
MATA UN	Provided)
BIL MAAROOFAY	On a reasonable (Scale)
HAQQAN	This is a duty
ALAL MUTTAQEENA	On the righteous.
Ayat No. 242	
KAZALEKA YUBAIYYANULLAHO	Thus doth God

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H

A

LAKUM AYATEHEE LA ALLAKUM TAQELOON	Make clear His Signs To you : in order that ye may understand.

(See 'The Holy Quran' by Yusuf Ali, Page 96).

B The correctness of the translation of these Aiyats is not in dispute except that, the contention of the appellant is that the word 'Mata' in Aiyat No. 241 means 'provision' and not 'maintenance'. That is a distinction without a difference. Nor are we impressed by the shuffling plea of the All India Muslim Personal Law Board that, in Aiyat 241, the exhortation is to the 'Mutta Queena', that is, to C the more pious and the more God-fearing, not to the general run of the Muslims, the 'Muslminin'. In Aiyat 242, the Quran says : "It is expected that you will use your commonsense".

The English version of the two Aiyats in Muhammad Zafrul- D lah Khan's 'The Quran' (page 38) reads thus :

> "For divorced women also there shall be provision according to what is fair. This is an obligation binding on the righteous. Thus does Allah make His commandments clear to you that you may understand."

E

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 :

F "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 G 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 H people.

242.

Thus Allah makes clear His commandments for you :

It is expected that you will use your commonsense."

In "The Running Commentary of The Holy Quran" (1964 Edition) by Dr. Allamah Khadim Rahmani Nuri, Aiyat No. 241 is translated thus :

"241

And for the divorced woman (also) a provision (should be made) with fairness (in addition to her dower) ; (This is) a duty (incumbent) on the reverent."

In "The Meaning of the Glorious Quran, Text and Explanatory Translation", by Marmaduke Pickthall, (Taj Company Ltd., karachi), Aiyat 241 is translated thus :

"241.

For divorced women a provision in kindness : A duty for those who ward off (evil)."

Finally, in "The Quran Interpreted" by Arthur J. Arberry. Aiyat 241 is translated thus :

"241.

There shall be for divorced women provision honourable—an obligation on the godfearing."

So God makes clear His signs for you : Happily you will understand."

Dr. K.R. Nuri in his book quoted above : 'The Running Commentary of the Holy Quran", says in the preface :

"Belief in Islam does not mean mere confession of the existence of something. It really means the translation of

A the faith into action. Words without deeds carry no meaning in Islam. Therefore the term "believe and do good" has been used like a phrase all over the Quran. Belief in something means that man should inculcate the qualities or carry out the promptings or guidance of that B thing in his action. Belief in Allah means that besides acknowledging the existence of the Author of the Universe, we are to show obedience to His commandments..."

These Aiyats leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide C maintenance to the divorced wife. The contrary argument does less than justice to the teaching of the Quran. As observed by Mr. M. Hidayatullah in his introduction to Mulla's Mahomedan Law, the Quran is Al-furqan' that is one showing truth from falsehood and right from wrong.

D

The second plank of the appellant's argument is that the respondent's application under section 125 is liable to be dismissed because of the provision contained in section 127 (3) (b). That section provides, to the extent material, that the Magistrate shall cancel the order of maintenance, if the wife is divorced by the husband and, E she has received "the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce". That raises the question as to whether, under the Muslim Personal Law, any sum is payable to the wife 'on divorce'. We do not have to grope in the dark and speculate as to which kind of a sum this can be because, the only argument advanced before us on F behalf of the appellant and by the interveners supporting him, is that Mahr is the amount payable by the husband to the wife on divorce. We find it impossible to accept this argument.

In Mulla's principles of Mahomedan Law (18th Edition, page 308), Mahr or Dower is defined in paragraph 285 as "a sum of G 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), criticises this definition on the ground that Mahr is not payable "in consideration of marriage" but is an obligation imposed by law on H 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. We need not enter into this controversy and indeed, Mulla's book itself contains the further statement at page 308 that the word 'consideration' is not used in the sense in which it is used in the Contract Act and that under the Mohammedan Law, Dower is an obligation imposed upon the husband as a mark of respect for the wife. We are concerned to find whether Mahr is an amount payable by the husband to the wife on divorce. Some confusion is caused by the fact that, under the Muslim Personal Law, the amount of Mahr is usually split into two parts, one of which is called "prompt", which is payable on demand, and the other is called "deferred", which is payable on the dissolution of the marriage by death or by divorce. But, the fact that deferred Mahr is payable at the time of the dissolution of marriage, cannot justify the conclusion that it is payable 'on divorce'. Even assuming that, in a given case, the entire amount of Mahr is of the deferred variety payable on the dissolution of marriage by divorce, it cannot be said that it is an amount which is payable on divorce. Divorce may be a convenient or identifiable point of time at which the deferred amount has to be paid by the husband to the wife. But, the payment of the amount is not occasioned by the divorce, which is what is meant by the expression 'on divorce', which occurs in section 127 (3) (b) of the Code. 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'.

In an appeal from a Full Bench decision of the Allahabad High Court, the Privy Council in *Hamira Bibi* v. *Zubaide Bibi*[1] sum-

(1) 43 I. A. 294.

A med up the nature and character of Mahr in these words :

> "Dower is an essential incident under the Muslim Law to the status of marriage; to such an extent that is so that when it is unspecified at the time the marriage is contracted, the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation; but the law allows its division into two parts, one of which is called "prompt" payable before the wife can be called upon to enter the conjugal domicil; the other "deferred", payable on the dissolution of the contract by the death of either of the parties or by divorce." (p. 300-301)

This statement of law was adopted in another decision of the Privy Council in *Syed Sabir Husain* v. *Farzand Hasan*.[1] It is not quite appropriate and seems invidious to describe any particular Bench of a court as "strong" but, we cannot resist the temptation of mentioning that Mr. Syed Ameer Ali was a party to the decision in *Hamira Bibi* while Sir Shadi Lal was a party to the decision in *Syed Sabir Husain*. These decisions show that the payment of dower may be deferred to a future date as, for example, death or divorce. But, that does not mean that the payment of the deferred dower is occasioned by these events.

It is contended on behalf of the appellant that the proceedings of the Rajya Sabha dated December 18, 1973 (volume 86, column 186), when the bill which led to the Code of 1973 was on the anvil; would show that the intention of the Parliament was to leave the provisions of the Muslim Personal Law untouched. In this behalf, reliance is placed on the following statement made by Shri Ram Niwas Mirdha, the then Minister of State, Home Affairs :

> "Dr. Vyas very learnedly made certain observations that a divorced wife under the Muslim law deserves to be treated justly and she should get what is her equitable or legal due. Well, I will not go into this, but say that we would not like to interfere with the customary law of the Muslims through the Criminal Procedure Code. If there is

(1) 65 I. A. 119, 127

a demand for change in the Muslim Personal Law,it should actually come from the Muslim Community itself and we should wait for the Muslim public opinion on these matters to crystalise before we try to change this customary right or make changes in their personal law. Above all, this is hardly, the place where we could do so. But as I tried to explain, the provision in the Bill is an advance over the previous situation. Divorced women have been included and brought within the admit of clause 125, but a limitation is being imposed by this amendment to clause 127, namely, that the maintenance orders would ceases to operate after the amounts due to her under the personal law are paid to her. This is a healthy compromise between what has been termed a conservative interpretation of law or a concession to conservative public opinion and liberal approach to the problem. We have made an advance and not tried to transgress what are the personal rights of Muslim women. So this, I think, should satisfy Hon. Members that whatever advance we have made is in the right direction and it should be welcomed."

It does appear from this speech that the Government did not desire to interfere with the personal law of the Muslim through the Criminal Procedure Code. It wanted the Muslim community to take the lead and the Muslim public opinion to crystalise on the reforms in their personal law. However, we do not concerned with the question whether the Government did or did not desire to bring about changes in the Muslim Personal Law by enacting sections 125 and 127 of the Code. As we have said earlier and, as admitted by the Minister, the Government did introduce such a change by defining the expression 'wife' to include a divorced wife. It also introduced another significant change by providing that the fact that the husband has contracted marriage with another woman is a just ground for the wife's refusal to live with him. The provision contained in section 127 (3) (b) may have been introduces because of the misconception that dower is an amount payable "on divorce". But, that cannot convert an amount payable as a mark of respect for the wife into an amount payable on divorce.

It must follow from this discussion, unavoidably a little too long, that the judgments of this Court in *Bai Tahira* (Krishna

A Iyer J., Tulzapurkar J. and Pathak J.) and *Fazlunbi* (Krishna Iyer, J.,) one of us, Chinnappa Reddy J. and A. P. Sen J.) are correct. Justice Krishna Iyer who spoke for the Court in both these cases, relied greatly on the teleological and schematic method of interpretation so as to advance the purpose of the law. These constructional B techniques have their own importance in the interpretation of statutes meant to ameliorate the conditions of suffering sections of the society. We have attempted to show that taking the language of the statute as one finds it, 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 C Muslim Personal Law, is payable on divorce.

Though *Bai Tahira* was correctly decided, we would like, respectfully, to draw attention to an error which has crept in the judgment. There is a statement at page 80 of the report, in the context of section 127 (3) (b), that "payment of Mahr money, as a customary discharge, is within the cognizance of that provision". We have D taken the view that Mahr, not being payable on divorce, does not fall within the meaning of that provision.

It is a matter of deep regret that some of the interveners who supported the appellant, took up an extreme position by displaying E an unwarranted zeal to defeat the right to maintenance of women who are unable to maintain themselves. The written submissions of the All India Muslim Personal Law Board have gone to the length of asserting that it is irrelevant to inquire as to how a Muslim divorce should maintain herself. The facile answer of the Board is F (that the Personal Law has devised the system of Mahr to meet the requirements of women and if a woman is indigent, she must look to her relations, including nephew and cousins, to support her. This is a most unreasonable view of law as well as life. We appreciate that Begum Temur Jehan, a social worker who has been working in association with the Delhi City Women's Association for the uplift of Muslim women, intervened to support Mr. Daniel Latifi G who appeared on behalf of the wife.

It is also a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavour to secure for the citizens a uniform civil code throughout the H territory of India". There is no evidence of any official activity for

framing a common civil code for the country. A belief seems to have gained ground that it is for the Muslim community to take a lead in the matter of reforms of their personal law. A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common Civil Code. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case.

Dr. Tahir Mahmood in his book 'Muslim Personal Law' (1977 Edition, pages 200-202), has made a powerful plea for framing a uniform Civil Code for all citizens of India. He says : "In pursuance of the goal of secularism, the State must stop administering religion-based personal laws". He wants the lead to come from the majority community but, we should have thought that, lead or no lead, the State must act. It would be useful to quote the appeal made by the author to the Muslim community :

> "Instead of wasting their energies in exerting theological and political pressure in order to secure an "immunity" for their traditional personal law from the state's legislative jurisdiction, the Muslim will do well to begin exploring and demonstrating how the true Islamic laws, purged of their time-worn and anachronistic interpretations, can enrich the common civil code of India."

At a Seminar held on October 18, 1980 under the auspices of the Department of Islamic and Comparative Law, Indian Institute of Islamic Studies, New Delhi, he also made an appeal to the

A Muslim community to display by their conduct a correct understanding of Islamic concepts on marriage and divorce (See Islam and Comparative Law Quarterly, April-June, 1981, page 146).

B Before we conclude, we would like to draw attention to the Report of the Commission on marriage and Family Laws, which was appointed by the Government of Pakistan by a Resolution dated August 4, 1955. The answer of the Commission to Question No.5 (page 1215 of the Report) is that

> C "a large number of middle-aged women who are being divorced without rhyme or reason should not be thrown on the streets without a roof over their heads and without any means of sustaining themselves and their children."

The Report concludes thus :

> D "In the words of Allama Iqbal, "the question which is likely to confront Muslim countries in the near future, is whether the law of Islam is capable of evolution—a question which will require great intellectual effort, and is sure to be answered in the affirmative."

E For these reasons, we dismiss the appeal and confirm the judgment of the High Court. The appellant will pay the costs of the appeal to respondent 1, which we quantify at rupees ten thousand. It is needless to add that it would be open to the respondent to make an application under section 127 (1) of the Code for increasing the F allowance of maintenance granted to her on proof of a change in the circumstances as envisaged by that section.

G S.R. *Appeal dismissed*