MAHR AND MUSLIM DIVORCEE'S RIGHT TO MAINTENANCE

I Introduction

THE SUPREME Court in *Mohammed Ahmed Khan* v. *Shah Bano Begum*,[1] observed:

> This appeal . . . raises . . . [an] 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.[2]

In the course of re-enacting the provisions concerning the summary jurisdiction of the magistrate to order maintenance for a neglected wife or child found in section 488 of the Criminal Procedure Code 1898, in section 125 of the Code of Criminal Procedure 1973, an important "Explanation" was incorporated which reads:

> For the purposes of the chapter,[2a] . . . (*b*) 'wife' includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

The position was, however, somewhat muddled and confused by section 127, which deals with alterations in a maintenance order. The relevant portion of this section, as amended, reads:

> (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—
>
> . . .
>
> (*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, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,
>
> . . .
>
> (*c*) the woman has obtained a divorce from her husband

---

1. A.I.R. 1985 S.C. 945.
2. *Id.* at 946, per Chandrachud C.J.
2a. Ch. IX.

and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.

The interpretation of the provisions of sections 125 and 127 of the new code as they applied to Muslim divorcees has been considered by the Supreme Court in four cases. The question essentially has been whether payment of *mahr* by the Muslim husband satisfied the terms of section 127(3)(*b*) and obliged the magistrate to cancel a maintenance order made in favour of a divorced Muslim woman.

II Mahr under the Muslim law

Mahr is an amount settled on the wife by the husband and is an essential component of a Muslim marriage contract. Even if no sum is mentioned in the contract (or, indeed, even if it is explicitly stated that no *mahr* will be given), the wife is nonetheless entitled to a "proper" *mahr*,[3] assessed on the basis of her personal qualities (age, beauty, virginity, *etc.*) and the status of the families involved. In *Hanafi* law the minimum amount that may be specified as *mahr* is ten *dirhams*;[4] other schools recognise no minimum stipulated *mahr*.[5] Although all of the *mahr* may be payable at or immediately after the marriage ("prompt" *mahr*), some portion is often deferred, becoming payable on dissolution of the marriage by the death of either spouse or divorce. Any unpaid prompt *mahr* will also fall due on dissolution of the marriage.

If the deferred *mahr* is set at a sufficiently high amount, it may well cause a Muslim husband to think twice before divorcing his wife; and may be of real benefit to the wife should she be divorced or widowed, given the divorced wife's limited right (under the traditional interpretation of Muslim law) to maintenance from her ex-husband and the widow's small share as an heir to her husband (1/8th if there are children; a fractional share of this 1/8th if there is more than one wife). However, divorce or widowhood is the furthest thing from the minds of the nuptial couple on the joyous occasion of marriage; emotional and economic vicissitudes of life are unpredictable; and the deferred *mahr* bears no necessary relationship to either the ability of the husband to pay or the needs of the wife should a divorce occur, particularly after some years of marriage. It has been observed that, "In India no uniform rates of *mahr* prevail in any part of the country. In some cases it is ridiculously low, whereas sometimes it is unconscionable."[6]

Ironically, in some parts of India local laws exist to protect the

3. A very exceptional rule to the contrary may apply in rare circumstances in *Ithna Ashari* law. See Tahir Mahmood, *The Muslim Law of India* 71 (1980).

4. A *dirham* was a silver coin weighing 2.97 grammes.

5. *Supra* note 3 at 73.

6. Tahir Mahmood, *Muslim Personal Law* 72 (1977).

interests of the *husband* should the *mahr* have been set too high. The identical provisions of the Oudh Laws Act 1876 and the Jammu and Kashmir State Muslim Dower Act 1920 provide that if the amount of *mahr* specified in a Muslim marriage contract is excessive with regard to the means of the husband, the court, in a suit for enforcement of the contract, shall allow not the stipulated *mahr*, but a sum which is "reasonable" with reference to the means of the husband and the status of the wife. No similar statute, local or national, exists to protect the interests of the *wife* should the *mahr* have been set unreasonably low, and also have been severely reduced in real value by intervening years of inflation, or be, at the time of the divorce, totally inadequate in terms of the divorcee's needs and the husband's financial position.

Mahr clearly does not necessarily and in every case protect a Muslim woman from destitution following a divorce.[7] Section 125 of the Code of Criminal Procedure, 1973 equally clearly attempts to give all divorced women some minimal degree of protection. But does *mahr* constitute a sum "under any customary or personal law applicable to the parties . . . payable on . . . divorce," remittance of which absolves a Muslim husband from his liabil ties, and negates the rights of a Muslim divorcee, under the code? Three distinct positions on this question can be identified from successive Supreme Court decisions, the definitive ruling being that in the recent *Shah Bano* case.[8]

III Case law

(i) Bai Tahira and Fuzlunbi

The first case to reach the Supreme Court was *Bai Tahira* v. *Ali Hussain Fissalli*[9] which came up before a bench comprising V.R. Krishna Iyer, V.D. Tulzapurkar and R.S. Pathak JJ. The judgment was delivered by Krishna Iyer J. who stressed the social welfare concern underlying the legislation and rejected the contention that payment of *mahr per se* absolved a Muslim husband from any further liability under section 125. Although the amount paid as *mahr* had to be considered, yet it was necessary that there be some rational correlation between the sum payable under personal or customary law and what would be payable under a maintenance order before the husband could claim immunity from an order made under section 125 of the code. He states:

---

7. This fact was recognised fully thirty years ago by the Pakistan Commission on Marriage and Family Laws. In its 1956 *Report* the commission recommended that the courts be empowered to award maintenance to a divorced wife for life or until she remarried, observing that the "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." (Report of the Commission, *Gazette of Pakistan, Extraordinary*, 20 June 1956, 1197-1232 at 1215). No action has yet been taken in Pakistan to implement this recommendation.

8. *Supra* note 1.

9. A.I.R. 1979 S.C. 362.

> Payment of mehar money, as a customary discharge, is within the cognizance of . . . [section 127 (3)(b)]. But what was the amount of mehar? Rs. 5000/-, interest from which could not keep the woman's body and soul together for a day . . . unless she was ready to sell her body and give up her soul! . . . . [T]he complex of provisions in Chap. IX has a social purpose. Ill-used wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets . . . . Where the husband, by customary payment at the time of divorce, has adequately provided for the divorcee, a subsequent series of recurrent doles is contra-indicated. . . . The key-note thought is adequacy of payment which will take reasonable care of her maintenance.
>
> The payment of illusory amounts 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. The legal sanctity of the payment is certified by the fulfilment of the social obligation, not by a ritual exercise rooted in custom. . . . The purpose of the payment 'under any customary or personal law' must be to obviate destitution of the divorcee and to provide her with wherewithal to maintain herself. . . . There must be a rational relationship between the sum so paid and its potential as provision for maintenance. . . . [N]o husband can claim under Section 127 (3)(b) absolution from his obligation under S. 125 towards a divorced wife except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance.[10]

Thus, payment of *mahr* was a matter to be taken into consideration, but it would not automatically disentitle a divorced woman to a maintenance order under section 125. The court would look behind the "ritual exercise" of payment to the amount actually paid, the means of the husband, and the needs of the divorced wife. Social policy of the secular welfare state, underlying and forming the provisions of the new code, protected the "derelict divorcee,"[11] whatever her religious denomination and regardless of her personal law, unless that personal law had already granted her such protection against moral and material degradation as the courts considered adequate in all the circumstances of the case. Section 127 (3)(*b*) of the code operated to protect the husband from double liability, not to deprive a divorcee of her statutory right under section 125 in circumstances where payment under customary or personal law left her inadequately provided for.

The following year Krishna Iyer J. again delivered the judgment for

10. *Id.* at 365-66.
11. *Id.* at 365.

the court (V.R. Krishna Iyer, O. Chinnappa Reddy and A.P. Sen JJ.) in *Fuzlunbi* v. *K. Khader Va'i*'[12] and reiterated the conclusion that the 'make believe ritual of miniscule *mahr*' did not deprive a wife *talaq*-ed into destitution of her right to maintenance under section 125.[13]

(*ii*) Zohara Khatoon

In early February 1981 two judges of the Supreme Court (Murtaza Fazal Ali and A. Varadarajan JJ.), in a referring judgment, indicated their dissent from the decisions in *Bai Tahira* and *Fuzlunbi* and requested that the case then before them (*Shah Bano*)[14] be referred to a larger bench consisting of more then three judges. Two weeks later, the same judges (together with A.D. Koshal J.) dealt with a case which differed from *Bai Tahira*, *Fuzlunbi* and *Shah Bano* in that while in these three cases the Muslim wife had been divorced by *talaq*, in the present case—*Zohara Khatoon* v. *Mohammad Ibrahim*[15]—the wife had obtained a judicial divorce under the Dissolution of Muslim Marriages Act 1939.

The husband in *Zohara Khatoon* argued, and the High Court had accepted, that the "Explanation" to section 125 did not encompass a woman who had obtained a divorce *from the court* under the Act of 1939, and only covered a woman who had been divorced extra-judicially *by her husband*—an argument, incidentally, which would, by logical implication, bar a woman who obtained a divorce, under the Hindu Marriage Act 1955, Parsi Marriage and Divorce Act 1936, (Christian) Divorce Act 1869, or the Special Marriage Act 1954, from proceeding under section 125. The Supreme Court rejected this interpretation of the "Explanation" and held that the Muslim wife who obtained a judicial divorce under the Act of 1939 was entitled to claim maintenance under section 125.

The decision of Murtaza Fazal Ali and A. Varadarajan JJ. however, makes clear that these two judges read the relevant provisions of the new code in a way that would exclude a woman divorced by *talaq* and paid her *mahr* from obtaining a maintenance order under section 125.[16] Although the "Explanation" to section 125 covered both a woman divorced by her husband (*e.g.*, by *talaq*) and the woman who had obtained a judicial divorce (*e g.*, under the Dissolution of Muslim Marriages Act), Fazal Ali and Varadarajan JJ. concluded that section 127(3)(*b*) applied to the first eventuality and section 127(3)(*c*) to the latter. On this reading, sub-section (3)(*b*) obliged the magistrate to cancel a maintenance order in favour of a woman who had been *divorced by her husband and been paid her*

12. A.I.R 1980 S.C. 1730.

13. The *mahr* in this case was Rs. 500. Krishna Iyer J. commented that, "No one in his senses can contend that the mehar of Rs. 500 will yield income sufficient to maintain a woman even if she were to live on city pavements!" (*Id.* at 1731).

14. *Supra* note 1 at 947. See *infra* at 492.

15. A.I.R. 1981 S C. 1243.

16. These remarks were *obiter* and have, of course, been superseded by the definitive judgment in *Shah Bano*. See *infra* at 492-93.

mahr; while a woman who had *obtained a judicial divorce* (whether she was paid any *mahr* or not) was entitled to maintenance under section 125 unless she had *voluntarily surrendered* her right to maintenance.

Everything thus turned, not on the amount of *mahr* and its relationship to the woman's maintenance requirements, but on the procedure by which the marriage had been dissolved. One result of such an interpretation is to place in the hands of the Muslim husband not only the right (which he already possesses) of unilaterally dissolving the marriage extra-judicially, but also the right of unilaterally negating the wife's statutory right to maintenance following the divorce by pronouncing *talaq* when she instituted divorce proceedings under the Dissolution of Muslim Marriages Act.

(*iii*) Shah Bano

Having been referred by Fazal Ali and Varadarajan JJ. to a larger bench, *Mohammad Ahmed Khan* v. *Shah Bano Begum*[17] recently came up before a bench comprising five judges, including the Chief Justice, who delivered the decision of the court.

While the previous judgments had proceeded on the assumption that deferred *mahr* did come within the contemplation of section 127(3)(*b*) by virtue of being a sum payable under Muslim personal law on divorce, the present court proceeded to examine the issue and question the assumption. The court quoted passages to the effect that *mahr* is "a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage,"[18] and "an obligation imposed by law on the husband as a mark of respect for the wife."[19] These propositions the court found incapable of being reconciled with the notion that *mahr* was an amount payable "on divorce."[20] It was observed:

> 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. . . .[N]o 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. . . .[H]e does not divorce her as a mark of

---

17. *Supra* note 1 (Y.V. Chandrachud C.J.; D.A. Desai, O. Chinnappa Reddy, E.S. Venkataramiah and Ranganath Misra JJ.).

18. Mulla, *Principles of Mahomedan Law* 308 (18th ed.).

19. Paras Diwan, *Muslim Law in Modern India* 60 (1982).

20. *Supra* note 1 at 952.

respect. Therefore, a sum payable to the wife out of respect cannot be a sum payable 'on divorce.'[21]

The fact that *mahr*, or a part of it, may actually become due on the occasion of divorce, did not convert it into a sum payable "on divorce" within the meaning of section 127(3)(*b*); the obligation arose on marriage and because of the marriage, not because of the divorce. Although payment or part of the *mahr* may be deferred until some future date or event, such as death or divorce, this "does not mean that the payment of the deferred dower is occasioned by these events."[22]

While upholding the decision in *Bai Tahira*, the court took exception to Justice Krishna Iyer's statement that "payment of mehar money, as a customary discharge, is within the cognizance" of section 127(3)(*b*). Given the present conclusion that *mahr* was not a sum payable "on divorce," it followed that it did not come within the terms of that section.[23] Nevertheless, *mahr*, if any were paid at the time of the divorce, would undoubtedly be taken into consideration in assessing the divorced wife's ability to support herself (*e.g.*, any interest she could obtain from investment of that amount would constitute income) and the amount of maintenance that the husband should be ordered to pay. This is substantially the position reached by Krishna Iyer J. in *Bai Tahira* and *Fuzlunbi* and, it is suggested, would remain the position after *Shah Bano*.

IV Concluding remarks

"[A]ll those aspiring to create an equal society of men and women"[24] must welcome the *Shah Bano* decision. Nothing could be more unfair and unjust than that Muslim women, merely because of their religion, should be denied the elemental protection against destitution following divorce to which women of all other religions would be entitled; or that Muslim men, merely because of their religion, should be excused from a responsibility to which men of all other religions would be liable. Further, as the Supreme Court perceptively observed, such a result would not do "justice to the teaching of the Quran."[25]

---

21. *Id.* at 952-953.
22. *Id.* at 953.
23. *Id.* at 954.
24. *Id.* at 946.
25. *Id.* at 952. The reference, was to Sura II, verse 241: Yusuf Ali, *The Holy Quran* 96, states:

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

See *id.* at 951.

One question, however, remains. If a Muslim husband refuses to give *talaq* to his wife and instead presses her to agree to a *khul* (an extra-judicial divorce by mutual consent which involves some financial restitution by the wife to the husband: usually the wife is required to renounce all or part of the *mahr*), one of the terms of which is that she renounce her statutory right to maintenance under section 125, would such an agreement satisfy section 127(3)(*c*)? Is a remission made in such circumstances truly "voluntary"? Perhaps an analogy may be found in a Pakistan decision in a case where the wife had consented to her husband's demand for custody of the three and a half year old child of the marriage as part of a *khul* agreement, and then subsequently sued for custody of the infant. The first question before the court was obviously the validity of the custody agreement. In the words of the Karachi High Court:

> On the first point, there can be no dispute that questions with regard to the custody and guardianship of minors cannot be settled by private compromise or even by arbitration. An agreement of this nature, therefore, cannot be enforceable. But such an agreement may be evidence of the abandonment of the child by one of the parents. The question, therefore, is whether in this case I should hold that by agreeing that Asma Khatoon should remain with her father, the appellant [mother], in effect, abandoned all claims to her child. I think in the circumstances of this case I cannot draw any such inference. . . *I would venture to think that the appellant agreed to the inclusion of the provision* with regard to Asma Khatoon's custody in the aforesaid agreement *only to make it easy for her to induce the respondent [to] give divorce, as otherwise the appellant would have had to go to civil Court for dissolution of her marriage, which proceedings, as in my experience, generally last 6 to 10 years.* I would not, therefore, put any blame on the appellant that to obtain divorce she agreed to abandon Asma Khatoon.[26]

The Karachi court was obviously sympathetic to the disadvantageous position of a Muslim wife in regard to the dissolution of marriage. While the husband can speedily and unilaterally dissolve the marriage extra-judicially, a wife, in the absence of her husband's consent to an extra-judicial divorce, must resort to often protracted legal proceedings. Given the unequal position of the parties, any concession detrimental to her own interests and her legal rights made by a woman in a *khul* agreement

---

26. *Tahera Begum* v. *Saleem Ahmed Siddiqui*, P.L.D. 1970 Karachi 619 at 620. (Emphasis added). The court proceeded to examine the question of custody from the point of view of the welfare of the child, and concluded that the child's welfare would best be served by giving custody to the mother.

must *prima facie* be considered open to question as regards its "voluntary" nature.

Another matter that requires consideration is the limit of Rs. 500 imposed on maintenance orders made under section 125. This maximum was set thirty years ago,[27] it must be at least doubled to Rs. 1,000 in order to catch up with inflation and rising costs.

*Lucy Carroll**

27. Act 26 of 1955, s. 92

*Centre for South Asian Studies, University of Cambridge, United Kingdom