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# Mohammed Ahmed Khan v. Shah Bano Begum (AIR 1985 SC 945)

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AMBIKA GUPTA<sup>1</sup>

## ABSTRACT

*ON APRIL 1985, Supreme Court in the landmark judgement of Shah Bano, while recognizing the ethos of egalitarianism declared that a divorced muslim woman would be entitled to receive maintenance from her husband. It was an omnipresent case (as the same issue was judged in the previous cases as well) and yet, it was distinct. The events of the case, the socio-political debates which erupted after the verdict and the publicity that it received altered the communal climate in India. This judgment marks the inception of redressing regressive religious fundamentalist thinking with the instruments of constitutionalism.*

## I. INTRODUCTION

India is a largest democratic country which rests its foundation on the ideals of equality. Accordingly, there persists uniform set of laws in constitution that binds all citizens, irrespective of religion, race, caste, sex and place of birth. However, in respect of matters involving family issues – marriage, divorce, maintenance and succession- there exists distinct personal laws as per different faiths.

During 1970s and '80s, there were widespread conflicts as to the application of Indian laws on the personal affairs of the citizens who were governed by their own distinct personal laws. One such area of conflict, was the applicability of Sec 125 of the Code of Criminal Procedure, 1973 (CrPC) on citizens of Islamic faith. As specified by this section, a 'First Class Magistrate could order a husband to provide a monthly allowance to his wife/divorced wife (as long as she had not remarried) if he neglected to maintain her and she was unable to maintain herself'. The primary objective of law was to ensure the emancipation of women who were economically dependent on their husbands; it was a *benign provision enacted to ameliorate the economic condition of neglected wives and discarded divorcees*<sup>2</sup>.

In Islam, at the time of marriage the bride is entitled to a 'marriage gift' which is known as

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<sup>2</sup>Bai Tahira v. Ali Hussain, AIR 1979 SC 362

*Mahr*. This can be paid either promptly or deferred to a later date (death of husband or at the time of divorce). The Supreme Court encountered this issue in two cases<sup>3</sup>: Can the payment of *mahr* (irrespective of its amount) exonerate the liability of muslim husband under section 125 of the CrPC? In both cases, the court gave a very liberal view and observed that payment of *mahr* will not fetter the woman's entitlement to maintenance under section 125 CrPC. Though significant, these decisions were inconspicuous and did not receive much coverage till the Shah Bano case emerged.

## II. FACTS

In 1932, Mohammad Ahmed Khan a prosperous muslim lawyer<sup>4</sup> got married with Shah Bano and the *mahr* that was fixed was Rs 3000. Out of this wedlock three sons and two daughters were born. Subsequently, in 1978 he unilaterally divorced his forty-year-old wife by pronouncing 'triple talaq' (*talaq -ul- biddat*)<sup>5</sup>. Consequently, as per the provisions of Islamic Law he paid the agreed *mahr* to his divorced wife during *iddat*<sup>6</sup>. Having been thrashed out of her matrimonial home in Madhya Pradesh, she filed a petition under section 125 of the CrPC before Judicial Magistrate in Indore asking for a maintenance. The magistrate ordered the husband to pay Shah Bano a meagre Rs 25 per month as maintenance. Dissatisfied with the amount, she appealed to the Madhya Pradesh High Court in 1979, accordingly maintenance amount was increased to Rs 179.20 per month. It was then that Shah Bano's ex-husband petitioned the Supreme Court in 1981 to challenge the high court's decision. He vehemently contended that as per the provisions of Muslim personal law, a husband's liability to maintain his wife after divorce extends only up to the *iddat* period, therefore provisions of Sec 125 CrPC stands overruled.

Though, the concerned question of law was already discussed by Supreme Court in its previous judgements<sup>7</sup>. However, when the matter came up before two judge bench of the court judges were of opinion that the present judgements are not vigorous and had not been accurately pronounced. Therefore, in order to decide the issue involved, a five-judge Constitution Bench comprising of Chief Justice Y.V. Chandrachud, Justices D.A. Desai, E.S.

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<sup>3</sup>*Ibid.*; Fuzlunbi v. K. Khader Vali, AIR 1980 SC 1730

<sup>4</sup>Louise Harmon and Eileen Kaufman, 'Dazzling the World: A study of India's Constitutional Amendments Mandating Reservation for Women on Rural Panchayats', Berkeley Women's Law Journal, vol. 19 (2004): p. 32

<sup>5</sup>One of the modes of divorce under which husband make three pronouncements of divorce. It is an irrevocable form of divorce prevalent amongst Hanafi school; Declared unconstitutional in the case of Shayara Bano v. UOI & Ors. (2017) 9 SCC 1

<sup>6</sup>Three-month period directly after the divorce in which a muslim woman is not allowed to remarry.

<sup>7</sup>*Supra* note 3

Venkataramiah, Ranganath Misra and O. Chinnappa Reddy was constituted.

### III. ISSUES

The Supreme Court articulately framed the agonizing issues before it:

- Is Sec 125 of CrPC a secular provision?
- Is there any provision in the Muslim Personal Law under which a sum is payable to the wife ‘on divorce’<sup>8</sup>?
- Is the law so ruthless in its equality that, no matter how much the husband pays for the maintenance of his divorced wife during the period of *iddat* absolves him forever from the duty of paying adequately so as to enable her to keep her body and soul together<sup>9</sup>?

### IV. REASONING

The constitution bench unanimously mentioned *en passant* that Sec 125 of CrPC is a religious neutral provision, whether the spouses were *Hindus or Muslims, Christians or Parsis, pagans or heathens is wholly irrelevant*<sup>10</sup>. Its interpretation is that the concerned provision is *applicable to all persons belonging to all religions and has no relationship with personal law of the parties*<sup>11</sup>. It *intends to serve a social purpose*<sup>12</sup>. Therefore, it can be deduced that underlying purpose of Sec 125 was to protect dependents from ‘vagrancy’ and ‘destitution’ – thus it saw no reason to exclude Muslims from its ambit.

The court while drawing a line of demarcation between provisions of muslim law and Sec 125 of CrPC was of concerned opinion that muslim personal law did not address the situation incorporated in Sec 125. The personal law allows payment of *mahr* during *iddat* but fails to contemplate the situation where divorced wife is not in a condition to maintain herself after the expiration of *iddat*. Thus, using ‘deft interpretative tools’ the court reconciled muslim personal law and Sec 125. Therefore, court stated in existence of perceived conflict between the two, the CrPC would override the provisions of muslim personal law.

The court while rejecting the argument that the order for maintenance under Sec 125 could be cancelled under Sec 127, simply because the husband had made a payment (*mahr* in this case) to the wife at the time of divorce, under muslim personal law, assiduously stated that

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<sup>8</sup>*Supra* note 1, para 7

<sup>9</sup>*Supra* note 1, para 3

<sup>10</sup>*Ibid*

<sup>11</sup>Nanak Chand v. Shri Chandra Kishore Agarwal, AIR 1970 SC 446

<sup>12</sup>Jagir Kaur v. Jaswant Singh, AIR 1963 SC 1521

*mahr* is not a payment liable to be paid at the time of divorce. While acknowledging the interpretation of expression *mahr*, court came to the understanding that – *it was an amount that a wife is entitled to in consideration of marriage*<sup>13</sup>, therefore cannot be considered as divorce payment. The mere fact that *mahr* was paid at the time of dissolution did not imply that the payment was ‘occasioned by divorce’. Thus, defining *mahr as a marriage payment*<sup>14</sup> rather than divorce payment, the court emphasized that payment of *mahr* could not restrain courts from awarding maintenance.

## V. DISPOSITION

The concordant opinions of five judge bench were: Firstly, Sec 125 of CrPC is a secular provision which is applicable to all citizens irrespective of their religion. Secondly, a divorced muslim woman who is not able to maintain herself is entitled to claim compensation under sec 125 of CrPC till she gets remarried. Lastly, if divorced muslim woman is able to maintain herself then she is entitled to maintenance up to the period of *iddat*. Accordingly, the court unanimously reiterated the amount of compensation fixed by Madhya Pradesh High Court (Rs 179.20 per month) and also awarded Rs 10000 as the legal costs of the appeal.

## VI. CRITICAL ANALYSIS

After the judicial pronouncement in Shah Bano case, there were juggernaut of reactions. It witnessed scandalous press coverage, vociferous protests and counter protests by so called stake holders of divergent religious groups. The biggest backlash of this judgement was creation of line of demarcation not only between Hindus and Muslims, but also among different muslim sects<sup>15</sup>. Conservative muslim theologists opposed the verdict while liberal muslims, hindus and feminists supported it. Many muslims were dissatisfied by the credibility of the interpretation of muslim verses done by five judge bench, all having a background in secular law<sup>16</sup>. Muslim theologists were of view that it was indecorous for a religiously neutral court to explore the meanings of religious law and it might set a bad precedent<sup>17</sup>. Muslim clergymen believed that constitutional bench while interpreting the verses of Quran has adopted eurocentric approach. There was a strong perception that the

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<sup>13</sup>Mulla's Principles of Mohammedan Law, 18<sup>th</sup> edition, p. 308

<sup>14</sup>Hamira Bibi v. Zubaida Bibi, AIR 1916 PC 46

<sup>15</sup>Henry Steiner and Philip Alston, International Human Rights in Context (Oxford: Oxford University Press, 2000), p.508

<sup>16</sup>Shalina A. Chibber, 'Charting a New Path Toward Gender Equality in India: From Religious Personal Laws to a Uniform Civil Code', Indiana Law Journal, vol. 83 (2008) p. 695

<sup>17</sup>Robert D. Baird, 'Traditional Values, Governmental Values, and Religious Conflict in Contemporary India', Brigham Young University Law Review, vol. 1998, p. 337

Shah Bano judgement rather than being a simple maintenance award, was unduly critical of muslim law and islamic practices<sup>18</sup>. However, the court used the non-legislation of Uniform Civil Code to justify its interventionist approach in a theological issue. *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*<sup>19</sup>. The constitutional bench while expressing its agony over the incompetence of legislature to establish a Uniform Civil Code in accordance with Article 44<sup>20</sup> of Constitution of India was of concerned opinion that – *Article 44 had remained a dead letter therefore concrete steps were needed if the constitution of India was to have any meaning*<sup>21</sup>. The operative part of the judgement was relatively non-controversial howbeit, the way in which it was contemplated became the matter of public controversy. The vociferous reactions of a large segment of muslims led to an anticlimax; a total volte-face. In spite of a vigorous defense of the judicial pronouncement in Parliament by muslim leader Arif Mohammed Khan<sup>22</sup>, the Rajiv Gandhi government crumbled under pressure and enacted Muslim Women (Protection of Rights in Divorce) Act, 1986 (the MWA). Contrary to its name, the MWA actually undermined the far-reaching protection granted to divorced muslim women in Shah Bano and similar other judgements. It was more in the nature of a ‘dissolution of rights in divorce’ act rather than a ‘protection of rights in divorce’ act<sup>23</sup>. According to the MWA, the husband of the divorced woman is under an obligation to pay a reasonable, and fair amount of maintenance, only till the period of *iddat*. In case of children born from the wedlock, the husband is bound to pay maintenance amount for the period of two years from the respective dates of birth of such children. Additionally, the husband is required to pay *mahr* and all the properties which have been given to the woman before, at or after marriage by her relatives or friends or by husband or his relatives or his friends till the period of *iddat*. Therefore, it can be deduced that the provisions of the MWA have effectively abridged muslim widows right to file a maintenance under section 125 of CrPC<sup>24</sup>. What divorced women who were financially dependent on their husbands were expected to do after the expiry of *iddat* was

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<sup>18</sup>Josh Goodman, ‘Divine Judgement: Judicial Review of Religious Legal Systems in India and Israel’, Hastings International and Comparative Law Review, vol. 32 (2009): p.477

<sup>19</sup>*Supra* note 1, para 35

<sup>20</sup>The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

<sup>21</sup>*Supra* note 19

<sup>22</sup>Bipin Chandra, Mridula Mukherjee and Aditya Mukherjee, India after Independence, New Delhi: Penguin Books, 2000, p.285

<sup>23</sup>Zia Mody, Ten Judgements that changed India, Gurgaon: Penguin Books, 2013, p.60

<sup>24</sup>Madhavi Sunder, ‘Piercing the Veil’, Yale Law Journal, vol. 112 (2003): p. 1399

anyone's guess<sup>25</sup>.

Meanwhile, several High Courts started creating ruckus as to the interpretation of provisions of the MWA which were put a stop to in the case of *Danial Latifi v. UOI*<sup>26</sup>. In this case Danial Latifi contented that provisions of the MWA are violative of right to equality (Article 14<sup>27</sup> and 15<sup>28</sup>) as well as right to life (Article 21<sup>29</sup>), thereby challenging the constitutional validity of concerned legislation. Rejecting the petition, the court observed that it is not violative of constitutional provisions as the husband would not only maintain his divorced wife during *iddat* but will also pay a fair and reasonable amount of maintenance in lumpsum which will safeguard her present and future both.

It will be prejudicial to criticize the intrinsic and peripheral elements of the court's judgement without giving due respect to the ideals of egalitarianism and emancipation of women that the court espoused in the crux of its judgement. Many view this judgement as a vindication of the rights of women in Islamic law. However, this judgement can be appraised as one of the few accolades earned by the highest court of the land which has historically been perceived as a male dominated court in the area of women's rights<sup>30</sup>.

## VII. CONCLUSION

At the end it will be appropriate to state that the entire journey of Shah Bano case and its aftermath was a conflict between Feminism and Secularism (Feminism v. Secularism). This case acted as a mirror which reflected the unfortunate realities about what happens when women's rights and religious tenets collide in a democracy. The hasty enactment of the MWA showed that gender equality would succumb to the realities of pluralism<sup>31</sup>. Though Shah Bano did not claim her alimony from her husband, there are many divorced muslim women who will. It can only be hoped that the next Shah Bano case is met with responses rather than reactions by so called stake holders of the society.

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<sup>25</sup>*Supra* note 23

<sup>26</sup>(2001) 7 SCC 740

<sup>27</sup>The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

<sup>28</sup>Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

<sup>29</sup>No person shall be deprived of his life or personal liberty except according to procedure established by law.

<sup>30</sup>*Supra* note 23

<sup>31</sup>Radhika Coomaraswamy, 'Reinventing International Law: Women's Rights as Human Rights in the International Community' (The Edward A Smith Lecture, Human Rights Program, Harvard Law School, 1997)