

**THE SEE-SAW OF RELIGIOUS DEMANDS AND SOCIAL JUSTICE:
AN ANALYSIS OF SHAH BANO JUDGEMENT AND 36 YEARS DOWN
THE LINE**

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INTRODUCTION:

Indian Constitution states that India is a secular country but at the same time it recognizes personal laws and various customs and usages for governing, especially the civil activities of its people. India is a culturally diverse country based on religion, language, region, sect etc.¹ Almost every religion has its own personal law which are also protected from the judicial scrutiny.² The issue with being governed by personal laws is that they are particularly gender biased. Hence, women are the most exploited class of the society when governed by personal laws. While judicial interventions have corrected the position in this respect and stated that personal laws cannot be a substitute for statutory secular rights conferred on citizens.³ One such case is *Mohd Ahmad Khan v. Shah Bano Begum*⁴ wherein the Constitution Bench of Supreme Court has preferred gender and individual justice over gender biased personal laws.

Following are the relevant provisions of legislation being interpreted in the judgment.

Section 125⁵ of Criminal Procedural Code, 1973 lays obliges the person having sufficient means to support his wife, children and parents who are unable to maintain themselves. And explanation (b)⁶ of the said provision includes divorced wife within the meaning of “wife”, until she remarries. Whereas, Section 127(3)(b)⁷ exempts the liability of the husband under Section 125 if he has paid the whole of the sum payable under any customary or personal law applicable to the parties which was payable on such divorce.

¹ Sushmita Nath, *Accommodating Religious demands and gender justice concerns: Indian State Practices After the Shah Bano Judgment*, ASIEN, 8 (2013).

² *Narasu Appa Mali v. State of Bombay* AIR 1952 Bom 84.

³ Vikramjit Banerjee, Suhaan Mukherji and Aymen Mohammed, *The Case for Legislative Equality in Private sphere*, (2016) 8 SCC (J).

⁴ *Mohd Ahmad Khan v. Shah Bano Begum* (1985) 2 SCC 556.

⁵ The Code of Criminal Procedure, 1973, § 125, No. 2, Act of Parliament 1974 (India).

⁶ The Code of Criminal Procedure, 1973, § 125, explanation (b), No. 2, Act of Parliament 1974 (India).

⁷ The Code of Criminal Procedure, 1973, § 127(3)(b), No. 2, Act of Parliament 1974 (India).

This paper examines the scope of Section 125⁸ and 127(3)(b)⁹ of Criminal Procedural Code, 1973(Cr.P.C) in relation with *Shah Bano* judgments, legislative actions and judicial pronouncements thereafter. The paper attempts to establish that since *Shah Bano* judgment the judiciary has tried to widen the scope of Section 125 in order to prevent destitution and indigence amongst divorced Muslim woman and limit the ambit of male favoring Islamic laws. The court has circumscribed the ambit of Section 127(3)(b), just to prevent undue advantage to woman.

BREIF FACTS:

The appellant and respondent (both Muslims) got married in 1932 and in 1975 the former drove the respondent out for her matrimonial home. In April 1978, the respondent filed a petition under Section 125 Cr.P.C before JMFC, Indore. In November 1978, the appellant divorced the respondent. In August 1979, the district court directed the appellant to pay Rs. 25 per month as maintenance. The amount was further increased by Hon'ble High Court of Madhya Pradesh to Rs. 179.20. Hence, Appellant, Mohd. Ahmed Khan, has moved to Hon'ble Supreme Court, by way of Special Leave Petition, challenging the order of Hon'ble High Court of Madhya Pradesh.

The appellant has taken shield of Muslim Personal Laws and claimed that he has already paid maintenance to the respondent for the period of two years and has deposited Rs. 3000 as dower. He also claimed that as a consequence of divorce, the respondent has ceased to be his wife and thus he is under no obligation to maintain her.

Considering the involvement of question of law in the present case, the hon'ble three judge bench referred the case to a larger bench.

ISSUES RAISED:

Following are the major issues dealt by the Constitution Bench in present case:

1. Whether Section 125 of Cr.P.C is applicable to Muslims?
2. Whether divorced Muslim wife is a "wife" within the meaning of Section 125?
3. Whether Section 125 of Cr.P.C would prevail over the personal laws?

⁸ supra note 5.

⁹ supra note 7.

4. Whether there is any conflict between the provisions of S. 125 Cr.P.C and those of Muslim Personal Law over the liability of Muslim husband to provide maintenance to his divorced wife?
5. Whether Muslim husband is required to pay maintenance to his divorced wife even after the period of 'iddat'?
6. Whether the application under S. 125 Cr.P.C is liable to be dismissed because of the provisions contained in S. 127(3)(b)?
7. Whether 'Mahr' is a sum payable 'on divorce'?

JUDGEMENT

After perusing relevant provisions of Code of Criminal Procedure 1973, judicial precedents and religious texts of Islam, Hon'ble Constitution bench of Supreme Court came to the following conclusions:

1. Section 125 of Cr.P.C is secular in nature and hence, a divorced woman has the right to claim maintenance under Section 125 of Cr.P.C irrespective of her religion.
2. A divorced Muslim wife is a "wife" within the meaning of Section 125 as long as she remarries.
3. 'Mahr' is an amount payable to a Muslim wife as a sign of respect to her at the time of marriage, therefore it cannot be said to be a sum payable 'on divorce' under Section 127(3)(b) of Cr.P.C and the husband cannot negate his obligations after paying Mahr to his divorced wife.
4. A Muslim divorced woman is entitled to maintenance under Section 125 Cr.P.C from her former husband even after the iddat period and that the provision of Criminal Procedural Code prevails over personal laws.
5. The court repudiated the contention that the provisions of Cr.P.C and that of Muslim Personal Laws are inconsistent.

The court has thereby upheld the judgment of this court in the case of *Bai Tahira v. Ali Hussain Fidaalli Chothia*¹⁰ and *Fuzlunbi v. K. Khader Vali*.¹¹ Although it partially overruled

¹⁰ Bai Tahira v. Ali Hussain (1979) 2 SCC 316.

¹¹ Fuzlunbi v. K. Khader Vali (1980) 4 SCC 125.

the judgment of *Bai Tahira*¹² wherein the court held that paying ‘Mahr’ after divorce is covered under the ambit of Section 127(3)(b) of Cr.P.C.

BRIEF BACKGROUND OF SECTION 125 CR.P.C

Section 125 of Criminal Procedural Code 1973 has its genesis in Section 488 of the Criminal Procedural Code of 1898 which was piloted by Fitz James Stefen.¹³ The objective of section 488 was to “prevent vagrancy or atleast preventing its consequences” and to “serve a social purpose”.¹⁴ However, the said provision excluded divorced wife from taking recourse under it.¹⁵ Section 125 was incorporated in The Code of Criminal Procedure 1973 with the similar objective i.e. to “ameliorate the economic conditions of neglected wives and discarded divorcees”¹⁶ hence, making the remedy accessible to divorced wife as well.¹⁷ Section 125 is an obligatory provision and although a part of criminal law, it is more of a remedial measure than being punitive in nature; as in the words of Justice R. Chandra:

*“The object of a proceeding for maintenance is to prevent vagrancy by compelling the husband or the father to support his wife or child unable to support itself. These provisions are not in the nature of penal provisions but are only intended for the enforcement of a duty, a default in which may lead to vagrancy. The real object is to provide food, clothing and shelter to deserted wife and children.”*¹⁸

However, the Section 127(3)(b) of Cr.P.C lays down an exception to Section 125 of Cr.P.C 1973, wherein the former husband can be absolved from his obligation under Section 125 if he pays the sum ‘payable on divorce’ to his divorced wife under the customary or personal law applicable to him.¹⁹ Accordingly, the judiciary was confronted with the question that *whether the remedy under Section 125 was available to divorced Muslim woman who, according to Muslim personal law, was entitled to maintenance only till the period of iddat? What is the true*

¹² supra note 1.

¹³ Paras Diwan, *Claim of Maintenance under criminal procedural code*, SCC, 27 JILI (1985) 291.

¹⁴ Jagir Kaur v. Jasant Singh AIR 1953 SC 1521.

¹⁵ The Criminal Procedural Code, 1898, § 488 (India).

¹⁶ Justice Krishna, *Bai Tahira v. Ali Hussain* (1979) 2 SCC 316.

¹⁷ The Code of Criminal Procedure, 1973, § 125, No. 2, Act of Parliament 1974 (India).

¹⁸ Naurang Singh Chuni Singh v. Capla Devi AIR 1968 All 412.

¹⁹ The Code of Criminal Procedure, 1973, § 127(3)(b), No. 2, Act of Parliament 1974 (India).

intendment of Section 127(3)(b)? And, what are the obligations of a husband towards his divorced wife?

BEFORE SHAH BANO JUDGEMENT

As far as the first question is concerned, there were many conflicting views of different High Courts upon these issues until the Supreme Court clarified the law in the case of *Bai Tahira v. Ali Hussain Fidaalli Chothia*, wherein the court, while elucidating the benevolent aspect of section 125 and constitutional backing of such provisions, also stated that the remedy under section 125 is available to all women and divorce does not hold any relevance. Hence, the court categorically stated that:

“Article 15(3) has compassionate relevance in the context of section 125 Cr.P.C and the benefit of doubt, if any, in the statutory interpretation belongs to the ill-used wife and the derelict divorcee. So, Section 125 and sister clauses must receive a compassionate expansion of the sense that the words used permit”²⁰. The court further held that, “We hold that every divorcee, otherwise eligible, is entitled to the benefit of maintenance allowance and the dissolution of marriage makes no difference to this right under the current code.”²¹

On the subsequent year, Supreme Court once again dealt with the question of right of Muslim woman under Section 125. In the case of *Fuzlunbi v. K. Khader Vali & Anr.* wherein the court maintained that section 125 is secular in nature. Therefore, while concurring with the judgment in *Bai Tahira* case, it held that:

“We must first remember that Sections 125-127 are secular codes deliberately designed to protect destitute women who are victims of neglect during marriage and after divorce. It is rooted in the state’s responsibility for the welfare of weaker sections of women and children and it is not confined to members of one religion or region but the whole community of womanhood.”²²

²⁰ Bai Tahira v. Ali Hussain (1979) 2 SCC 316 para 1.

²¹ Bai Tahira v. Ali Hussain (1979) 2 SCC 316 para 5.

²² Fuzlunbi v. K. Khader Vali (1980) 4 SCC 125 para 15.

With regard to section 127(3)(b), both the Supreme Court in both the judgments concurred that the objective of the said provision was to prevent divorcees from deriving double benefit. The amount paid under the customary or personal law must be reasonable enough to suffice the purpose of granting maintenance allowance. The Court in Fuzlunbi held that:

*“At any rate the payment of money contemplated at section 127(3)(b) should be so linked with the divorce as to be made payable only in the event of divorce. Mahr as understood in Mohammadan law cannot, under any circumstances be considered as consideration for divorce.”*²³

Therefore unlike in the case of Bai Tahira wherein the court affirmed Mahr as a sufficient sum payable on divorce under the ambit of section 127(3)(b), the court in Fuzlunbi case, after perusing various precedents and commentaries on Muslim Law, held that Mahr in no event can be considered as ‘sum payable on divorce’ under 127(3)(b). The court observed that “divorce is farthest from the thought of bride and bridegroom when the Mahr is promised”. Thereby, apparently defying the former judgment of the court in this respect.

Hence, the Supreme Court in above two judgments majorly took the welfarist approach while interpreting section 125. Moreover, in the case of *Fuzlunbi*²⁴, it narrowed down the ambiguous language of section 127(3)(b), thereby adjudicating in the favour of destitute divorced wives. Nevertheless, these judgments were earlier doubted by lower bench of Supreme Court in *Shah Bano Begum* but the constitution bench in the same case, later, upheld the impugned judgments while giving its own unique reasoning.

THE SHAH BANO JUDGEMENT

The Supreme Court in *Shah Bano Begum* dealt with all three areas which were questioned earlier. The court has strictly relied on the position of law as per clause (b) of Explanation to Section 125(1) of Cr.P.C. to clarify the rights of divorced wife; wherein it is conspicuously stated that ‘wife with respect to section 125 includes divorced wife. The court in present case reiterated that “section 125 Cr.P.C is secular in nature and for this it was precisely observed that:

²³ Fuzlunbi v. K. Khader Vali (1980) 4 SCC 125, para 17.

²⁴ Fuzlunbi v. K. Khader Vali (1980) 4 SCC 125.

“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 the part of criminal procedural code and not of civil laws which define and govern the rights and obligations of parties belonging to particular religion...” it further observed that *“True that they cannot supplant the personal law of parties but equally, the religion professed by parties or the state of personal laws by which they are governed cannot have any repercussions on applicability of such laws unless, within the frame of Constitution their application is restricted to a defined category of religious groups or classes.”*²⁵

Hence, the court was of the view that the provision was incorporated for the purpose of social justice, therefore religion has no role to play here.

The courts have previously stated that proceedings under section 125 are quasi civil in nature, which has been categorically held in *Savitri v. Govind Singh Rawat* wherein the court held that:

*“the jurisdiction of Magistrate under Chapter IX of CrPC is not strictly criminal jurisdiction. While passing an order of maintenance under it, the magistrate does not impose any punishment on such person for any crime committed by him”*²⁶

Moreover, these cases are tried in family courts as per Section 7(2)(a) of Family Courts Act 1984.²⁷ Thus, the courts have highlighted the civil character of Section 125, despite being part of Criminal Procedure Code. Hence, the reasoning of Supreme Court in *Shah Bano Begum* for completely excluding Section 125 from the audit of personal laws appears relatively vague as the courts seems to be ignorant of this angle of the said provision. However the social objective, welfarist or secular nature of Section 125 is not questioned but reasoning with respect to exclusion of the provision from audit of personal laws.

The court further held that Section 125 Cr.P.C has an overriding effect over personal laws whenever the two are in conflict with each other.²⁸ The view of Supreme Court is correct. According to Section 2 Muslim Personal law (Shariat) Act 1937, the questions relating to

²⁵ Mohd Ahmad Khan v. Shah Bano Begum (1985) 2 SCC 556, para 7.

²⁶ Savitri v. Govind Singh Rawat (1985) 4 SCC 337.

²⁷ Family Courts Act, 1984, § 7(2)(a), No. 66, Act of Parliament, 1984 (India).

²⁸ Mohd Ahmad Khan v. Shah Bano Begum (1985) 2 SCC 556, para 10.

maintenance are to be dealt by the said Act.²⁹ The provision has a non-obstante clause, “Notwithstanding any custom or usage to the contrary”, which means the Act only has an overriding effect over the other customs and usages in Islam. Section 125, is a statutory law, and is not derived out of any custom or usages, hence Shariat Act would not be applicable on it.³⁰

Nonetheless, the reasoning given by Hon’ble Supreme Court is quite different. The view of the court was based on its analogy between Section 125(3), which rationalize wife’s refusal to leave her husband if he marries another woman, with that of Muslim personal law which allows Muslim man to marry maximum four women.³¹ Hence, the court held that intendment of Section 125 was to override personal laws.

The Supreme Court further went on to decide the vexed question i.e whether Section 125 is in conflict with Muslim Personal laws. To answer these question the judges involved themselves with religious exigencies, which later on became the main reason for Shah Bano controversy. The Hindu dominant bench, thus interpreted and reinterpreted the verses of the Holy Quran and commentaries such as Mulla on Mohmmadan Law etc. The court came to the conclusion that Muslim personal law, which limits the husband’s liability to provide maintenance only till the period of ‘iddat’, did not contemplate a situation where divorced woman is unable to maintain herself and the books cited are “inadequate to establish that the Muslim husband is not under an obligation to provide maintenance to his divorced wife who is *unable to maintain herself*.” Thus the court held that:

*“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.”*³²

The court thereby concluded that Muslim Personal laws were not in conflict with Section 125 of Cr.P.C. However, it appears that the court unnecessarily tried to probe into this complex and controversial question when it had already empathetically stated that the provision of Cr.P.C would override personal laws. It can be said that the Indian Judiciary, by such actions, tries to

²⁹ Muslim Personal Law (Shariat) Act, 1937, § 2, No. 26, 1937 (India).

³⁰ Badar Dures Ahmad, *Mohd Ahmad Khan v. Shah Bano Begum*, (1985) 4 SCC J-9.

³¹ *Mohd Ahmad Khan v. Shah Bano Begum* (1985) 2 SCC 556, para 10.

³² *Mohd Ahmad Khan v. Shah Bano Begum* (1985) 2 SCC 556, para 14.

establish that there is no serious disagreement between religious demands and demands of justice in secular laws of the state.³³

The Concept of Mahr as discussed in Shah Bano

The most important issue dealt in the judgement was whether Mahr amounts to the sum payable 'on divorce' under Section 127(3)(b) of Cr.P.C. To answer this question, the court referred various books on Mohmmaden Law which defines Mahr in two ways i.e a sum payable as a consideration of marriage³⁴ and a sum payable on marriage as a mark of respect to wife.³⁵

Justice Mahmood, in the case of Abdul Kadil v. Salima described Mahr as:

“Dower, under the Muhamaddan Law is a sum of money or other property promised by husband to be paid or delivered to wife as a consideration of marriage.....To use the language of Hedaya the payment of dower is enjoined by the law merely as a token of respect for its object (the woman).”³⁶

Dower is generally said to be of two types; 1) specified 2) unspecified. 'Prompt' and 'Deferred' dower are the sub types of specified dower. Prompt dower is payable on demand while deferred is payable on dissolution of marriage by death or divorce.³⁷ However the quantum differs with Shia and Sunni law.³⁸

As previously discussed in the paper, as per observation of court in *Fuzlunbi* case, the amount to fall under the scope of Section 127(3)(b), it must be occasioned to be paid particularly on divorce. Hence, in the same sense, the court in *Shah Bano* held that the fact that deferred Mahr is paid on dissolution of marriage does not mean it is a sum payable 'on divorce' within the meaning of Section 127 Cr.P.C.³⁹

The court observed that:

³³ Sushmita Nath, *Accommodating Religious demands and gender justice concerns: Indian State Practices After the Shah Bano Judgment*, ASIEN, 12 (2013).

³⁴ MULLA: PRINCIPLE OF MOHAMMEDAN LAW (20th ed. Lexis Nexis).

³⁵ Mohd Ahmad Khan v. Shah Bano Begum (1985) 2 SCC 556 (citing Book of Paras Diwan on Muslim law).

³⁶ Abdul Kadil v. Salima 1886 SCC OnLine All 3.

³⁷ SYED KHALID RASHID, MUSLIM LAW (6th ed. EBC).

³⁸ Id.

³⁹ Mohd Ahmad Khan v. Shah Bano Begum (1985) 2 SCC 556, para 24.

*“If Mahr is an amount which a wife is entitled to receive from husband in consideration of the marriage, that is the very opposite of the amount payable in consideration of divorce. Divorce dissolves the marriage. Therefore, no amount payable in consideration of marriage can be said to be payable ‘on divorce’.”*⁴⁰

The court further opined that a sum payable as a mark of respect cannot be said to be a sum payable on divorce because one does not divorce his wife out of respect.⁴¹

The court was correct in its reasoning, however, it failed to discover if any amount is payable to the divorced wife in the event of divorce. This happened even after concluding that The Holy Quran has recognized the liability of man to maintain his wife after divorce.

The judgment of the court in *Shah Bano Begum* was woman friendly and gave huge relief especially to Muslim woman who, before *Shayra Bano v. Union of India* judgment, were vulnerable to her husband’s discretion. Hence, it was an attempt to prevent woman from destitution and deprivation. The court adjudicated only in the light of Section 125 which only deals with the rights of woman who are unable to maintain themselves and hence it did not bother to specify the right of those who are able to maintain themselves. However, the followers of Islam found the judgment derogatory to their personal laws. They argued that granting alimony to a divorced woman after the period of ‘iddat’ is against Muslim personal law and the judgment is in conflict with it. The judgment led to a lot of controversy and protests from Muslim community.⁴² Considering the social and majorly the political needs, the then Government hurriedly passed Muslim Woman (Protection of Rights on Divorce) Act, 1986 (hereinafter referred as ‘the Act’) with an aim to overpower the judgment of Supreme Court in *Shah Bano Begum*.

MUSLIM WOMAN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986

According to its preamble, the objective of the Act is to protect the maintenance rights of particularly divorced Muslim woman. It states: *“An Act to protect the rights of Muslim women*

⁴⁰ Id.

⁴¹ supra note 36.

⁴² Vatsal Joshi & Ananya Kumar Singh, *Communal Secular Dicotomy- Are the Communal Violence Bills Adequate to tackle the Frankentein’s Monster?*, SCC, 4.2 NLIU LR (2015) 195.

who have been divorced by, or have obtained divorce from, their husbands and to provide for matters connected therewith or incidental thereto.”⁴³ Section 2(a)⁴⁴ of the Act defines ‘divorced woman’ which only includes a woman who is married and has been divorced according to Muslim Law. Section 3⁴⁵ and Section 4⁴⁶ are the provisions laying down the maintenance rights of divorced Muslim woman. According to Section 3, divorced Muslim woman is entitled to “reasonable and fair provision and maintenance within the iddat period” from her former husband.⁴⁷ She is further entitled to amount of Mahr as promised,⁴⁸ all the property given to her before/after/at the time of marriage.⁴⁹ According to Section 4, if the woman is unable to maintain herself after the period of iddat, she is entitled to receive maintenance from those relatives who would inherit her property on her death⁵⁰ or her children as the case may be and if they are unable to maintain her,⁵¹ the Magistrate may ask State Wakf Board to maintain her.⁵² Section 5 allows remedy under Section 125-128 Cr.P.C only with mutual consent of both the parties.⁵³

The prima facie intend of the Act appears to set aside the judgment of *Shah Bano Begum* and to restrict the liability of husband till the period of iddat. This is evident as the parliament has specifically taken care of the indigence of divorced Muslim woman through Section 4 of the Act. Moreover, the Act intends to oust the jurisdiction of Section 125 Cr.P.C. It can be implied through Section 5 wherein prior consent of both the parties has been made mandatory by including the word “shall”, for invoking jurisdiction of Section 125 Cr.P.C. Furthermore, Section 7⁵⁴ of the Act obliges Magistrate to dispose of all the pending cases under Section 125 or 127 Cr.P.C in accordance with the Act, thereby, providing retrospective effect to the Act. Hence, the Act can be said to be protecting the interests of Muslim men and at the same time burdening the relatives of the divorced wife to maintain her.

⁴³ Muslim Woman (Protection of Rights on Divorce) Act, 1986, No. 25, Act of Parliament, 1986 (India).

⁴⁴ Muslim Woman (Protection of Rights on Divorce) Act, 1986, § 2(a), No. 25, Act of Parliament, 1986 (India).

⁴⁵ Muslim Woman (Protection of Rights on Divorce) Act, 1986, § 3, No. 25, Act of Parliament, 1986 (India).

⁴⁶ Muslim Woman (Protection of Rights on Divorce) Act, 1986, § 4, No. 25, Act of Parliament, 1986 (India).

⁴⁷ Muslim Woman (Protection of Rights on Divorce) Act, 1986, § 3(a), No. 25, Act of Parliament, 1986 (India).

⁴⁸ Muslim Woman (Protection of Rights on Divorce) Act, 1986, § 3(c), No. 25, Act of Parliament, 1986 (India).

⁴⁹ Muslim Woman (Protection of Rights on Divorce) Act, 1986, § 3(d) No. 25, Act of Parliament, 1986 (India).

⁵⁰ Muslim Woman (Protection of Rights on Divorce) Act, 1986, § 4(1), No. 25, Act of Parliament, 1986 (India).

⁵¹ Muslim Woman (Protection of Rights on Divorce) Act, 1986, § 4(1) (proviso) No. 25, Act of Parliament, 1986 (India).

⁵² Muslim Woman (Protection of Rights on Divorce) Act, 1986, § 4(2), No. 25, Act of Parliament, 1986 (India).

⁵³ Muslim Woman (Protection of Rights on Divorce) Act, 1986, § 5, No. 25, Act of Parliament, 1986 (India).

⁵⁴ Muslim Woman (Protection of Rights on Divorce) Act, 1986, § 7, No. 25, Act of Parliament, 1986 (India).

Judicial Interpretation

However, between 1986 i.e. after the enactment of the Act till 2001, High Courts gave contradictory interpretation of the Act with respect to liability of husband beyond iddat period. For instance, in 1990, in the case of *Usman Khan Bahamani v. Fathimunnisa Begum & Ors.*⁵⁵, the full bench of Andhra Pradesh High Court held that the husband is not liable to pay maintenance beyond iddat period. On the other hand, in 1988, Gujarat High Court, in the case of *Arab Ahemadhia Abdulla And Etc. v. Arab Bail Mohmuna Saiyadbhai And Ors. etc.*⁵⁶ wherein the court took *Shah Bano Case* as a precedent and upheld the right of Muslim woman under Section 125 of Cr.P.C.

The complexity was finally resolved in *Danial Latifi v. Union of India*⁵⁷ wherein the Constitution Bench dealt with the writ petition challenging the constitutional validity of the Act. The case is yet another landmark judgment wherein the court interpreted the provisions of the Act in the light of *Shah Bano Begum* judgment. It was observed in the present case that the conclusion in *Shah Bano* case was that Section 125 extends to only those situations where Muslim divorced wife is unable to maintain herself, and if there is no possibility of destitution of vagrancy the liability of husband would be limited to iddat period.⁵⁸

The court explained the meaning of term “provision” whereby the court observed that:

*“the word ‘provision’ indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance to meeting those future needs...may include provision for her residence, her food, clothes and other articles.”*⁵⁹

By the words “made and paid within the period of iddat”⁶⁰, the court explained that, they only specify the duration within which the arrangements for reasonable and fair provision and

⁵⁵ *Usman Khan v. Fathimunnisa* AIR 1990 AP 225.

⁵⁶ *Arab Ahmedia v. Arab Bail* AIR 1988 Guj 148.

⁵⁷ *Danial Latifi v. Union of India* (2001) 7 SCC 240.

⁵⁸ *Danial Latifi v. Union of India* (2001) 7 SCC 240, para 8.

⁵⁹ *Danial Latifi v. Union of India* (2001) 7 SCC 240, para 28.

⁶⁰ Muslim Woman (Protection of Rights on Divorce) Act, 1986, § 3, No. 25, Act of Parliament, 1986 (India).

maintenance has to be made. It is nowhere specified that the liability of Muslim husband is limited to iddat only. In the words of the Hon'ble Court:

“The emphasis of this section is not on the nature or duration of any such ‘provision’ or maintenance’ but the time on which the arrangement of payment of provision and maintenance should be concluded, namely ‘within the iddat period’. If the provisions are so read. The Act would exclude from liability for post iddat period maintenance to those man who has already discharged the obligation of both ‘reasonable and fair provision’ and ‘maintenance’ by paying these amounts in lump sum to his wife....”⁶¹

The court thereafter equated this reasoning with the facts of *Shah Bano Begum* case, whereby the court observed that in *Shah Bano* the dispute precisely arose as a result of husband's failure to provide “reasonable and fair provision” to his divorced wife despite paying minimal Mahr and iddat maintenance. Therefore, the court opined that the Act unintentionally codified the very rationale behind the *Shah Bano Begum* judgment.⁶²

Hence while upholding the validity of the Act and at the same time considering *Shah Bano* judgment as a precedent, the court in *Danial Latifi* reached the following conclusions:

1. A Muslim husband is liable to make and pay “reasonable and fair provision” and maintenance within the iddat period. Such reasonable and fair provision extends beyond the iddat period.
2. Liability of husband can only be absolved if he pays such reasonable and fair provision and maintenance in one go. Which means the lump sum amount paid would suffice for the entire life of woman to maintain her standard of living.
3. The liability of Muslim husband under Section 3 is not limited to iddat period.
4. A divorced woman who has not remarried and is unable to maintain herself may exercise her right under Section 4 of the Act.
5. The provisions of the Act are constitutionally valid.

⁶¹ *Danial Latifi v. Union of India* (2001) 7 SCC 240, para 29.

⁶² *Id.*

It can be concluded that, the court in Danial Latifi has tried to balance the religious demands, secular nature and social objective of Section 125 Cr.P.C, just like the court in Shah Bano judgment did. Hence, by its distinctive reasoning, the court has once again opened the doors of remedy under Section 125 Cr.P.C to those Muslim divorced woman who are otherwise unable to maintain themselves thereby settling the longstanding controversy.

OTHER IMPORTANT JUDGMENTS

Shah Bano judgment has become precedent in catena of judgments of Supreme Court and High Court. Indian judiciary, since Shah Bano judgment, has repeatedly recognized the right of Muslim divorced wife under Section 125 of Cr.P.C. A few of those judgments are referred in this paper.

1. **Iqbal Bano v. State of UP**⁶³ : The court held that proceedings under Section 125 Cr.P.C are criminal in nature. It further held that the 1986 Act is only applicable to divorced Muslim woman and that it is open for the court to treat an application made under Section 125 Cr.P.C as a petition under the 1986 Act considering the beneficial nature of the Act. The liability under Section 3(1)(a) of the Act is not confined to iddat period.
2. **Shabana Bano v. Imran Khan**⁶⁴ : The court held that a divorced Muslim woman is entitled to claim maintenance from her husband under section 125 Cr.P.C as long as she does not remarry, as the provision under Criminal Procedural Code is beneficial in nature.
3. **Khatoon Nisa v. State of UP**⁶⁵ : The Magistrate has power to entertain application under Section 125 of Cr.P.C and condition under Section 5 of 1986 wherein mutual consent is required for invoking jurisdiction under Section 125, is not sine qua non.
4. **Shamima Farooqui v. Shahid Khan**⁶⁶ : Right under Section 125 Cr.P.C is an absolute right unless the wife is disqualified on grounds such as remarriage. Woman is entitled to lead such a life as she would have lived in her matrimonial home and thus, the quantum of maintenance must be decided accordingly.

⁶³ Iqbal Bano v. UP (2007) 6 SCC 785.

⁶⁴ Shabana Bano v. Imran Khan (2010) 1 SCC 666.

⁶⁵ Khatoon Nisan v. UP (2014) 12 SCC 646.

⁶⁶ Shamima Farooqui v. Shahid Khan (2015) 5 SCC 705.

5. Jubair Ahmad v. Ishrat Bano⁶⁷ : After considering the above precedents , it has been held that, Section 125 is one of the most secular laws. Muslim woman are entitled to maintenance even after the period of iddat. The husband is not discharged from his liability to pay on the ground that he has no means to pay.

MORAL OBLIGATION OF HUSBAND: JUDICIAL PERSPECTIVE

Time and again, judicial pronouncements have also observed that the rationale behind compelling husbands for maintaining wife, is their deemed superior position in society and capability to earn and feed their family. In the case of *Danial Latifi v. Union of India*, the court observed that:

*“Another aspect which has to be kept uppermost in mind is that when the marriage breaks up, a woman suffers from emotional fractures, fragmentation of sentiments, loss of economic and social security and, in certain cases, inadequate requisites for survival. A marriage is fundamentally a unique bond between two parties. When it perishes like a mushroom, the dignity of the female fame gets corroded. It is the law's duty to recompense, and the primary obligation is that of the husband.”*⁶⁸

In the case of *Chander Prakash Bodhraj v. Shila Rani Chander Prakash*,⁶⁹ the court while defining the obligation of husband, states that:

*“An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard....”*⁷⁰

Again in *Shamima Farooqui v. Shahid Khan*, the court considering the patriarchal nature of society, held that:

⁶⁷ Jubair Ahmad v. Ishrat Bano 2019 SCC OnLine All 4065.

⁶⁸ Danial Latifi v. Union of India (2001) 7 SCC 240, para 1.

⁶⁹ Chander Prakash Bodhraj v. Shila Rani Chander Prakash AIR 1968 Delhi 174.

⁷⁰ Id.

“If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125, CrPC, unless disqualified, is an absolute right.”⁷¹

The position of law in relation with right of maintenance to Muslim woman has been similar since Shah Bano judgment. The courts have interpreted the scope of Section 125 very liberally in order to override the gender biased personal laws and spread the colour of justice on vulnerable and indigent Muslim woman. Courts have very brilliantly harmonized the religious demands and the demands of justice in the law.

CONCLUSION

The Hon'ble Constitution Bench in the landmark case of *Mohd. Ahmed Khan v. Shah Bano Begum* has interpreted Section 125 of Cr.P.C in the light of previous judgments of Supreme Court in *Bai Tahira v. Ali Hussain Filaaddi Chothia* and *Fulzunbi v. K. Khader Vali*. The court has tried to analyze these judgments considering the objective of the said provision while using positivist approach in its interpretation while highlighting the 'ought' character of law. Moreover, the court delved into expounding the verses of The Holy Quran and various commentaries on Muslim Personal Laws, which is what has made the judgment unique and at the same time controversial. Furthermore, the court has narrowed down the ambit of Section 127(3)(b) of Cr.P.C. The judgment was an audacious and aggressive step towards prioritizing individual rights and gender justice over religious demands. However, the parliament tried to set aside the benevolent judgment by the way of Muslim Woman (Protection of Rights on Divorce) Act, 1986. Supreme Court, in the case of *Daniel Latifi v. Union of India*, very astutely formed a balance between the ratio of *Shah Bano Begum* judgment and the provisions of the Act. Hence, the legacy of the judgment laid down in *Shah Bano Begum* is carried on by the Supreme Court and High Courts till date.

⁷¹ Supra Note 66.