(1978) 80 BOMLR 238

Bombay High Court

Case No: Criminal Application No. 2889 of 1976

Ahamadalli Mahamad Hanif Makandar		APPELLANT
	Vs	
Rabiya Alias Babijan Hasan Shaikh		RESPONDENT

Date of Decision: Jan. 12, 1977

Acts Referred:
Constitution of India, 1950 â€" Article 227#Criminal Procedure Code, 1973 (CrPC) â€" Section 125, 126, 127

Citation: (1978) 80 BOMLR 238

Hon'ble Judges: Vaidya, J; Sawant, J

Bench: Division Bench

Judgement

Vaidya, J.
The above petition under Article 227 of the Constitution of India, raises a very important point with regard to the construction

of Section 127(3)(b) of the Code of Criminal Procedure, 1973.

2. The petitioner, Ahamadalli, was the husband of the respondent No, 1, Rabiya alias Babijan, who filed Miscellaneous Application No. 30 of

1974, on September 30, 1974, in the Court of the Judicial Magistrate, F.C. Sangli, claiming maintenance at the rate of Rs. 225 per month from her

husband.

3. She stated in the said application that she resided with the husband after the marriage from 1967 to 1971 and had a child from him. On April

27, 1972, her husband divorced her by publishing a Talaknama in Daily ""Navsandesh"". She was not consulted at the time of giving the said

newspaper divorce. She stated that the husband had three to four acres of irrigated lands in village Alas in Shirol Taluka. He also carried on the

business of crackers, poultry and dairy. Besides he was employed as a teacher on a monthly salary of Rs. 300 or Rs. 400. He had married a

second wife from village Shirdhon.

4. Rabiya had no means of livelihood. She was divorced against her will; and she had remained unmarried since then. She, therefore, made the

application u/s 125 praying for maintenance at the rate of Rs. 225 per month as stated above.

5. The husband resisted the application. He denied that he was getting a salary of Rs. 300 to Rs. 400 or that he was doing poultry or dairy

business. He further stated that the petitioner had filed an application in the Court of the Judicial Magistrate, First Class, Kurundwad, and that

Court was pleased to grant a monthly allowance of Rs. 60 per month to her.

6. His main contention, however, was u/s 127(3)(b). He submitted that he had paid the Iddat amount payable under the Mohammedan law to his

wife the petitioner; and the maintenance order which was made was liable to be cancelled. It was also stated that as per the Muslim personal law,

the wife was entitled for maintenance for a period of two months after the divorce and that the maintenance allowance could not be claimed for

more than two months after April 27, 1972.

7. On consideration of the evidence produced before him by the wife and the husband who also examined themselves, the learned Judicial

Magistrate, First Class, Sangli, by his judgment and order dated December 3, 1974, ordered the husband to pay maintenance at the rate of Rs. 75

per month to the wife from the date of the filing of the application and also ordered him to pay costs of Rs. 50.

8. The learned Magistrate held that the rule of Mohammedan law relating to the payment of maintenance only for the Iddat period, did not bar the

application u/s 125. So far as this point is concerned, it is covered by the decisions of the division Bench of this Court in Khurshid Khan Amin

Khan Vs. Husnabanu Mahimood Shaikh, and Smt. Mehbubabi Nasir v. Nasir Farid AIR(1976) 78 258 and Mr. Shastri has not agitated the point

before us.

9. The learned Magistrate negatived the contentions on behalf of the husband, that the present application would be barred by the order passed in

Miscellaneous Application No. 2 of 1972, on the ground that Section 125 gave a right to a divorced wife to make the application. That contention

is also not pressed before us, having regard to the provisions of Section 125.

10. The learned Magistrate further held that the contention raised on behalf of the husband u/s 127(3)(b) was also not tenable, observing as

follows:

...However, on trying to appreciate the plain meaning of the above section, what the above section says to my mind is that the order on payment of

the Iddat amount is liable for cancellation. The order would be specifically for the 3 months of the Iddat period. The section does not speak about

the future maintenance for which the applicant would be entitled. Section 125 which has been enacted by the Parliament is a general section

relating to the maintenance which is allowed in respect of a married wife but who is subsequently divorced. The divorced wife till her remarried

would be entitled to maintenance from her husband, who has divorced her. This and there being a provision in Section 125 and Section 125 being

an independent Section, I do not feel the Section 127(3)(b) of the Cri. P.C. would control Section 125 of the Cri. P.C. Sections 125 and 127 are

independent sections and I feel under the former Section of 125 of the Cri. P.C. a divorced woman until her remarriage would be entitled to future

maintenance. This being the view which I have taken of the matter, I feel that the applicant is entitled to maintenance from the opponent.

11. The learned Magistrate then proceeded to consider the quantum of maintenance; and after appreciating the evidence before him, ordered the

husband to pay maintenance at the rate of Rs. 75 per month from the date of the application as stated above. The quantum is not challenged before

us.

12. Thereafter, on December 31, 1974, the husband filed an application for cancellation of the maintenance order stating, (1) that the wife had

already received, on December 13, 1972, as per the order passed in Miscellaneous Application No. 30 of 1974, the Iddat amount for two months

and two days at Rs. 60 per month; and, therefore, she was to be paid only Rs. 56 for a period of twenty-eight days only; (2) that though the

husband had already paid the Meher amount of Rs. 125 in the Dargah at Miraj, as there was no evidence to that effect, he was still willing to give

the said amount again to the wife; and (3) that he had already deposited Rs. 456 in the Court on the date of the application to cover the aforesaid

sums of Rs. 56, Rs. 125 Meher and maintenance at the rate of Rs. 75 as per the order of the learned Magistrate, from September 30, 1974, till

the date of the application and Rs. 50 as costs.

13. The application was resisted by the wife, on the ground that she was not ready to accept the amount in lieu of the permanent maintenance,

which was payable u/s 125 under the aforesaid order passed by the learned Magistrate on December 3, 1974. She submitted that as the

contention u/s 127(3)(b) was already negatived by the learned Magistrate in passing the order for the maintenance, application was not at all

maintainable.

14. The learned Judicial Magistrate, First Class, Sangli, by his judgment and order dated January 13, 1976, allowed the application of the husband

as he interpreted Section 127(3)(b) as compelling the Court to cancel the order observing as follows:

If we read the provisions of the said Section 127(3)(b) of Cri. P.C., we find that the provision is mandatory. The Magistrate shall have to cancel

the order of maintenance passed u/s 125 Cri. P.C. under the said provisions, if two conditions are satisfied. Firstly, the Magistrate is to be satisfied that the woman has been divorced by her husband and secondly she has received, whether before or after the date of the said order u/s 125 Cri.

P. C., the whole of the sum which under any customary or personal law applicable to the parties, was payable on such divorce. Both these

conditions in this case have admittedly been fulfilled. The opponent has been divorced on 27.4.1972 and as per exhs. 13 and 17 receipts

produced in this case, she has also been over-paid. On divorce only two amounts viz. Iddat amount for three months and Meher amount of Rs.

125 are payable to the opponent and they have since been fully paid by the applicant as per the receipt exh. 17, Whatever dues therefore were

payable to the opponent under the personal law on divorce, have been wholly paid to her and as such, both the conditions of Section 127(3)(b)

have been fully complied with. And when once the said two conditions are fulfilled, this Court has no other alternative but to cancel the

maintenance under exh. 25.

15. It may be noted that the learned Magistrate has observed that both the parties filed a Purshis before the learned Magistrate stating that they did

not want to lead any evidence in the proceeding and that the matter should be decided as a matter of law.

16. The order was challenged by the wife by filing Criminal Revision Application which came up for hearing before the learned Additional Sessions

Judge, Sangli, who by his judgment and order, dated August 31, 1976, set aside the order passed by the learned Magistrate, cancelling the

maintenance, overruling the contentions raised on behalf of the husband, and observing as follows:

...It is difficult to accept this submission of Shri Bargir in view of Khurshid Khan v. Husnabanu Mahimood, which is the ruling of our High Court.

This ruling has clearly stated that the Iddat amount has got the peculiar characteristics and is made payable to avoid any confusion of parentage, if

any, child was born to the divorced wife. The period was numbered as 3 months period and it was just by way of a check. This ruling further made it clear that the Iddat amount has nothing to do with the right of a Mohammedan divorced wife to get maintenance u/s 125 of the Code, which has

conferred more or wider benefits on all divorced wives including even Mohammedan wives governed by the Mohammedan Law. Thus, so far as

Iddat amount is concerned, there is no force in the argument of Shri Bargir.

As regards Meher amount, Shri Bargir has not shown any provision from the Mohammedan Law to conclude that Meher amount must be treated

as the sum contemplated in Section 127(3)(b) of the Code within the meaning of the words "the whole of the sum, which was payable on such

divorce". So long as husband is not in a position to show that under the Mohammedan Law, there is a particular sum defined as payable on the

divorce, the husband cannot possibly come u/s 127(3)(b) only on the ground by saying that he has paid the Meher amount.

It is not disputed before me that u/s 125 of the Code, even Muslim wives who are divorced are included. Moreover, in the present case, even on

facts, it is not possible to accept that the husband has strictly established the ground mentioned in Section 127(3)(b) of the Code. On plain reading

of the main application of the husband for cancellation of the previous order of maintenance would be enough to show that there is no evidence

with him to show that he has paid Rs. 125. He has, no doubt, as an alternative measure, deposited the amount in the Court of learned Magistrate in

Criminal Miscellaneous Application No. 50/74. But, even if that is so, it is difficult to accept "that the amount is received by the wife. On carefully

reading the wording of Section 127(3)(b), I am of the view that the whole sum mentioned in the section, as payable on such divorce, is to be

received by the wife whether before or after passing of the said order (admittedly order u/s 125 of the Code). In my view, the word "receive" used

in this sub-section has significance because that contemplates voluntary act on the part of a divorced wife to accept that particular amount payable

on such divorce. Depositing of the amount in the court or forcing the wife to accept the amount described in Sub-section 3(b) cannot be taken to mean that it was received by the wife. The word, "receive" admittedly means to take or to accept or to welcome or to bear to hold. In the present

case, it is not, at all, possible to accept that the wife received the amount only because the husband has deposited the amount in the Court. Thus,

even from this point of view, it is not possible to accept that ground u/s 127(3)(b) of the Code, has been established by the husband.

17. The order passed by the learned Additional Sessions Judge is challenged in the above petition, filed by the husband on the ground that the

learned Additional Sessions Judge misinterpreted Section 127(3)(b) in holding that although the husband deposited the balance of the Iddat

amount and the Meher amount together with the maintenance and costs ordered by the Court, the order for maintenance was not liable to be

cancelled. In support of this contention, reliance is placed on a judgment of Chandurkar and Shah JJ. in Rukhsana Parvin v. Shaikh Mohomed

(1976) 79 Bom. L.R. 123.

18. As the wife, though served was unrepresented and merely wrote a letter asking the High Court to inform her of the date of hearing so as to

enable her to engage her advocate, we requested Mr. S.A. Jafferbhoy to appear amicus curae for the wife; and he drew our attention to the

decisions not only of this Court in Khurshid Khan v. Husnabanu Mahimood, but also to the decision of a single Judge of the Karnataka High

Court, in Umar Hayat Khan Vs. Mahaboobunnisa, and a division Bench of the Andhra Pradesh High Court in K. Raza Khan Vs. Mumtaz

Khatoon and Another,

19. In support of the order passed by the learned Additional Sessions Judge, Mr. Jafferbhoy further contended that the judgment in Criminal

Revision Application No. 310 of 1975 was inconsistent with the spirit and the scheme of Sections 125 to 127, contained in chap. IX of the New

Criminal Procedure Code, enacted as a revolutionary piece of legislation to prevent destitution and vagrancy amongst women; and strongly relied on the observations made by the Joint Committee of the Parliament when enacting these provisions which are quoted at page 72 of the Taxman

Publication of the Code of Criminal Procedure, 1973 as follows:

The benefit of the provision should be extended to a woman who has been divorced from her husband, so long as she has not remarried after the

divorce. The Committee''s attention was drawn to some instance in which, after a wife filed a petition under this section on the ground of neglect or

refusal on the part of her husband to maintain her, the unscrupulous husband frustrated her object by divorcing her forthwith thereby compelling the

Magistrate to dismiss the petition. Such divorce can be made easily under the personal laws applicable to some of the communities in India. This

causes special hardship to the poorer sections of the community who become helpless. The amendments made by the Committee, are aimed at

securing social justice to women in our society belonging to the poorer classes.

Relying on this passage, Mr. Jafferbhoy submitted that it was common knowledge that very petty amounts were mentioned in Muslim marriages as

Meher amounts amongst poorer classes; and it could never have been intended by the Parliament that merely because the husband pays the

amount of Meher, the order for maintenance passed u/s 125 could be cancelled.

20. Mr. Jafferbhoy also referred to the general Principles of the Mohammedan Law with regard to Iddat and Meher and contended that these

amounts payable in respect of Iddat and Meher, could not have been contemplated by the Parliament as amounts payable on divorce within the

meaning of Section 127(3)(b). In support of his argument, he relied on a judgment of the division Bench of the Kerala High Court, decided by

Khalid and Janaki Amma JJ. in Kunhimoyen v. Palliyuma [1976] 1 Ker. 182 : S.C. [1976] K.L.T. 87 and a decision, following the said decision,

of Mr. Justice Khalid sitting singly in Muhammed v. Sainabi [1976] K.L.T. 711.

21. As already stated above, the only point which was urged by Mr. Shastri for the husband in support of the petition was that, having regard to

the deposit of the balance of the Iddat maintenance and the Meher amount, the order for maintenance is liable to be cancelled u/s 127(3)(b) of the

Code of Criminal Procedure, 1973, relying on the aforesaid judgment of Chandurkar and Shah JJ.

22. With very great respect, however, we find it difficult to agree with the view taken by the learned Judges. In our view the words, ""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,"" cannot at all be applicable to the amounts payable as maintenance during the Iddat period or the Meher

amount.

23. If an order for maintenance is made, there could be no question of cancelling it on the ground of payment of maintenance during the Iddat

period, because such an amount is bound to be taken into consideration when executing the order for maintenance. It is well settled in

Mohammedan law that Iddat is the term of probation incumbent upon a woman in consequence of the dissolution of marriage after carnal

connexion. The most approved definition of Iddat is that it is ""the term by the completion of which a new marriage is rendered lawful."" See the

judgment delivered by Mr. Justice Mahmood in In the Matter of the Petition of Din Muhammad ILR(1882) All. 226, Mulla, Principles of

Mahomedan Law 258 and Faizy Mohammedan Law 107 to 109.

24. The husband has to provide maintenance for the wife during the Iddat period, It is because of this, that the learned Magistrate, who ordered

maintenance was inclined to misinterpreted Section 127(3)(b) as empowering the Court to cancel the order for maintenance only with regard to the

amounts paid by the husband to the wife during the period of the Iddat; but we are not inclined to agree with that interpretation because Iddat

maintenance cannot be said to be an amount payable ""on divorce"".

25. It appears that in the Ahsan form of Talak only after the expiry of the Iddat period, divorce becomes irrevocable as stated by Faizy''s Outlines

on Mohammedan Law, fourth edn., 1974, at p. 152. In our opinion, the proper interpretation of Section 127(3)(b) would be that the Parliament

intended to authorise cancellation of the order of maintenance only when the wife received the amount under any customary or personal law

applicable to the parties, if such amount was payable in consideration of the divorce ""on such divorce"". It cannot be said that Iddat amount is an

amount payable in consideration of the divorce or payable ""on divorce"".

26. Similarly, in our opinion, the Meher payable in the Mohammedan Law is a sum of money or other property which the wife is entitled to receive

from the husband in consideration of the marriage. See para. 285, p. 277, Mulla Principles of Mohammedan Law, seventeenth edn. If the

Parliament intended that on payment of Meher, the order for maintenance was liable to be cancelled, the Parliament could not have mentioned only

the amount to be paid and not the property which very often would be of more value than the Meher amount.

27. Moreover, it is well-known that the amount of Meher is usually split into two parts, one called ""prompt"", which is payable on demand, and the

other called ""deferred,"" which is payable on dissolution of marriage by death or divorce. It is open to the wife not to receive the Meher or to remit

the Meher. Parliament must be presumed to know these well-settled rules of Mohammedan Law. It is true that one of the incidents of Meher is

that it may be payable in some cases ""on divorce"". The Parliament, however, could not have intended to include such Meher amounts as amounts

payable under any customary or personal law, ""on divorce"", as Meher was also a consideration for the marriage and had many legal incidents

independent of the factum of divorce.

28. In our opinion, having regard to the general object and scheme of chap. IX of the Code of Criminal Procedure, 1973, Section 127(3)(b) must

be so construed as not to reduce the whole scheme to an absurdity with regard to the Muslim women. The Parliament did not want to make any distinction between women of one community and women of another, when making these revolutionary legal provisions for the benefit of women.

For the first time in the history of the Criminal Procedure in this country, the right was conferred on divorced women of all communities to apply for

maintenance from their quondam husband.

29. The Parliament must have known that the Meher amounts are only nominal or ritual amounts fixed in most cases and specially amongst poor

Muslims as amounting to sums of Rs. 25 or Rs. 50. Merely because such an amount was paid to the wife or was to be paid to the wife either

outside or inside the Court, the liability to pay maintenance u/s 125 could never have been intended to come to an end. Such an interpretation

would be inconsistent with the ameliorative and progressive nature of chap. IX of the Code of Criminal Procedure.

30. What the Parliament appears to have intended in enacting the words, ""the whole of the sum which, under any customary or personal law

applicable to the parties, was payable on such divorce,"" was a sum wholly and exclusively in consideration of the divorce which was allowed under

the customary or the personal law of parties. If, for instance, in a particular community, an amount is settled by the community as full and final

settlement of all liabilities in respect of the marriage towards the wife and the wife receives that amount or the husband offers that amount as settled

by the community, Section 127(3)(b) may come into operation.

31. In such a case, it could be said that the wife according to the customary or personal law, gives up her right to maintenance according to the

customary or personal law in accordance with the wishes of the community. No such customary or personal law exists with regard to Meher. On

the contrary, there are passages in the holy Quoran which show that the Prophet Mohammed wanted good Muslims to maintain even their

divorced wives and not to starve them and throw them in the streets.

32. In view of this interpretation, we are inclined to affirm the order of the learned Additional Sessions Judge, Sangli, setting aside the order passed

by the Judicial Magistrate, F.C., Sangli, on January 13, 1976, cancelling the order for maintenance. We also find a considerable force in the

reasoning of the learned Additional Sessions Judge, that merely depositing of the amount in the Court or forcing the wife to accept the amount

cannot be said to be ""received"" by the divorced wife, within the meaning of Section 127(3)(b).

33. It cannot be said that wife has ""received"" the amount when she refuses to receive the amount or when she receives the amount without

prejudice to her right to claim maintenance under the provisions of Section 125. We do not, however, like to rest our judgment on this narrow

ground which appears to be rather technical, having regard to the importance of the question involved in the case and also having regard to the

different views taken on the interpretation of the section by Chandurkar and Shah JJ. in the aforesaid judgment.

34. With the greatest respect to the learned Judges, we find it very difficult to agree with their view. After distinguishing the cases in Khurshid Khan

v. Husnabanu Mahimood and Smt. Mehbubabi Nasir v. Nasir Farid and U.H. Khan v. Mahaboobunnisa, as having not dealt with the question u/s

127(3)(b), it was observed at p. 130 of that judgment as follows:

It was vehemently pressed upon us by the learned Counsel for the petitioner that the construction which we were placing on Section 127(3) of the

new Code will take away the benefit which is in terms given u/s 125 as by way of a progressive and ameliorative measure to create a right of

maintenance in favour of a divorced woman.

Now, while we are conscious of the fact that in a case which expressly falls u/s 127(3)(b) such a result is bound to occur, in view of the express

provisions in Section 127(3)(b), it is not possible for us to obviate this result.

With profound respect, we find it difficult to agree with this view.

35. We are inclined to agree with the view taken by the Kerala High Court in Kunhimoyen v. Palliyuma. Khalid J. with respect, rightly observed

with regard to Section 127(3)(b) at pp. 201 to 202 as follows:

...This section provides that the Magistrate shall cancel the order for maintenance if any sum under any customary or personal law applicable to the

parties is paid on divorce. This section may be pressed into service by some ingenious husbands to defeat the provisions contained in Section 125.

We would like to make it clear that Section 127(3)(b) refer not to maintenance during the period of iddat or payment of dower, Unfortunately,

place of dower is now occupied by dowry, payable by the girls'' parents, which till 1st June 1961 was paid in public and thereafter in private;

thanks to the Dowry Prohibition Act, 1961. It is therefore not a sum of money which under the personal law is payable on divorce as expressed in

Section 127(3)(b). On the other hand, what is impliedly covered by this clause is such sums of money as alimony or compensation made payable

on dissolution of the marriage under customary or personal law codified or uncodified, or such amount agreed upon at the time of marriage to be

paid at the time of divorce; the wife agreeing not to claim maintenance or any other amount, We thought it necessary to clarify this position lest

there be any doubt regarding the scope of Section 127(3)(b), for, at the first blush, it might appear that, it takes away by one hand what is given

u/s 125 by the other hand. This is not so.

36. We are in complete agreement with the construction placed on Section 127(3)(b) by the division Bench of the Kerala High Court in

Kunhimoyen''s case.

37. In Muhammed v. Sainabi, Khalid J. once again reiterated his view and observed (p. 713):

...Mahar is an amount payable by the husband to the wife either prompt of deferred. Payment of Mahar will not effect a discharge of a claim for

maintenance, because the claim for Mahar is a valuable right available to the wife and this claim is a charge over the properties of the husband.

The construction made of the section by Chandurkar and Shah JJ. may require all Muslim wives at once to remit the Meher amount immediately after the Meher amount is agreed, so as to enable them to take the benefits of Sections 125 to 127. As already stated above, we are of the view

that Meher amount cannot be said to be an amount which is necessarily payable ""on divorce""; and, therefore, it cannot be an amount which is

contemplated within the meaning of Section 127(3)(b).

38. However, as the question is of public importance affecting all Muslim women who are divorced, we have come to the conclusion that the

matter of proper construction of Section 127(3)(b) must be considered by a larger Bench, as we are not inclined to agree with the view taken by

Chandurkar and Shah JJ. Accordingly, we direct that'' the papers of the above case, may be placed before the Hon''ble the Chief Justice for

referring the case to a larger Bench,

Sawant, J.:

I agree with the proposed order requesting the learned Chief Justice to refer the matter to a larger Bench. According to me, the short question that

falls for consideration in the present case is whether the amount of Mahar or of maintenance during the period of Iddat paid by the petitioner to his

divorced wife can be said to be ""the sum"" which, under the personal law of the petitioner viz. the Mahomedan Law ""was payable on divorce."" If

the answer to the said question, is in the affirmative, then the petitioner will be covered by the exemption from paying maintenance provided by

Clause (b) of Sub-section (3) of Section 127 of the Criminal Procedure Code, 1973, (hereinafter referred to as the said Code). If on the other

hand, the said answer is in the negative, he will not be entitled to the said exemption. It is therefore necessary to understand the exact nature of the

said two payments as understood in the Mahomedan Law.

39. Mahar or Dower according to the Mahomedan Law is a sum of money or other property promised by the husband to be paid or delivered, to

the wife in consideration of the marriage. Even where no dower is expressly fixed or mentioned before the marriage, the law confers the right of dower upon the wife. It is an obligation imposed by law upon the husband as a mark of respect for the wife. Since this payment is enjoined by law

merely as a token of respect for the wife, the mention of it is not absolutely essential to the validity of a marriage, and for the same reason the

marriage is valid even though the parties were to enter in the contract of marriage on the special condition that there should be no dower. Whatever

the origin of the term ""Mahar"" (which literally means the sale price), the Mahomedan Law has not accepted that word to mean a price for

concubinage intercourse. The said word is accepted to denote that the Mahomedan Law considers marriage as a civil contract.

40. Although further, payment of Mahar or Dower is not absolutely essential to the validity of marriage, and a contract of marriage under the

Mahomedan Law can be entered into on a special condition that there should be no dower, by practice it is considered an essential incident to the

status of marriage, to such an extent 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 conjugal relationship and the other ""deferred""-

payable on the dissolution of the marriage by the death of either of the parties or by divorce. Dower, however, ranks as a debt and the wife is

entitled along with the other creditors to have it satisfied on the death of the husband out of his estate. Her right however is not greater than that of

any other unsecured creditor except that if she lawfully obtains possession of the whole or part of his estate to satisfy her claims with the rents

accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow''s lien for dower. The amount of Mahar or

Dower may either be fixed or not. If it is fixed, it cannot be less than the minimum laid down by law. According to Hanafi law and Maliki law, the minimum dower is fixed as 10 dirhams (Rs. 3 to Rs. 4) and 3 dirhams (Rs. 1 to Rs. 2) respectively. The said minimum amount of dower laid down

by law is itself sufficient to show that it was by no means meant to be a provision for the wife, but was an amount to be paid to show respect by

the man to the woman he was marrying and that is why the monetary value of the dower was considered insignificant. In fact, it is said that in the

case of an extremely poor man, the Prophet requested him to teach Kuran to his wife and that was considered by the Law-Giver to be an

adequate requital of the husband''s obligation. Where the amount of dower is not fixed, the proper dower has to be fixed with reference to the

social position of the woman''s father''s family and her own personal qualifications such as age, beauty, fortune, understanding and virtue, and the

social position of the husband and his means are of little account. It also appears that in fixing the amount of proper dower, regard is also to be had

to the amount fixed in the case of the other family members of the wife''s family. Among the Muslims of India, the minimum amount of dower varies

between Rs. 40 to Rs. 40,000.

41. It will thus appear that under the Mahomedan Law, although the non-payment to Mahar does not invalidate the marriage, it is considered an

essential incident to the status of marriage to such an extent that when it is unspecified, or not provided, at the time the marriage is contracted, the

law declares that it must be adjudged on definite principles and the principle on which the said amount is fixed is the social position of the bride''s

father''s family.

42. It is either ""prompt"" or ""deferred"" and specified or unspecified. Prompt dower is payable either before marriage or immediately after the

marriage if demanded by the wife, while deferred dower is payable on the dissolution of the marriage either by death of either parties or by divorce

or on the happening of a specified event. When dower is fixed it is usual to split it into two equal parts and to stipulate that one should be paid at once or on demand, and the other on the death of either party or divorce or the happening of some specified event. When however the amount of dower is not specified, difficulties do arise as to whether the same is prompt or deferred. According to one of the branches of the Mahomedan Law, the presumption is that the whole of the dower is prompt and according to another branch the presumption is that half is prompt and the other half deferred and the proportion may be changed to suit particular cases. It is also open to the husband to increase dower at any time after marriage. Likewise, the wife may also remit the dower wholly or partially. According to the Mahomedan Law, a girl who has attained puberty is competent to relinquish wholly or partly her Mahar, although she may not have attained majority within the meaning of the Indian Majority Act.

43. The claim of the wife or widow for the unpaid portion of Mahar is the unsecured debt due to her from her husband or his estate respectively. It ranks rateably as an unsecured debt and is an actionable claim. During her life-time, the wife can recover the debt from the estate of her deceased husband. If however she predeceases her husband, the heirs of the wife become entitled to her dower. If her husband refuses to pay prompt dower, the guardian of the minor wife has a right to refuse to allow her to be sent to her husband''s house, and similarly the wife may refuse her husband her conjugal company provided no consummation has taken place. According to the Mahomedan Law, the wife is entitled to refuse herself to her husband until prompt dower is paid and the husband is bound to maintain her if in such circumstances she happens to reside apart from him. Thus, if her husband files a suit for restitution of his conjugal rights before cohabitation, non-payment of prompt dower is a complete defence for the wife. It has been held that even if there was prior cohabitation, in such cases the proper course for the Courts is to pass a decree for restitution of conjugal rights conditionally on payment of prompt dower.

44. As regards the payment of deferred dower, the right to enforce such payment arises either on death of either of the parties or on divorce or on

the happening of a specified event.

45. Thus, the above discussion with regard to the nature of dower or Mahar will show that it is a payment in consideration of marriage only. The

said payment is made or required to be made by the man to the woman either before or after marriage to show his respect and obligation to her for

entering into the marital relationship with her. In case of prompt dower, the said payment has to be made either wholly or partly even before the

marriage is contracted. Where however the dower is deferred, the right to demand the deferred dower arises not only after divorce, but also in the

event the marriage is dissolved by the death of either the husband or the wife or on the occurrence of a specified event. Where for example the

husband dies during the continuation of marriage, the wife is entitled to dower from the estate of the husband as a debt, although unsecured. On the

other hand, where the wife dies during the continuation of marriage, it is the wife''s heirs who are entitled to such deferred dower from the husband.

Again, even if the marriage is not dissolved either by divorce or by death of either of the parties, the deferred dower will still become payable, if an

event specified in the contract of marriage occurs. The mere fact that in case of a species of dower viz. deferred dower, the same becomes

payable on dissolution of marriage which in some cases may come about on account of divorce, does not change the nature of the said payment

and convert it from a consideration for marriage into a consideration for divorce. It should therefore be clear from the aforesaid discussion, that it

will be doing violence to the concept of Mahar or Dower to regard it ""as a sum payable on divorce"" within the meaning of Clause (b) of Sub-

section (3) of Section 127 of the said Code. On the other hand, it should be clear to anyone that it is nothing but an amount payable in

consideration of entering into a contract of marriage.

46. Coming now to the nature of the amount paid as maintenance during the period of Iddat or Iddat, in Mahomedan Law when a marriage is

dissolved either by death or divorce the woman is prohibited from marrying for a specified time. This period is called Idda or Iddat. The most

approved definition of the word Iddat is ""term or the period by the completion of which a new marriage is rendered lawful"". It is a compulsory

period of continence imposed on a woman on the termination of the marriage, to determine the certainty of the paternity. During this period, the

woman is supposed to live a life of seclusion and also to abstain from certain luxuries. If consummation of marriage has taken place and the

marriage is dissolved by divorce, the duration of Idda is three courses (roughly three months) and if the woman is pregnant, the duration of Iddat is

till delivery. If however the marriage is dissolved by death and not by divorce, the period of Iddat is four months and ten days and if the woman is

pregnant in such cases, the said period is till delivery, whichever is longer. If on the other hand, the marriage is not consummated, the Iddat has to

be observed only in the case of death but not in the case of divorce. Thus whether Iddat will or will not be observed and its duration, will depend

upon whether the marriage has been consummated or not.

47. Iddat is thus a period of compulsory continence imposed on the woman and will come into operation not only on account of divorce, but also

on account of death of the husband. In the case of divorce, if the marriage has been consummated, the Iddat has to be observed. However, it need

not be observed if the marriage is not consummated. Thus even on divorce Iddat is not a necessary consequence.

48. The incidents of Iddat again vary depending upon the form of divorce. During the period of iddat following Ahsan form of talaq or divorce, it is

open for the parties to revoke the divorce. In fact, divorce does not become final and irrevocable, until the period of Iddat expires. It is not open

for either of the parties to marry during the period of Iddat. Further, where consummation has taken place, maintenance has to be paid during Idda

whether the divorce is at the instance of the husband (Talaq-al-Sunna) or at the option of the wife (Talaq-e-Tafwid) or by consent of the parties

(Khul i.e. on account of the desire to separate emanating from the wife or Mubara i.e. on account of mutual aversion) or by judicial process.

49. Hence the amount of maintenance paid during Iddat cannot be called a sum paid or payable in consideration of divorce within the meaning of

Clause (b) of Sub-section (i) of Section 127 of the said Code. On the other hand it represents an amount to be paid only during a specific period

in consideration of the compulsory period of continence to be observed by the woman. Neither therefore Mahar nor the amount of maintenance

paid during Iddat can be covered by the said provision.

50. The decision of the division Bench in Rukhsana Parvin v. Shaikh Mohamed (1976) 79 Bom. L.R. 123, has gone on the footing that these two

amounts are a sum payable in consideration of divorce as mentioned in the said Clause (b) of Sub-section (5) of Section 127 of the said Code,

and that is why the Bench has held that once the husband shows the payment of such amount, the exemption mentioned in the said provision comes

to his rescue. In view of what has been discussed above with regard to the nature of the said payments, with respect to the learned Judges, I am

unable to agree with the view they have taken. This is on the plain interpretation of the provisions of the Statute itself. Apart from this, both the

history of the relevant provisions and the intention of the Parliament in making the amendment make it clear that the Legislature wanted to provide

against the machinations of the unscrupulous husbands and protect the helpless and weaker sex. The interpretation placed by the division Bench,

with respect, would lead to the continuation of the same old unfortunate situation in spite of the amendment, and thus defeat the intention of the

Legislature.