FAZLUNBI

v.

K. KHADER VALI AND ANR.

May 8, 1980

[V. R. KRISHNA IYER, O. CHINNAPPA REDDY AND A. P. SEN, JJ.]

Code of Criminal Procedure Code, 1973, *Section* 127 (3) (*b*), *scheme and scope of—Whether by the payment of Mahar and Iddat dues, the provisions of s.* 127(3)(*b*) *of the Code would be complied with or the vinculum juris created by the order under s.* 125 *continues despite the make-believe ritual of miniscule mahar which merely stultified section* 127(3)(*b*) *Cr.P.C.—Precedents and binding nature under Article* 141 *of the Constitution.*

Fazlunbi, the appellant, married Khader Vali, the respondent, in 1966, and during their conjugal life, a son Khader Basha, was born to them. The respondent, husband, an additional accountant in the State Bank of India, drawing a salary of Rs. 1000/-, discarded the wife and the child, and the tormented woman *talaqed* out of the conjugal home, sought shelter in her parent's abode. Driven by destitution, she prayed for maintenance allowance for herself and her son under section 125 Cr. P.C. and the Magistrate granted payment of a monthly sum of Rs. 250/- to the wife and Rs. 150/- to the child. The respondent husband challenged the award in the High Court where the unjustified neglect was upheld, but the quantum of maintenance of the child was reduced to Rs. 100/- per mensem.

Thereafter, the respondent husband resorted to the unilateral technique of talaq and tendered the magnificent sum of Rs. 500/- by way of *Mahar* and Rs. 750/- towards maintenance for the period of *iddat*, hopeful thereby, of extricating himself from the obligation to maintain the appellant. The Additional First Class Magistrate vacated the grant of maintenance already granted on the score of divorce coupled with discharge of *mahar and Iddat* dues. This order was unsuccessfully challenged in the Sessions Court. The desperate appellant reached the High Court and invoked its jurisdiction under section 482 Cri. P.C. A Division Bench of that High Court, though the revision petitioner banked upon the decision of the Supreme Court in *Bai Tahira's case* [1979] 2 SCR 75 in her favour, distinguished that case and dismissed the petition. Hence the appellant-wife's appeal by special leave.

Allowing the appeal, the Court

HELD : 1. The conscience of social justice, the cornerstone of our Constitution will be violated and the soul of the scheme of Chapter IX of the Code, a secular safeguard of British India vintage against the outrage of jetsam women and flotsam children, will be defiled if judicial interpretation sabotages the true meaning and reduces a benign protection into a damp squib. [1131 E-F]

2. Precedents of the Supreme Court are not to be left on the shelves. Neither could they be brushed aside saying that precedents is an authority only "on its actual facts". Such devices are not permissible for the High Courts when decisions of the Supreme Court are cited before them not merely because of the jurisprudence of precedents, but because of the imperatives of Article 141. [1134 D-E]

A No Judge in India, except a larger Bench of the Supreme Court, without a departure from judicial discipline can whittle down, wish away or be unbound by the ratio in *Bai Tahira's* case, in which Section 127(3)(b) of Crl. P.C. was interpreted. The language used is unmistakable, the logic at play is irresistible, the conclusion reached is inescapable the application of the law as expanded there is an easy task. And yet, the Division Bench, by the fine art of skirting the real reasoning laid down "unlaw" in the face of the law in B *Bail Tahira* which is hardly a service and surely a mischief, unintended by the Court may be, but embarrassing to the subordinate judiciary. There is no warrant whatever for the High Court to reduce to a husk a decision of this Court by its doctrinal gloss. [1132 C-E]

(3) Crl. P.C. (Sections 125-127) is a secular code deliberately designed to C 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 the weaker sections of women and children and is not confined to members of one religion or region, but the whole community of womanhood. Secondly muslim law show its reverence for the wife in the institution of Mehar (dower). It is neither dowry nor price for marriage. [1138 C-E]

D 4. The quintessence of *mehar* whether it is prompt or deferred is clearly not a contemplated quantification of a sum of money in lieu of maintenance upon divorce. Indeed, dower focusses on marital happiness and is an incident of connubial joy. Divorce is farthest from the thought of the bride and the bridegroom when *mehar* is promised. Moreover, dower may be prompt and is payable during marriage and cannot, therefore, be a recompense for divorce too distant and unpleasant for the bride and bridegroom to envision on the E nuptial bed. May be, some how the masculine obsession of jurisprudence linked up this promise or payment as a consolidated equivalent of maintenance after divorce. [1140 D-F]

5. The language of Section 127(3)(b) suggests that payment of the sum and the divorce should be essential parts of the same transaction so as to make one the consideration for the other. The payment of money contemp- F lated by section 127(3)(b) should be so linked with the divorce as to become payable only in the event of the divorce. Mehar as understood in Mohammadan Law cannot, under any circumstances be considered as consideration for divorce or a payment made in lieu of loss of connubial relationship. Under s. 127(3)(b) of the Cr. P.C., an order for maintenance may be cancelled if the Magistrate is satisfied that the woman has been divorced by her husband and that she has received, whether before or after the said order, the whole of the sum G which, under any customary or personal law applicable to the parties was payable on such divorce. Therefore, even by harmonising payments under personal and customary laws with the obligations under ss. 125 to 127 of the Cr. P.C., the conclusion is clear that the liquidated sum paid at the time of divorce must be a reasonable and not an illusory amount and will release the quondam husband from the continuing liability, only if the sum paid is realistically sufficient to maintain the ex-wife and salvage her from destitution H which is the anathema of the law. This perspective of social justice alone does justice to the complex of provisions from s. 125 to s. 127 of the Criminal Procedure Code. [1140 F-H, 1141 A-C]

Kunhi Moyin v. *Pathimma*, 1976 KLT 87 at 96; *Kamalakshi* v. *Sankaran*, AIR 1979 Kerala 116; *Hajabean Sulaiman & Anr.* v. *Ibrahim Gandhabai and Anr.*, Guj. L.R. Vol. XVIII 1977 p. 133 at 137-139, referred to. A

6. (i) Section 127(3)(b) has a setting, scheme and a purpose and no *talaq* of the purpose different from the sense is permissible in statutory construction. [1141 C-D]

(ii) The payment of an amount, customary or other, contemplated by the measure must inset the intent of preventing destitution and providing a sum which is more or less the present worth of the monthly maintenance allowances the divorce may need until death or remarriage overtake her. The policy of the law abhors neglected wives and destitute divorcees and s. 127(3)(b) takes care to avoid double payment one under custom at the time of divorce and another under s. 125. [1141 D-E] B

(iii) Whatever the facts of a particular case, the Code, by enacting ss. 125 to 127, charges the court with the humane obligation of enforcing maintenance or its just equivalent to ill-used wives and castaway ex-wives, only if the woman has received voluntarily a sum, at the time of divorce, sufficient to keep her going according to the circumstances of the parties. [1141 E-F] C

(iv) Neither personal law nor other salvationary plea will hold against the policy of public law pervading s. 127(3) (b) as much as it does s. 125. So a farthing is no substitute for a fortune nor naive consent equivalent to intelligent acceptance. [1141 F-G] D

(v) Here the *mahar* paid is Rs. 500/- and the income therefrom may will be Rs. 5/- a month, too ludicrous to mention as maintenance. The amount earlier awarded is the minimum. [1141 G-H]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 156 of 1980. E

Appeal by certificate against the Judgment and Order dated the 21 Nov., 1979 of the Andhra Pradesh High Court in Criminal Misc. Petition No. 1351 of 1979.

A. Suba Rao for the Appellant. F

G. Narasimhulu for Respondent No. 1.

The Judgment of the Court was delivered by

KRISHNA IYER, J.— The last judicial lap of the journey to gender justice made by Fazulnbi, a married woman just past 30 years and *talaged* into destitution, constitutes the compassionate core of this case. G The saga of Fazlunbi, who had earlier secured an order for maintenance in her favour under s. 125 Cr. P. C. which was cancelled under s. 127(3)(b) Cr. P. C., by three courts, tier upon tier in the vertical system, by concurrent misinterpretation of the relevant provision, constitutes the kernel of her legal grievance. If her plea has substance, social justice has been jettisoned by judicial process and a H just and lawful claim due to a woman in distress has been denied heartlessly and lawlessly. We say 'heartlessly', because no sensitive

A judge with empathy for the weaker sex could have callously cancelled an order for a monthly allowance already made in her favour, as has been done here. We say 'lawlessly', because no disciplined judge bound by the decision of this Court which lays down the law for the nation under Art. 141 of the Constitution could have defied the crystal clear ruling of this Court in *Bai Tahira v. Ali* B *Hussain Fidaalli Chothia*(1) by the disingenuous process distinguishing the decision. We are surprised by this process of getting round the rule in *Bai Tahira's* case (supra) by the artful art of concocting a distinction without a difference. The Sessions Court and the High Court, who had before them the pronouncement of the Supreme Court, chopped legal logic to circumvent it. Reading their 'reasoning' we are C left to exclaim how the high Bench argued itself out of *Bai Tahira's case* by discovering the strange difference.

"Twixt Tweeldedum and Tweedledee", the discipline of law, the due process of law and the rule of law become mere claptrap if judges bound to obey precedent choose to disobey on untenable *alibi.* D And, behind it all is the unheeded wail of Fazulnbi's womanhood for the *karuna* and *samata* of the law and we are conscientized into reversing the judgment under appeal in terms express, explicit and mandatory so that masculine injustice may not crucify the weaker sex. Small wonder that many a divorcee, beguiled by Arts. 14 and 15 and the decision in *Bai Tahira's case,* may well exclaim, "How long, E O Lord, how long!"

The brief facts which have led to this appeal are that Fazlunbi, the appellant married Khader Vali, the respondent, in 1966 and during their conjugal life, a son, Kader Basha, was born to them. The husband, an Additional Accountant in the State Bank F of India, apparently drawing a salary well above Rs. 1000/-, discarded the wife and the child, and the tormented woman, *talaged* out of the conjugal home, sought shelter in her parents' abode. Driven by destitution, she prayed for maintenance allowance for herself and her son under s. 125 Cr. P. C. and the Magistrate granted payment of a monthly sum of Rs. 250/- to the wife and Rs. 150/- to the child. The G husband challenged the award in the High Court where the unjustified neglect was upheld but the quantum of maintenance of the child was reduced to Rs. 100/- per mensem.

The respondent-husband resorted to the unilateral technique of *talaq,* and tendered the magnificent sum of Rs. 500/- by way of H *mahar* and Rs. 750/- towards maintenance for the period of *iddat,* hopeful thereby, of extricating himself from the obligation to maintain

(1) [1979] 2 SCR 75.

the appellant. The Additional First Class Magistrate vacated the grant of maintenance on the score of divorce coupled with discharge of *mahar* and *iddat* dues. This order was unsuccessfully challenged in the Sessions Court. The desperate appellant reached the High Court and invoked its jurisdiction under s. 482 Cr. P.C. A Division Bench of that Court, however, dismissed the revision petition and Fazlunbi has landed up in this Court and banks upon the application of the rule in *Bai Tahirai's case* (supra).

The facts are clear, the *talaq* has snapped the marital tie, the flimsy *mahar* has been tendered together with the three months' *iddat* dues and the divorcee remains neglected. The question is whether s. 127 (3)(b) of the Code has been complied with or the *vinculum juris* created by the order under s. 125 continues despite the make-believe ritual of miniscule *mahar* which merely stultifies s. 127(3)(b) Cr. P. C. and hardly fulfils it. The matter is no longer *res integra*. No one in his senses can contend that the *mahar* of Rs. 500/- will yield *income* sufficient to maintain a woman even if she were to live on city pavements! What is the intendment of s. 127(3)(b)? What is the scheme of relief for driftwood and destitute wives and divorcees discarded by heartless husbands? What is the purpose of providing absolution from the obligation to pay continued maintenance by lumpsum liquidation? What, in short is the text and texture of the provision, if read in the light of the mischief to be avoided, the justice to be advanced? The conscience of social justice, the cornerstone of our Constitution will be violated and the soul of the scheme of Chapter IX of the Code, a secular safeguard of British Indian vintage against the outrage of jetsam women and flotsam children, will be defiled if judicial interpretation sabotages the true meaning and reduces a benign protection into a damp squib. The holistic art of statutory construction has not the pettifogging craft of lexical and literal reading of the text woefully keeping alive the moribund *mores* of a bygone age but, in the felicitous diction of Cardozo, 'the task of a translator, the reading of signs and symbols given from without (by those) who have absorbed the spirit, have filled themselves with a love of the language they must read'. Lord Denning's great tribute to the task of a judge is never barred by the law of limitation(1).

> Many of the Judges of England have said that they do not make law. They only interpret it. This is an illusion which they have fostered. But it is a notion which is now being discarded everywhere. Every new decision—on every new situation—is a development on the law. Law does not

(1) Foreward by Denning M. R. to Supreme Court of India by Rajeev Dhavan.

A stand still. It moves continually. Once this is recognised, then the task of the Judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working mason, laying brick on brick, without thought to the overall design. He must be an architect—thinking of the B structure as a whole—building for society a system of law which is strong, durable and just. It is on his work that civilised society itself depends.

We lay so much emphasis on the functional sensitization of a judge lest what is absurd may be fobbed as obvious by judicial semanticisation. C

We need not labour the point because this Court has already interpreted s. 127(3)(b) in *Bai Tahira* and no judge in India, except a larger bench of the Supreme Court without a departure from judicial discipline can whittle down, wish away or be unbound by the ratio thereof. The language used is unmistakable, the logic at play is D irresistible, the conclusion reached is inescapable, the application of the law as expounded there is an easy task. And yet, the Division Bench, if we may with respect say so, has, by the fine art of skirting the real reasoning laid down 'unlaw' in the face of the law in *Bai Tahira* which is hardly a service and surely a mischief, unintended by the Court may be, but embarrassing to the subordinate judiciary.

E There is no warrant whatever for the High Court to reduce to a husk a decision of this Court by its doctrinal gloss. The learned judges observe, to our bafflement—

> "The decision in *Bai Tahira* v. *Ali Hussain Fassalli* (supra) is to be confined only to the facts of that case. It F falls to be distinguished for the following reasons : (i) the compromise of 1962 referred to therein was construed as not affecting the rights of a Muslim divorced wife in seeking to recover maintenance under Sec. 125 Cr. P.C., (ii) what was considered to have been paid to the Muslim divorced wife was only the Mahar amount and not the maintenance amount G payable for the Iddat period, (iii) The Mahar amount paid revealed a rate of interest which for a person residing in Bombay was held to be wholly inadequate to do duty for maintenance allowance, (iv) there was nothing in that case to show that the amount of Rs. 130/- paid towards Iddat represented the payment of a sufficient maintenance amount H for the three months period of Iddat and (v) the husband in that case did not raise any plea based on sec. 127(3)(b) Cr. P.C."

Let us quote a few passages from this Court's ruling in *Bai Tahira* (supra) to express the untenability of the excuse not to follow the binding ratio. A

> Nor can Section 127 rescue the respondent from his obligation, payment of *mehar* money, as a customary discharge, is within the cognizance of that provision. But B what was the amount of *mehar*? Rs. 5000/-, interest from which could not keep the woman's body and soul together for a day, even in that city where 40% of the population are reported to live on pavements, unless she was ready to sell her body and give up her soul! The point must be clearly understood that the scheme of the complex of pro- C visions in Chapter IX has a social purpose. Ill-used wives and desperate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets. This traumatic horror animates the amplitude of Section, 127. Where the husband, by customary payment at the D time of divorce, has adequately provided for the divorce, a subsequent series of recurrent doles is contra-indicated and the husband liberated. This is the teleological interpretation, the sociological decoding of the text of Sec. 127. The key-note though is adequacy of payment which will take reasonable care of her maintenance. E
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> The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate the rate unless it is a reasonable substitute. The legal sanctity of the payment is certified by the fulfilment of the F social obligation, not by a ritual exercise rooted in custom. No construction which leads to frustration of the statutory project can secure validation if the court is to pay true homage to the Constitution. The only just construction of the section is that Parliament intended divorcees should not derive a double benefit. If the payment by any G *mehar* or ordained by custom has a reasonable relation to the object and is a capitalised substitute for the order under Section 125—not mathematically but fairly—then Section 127(3)(b) subserves the goal and relieves the obliger, not *pro tanto* but wholly. The purpose of the payment 'under any customary or personal law' must be H to obviate destitution of the divorcee and to provide her with wherewithal to maintain herself. The whole scheme

A of Section 127(3)(b) is mainfestly to recognise the substitute maintenance arrangement by lump sum so paid and is potential as provision for maintenance to interpret otherwise is to stultify the project. Law is dynamic and its meaning cannot be pedantic but purposeful. The proposition, therefore, is that no husband can claim under Section 127(3)(b) absolution from his obligation under Section 125 towards a divorced wife except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance.

C Granville Williams in his "Learning the Law" (pp. 77-78) gives one of the reasons persuading judges to distinguish precedents is "that the earlier decision is altogether unpalatable to the court in the later case, so that the latter court wishes to interpret it as narrowly as possible". The same learned author notes that some judges may "in extreme and unusual circumstances, be apt to seize on D almost any factual difference between this previous case and the case before him in order to arrive at a different decision. Some precedents are continually left on the shelf in this way, as a wag observed, they become very "distinguished". The limit of the process is reached when a judge says that the precedent is an authority only "on its actual facts". We need hardly say that these devices E are not permissible for the High Courts when decisions of the Supreme Court are cited before them not merely because of the jurisprudence of precedents, but because of the imperatives of Art. 141.

We have been painstakingly drawn into many rulings of the High Courts but none except this one has had the advantage of the pro- F nouncement in *Bai Tahira*. A Division Bench of the Kerala High Court—a ruling which perhaps advances the purpose more than the Full Bench decision which overruled it—dwelt on s. 127(3)(b) of the Code. Khalid, J. speaking for the court observed, and rightly if we may say so with respect,(1)

G 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) H (b) refers not to maintenance during the period of iddat or payment of dower. Unfortunately, place of dower is

(1) Kunhi Moyin v-Pathumma 1976 KLT 87 at96.

now occupied by dowry, payable by the girl's parents, which till 1-6-1961 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 s. 127(3)(b), for, at the first blush, it might appear that, it takes away by one hand what is given under s.125 by the other hand. This is not so.

While, in our view, the Full Bench decision in *Kamalakshi v. Sankaran*(1) in so far as it does not insist on an adequate sum which will yield a recurring income to maintain the divorcee in future, is bad law and the Division Bench, in so far as it excuses the husband if he pays a sum which the ignorant wife at the time of marriage has agreed upon to relinquish maintenance after divorce, does not go far enough.

A division Bench of the Gujarat High Court(2) has sought, even by literal construction, to reach the conclusion that unless the divorcee voluntarily accepts a sum in lieu of future maintenance she is still entitled to her claim and s. 127(3)(b) will not dissolve the liability of the husband. The Judges argue :

> We are concerned with the interpretation of sub-sec. (3) of sec. 127, more particularly clause (b) thereof. Evidently, this provision which seeks to confer power on the court to cancel an order of monthly allowance passed by it in certain specified contingencies, has to be confined strictly within the narrow limits laid down by sub-sec. (3). This is because the provision for maintenance of wives, whether married or divorced, who are unable to maintain themselves is a social welfare measure applicable to all people irrespective of caste, creed, community or nationality.

(1) AIR 1979 Ker. 116.

(2) *Hajeben Suleman & Anr.* v. *Ibrahim Ganadbhai & Aur.* Guj. L. R. Vol. XVIII 1977 p. 133 at 137-139.

A With the aforesaid background, we will now proceed to examine the provisions of sub-sec. (3) of sec. 127. A bare reading of clauses (a), (b) and (c) of that provision shows that three fact situations have been contemplated by the Legislature in which the Magistrate is given the power to cancel the order for monthly allowance. These B fact situations are shown by the words (1) has remarried in clause (a), (2) has received in clause (b) and (c) and (3) had voluntarily surrendered in clause (c). Clauses (a) and (c) of the said provision do not postulate any difficulty because they contemplate the fact situations C brought about by a voluntary and irrevocable act on the part of the divorced wife. Thus, clause (a) contemplates the act of the wife in getting remarried and clause (c) contemplates the act of the wife in obtaining divorce from her husband and surrendering her rights to maintenance after divorce. Both these eventualities, as observed D earlier, are brought about by a voluntary and irrevocable act on the part of the wife. If this is the obvious position to be kept in mind with regard to the scope and content of clauses (a) and (c) of sub-sec. (3) of sec. 127, we see no reason why we should adopt a different standard in ascertaining the scope and content of clause (b);

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....it is clear that one of the eventualities conferring jurisdiction on the Magistrate to cancel an order of monthly allowance can come into existence only on doing of a voluntary act by the wife of actually accepting the F amount offered as contemplated by clause (b). It is to be noted that the Legislature has not used words indicating mere offer by the husband of the amount contemplated by clause (b) as sufficient to bring into existence the fact situation contemplated or bring into existence the eventuality on which the power of the Magistrate to cancel the G order of maintenance is based. It appears that the Legislature has advisedly used the words "has received" in order to indicate and at the same time restrict the power of cancelling the order of monthly allowance to cases where the wife by a voluntary act on her part of receiving the amount contemplated by clause (b) brings about the eventuality H contemplated for exercise of the said power.... We, therefore, hold that in order to exercise power conferred by clause (b) of sub-sec. (3) of sec. 127, it has to be

found as a fact that the wife has done a voluntary act of receiving the whole sum contemplated to be payable by clause (b). If the wife shows her unwillingness to receive the amount tendered, the provisions of clause (b) are not applicable.

Even the literal and the purposive approaches may sometimes concur, once we grasp the social dynamics of interpretation, will serve the cause of truth and justice. We are reminded of Lord Denning's fascinating reference in his "The Discipline of the Law" to Portia's plea for the pound of flesh but not a drop of blood; The traditional English view is yielding to the pressure of the modern European view (which is also the American view) expressed by Denning in delightful diction as(1)

> "the 'schematic and teleological' method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design of purpose which lies behind it. When they come upon a situation which is to their minds within the spirit—but not the letter—of the legislation, they solve the problem by looking at the design and purpose of the legislature—at the effect which it was sought to achieve. They then interpret the legislation so as to produce the unashamedly, without hesitation. They ask simply: What is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly. If you study the decisions of the European Court, you will see that they do it every day. To our eyes—shortsighted by tradition — it is legislation, pure and simple. But, to their eyes, it is fulfilling the true role of the courts. They are giving effect to what the legislature intended, or may be presumed to have intended. I see nothing wrong in this. Quite the contrary.

Another angle to the subject of *Mahar* and its impact on liability for maintenance after divorce may be briefly considered. Khalid, J. of the Kerala High Court in two cases has taken the view that s.125 and s.127 Cr.P.C. are conceptually unconnected with payment of *mahar* and cannot bail out a muslim husband from his statutory obligation under s.125. We are aware of the criticism of this conceptual

(1) The Discipline of Law, Lord Denning, pp. 20-21.

A divorce between *mahar* and post-divorce maintenance by Dr. Tahir Mahmood in his recent book on the 'Muslim Law of India' (see p. 133) where the learned author prefers to retain the nexus between *mahar* and maintenance but has this to say :

> In a recent case the Supreme Court has held that the sum paid under personal law—referred to in clause (b) of section 127(3) of the Code—should be "more or less sufficient to do duty for maintenance allowance"; if it is not so it can be considered by the court for the reduction of the maintenance rate but cannot annihilate that rate. This, indeed, is a liberal ruling and conforms to the spirit of Islamic law on the subject.

Aside from this controversy, we may look perspicaciously at the legal connotation of 'dower' and the impact of its payment on divorcees' claims for maintenance. We must first remember that Cr.P. Code (s. 125-127) is a secular code 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 the weaker sections of women and children and is not confined to members of one religion or region, but the whole community of womanhood. Secondly we must realise that Muslim law shows its reverence for the wife in the institution of *Mahar* (dower). It is neither dowry nor price for marriage.

> As explained in an old judgment by Justice Syed Mahmood, *mahar* is "not the exchange or consideration given by the man to the woman, but an effect of the contract imposed by law on the husband as a token of respect for its subject : the woman". Giving a correct appraisal of the concept of *mahar,* the Privy Council once described it as "an essential incident to the status of marriage". On another occasion it explained that *mahar* was a 'legal responsibility' of the husband. These judicial observations evidence a correct understanding of the Islamic legal concept of *mahar.*(1)

Baillie in his Digest of Mohammaden Law says :

> "Dower is not the exchange or consideration given by the man to woman for entering into the contract; but an effect of the contract, imposed by the law on the husband as a token in respect, for its respect the woman.... Dower being, as already mentioned, opposed to the usu-

(1) Dr. Tahir Mahmood "The Muslim Law of India" p. 71.

fruct of the woman's person, the right to either is not completed without the other. Hence on the one hand, dower is said to be confirmed and made binding on the husband by consummation, or by its substitute, a valid retirement, or by death, which by terminating the marriage, puts an end to all the contingencies to which it is exposed; and on the other hand the woman becomes entitled to it as soon as she has surrendered her person."

Justice Mahmood has described the nature of *Meharin Abdul Kadir v. Salima and anr.* (8 All. 149 at 157-158). According to him :

"Dower, under the Muhammadan law, is the sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife as a necessary effect of marriage. To use the language of the Hedaya, 'the payment of dower is enjoined by the law merely as a token of respect for its subject (the woman), wherefore the mention of it is not absolutely essential to the validity of a marriage; and, for the same reason, a marriage is also valid, although the man were to engage in the contract on the special condition that there should be no dower"....(Hamilton's Hedaya by Grady, p. 44). Even after the marriage the dower may be increased by the husband during coverture....In this sense and in no other can dower under the Muhammadan law be regarded as the consideration for the connubial intercourse, and if the authors of the Arabic Text-books of Muhammadan law have compared it to price in the contract of sale, it is simply because marriage is a civil contract under that law.....Such being the nature of the dower, the rules which regulate its payment are necessarily affected by the position of a married woman under the Muhammadan law. Under that law marriage does not make her property the property of the husband, nor does coverture impose any disability upon her as to freedom of contract. The marriage contract is easily dissoluble, and the freedom of divorce and the rule of polygamy place a power in the hands of the husband which the law-giver intended to restrain by rendering the rules as to payments of dower stringent upon the husband. No limit as to the amount of dower has

A been imposed, and it may either be prompt, that is, immediately payable upon demand, or deferred, that is payable upon the dissolution of marriage, whether by death or divorce. The dower may also be partly prompt and partly deferred; but when at the time of the marriage ceremony no specification in this respect is made, the whole B dower is presumed to be prompt and due on demand".

In Tyabji's Muslim Law (4th Edn) it is stated :

"*Mahar* is an essential incident to the status of marriage. Regarded as a consideration for the marriage it is in theory payable before consummation; but the law allows C its division in two parts, one of which is called 'prompt' payable before the wife can be called upon to enter the conjugal domicle, the other 'deferred' payable on the dissolution of the contract by the death of either of the parties or by divorce. When the Kabin nama does not specify the portion that is prompt and that which is deferred, evi- D dence may be given of the custom or usage of wife's family".

The quintessence of *mahar* whether it is prompt or deferred is clearly not a contemplated quantification of a sum of money in lieu of maintenance upon divorce. Indeed, dower focusses on marital E happiness and is an incident of connubial joy. Divorce is farthest from the thought of the bride and the bridegroom when *mehar* is promised. Moreover, dower may be prompt and is payable during marriage and cannot, therefore, be a recompense for divorce too distant and unpleasant for the bride and bridegroom to envision on the nuptial bed. Maybe, some how the masculine obsession of F jurisprudence linked up this promise or payment as a consolidated equivalent of maintenance after divorce. Maybe, some legislatures might have taken it in that light, but the law is to be read as the law enacted. The language of s. 127(3)(b) appears to suggest that payment of the sum and the divorce should be essentially parts of the same transaction so as to make one the consideration for the G other. Such customary divorce on payment of a sum of money among the so called lower castes are not uncommon. At any rate the payment of money contemplated by s. 127(3)(b) should be so linked with the divorce as to become payable only in the event of the divorce. *Mahar* as understood in Mohammadan Law cannot under any circumstances be considered as consideration for divorce H or a payment made in lieu of loss of connubial relationship. Under s. 127(3)(b) of the Cr.P.C., an order for maintenance may be cancelled if the Magistrate is satisfied that the woman has been divorced

by her husband and that she has received, whether before or after the said order, the whole of the sum which, under any customary or personal law applicable to the parties was payable on such divorce. A

We are, therefore, inclined to the view that even by harmonising payments under personal and customary laws with the obligations under ss. 125 to 127 of the Cr.P.C., the conclusion is clear that the liquidated sum paid at the time of divorce must be a reasonable and not an illusory amount and will release the quondam husband from the continuing liability, only if the sum paid is realistically sufficient to maintain the ex-wife and salvage her from destitution which is the anathema of the law. This perspective of social justice alone does justice to the complex of provisions from s. 125 to s. 127 of the Criminal Procedure Code. B C

We may sum up and declare the law fool-proof fashion :

(1) Section 127(3)(b) has a setting, scheme and a purpose and no *talaq* of the purpose different from the sense is permissible in statutory construction. D

(2) The payment of an amount, customary or other, contemplated by the measure must inset the intent of preventing destitution and providing a sum which is more or less the present worth of the monthly maintenance allowances the divorce may need until death or remarriage overtake her. The policy of the law abhors neglected wives and destitute divorcees and s. 127(3)(b) takes care to avoid double payment one under custom at the time of divorce and another under s. 125. E

(3) Whatever the facts of a particular case, the Code, by enacting ss. 125 to 127, charges the court with the humane obligation of enforcing maintenance or its just equivalent to ill-used wives and castaway ex-wives, only if the woman has received voluntarily a sum, at the time of divorce, sufficient to keep her going according to the circumstances of the parties. F

(4) Neither personal law nor other salvationary plea will hold against the policy of public law pervading s. 127(3)(b) as much as it does s. 125. So a farthing is no substitute for a fortune nor naive consent equivalent to intelligent acceptance. G

(5) Here the *mahar* paid is Rs. 500/- and the income therefrom may well be Rs. 5/- a month, too ludicrous to mention as maintenance. The amount earlier awarded is the minimum. H

Before we bid farewell to *Fazlunbi* it is necessary to mention that Chief Justice Baharul Islam, in an elaborate judgment replete

A with quotes from the Holy Quoran, has exposed the error of early English authors and judges who dealt with *talaq* in Muslim Law as good even if pronounced at whim or in tantrum, and argued against the diehard view of Batchelor J. (ILR 30 Bombay 539) that this view 'is good in law, though bad in theology'. Maybe, when the point directly arises, the question will have to be considered by this
B court, but enough unto the day the evil thereof and we do not express our opinion on this question as it does not call for a decision in the present case.

We allow the appeal.

Appeal allowed.