

Begum Subanu Alias Saira Banu & Anr vs A.M. Abdul Gafoor on 3 April, 1987

Equivalent citations: 1987 AIR 1103, 1987 SCR (2) 773, AIR 1987 SUPREME COURT 1103, 1987 (2) SCC 285, 1987 (2) RECCRIR 270, 1987 (3) JT 55, 1987 SC CRIR 185, 1987 (1) IJR (SC) 1, 1987 CRIAPPR(SC) 248, 1987 CRIAPPR(SC) 246, 1987 APLJ(CRI) 118, 1987 CALCRILR 124, 1987 (1) APLJ 50, (1987) IJR 201 (SC), (1987) MARRILJ 317, (1987) 1 CRILC 656, (1987) 2 SCJ 244, (1987) 2 CURLJ(CCR) 468

Author: A.P. Sen

Bench: A.P. Sen

PETITIONER:

BEGUM SUBANU ALIAS SAIRA BANU & ANR.

Vs.

RESPONDENT:

A.M. ABDUL GAFOOR

DATE OF JUDGMENT 03/04/1987

BENCH:

NATRAJAN, S. (J)

BENCH:

NATRAJAN, S. (J)

SEN, A.P. (J)

CITATION:

1987 AIR 1103

1987 SCR (2) 773

1987 SCC (2) 285

JT 1987 (2) 55

1987 SCALE (1) 672

ACT:

Code of Criminal Procedure, 1973--Section 125 and Explanation to second proviso of sub-section (3)--Maintenance--Right of a Muslim wife to live separately and claim maintenance against the husband who marries another wife or takes a mistress--Liability to pay maintenance--Husband not absolved by offer to take back wife and maintain her--Right of Muslim husband to take more than one wife not affected--Scope and effect of.

HEADNOTE:

The appellant was married to the respondent on May 11, 1980. A girl was born on May 9, 1981. On grounds of neglect and failure to provide maintenance, the appellant filed a petition under Section 125 of the Code of Criminal Procedure, 1973, seeking maintenance for herself and the child at Rs.500 and Rs.300 per month respectively. The Magistrate dismissed the petition on the ground that the appellant had failed to establish adequate justification for living separately.

The appellant preferred a Revision Petition to the Sessions Judge. During the pendency of the said petition the respondent married again on October 18, 1984. It was urged on behalf of the appellant in the revision petition that irrespective of the other grounds, the second marriage of the respondent was by itself a ground for grant of maintenance. The Sessions Judge, however, held that the appellant was not entitled to claim maintenance since the respondent had contracted the second marriage after giving the appellant sufficient time and opportunity to rejoin him and since he had offered to take her back even after the second marriage. Insofar as the child was concerned the Sessions Judge granted maintenance at Rs.100 per month.

The appellant preferred a Petition to the High Court under Section 482 for grant of maintenance to her and for enhancing the maintenance awarded to the child and the High Court declined to interfere on the ground that the concurrent findings of the Court below precluded the appellant from agitating her claim.

In the appeal to this Court by special leave the appellant con-

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tended that the second marriage of the respondent had added a new dimension to her maintenance action and that she had become entitled under law to live separately and claim maintenance. The appeal was contested by the respondent on the ground that he was driven to the necessity of marrying again because the appellant failed to rejoin him and he had offered to take her back to maintain her and the said offer exonerated him from his liability to pay maintenance. It was further contended that as he was permitted by Muslim Law to take more than one wife his second marriage cannot afford a legal ground for the appellant to live separately and claim maintenance.

On the questions whether the second marriage of the respondent confers a right upon the appellant to live separately and claim maintenance and whether the appellant's rights stand curtailed in any manner because of the personal law governing the parties permitting a husband to marry more than one wife, and whether, even if the respondent is liable to pay maintenance, he stands absolved of his liability after his offer to take back the appellant and maintain her. Allowing the Appeal,

HELD: 1.1 Section 125 of the Criminal Procedure Code, 1973, its fore-runner being section 488 of the Criminal Procedure Code 1898, has been enacted with the avowed object of preventing vagrancy and destitution. It is intended to ensure the means of subsistence for three categories of dependents viz. children, wives and parents who are unable to maintain themselves. [782D-E]

1.2. Before an order of maintenance can be passed the three essential requisites to be satisfied are that: (1) the person liable to provide maintenance has sufficient means; (2) that he has neglected or refused to maintain; and (3) the dependent/dependents is/are unable to maintain himself/herself/themselves as the case may be. [782E-F]

1.3 The Legislature being anxious that for the sake of maintenance, the dependants should not resort to begging, stealing or cheating etc., the liability to provide maintenance for children has been fixed on the basis of the paternity of the father and the minority of the child and in the case of major children on the basis of their physical handicap or mental abnormality without reference to factors of legitimacy or illegitimacy of the children and their being married or not. [782F-G]

1.4 In the case of wives, whether their ties of marriage subsist or

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not, the anxiety of the Legislature is that they should not only not resort to begging, stealing or cheating etc. but they should also not feel compelled, for the sake of maintaining themselves, to resort to an adulterous life or in the case of divorced women, to resort to remarriage, if they have sentimental attachment to their earlier marriage and feel morally bound to observe their vows of fidelity to the persons whom they had married. [782G-H]

2.1 By reason of sub-sections (4) and (5) a husband can avoid his liability to pay maintenance if his wife is living in adultery. Correspondingly a right has been conferred on the wife under the Explanation to live separately and claim maintenance from the husband if he breaks his vows of fidelity and marries another woman or takes a mistress. It matters not whether the woman chosen by the husband to replace the wife is a legally married wife or a mistress. [783B-C]

2.2 The Explanation is of uniform application to all wives including Muslim wives whose husbands have either married another wife or taken a mistress. [783C-D]

2.3 The purpose of the Explanation is not to affect the rights of a Muslim husband to take more than one wife or to denigrate in any manner the legal and social status of a second wife to which she is entitled to as a legally married wife, as compared to a mistress but to place on an equal footing the matrimonial injury suffered by the first wife on account of the husband marrying again or taking a mistress during the subsistence of the marriage with her. [781E-F]

2.4 This Explanation has to be construed from the point

of view of the injury to the matrimonial rights of the wife and not with reference to the husband's right to marry again. [782B]

3. The offer to take back the wife and maintain her does not absolve the husband of his liability to pay maintenance. A husband who marries again cannot compel the first wife to the conjugal home with the co-wife and as such unless he offers to set up a separate residence for the first wife, any offer to take her back cannot be considered to be a bona fide offer. [783D-F]

Chand Begum v. Hyderbaig, [1972] CrL. Law Journal 1270, referred to.

In the instant case, the offer to take back the appellant had been

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made only before Revisional Court and that too after the second marriage had taken place. The offer was not to the effect that he would set up a separate residence for the appellant so as to enable her to live in peace and with dignity. The offer was only a make-believe one and not a genuine and sincere offer. On the basis of such an insincere offer the appellant's rights cannot be negated or defeated. [783D-F]

The Court granted maintenance to the appellant-wife Rs.300 per month and enhanced the maintenance to the minor girl to Rs.200 per month. [784B; C]

Bayanna v. Devamma, [1953], Mad. W.N. CrL. 243 = AIR 1954 Mad. 226; Kundaswami v. Nachammal, AIR 1963 Mad. 263; Syed Ahmed v. N.P. Taj Begum, AIR 1958 Mys 128; Shambu v. Ghalamma, AIR 1966 Mys 311; Teja Bai v. Shankarrao, AIR 1966 Bom 48; Mohammed Haneefa v. Mariam Bi, AIR 1969 Mad 414; Bela Rani v. Bhupal Chandra, AIR 1956 Cal 134; Rupchand v. Charubala, AIR 1966 Cal 83; Ishar v. Soma Devi, AIR 1959 Punj 295; Dhan Kaur v. Niranjana Singh, AIR 1960 Punj 595; Ramji Malviya v. Munni Devi, AIR 1959 All. 767; Sahulmeedu v. Subaida Beevi, [1970] Kerala Law Times Page 4; and Mohd. A. Khan v. Shah Bano Begum, [1985] 3 SCR 844 at 856, referred to.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 605 of 1986.

From the Judgment and Order dated 27.5.1985 of the Kerala High Court in CrL. Misc. Case No. 211 of 1985. Mrs. Geeta Luthra and D. Goburdhan for the Appellants. S.C. Birla for the Respondent.

The Judgment of the Court was delivered by NATARAJAN, J. Is a Muslim wife whose husband has married again worse off under law than a Muslim wife whose husband has taken a mistress to claim maintenance from her husband? Can there be a discrimination between Muslim women falling in

the two categories in their right to claim maintenance under Section 125 of the Code of Criminal Procedure, 1973 (for 'short the "Code")? These fundamental questions of a startling nature run as undercurrents beneath the placid waters of this seemingly commonplace action for maintenance by a Muslim wife against her husband. We have projected these fundamental issues in the prefatory itself because these larger questions also arise for consideration in this appeal.

Now for a resume of the facts. The appellant was married to the respondent on 11.5.80 and she begot him a girl child on 9.5.81. On grounds of neglect and failure to provide maintenance she filed a petition under Section 125 of the Code in the Court of the Judicial First Class Magistrate, Kasargod to seek maintenance for herself and the child at Rs.500 and Rs.300 per month respectively. The Magistrate dismissed the petition saying the appellant had failed to establish adequate justification for living separately. A revision was preferred to the Sessions Judge of Tellicherry. During the pendency of the revision the respondent married one Sahida Begum on 18.10.84, as his second wife. It was, therefore, urged in the revision that irrespective of the other grounds the second marriage of the respondent was by itself a ground for grant of maintenance. The Sessions Judge skirted the issue by taking a devious view that since the respondent had contracted the second marriage after giving the appellant sufficient time and opportunity to rejoin him and since he had offered to take her back even after the second marriage, the appellant was not entitled to claim maintenance. However, in so far as the child is concerned the Sessions Judge granted maintenance to it at Rs.100 per month. The appellant then preferred a petition to the High Court under Section 482 of the Code for grant of maintenance to her and for enhancing the maintenance awarded to the child. The High Court declined to interfere saying that the concurrent findings of the courts below precluded the appellant from agitating her claim any further. The aggrieved appellant has approached this Court of last resort under Article 136 of the Constitution for redressal of her grievance.

The principal controversy in the appeal centres round the rights of liabilities of the parties in the context of the second marriage entered into by the respondent on 18.10.84. The appellant's case is that the second marriage has added a new dimension to her maintenance action and she has become entitled under law to live separately and claim maintenance. The counter argument of the respondent is that he was driven to the necessity of marrying again because the appellant failed to rejoin him but even so he had offered to take her back and maintain her and the said offer exonerated him from his liability to pay maintenance. The main defence, however, urged is that since he is permitted by Muslim Law to take more than one wife his second marriage cannot afford a legal ground for the appellant to live separately and claim maintenance. These rival contentions fall for our determination in this appeal.

The justification put forward for the second marriage cannot be taken as a tenable defence, even if such a defence is open, because there is no evidence to show that the respondent had asked the appellant to rejoin him and she had declined to do so before the respondent took his second wife. Therefore, what really needs consideration is whether the second marriage of the respondent confers a right upon the appellant to live separately and claim maintenance and secondly whether her rights stand curtailed in any manner because of the personal law governing the parties permitting a husband to marry more than one wife. The further question to be decided is whether even if the respondent is liable to pay maintenance, he stands absolved of his liability after his offer

to take back the appellant and maintain her. For adjudicating the rights of the parties we must construe the Explanation and determine its scope and effect. The Explanation reads as follows:-

"If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him."

Before entering upon our discussion, we may refer to some of the decisions rendered by the High Courts on the scope and effect of the Explanation. We are setting out only some of the cases and not making an exhaustive reference because the purpose of the reference is only to show the divergent views taken by several High Courts. Furthermore, we have grouped the cases on broad classifications and not with reference to the line of reasoning adopted in each case. In the following cases it was held that the second marriage of the husband entitled the wife to an order of maintenance under Section 488, Code of Criminal Procedure, 1898:-

(1) Bayanna v. Devamma, [1953] Mad. W.N. CrL. 243 = AIR 1954 Mad. 226.

(2) Kundaswami v. Nachammal, AIR 1963 Mad. 263 (3) SyedAhmedv. N.P. TajBegum, AIR 1958 Mys 128 (4) Shambu v. Ghalamma, AIR 1966 Mys 311 (5) Tela Bai v. Shankarrao, AIR 1966 Bom 48 (6) Mohammed Haneefa v. Mariam Bi, AIR 1969 Mad 414.

In the following cases a contrary view was taken holding that the mere fact that a husband has contracted marriage with another wife or keeps a mistress cannot without more be said to amount to neglect or refusal on the part of the husband to maintain his wife within the meaning of sub- section (1) of Section 488:-

(7) Bala Rani v. Bhupal Chandra, AIR 1956 Cal 134 (8) Rupchand v. Charubala, AIR 1966 Ca183 (9) Ishar v. Soma Devi, AIR 1959 Pun} 295 (10) Dhan Kaur v. Niranjana Singh, AIR 1960 Punj 595.

A third line of view was taken in Ramji Malviya v. Munni Devi, AIR 1959 All. 767 where it was held that ordinarily remarriage will be a sufficient ground for refusing to live with the husband but if the remarriage had been occasioned by the wife's unjust refusal to live with her husband she cannot take advantage of her own wrong and claim maintenance.

There are two decisions, one of the Kerala High Court rendered by V.R. Krishna Iyer, J., as the then was, and the other of the Andhra Pradesh High Court rendered by Chinnappa Reddy, J., as he then was, which require mention because they pertain to maintenance actions by Muslim wives whose husband had married again. Krishna Iyer, J. held as follows in Sabulameedu v. Subaida Beevi, [1970] Kerala Law Times Page 4. "It behoves the Courts in India to enforce Section 488(3) of the Code of Criminal Procedure in favour of Indian women, Hindu, Muslim or other. I will be failing in my duty if I accede to the argument of the petitioner that Muslim women should be denied the advantage of para. 2 of the proviso to Section 488(3)." Chinnappa Reddy, J. held in Chand Begum v. Hyderabadiga, [1972] CrL. Law Journal 1270 as under:-

"Therefore, a husband who married again cannot expect the court to come to his rescue if he wants the first wife to share the conjugal home with a co-wife. If she decides to live separately he is bound to provide a home for her and maintain her. If he does not do that, he neglects or refuses to maintain her within the meaning of Section 488(1) Cr.P.C. Thus the offer of a husband who has taken a second wife, to maintain the first wife on condition of her living with him cannot be considered to be a bona fide offer and the husband will be considered to have neglected or refused to maintain the wife."

Lastly, we must also refer to the decision of this Court in *Mohd. A. Khan v. Shah Bano Begum*, [1985] 3 scr 844 at 856 wherein the Explanation came to be scanned by the Court while examining the larger question regarding the rights of divorced Muslim wives to claim maintenance under Section 125 of the Code. The relevant observation of the Court is in the following terms:-

"The conclusion that the right conferred by Section 125 can be exercised irrespective of the personal law of the parties is fortified, especially in regard to Muslims, by the provision contained in the Explanation to the second proviso to Section 125(3) of the Code. That proviso says that if the husband offers to maintain his wife on condition that she should live with him, and she refuses to live with him, the Magistrate may consider any grounds of refusal stated by her, and may make an order of maintenance notwithstanding the offer of the husband, if he is satisfied that there is a just ground for passing such an orderThe explanation confers upon the wife the right to refuse to live with her husband if he contracts another marriage, leave alone 3 or 4 other marriages. It shows, unmistakably, that Section 125 overrides the personal law, if there is any conflict between the two."

Having referred to the views taken by some of the High Courts and this Court about the ambit of the Explanation, we will now proceed to consider its terms and its operative force. Though we stand benefited by the enlightenment derived from the decisions referred to above, we are of opinion that the Explanation calls for a more intrinsic examination than has been done hitherto. Sub-section (1) of Section 125 inter alia provides that if a person having sufficient means neglects or refuses to maintain his wife who is unable to maintain herself, the Magistrate may, upon proof of such neglect or refusal, order the person to make a monthly allowance for the maintenance of his wife. The second proviso to sub-section (3) lays down that if a person liable to pay maintenance offers to maintain his wife on condition of her living with him, and she refuses to live with him, the Magistrate may consider the grounds of refusal, and may make an order for maintenance notwithstanding the husband's offer, if he is satisfied that there is just ground for ordering maintenance. Then comes the Explanation which says that if a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for the wife's refusal to live with him. In the reported decisions where the Explanation has been construed, as entitling a Muslim wife to claim maintenance on the basis of the Explanation, the courts have only taken into consideration the first limb of the Explanation viz. "If a husband has contracted marriage with another woman." Focussing attention on that part of the Explanation, the courts have held that the Explanation is of common application to all wives whose husbands have contracted

another marriage irrespective of the fact the personal law governing the parties permits another marriage during the subsistence of the earlier marriage. We would like to point out that the Explanation contemplates two kinds of matrimonial injury to a wife viz. by the husband either marrying again or taking a mistress. The Explanation places a second wife and a mistress on the same footing and does not make any differentiation between them on the basis of their status under matrimonial law. If we ponder over the matter we can clearly visualise the reason for a second wife and a mistress being treated alike. The purpose of the Explanation is not to affect the rights of a Muslim husband to take more than one wife or to denigrate in any manner the legal and Social Status of a second wife. to which she is entitled to as a legally married wife, as compared to a mistress but to place on an equal footing the matrimonial injury suffered by the first wife on account of the husband marrying again or taking a mistress during the subsistence of the marriage with her. From the point of view of the neglected wife, for whose benefit the Explanation has been provided, it will make no difference whether the woman intruding into her matrimonial life and taking her place in the matrimonial bed is another wife permitted under law to be married and not a mistress. The legal status of the woman to whom a husband has transferred his affections cannot lessen her distress or her feelings of neglect. In fact from one point of view the taking of another wife portends a more permanent destruction of her matrimonial life than the taking of a mistress by the husband. Be that as it may, can it be said that a second wife would be more tolerant and sympathetic than a mistress so as to persuade the wife to rejoin her husband and lead life with him and his second wife in one and the same house? It will undoubtedly lead to a strange situation if it were to be held that a wife will be entitled to refuse to live with her husband if he has taken a mistress but she cannot refuse likewise if he has married a second wife. The Explanation has to be construed from the point of view of the injury to the matrimonial rights of the wife and not with reference to the husband's right to marry again. The Explanation has, therefore, to be seen in its full perspective and not disjointively. Otherwise it will lead to discriminatory treatment between wives whose husbands have lawfully married again and wives whose husbands have taken mistresses. Approaching the matter from this angle, we need not resort to a comparison of Muslim wives with Hindu wives or Christian wives but can restrict the comparison to Muslim wives themselves who stand affected under one or the other of the two contingencies envisaged in the Explanation and notice the discrimination. It is this aspect of the matter which we feel has not been noticed hitherto.

Even if the Explanation is viewed in the larger context of the provisions of Section 125 the conclusion reached above is inescapable. Section 125, its fore-runner being Section 488, has been enacted with the avowed object of preventing vagrancy and destitution. The Section is intended to ensure the means of subsistence for three categories of dependents viz. children, wives and parents who are unable to maintain themselves. The three essential requisites to be satisfied before an order of maintenance can be passed are that (1) the person liable to provide maintenance has sufficient means; (2) that he has neglected or refused to maintain and (3) the dependent/dependents is/are unable to maintain himself/herself/themselves as the case may be. The Legislature being anxious that for the sake of maintenance, the dependents should not resort to begging, stealing or cheating etc. the liability to provide maintenance for children has been fixed on the basis of the paternity of the father and the minority of the child and in the case of major children on the basis of their physical handicap or mental abnormality without reference to factors of legitimacy or illegitimacy of the children and their being married or not. In the case of wives, whether their ties of marriage

subsist or not, the anxiety of the Legislature is that they should not only not resort to begging, stealing or cheating etc. but they should also not feel compelled, for the sake of maintaining themselves, to resort to an adulterous life or in the case of divorced women, to resort to remarriage, if they have sentimental attachment to their earlier marriage and feel morally bound to observe their vows of fidelity to the persons whom they had married. This position emerges when we take an overall view of sub-sections (1), (4) and (5).

While sub-section (4) provides that a wife shall not be entitled to receive maintenance from her husband if she is living in adultery or if without sufficient reason she refuses to live with her husband or if She lives separately by mutual consent, sub-section (5) provides that an order of maintenance already passed can be cancelled for any of the abovesaid reasons. Thus by reason of sub-sections (4) and (5) a husband can avoid his liability to pay maintenance if his wife is living in adultery. Correspondingly a right has been conferred on the wife under the Explanation to live separately and claim maintenance from the husband if he breaks his vows of fidelity and marries another woman or takes a mistress. As already stated it matters not whether the woman chosen by the husband to replace the wife is a legally married wife or a mistress. Therefore, the respondent's contention that his taking another wife will not entitle the appellant to claim separate residence and maintenance cannot be sustained. The Explanation is of uniform application to all wives including Muslim wives whose husbands were either married another wife or taken a mistress. It only now remains for us to consider the further defence of the respondent that in view of his offer to take back the appellant and maintain her he stand absolved of his liability to pay maintenance. The offer to take back the appellant had been made only before the Revisional Court and that too after the second marriage had taken place. The offer was not to the effect that he would set up a separate residence for the appellant so as to enable her to live in peace and with dignity. As has been pointed out in *Chand Begum v. Hyderbaig* (supra) a husband, who marries again cannot compel the first wife to share the conjugal home with the co-wife and as such unless he offers to set up a separate residence for the first wife, any offer to take her back cannot be considered to be a bona fide offer. It is, therefore, obvious that the offer was only a make-believe one and not a genuine and sincere offer. On the basis of such an insincere offer the appellant's rights cannot be negated or defeated. It is highly unfortunate that the Sessions Judge and the High Court should have declined to grant maintenance to the appellant in spite of the appellant's case falling squarely under the Explanation. As the record contains evidence regarding the earnings of the respondent we are in a position to determine the quantum of maintenance for the appellant in this appeal itself instead of remitting the matter to the Trial Court or the Revisional Court. The respondent has stated in his counter-affidavit in the special leave petition that his income is only Rs.1,000 per month. The appellant has stated in her petition for maintenance that the respondent was getting Rs. 1,500 per month by way of salary and Rs.500 per month by way of income from properties. In the four years that have gone by since the maintenance action was instituted the respondent's income must have certainly increased. Therefore, taking all factors into consideration we fix the quantum of maintenance for the appellant at Rs.300 per month. This amount will be paid with effect from 18.10.84 when the respondent married a second wife. The arrears of maintenance will be paid by the respondent in five equal instalments, the first of such instalments to be paid during the first week of June 1987. The subsequent instalments will be paid at intervals of three months thereafter i.e. during the first week of September 1987, first week of December 1987, first week of March 1988 and

first week of June 1988. Future maintenance must be paid before the cloth of every succeeding month. We also enhance the maintenance to the minor girl (second appellant) to Rs.200 per month from Rs. 100 per month with effect from 1.1.1987. Default in payment of future maintenance or any instalments of the arrears will entitle the appellant to levy execution against the respondent under Section 125(3) of the Code and realise the amount. The appeal will stand allowed accordingly.

N.P.V.
allowed.

Appeal allowed.