Supreme Court of India
Bai Tahira A vs Ali Hussain Fissalli Chothia And ... on 6 October, 1978
Equivalent citations: 1979 AIR 362, 1979 SCR (2) 75
Author: V Krishnaiyer
Bench: Krishnaiyer, V.R.

PETITIONER:
BAI TAHIRA A

Vs.

RESPONDENT:
ALI HUSSAIN FISSALLI CHOTHIA AND ANR.

DATE OF JUDGMENT06/10/1978

BENCH:
KRISHNAIYER, V.R.
BENCH:
KRISHNAIYER, V.R.
TULZAPURKAR, V.D.
PATHAK, R.S.

CITATION:
1979 AIR 362 1979 SCR (2) 75
1979 SCC (2) 316
CITATOR INFO :
R 1980 SC1730 (1,2,4,7,8,9,11)
F 1985 SC 945 (4,29,30)

ACT:
Code of Criminial Procedure, 1973-S. 127(3) (b)-Scope of-Wife divorced by the husband and was granted mehar in 1962-Wife claimed maintenance from husband under s. 125, Cr.P.C. 1973-If could claim-"under any customary or personal law"-Meaning of.

HEADNOTE:
Explanation (b) to s. 125(1) of the Code of Criminal Procedure, 1973 provides that "wife" includes a woman who has been divorced by or has obtained a divorce from her husband and has not re-married. Section 127(3) (b) provides that where any order has been made under s. 125 in favour of a woman who has been divorced by or has obtained a divorce from her husband, the Magistrate shall if he is satisfied that the woman has been divorced by her husband and 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 cancel such order in the circumstances stated

therein.

The respondent (husband) married the appellant (wife) and had a son by her. A few years later the respondent divorced his wife. By a consent decree, in the suit filed by the wife, he transferred to her the flat in which she was living and agreed to pay mehar money. The compromise stated that the "plaintiff declares that she has now no claim or right whatsoever against the defendant". For some time thereafter they lived together but again separated. The wife moved the magistrate under s. 125 Cr.P. for grant of maintenance to her and her son. This was granted. On appeal the Sessions Judge held mat the Court had no jurisdiction under s. 125. The High Court dismissed the wife's appeal.

On further appeal to this Court it was contended on behalf of the respondent that (i) s. 125(4) would apply in the absence of proof that the wife was not living separately by mutual consent; (ii) to attract s. 125 there must be proof of neglect to maintain the wife and (iii) no claim for maintenance in this case can survive in the face of the consent decree whereby mehar money had been paid and all claims adjusted.

Allowing the appeal the Court, G

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HELD: Every divorcee, otherwise eligible, is entitled to the benefit of maintenance allowance and the dissolution of the marriage makes no difference to this right under the current Code. [78H]

1. There is no force in the argument that the absence of mutual consent to live separately must be made out if the hurdle of s. 125(4) is to be overcome. The compulsive conclusion from a divorce by a husband and his provision of a separate residence as evidenced by the consent decree fills the bill.Divorce plainfully implies that the husband orders. the wife out of the conjugal home. [80D]

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2. The husband's plea is his right to ignore. So the basic condition of neglect to maintain is satisfied. In this generous jurisdiction the broader perception and appreciation of the facts and their bearing must govern the verdict-not chopping little logic or tinkering with burden of proof. [80C]

3. (a) The consent decree resolved all disputes and settled all claims then available. The new statutory right which could not have been in the contemplation of the parties when they entered into the consent decree in 1962 had been created by the Code of 1973. No settlement of claim which does not have the special statutory right of the divorcee under s. 125 can operate to negate that claim. [80F]

(b) No husband can claim under s. 127(3)(b) absolution from his obligation under s. 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. [81F]

(c) Section 127 cannot rescue the husband from his obligation. The scheme of 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. Where the husband, by customary payment at the time of divorce, has adequately provided for the divorcee. a subsequent series of recurrent doles is contra-indicated and the husband liberated. The key note thought is adequacy of payment which will take reasonable care of the wife's maintenance. [80H]

(d) 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 that rate unless it is a reasonable substitute The legal sanctity of the payment is certified by the fulfilment of the 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 first payment by way of mehar or ordained by custom has a reasonable relation to the object and is a capitalised substitute for the order under s. 125 then s. 127(3) (b) subserves the goal and relieves the obligor. not pro tanto but wholly the purpose of the payment "under any customary or personal law" must be to obviate destitution of the divorcee and to provide her with wherewithal to maintain herself There must be a rational relation between the cum so paid and its potential as provision for maintenance. [81B-C]

4. Welfare laws must be so read as to be effective delivery systems of the salutary objects sought to be served by the Legislature and when the beneficiaries are the weaker sections, like destitute women, the spirit of Art. 15(3) must belight the meaning of the section. The Constitution is a pervasive omnipresence brooding over the meaning and transforming the values of every measure. [77D]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 332 of 1977.

Appeal by Special Leave from the Judgment and order dated 20-10-75 of the Bombay High Court in Criminal Application No. 1 379/75.

M. C. Bhandare, A. N. Karkhanis, Miss Malini Panduval and Mrs. S. Bhandare for the Appellant.

G. L. Sanghi and A. K. Verma for Respondent No. 1. M. N. Shroff for Respondent No. 2.

The Judgment of the Court was delivered by A Prefatory statement KRISHNA IYER, J.-In this appeal, by special leave, we are called upon to interpret a benign provision enacted to ameliorate the economic condition of neglected wives and discarded divorcees, namely. s 125. Cr.P.C.

Welfare laws must be so read as to be effective delivery systems of the salutary objects sought to be served by the Legislature and when the beneficiaries are the weaker sections, like destitute women, this spirit of Art. 15(3) of the Constitution must belight the meaning of the Section. The Constitution is a pervasive omnipresence brooding over the meaning and transforming the values of every measure. So, s. 125 and sister clauses must receive a compassionate expansion of sense that the words used permit.

The Brief Facts The respondent (husband) married the appellant (wife) as a second wife, way back in 1956, and a few years later had a son by her. 15 The initial warmth vanished and the jealousies of a triangular situation erupted, marring mutual affection. The respondent divorced the appellant around July 1962. A suit relating to a flat in which the husband had housed the wife resulted in a consent decree which also settled the marital disputes. For instance, it recited that this respondent had transferred the suit premises, namely, a flat in Bombay, to the appellant and also the shares of the Cooperative Housing Society which built the flat concerned. There was a reference to mehar money (Rs. 5,000/- and 'iddat' money, Rs. 180/-) which was also stated to have been adjusted by the compromise terms.

There was a clause in the compromise: G "The plaintiff declares that she has now no claim or right whatsoever against the defendant or against the estate and the properties of the defendant." And another term in the settlement was that the appellant had by virtue of the compromise become the absolute owner of the flat and various deposits in respect of the said flat made with the cooperative housing society.

For some time there was flickering improvement in the relations between the quondum husband and the quondum wife and they lived together. Thereafter, again they separated, became entranged. The appellant, finding herself in financial straits and unable to maintain herself, moved the magistrate under s. 125 of the Criminal Procedure Code, 1973, for a monthly allowance for the maintenance of herself and her child. She proceeded on the footing that she was still a wife while the respondent rejected this status and asserted that she was a divorce and therefore ineligible for maintenance. The Magistrate who tried the petition for maintenance held that the appellant was a subsisting wife and awarded monthly maintenance of Rs. 300/- for the son and Rs. 400/- for the mother for their subsistence, taking due note of the fact that the cost of living in Bombay, where the parties lived, was high, and that the respondent had provided residential accommodation to the appellant.

This order was challenged before the sessions Judge by the aggrieved husband, who on a strange view of the law that the court, under s. 125, had no jurisdication to consider whether the applicant was a wife, dismissed the petition in allowance of the appeal. The High Court deigned to bestow little attention on the matter and summarily dismissed a revision petition. This protracted and fluctuating litigation misfortune has leu to the appeal, by special leave, before this Court.

The Questions Mooted Shri Bhandare appearing for the appellant contended that the Courts below had surprisingly forgotten the plain provision in the Explanation (b) to s. 125(1) of the Code, which reads:

> "wife' includes a woman who has been divorced by. or has obtained a divorce from, her husband and has not remarried.

On this foundation, he urged that accepting the contention of the respondent that the appellant was a divorcee? his client was still entitled to an allowance. This is obviously beyond dispute or. a simple reading of the sub-section and it is curious how this innovative and sensitive provision with a benignant disposition towards destitute divorcees has been overlooked by all the courts below. We hold that every divorce otherwise eligible, is entitled to the benefit of maintenance allowance and the dissolution of the marriage makes no difference to this right under the current Code. In the normal course, an order for maintenance must follow, the quantum having been determined by the learned Magistrate at the trial level.

However, Shri Sanghi, appearing for the respondent, sought sustain the order in his favour on three grounds They arc of pubic importance since the affected party in such a fact-situation is the neglected divorcee. He first argued that s. 125(4) would apply in the absence of proof that the lady was not living separately by mutual consent. His next plea was that there must be proof of neglect to maintain to attract s.125 and his third contention was that there was a settlement by consent decree in 1962 whereby the mehar money had been paid and all claims adjusted, and so no claim for maintenance could survive. The third contention is apparently based upon contractual arrangement in the consent decree read with s. 127(3) (b) which reads: C "(b) the woman has been divorced by her husband and 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 cancel such order,-

(i) in the case where such sum was paid before such order, from the date on which such order was made.

(ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;

We must state, however, that there was no specific plea, based upon the latter provision, set up anywhere in the courts below or urged before us. But if one were to locate a legal ground to raise The contention That the liability to pay maintenance had ceased on account of the payment of mehar, it is s. 127(3) of the Code. So we must deal with the dual sub-heads of the third ground.

The meaning of meanings is! derived from values in a given society and its legal system. Art.15(3) has compelling, compassionate relevance in the context of s. 125 and the benefit of doubt. If any in statutory interpretation belongs to the ill-used wife and the derelict divorcee. This social perspective granted, the resolution of all the disputes projected is easy. Surely, Parliament, in keeping with Art. 15(3) and deliberate by design, made a special provision to help women in distress cast away by

divorce. Protection against moral and material abandonment manifest in Art. 39 is part of social and economic justice, specificated in Art. 38, fulfilment of which is fundamental to the governance of the country (Art.37). From this coign of vantage we must view the printed text of the particular Code.

S. 125 requires, as a sine qua non for its application, neglect by husband or father. The magistrate's order proceeds on neglect to maintain; the sessions judge has spoken nothing to the contrary; and The High Court has not spoken at all. Moreover, the husband has not examined himself to prove that he has been giving allowances to the divorced wife. His case, on the contrary, is that she has forfeited her claim because of divorce and the consent decree. Obviously, he has no case of non-neglect. His plea is his right to ignore. So the basic condition of neglect to maintain is satisfied. In this generous jurisdiction, a broader perception and appreciation of the facts and their bearing must govern the verdict not chopping little logic or tinkering with burden of proof.

The next submission is that the absence of mutual consent to live separately must be made out if the hurdle of s. 125(4) is to be over come. We see hardly any force in this plea. The compulsive conclusion from a divorce by a husband and his provision of a separate residence as evidenced by the consent decree fills the bill. Do divorcees have to 1) prove mutual consent to live apart? Divorce painfully implies that the husband orders her out of the conjugal home. If law has nexus with life this argument is still-born.

The last defence, based on mehar payment, merits more serious attention. The contractual limb of the contention must easily fail. The consent decree of 1962 resolved all disputes and settled all claims then available But here is a new statutory right created as a projection of public policy by the Code of 1973, which could not have been in the contemplation of the parties when in 1962, they entered into a contract to adjust their then mutual rights. No settlement of claims which does not have the special statutory right of the divorcee under s. 125 can operate to negate that claim.

Nor can s.127 rescue the respondent from his obligation. Payment of mehar money, as a customary discharge, is within the cognisance of that provision. But 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 under stood that the scheme of the complex of provisions in Chapter IX has a social purpose. Ill-used wives and desparate divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets. This traumatic horror animates the amplitude of s.127. Where the husband, by customary payment at the time of divorce, has adequately provided for the divorce, a subsequent series of recurrent does is contra-indicated and the husband liberated. This is the teleological A interpretation, the sociological decoding of the text of s.127. The keynote thought is adequacy of payment which will take reasonable care of her maintenance.

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 that rate unless it is a reasonable substitute. The legal sanctity of the payment is certified by the fulfilment of the 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 first payment by way of mehar or ordained by custom has a reasonable relation to the object and is a capitalised substitute for the order under s. 125-not mathematically but fairly-then s. 127(3) (b) subserves the goal and relieves; the obligor, not pro tanto but wholly. The purpose of the payment 'under any customary or personal law' must be to obviate destitution of the divorcee and to provide her with wherewithal to maintain herself. The whole scheme of s. 127(3) (b) is manifestly to recognise the substitute maintenance arrangement by lump sum payment organised by the custom of the community or the personal law of the parties. There must be a rational relation between the sum so paid and its potential as provision for maintenance. To interpret otherwise is to stultify the project. Law is dynamic and its meaning cannot he pedantic but purposeful. The proposition, therefore, is that no husband can claim under s. 127(3)(b) absolution from this obligation under s. 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.

The conclusion that we therefore reach is that the appeal should be allowed and it is hereby allowed, and the order of the trial court restored.

P.B.R. Appeal allowed.