Calcutta High Court
Sk. Omar Ali vs Aspia Bibi And Anr. on 25 November, 1997
Equivalent citations: 1998 CriLJ 752
Author: D B Dutta
Bench: D B Dutta
ORDER Dibyendu Bhusan Dutta, J.

1. The facts and circumstances leading to the instant revisional application may in substance be stated as follows.

2. The wife opposite party No. 1 filed on 24-12-85 case under Section 125, Cr. P.C. being Misc. Case No. 149 of 1985 against the petitioner-husband claiming maintenance allowance for herself and her minor son on the ground of neglect and refusal on the part of the petitioner to maintain them. The opposite party No. 1 filed written objection on 26-8-86 admitting that the applicant was his legally married wife and that the minor son for whom the maintenance was claimed by the applicant was born out of the wedlock. During the pendency of that Misc. case, the petitioner filed on 21-12-88 an application under Section 3(b) and Section 7 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 praying for rejection of the application that was filed under Section 125, Cr. P.C. alleging that he had divorced his wife on 16-3-88 and that the said divorce was intimated to the applicant by the Muslim Marriage Registrar of Kanksa and that in view of the said divorce and the pendency of the application under Section 125, Cr.P.C. on 19 May, 1986, the date on which the Muslim Women (Protection of Rights on Divorce) Act, 1986 had come into force, the said application under Section 125 is not maintainable. The applicant under Section 125, Cr. P.C. opposed the said application of the petitioner on filing a written objection praying for rejection of that application denying the alleged divorce and contending inter alia that the application under Section 125 was quite maintainable and the applicant was entitled to get maintenance allowance as prayed for. Upon hearing both parties, the learned Magistrate by order dated 17-1-89 rejected the husband's application under the Muslim Women (Protection of Rights on Divorce) Act, 1986 as he was of the view that it was not maintainable. The husband-petitioner did not challenge this order before higher Court and allowed the case under Section 125, Cr. P.C. to be proceeded with. Upon consideration of the evidence adduced by the parties during the trial of the Misc. Case, the learned Magistrate by his judgment dated l- l1-90 allowed the application under Section 125, Cr. P.C. directing the petitioner-husband to pay maintenance with effect from the date of filing of the case at the rate of Rs. 150/- per month for the wife herself and at the rate of Rs. 125/- per month for the minor son till his attainment of majority. Being aggrieved by this judgment, the husband preferred a motion being Criminal Motion No. 74 of 1990 before the Sessions Judge and the Sessions Judge by his judgment dated 27-3-91 dismissed the motion subject to the modification that the maintenance awarded by the Magistrate in favour of his son would be payable till 2-4-88. The wife put the award into execution in Misc. Execution Case No. 13 of 1991 on 17-8-91 for realisation of arrear maintenance allowance. On 13-3-92, the husband preferred a revision being Criminal Revision No. 725 of 1992 before the High Court challenging the judgment dated 1-11-90 passed by the learned Magistrate in the Misc. Case No. 149 of 1985 and the order dated 27-3-91 passed by the learned Sessions Judge in Criminal Motion No. 74 of 1990. The said revision case was filed 265 days after the expiry of the prescribed time limit and for condonation of the delay, an application under

Section 5 of the Limitation Act was filed on behalf of the husband. N. N. Bhattacharyya, J. as His Lordship then was, was not satisfied with the explanation offered for the delay in filing the revisional application and accordingly, by order dated 6-9-93 dismissed the application under Section 5 of the Limitation Act. So far as the revisional application itself was concerned, His Lordship was of the view that the said application was a second revisional application and was barred under Section 397(3) of the Cr. P.C. and as such, refused to entertain the revisional application. Thereafter, the husband filed a suit being Title Suit No. 179 of 1993 and prayed for a temporary injunction in the suit restraining the wife from giving any effect to the award of maintenance allowance passed in Misc. Case No. 149 of 1985 and the order dated 27-3-91 passed by the learned Sessions Judge rejecting the Criminal Motion No. 74 of 1990 and also from proceeding any further with Misc. Execution Case No. 13 of 1991 till the disposal of the suit. The injunction having been refused the husband preferred an appeal being Misc. Appeal No. 42 of 1994. Thereafter, on December 18, 1994 the husband filed an application under Section 127 of the Cr. P.C. being Misc. Case No. 44 of 1994 in the Court of the Sub-Divisional Judicial Magistrate praying for setting aside the order of maintenance passed in Misc. Case No. 149 of 1985 on the ground that he had already divorced the wife on 16-3-88. The wife resisted the application on filing a written objection challenging the maintainability of the said application and upon hearing both sides, the 1d. Magistrate by his order dated 17-7-96 dismissed the application under Section 127 Cr. P.C. in view of the fact that the petitioner had already unsuccessfully raised the question of divorce even before the order of maintenance allowance was passed under Section 125 Cr. P.C. by the Magistrate. And hence the application. Against this application, opposite party No. 1 filed an affidavit in opposition.

3. Mr. Ashim Roy, appearing for the petitioner, made the following submissions. The order dated 17-1-89 passed in Misc. Case No. 149 of 1985 whereby the ld. Magistrate rejected the petitioner's application under Sections 3(b) and 7 of the Muslim Women (Protection of rights on divorce) Act, 1986 was bad, illegal and without jurisdiction. The opposite party No. 1 might have been the legally married wife of the petitioner on 24-12-85, the dale on which the opposite party No. 1 filed the application under Section 125 Cr. P.C. (Misc. Case No. 149 of 1985) and might have continued to be so till 19-5-86, the date on which the Muslim Women (Protection of Rights on Divorce) Act, 1986 did come into force and also till 26-8-86, the date on which the petitioner filed the written objection admitting the opposite party No. 1 to be his legally married wife. But the situation had undergone a change thereafter by reason of the fact that the petitioner did divorce the opposite party No. 1 on 16-3-88, the date on which the application under Section 125 Cr. P. C. was pending. Sub-section (1) of Section 3 of the Muslim Women (Protection of rights on divorce) Act, 1986 contains a non-obstante clause and entitles a divorced muslim woman, amongst others, to a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband and similar provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of the children, if there by any, born to her before or after her divorce, where she herself maintains such children. Sub-section (2) entitles a divorced woman or anyone duly authorised by her on her behalf to make an application to a Magistrate for an order for payment of such provision of maintenance and other dues admissible to her under Sub-section (1) in case of default in making the payment or delivery of the properties as contemplated under Sub-section (1), on her divorce. According to Sub-section (3) of Section 3, where an application has been made under Sub-section (2) by a divorced woman, the Magistrate

may upon satisfaction that her husband having sufficient means has failed or neglected to make or pay her within the iddat period a reasonable and fair provision and maintenance for her and the children or the cash equivalent of the dower or that the properties referred to in Clause (d) of Sub-section (1) have not been delivered to her, may make an order directing the former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper or as the case may be for the payment of such dower or the delivery of such properties as mentioned in Sub-section (1) to the divorced woman. In the event of any failure without sufficient cause to comply with the order made under Sub-section (3), Sub-section (4) provides for the procedure for execution of that order. Section 5 gives an option to the divorced woman and her former husband to be governed by the provision of Section 125 of the Cr. P.C. and provides for the procedure for exercising such option. Section 7 of the Act also contains a non-obstante clause and provides for disposal of every application by a divorced woman under Section 125 or under Section 127 of the Code of Criminal Procedure if pending before a magistrate on the commencement of this Act, in accordance with the provisions of the Act subject, however, to the provisions of Section 5 of the Act. In view of Explanation (b) to Sub-section (1) of Section 125 of Cr. P.C., maintenance allowance is admissible to even a wife who has been divorced by her husband and is not remarried. But for a muslim woman who has been divorced by her husband in accordance with muslim law, the Muslim Women (Protection of Rights on Divorce) Act, 1986 was enacted and in view of the non-obstante clause contained in Section 3 of that Act, the provisions of Section 125 of the Code of Criminal Procedure which are inconsistent with this enactment can be said to have suffered an implied repeal so far as the divorced woman is concerned and consequently any obligation imposed under the provisions of Section 125 of Cr. P.C. must be deemed to have ceased to have any effect with effect from the date of coming into force of this Act. Mr. Roy relied on a Division Bench decision of this Court reported in 1989 Cal Cri LR 197 Abdul Satter v. Sahani Bibi. In the instant case, however, the order under Section 125 Cr. P.C. was yet to be passed on 19-5-86, the date on which the Muslim Women (Protection of Rights on Divorce) Act, 1986 came into force. In fact, the divorce itself is alleged to have taken place long after the coming into operation of this enactment. According to Mr. Roy, in view of the aforesaid Division Bench decision, had there been any order of maintenance allowance under Section 125 Cr. P.C. in favour of the wife, the petitioner's obligation to pay the said maintenance allowance would have ceased to have any effect after the divorce and the petitioner could have maintained an application under Section 127 Cr. P.C. by proving the factum of divorce. But since in the instant case, the divorce took place on 16-3-88 long after the advent of the new enactment at a time when the application under Section 125 Cr. P.C. was still pending, the application under Section 125 Cr. P.C. would cease to be maintainable with effect from the date of that divorce and the ld. Magistrate ought to have allowed the application that was filed by the petitioner under the Muslim Women (Protection of Rights on Divorce) Act, 1986 on 21 -12-88. The ld. Magistrate was not justified in rejecting the said application of the petitioner straightway without giving the petitioner an opportunity to prove the factum of divorce pleaded in the said application. The order passed by the Magistrate on 17-1-89 rejecting the said application of the petitioner was wholly bad, illegal and without jurisdiction. The Magistrate was also not justified in allowing the application under Section 125 Cr. P.C. by his order dated 1-11 -90 without recording any finding on the question of divorce. The Magistrate's order dated 1-11-90 granting maintenance allowance, to the wife opposite party No. 1 treating her as the legally married wife was equally bad and without jurisdiction. Even the order dated 27-3-91 passed by the Sessions judge in Criminal

Motion No. 74 of 1990 which was preferred against the Magistrate's order dated 1-11-90 allowing the Misc. Case No. 149 of 1985 was also bad and illegal. It was strenuously argued by Mr. Ashim Roy that none of the orders dated 17-1 -89 and 1 -11 -90 passed by the ld. Magistrate in Misc. Case No. 149 of 1985 or the order passed by the ld. Sessions Judge rejecting the criminal motion No. 74 of 1990 could legally operate as a barto the petitioners raising the question of divorce in Misc. Case No. 44 of 1994 under Section 127 Cr. P.C. and the ld. Magistrate was not justified in rejecting the said application under Section 127 Cr. P.C. by the impugned order dated 17-7-96. Even the order dated 6-9-93 passed by N.N. Bhattacharyya, J. as His Lordship then was, in Criminal Revision No. 725 of 1992 rejecting the application under Section 5 of the Limitation Act as well as the said revisional application, which was preferred against the Magistrate's order dated 1 -11-90 and the Sessions Judge's order dated 27-3-91, cannot legally operate as a bar to the petitioners agitating the question of divorce by an application under Section 127 Cr. P.C. before the ld. Magistrate because the factum of divorce was never gone into by any court at any stage nor was there any finding recorded negativing the petitioner's allegation of divorce at any stage of the proceeding under Section 125 Cr. P.C. or in Criminal Motion 74 of 1990 or in Criminal Revision 725 of 1992. The main thrust of Mr. Roy's argument is that the orders dated 17-1 -89 and 1-11-90 passed by the ld. Magistrate in Misc. case No. 149 of 1985 were without jurisdiction and as such could not operate as resjudicata in the subsequent proceeding under Section 127 Cr. P.C. In support of this particular contention, Mr. Roy placed his reliance on a Supreme Court decision in the case of Sushil Kr. Mehta v. Gobind Ram Bohra reported in (1990) SCC 193. Finally, Mr. Roy submitted that the impugned order dated 17-7-96 passed in Misc. Case No. 44 of 1994 should be set aside and the petitioner should be given opportunity to prove the factum of divorce in order to absolve himself of the liability to pay maintenance allowance in terms of the order dated 1-11-90 passed in Misc. Case No. 149 of 1985 which ceased to have effect with effect from the date of divorce in view of the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, so far as the opposite party No. 1 is concerned.

4. To repel the contentions of Mr. Ashim Roy, Mr. Yasin Ali, the ld. advocate appearing for the wife opposite party No. 1, made the following submissions. There is, virtually, no scope for interference with the impugned order dated 17-7-96 whereby the Id. Magistrate rejected the petitioner's application under Section 127 Cr. P.C. A change in the circumstances' is the sine qua non of the applicability of Section 127 of Cr. P.C. and this change must follow the order under Section 125 and not precede the same. It is the alleged divorce which, according to the petitioner, constitutes the so called change in the circumstance, but this divorce, according to the petitioner, took place on 16-3-88, long before the order under Section 125 Cr. P.C. was passed and as such, the application under Section 127 Cr. P.C. which was registered as Misc. Case No. 44 of 1994 at the instance of the petitioner was not at all entertainable and the ld. Magistrate was quite justified in rejecting the said application by his impugned order. Besides, this plea of divorce was taken by the petitioner in the application that was filed on his behalf under Sections 3(b) and 7 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 on 21-12-88 and upon a contested hearing of the said application, the ld. Magistrate was pleased to reject the same by his order dated 17-1-89. Even assuming that the ld. Magistrate was wrong in rejecting that application, the petitioner not having taken any step whatsoever in having the said order set aside by the appropriate forum, the said order rejecting the application under Muslim Women (Protection of Rights on Divorce) Act, 1986 would operate as res

judicata or at least issue estoppel. The said order can be said to have been merged with the subsequent order dated 1-11 -90 by which the ld. Magistrate allowed the Misc. Case 149 of 1985 under Section 125 Cr. P.C. after a full trial. The said order dated 1-11-90 would also show that the petitioner unsuccessfully raised the same plea of divorce before he suffered the order of maintenance allowance under Section 125 Cr. P.C. The said orders can be said to have reached finality by reason of the order dated 27-3-91 by the ld. Sessions Judge whereby he rejected the criminal motion 74 of 1990 that was prefered by the petitioner against that order as also the subsequent order dated 6-9-93 whereby his Lordship refused to condone the delay of 265 days in preferring the criminal revision being Criminal Revision 725 of 1992 against the earlier orders of the Magistrate as well as the Sessions Judge and refused to entertain the revision on the ground that it was a second revision being hit by the mischief of Section 397(3) of Cr. P.C. It is submitted on behalf of the opposite party No. 1 that there is after all a need for giving a finality to a judicial decision and when a matter whether of a question of factor a question of law has been decided between two parties in a proceeding and the decision is final either because no appeal was taken to a higher court or because the appeal was dismissed neither party should be allowed in a future proceeding between the same parties to canvass the matter again. It is submitted that the principle of res judicata applies between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way, will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceeding. The question of divorce might not have been specifically adjudicated upon. But then the question of divorce had a direct bearing on the fate of the application that was filed on behalf of the petitioner under Sections 3(b) and 7 of the Muslim Women (Protection of rights on divorce) Act, 1986 and rightly or wrongly the ld. Magistrate having rejected the said application by his order dated 17-1 -89 and the petitioner not having taken any step in preferring any motion before the higher court to have that order set aside, cannot be allowed to reagitate the matter again and again. In fact, during the trial of Misc. Case 149 of 1985, as it will appear from the relevant judgment passed by the ld. Magistrate on 1-11 -90, the petitioner does not appear to have led any evidence in respect of his plea of divorce. Assuming that the petitioner sought to lead such evidence and was debarred by the ld. Magistrate from adducing such evidence in view of his earlier order dated 17-1 -89 rejecting the petitioner's application under the Muslim Women (Protection of Rights on Divorce) Act, 1986, the petitioner should have obtained an order of remand from the higher court. The court of Sessions was unsuccessfully moved in criminal motion No. 74 of 1990 and the Sessions Court by its order dated 27-3-91, did not disturb the order of maintenance allowance passed by the Magistrate under Section 125 Cr. P.C. except making certain modification with regard to the period of entitlement of the minor child for whom as well the maintenance allowance was awarded by the Magistrate. The plea of divorce having been unsuccessfully raised in the original proceeding, that is to say, Misc. Case No. 149 of 1985 and the motion that is Criminal motion No. 74 of 1990, the petitioner cannot be allowed to raise the same issue over again in his application under Section 127 Cr. P.C. Moreover, what the petitioner could not achieve by his application under Sections 3(b) and 7 of Muslim Women (Protection of Rights on Divorce) Act, 1986, before the Magistrate, by Criminal Motion No. 74 of 1990 before the Sessions Judge and even by Criminal Revision 725 of 1992 before this Court, the petitioner cannot be permitted to get the same thing done in an indirect way by taking resort to the provisions of Section 127 Cr. P.C. before the Magistrate. Mr. Yasin Ali strenuously urged that the present revisional application is hopelessly barred by the principles of not only res judicata but also issue estoppel.

Reliance has been placed in support of this contention in the decision Bank of Baroda v. Fishco, and Piara Singh v. State of Punjab. It is also submitted on behalf of the opposite party No. 1 that there was no inherent lack of jurisdiction on the part of the ld. magistrate in rejecting the application that was filed by the petitioner under Muslim Women (Protection of Rights on Divorce) Act, 1986 and in allowing the opposite party No. 1's claim for maintenance on the footing that she still continued to be the legally married wife of the petitioner or on the part of the ld. Sessions Judge in affirming the said order of maintenance allowance in criminal motion No. 74 of 1990 and on the part of this Court in refusing to condone the inordinate delay in filing the criminal revision No. 725 of 1992 against the earlier orders of the magistrate as well as the sessions Judge and also in summarily rejecting the same criminal revision on the ground of its being hit by the mischief of Section 397(3) Cr. P.C. and as such, the case of Sushil Kr. Mehta, (supra) cited by Mr. Ashim Roy cannot have any manner of application to the facts and circumstances of the present case. The present revisional application is not at all maintainable in law inasmuch as by this application the order passed in the earlier criminal revision No. 725 of 1992 is in effect sought to be revised. It is also submitted on behalf of the opposite party No. 1 that the instant criminal revision constitutes a sheer abuse of the process of the court and it cannot be a fit and proper case for invoking the inherent jurisdiction of this Court under Section 482 Cr. P.C. The impugned order dated 17-7-96 rejecting the petitioner's application under Section 127 Cr. P.C. does not suffer from any illegality or impropriety and as such, does not call for any interference.

5. My concern would be to examine the respective contentions that have been made on behalf of the petitioner and the opposite party No. 1 as stated above and determine whether any interference with the impugned order is called for.

6. Admittedly, the petitioner pleaded the alleged divorce dated 16-3-88 for the first time in the application that was filed by him on 21-12-88 under Sections 3(b) and 7 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. The said application itself has not been placed before this Court, but the purport of that application can be gathered from the order No. 26 dated 17-1 -89 that was passed in Misc. Case No. 149 of 1985 by which the ld. Magistrate had rejected that application. From the recitals of the submissions recorded in that order, it will appear that on behalf of the petitioner, it was urged before the Magistrate that he had divorced the opposite party No. 1 on 16-3-88 and the said divorce had become effective from 16-3-88 onwards, that in view of that divorce, the provisions of Sections 125 Cr. P.C. would no longer be attracted and the Misc. Case No. 149 of 1985 was no longer maintainable. On behalf of the husband-petitioner, reference was also made to a decision and the provisions of Section 7 of the Act and it was contended that the application under Section 125 Cr. P.C. was liable to be disposed of in accordance with the provisions of the Muslim Women (Protection of Rights on Divorce) Act. 1986. The petitioner also pressed for dismissal of the petition under Section 125 Cr. P.C. The wife opposite party No.1 resisted that application on filing a written objection denying the alleged divorce and praying for rejection of the said application under the Muslim Women (Protection of rights on divorce) Act, 1986. It was contended on behalf of the opposite party No. 1 that the said application of the petitioner was not maintainable in view of the fact that the application under Section 125 Cr. P.C. was filed long before the alleged divorce and that the provisions of Section 125 Cr. P.C. were very much attracted. It was also contended on behalf of the opposite party No. 1 before the Id. Magistrate that Section 7 of the

Muslim Women (Protection of Rights on Divorce) Act, 1986 was not applicable in view of the fact that at the time of the filing of the application under Section 125 Cr. P.C. the opposite party No. 1 was the legally married wife of the petitioner. It was further contended on behalf of the opposite party No.1 that there was no inconsistency between the provisions of the new Act and those of Sections 125 to 128 Cr. P.C. and that the new enactment also did not disentitle the opposite party No. 1 altogether to get relief and that the provisions of Section 125 Cr. P.C. were in effect limited to some extent. A ruling was also cited on behalf of the opposite party No. 1 in support of this contention. Having heard both sides and considered the rival contentions of the parties, the ld. Magistrate was of the opinion that the application dated 21-12-88 under the new enactment filed by the petitioner was not maintenable and accordingly, he rejected the said petition by his order dated 17-1 -89. It goes without saying that the question of applicability or otherwise of the provisions of the Act of 1986 to the proceeding under Section 125 Cr. P.C. did come up before the Magistrate as an issue for decision when he heard the application dated 21 -12-88 filed by the petitioner under the new Act praying for dismissal of the application under Section 125 Cr. P.C. and the opposite party No. l's written objection. It is not the case of the petitioner that the Id. Magistrate had absolutely no jurisdiction or for that matter, was not competent at all to decide that issue. If the Magistrate had the jurisdiction to decide an issue, he had certainly the jurisdiction to decide it rightly or wrongly and if the decision was wrong and the petitioner felt aggrieved by the decision which was recorded by the Magistrate by order dated 17-1-89, the petitioner should have taken recourse to the remedies which were available to him to have that order revised or set aside before the appropriate forum. But in the instant case, the petitioner did not take any step and suffered the rejection of his petition dated 21-12-88 and even allowed the Misc. Case No. 149 of 1985 to be proceeded with in accordance with the provisions of Section 125 Cr. P.C. The oral evidence that was led by the parties are not placed before this Court but from the certified copy of the judgment dated 1-11 -90 whereby the ld. Magistrate allowed the Misc. Case No. 149 of 1985, it would appear that the ld. Magistrate observed that it transpires from the evidence of the petitioner himself (OPW 1) that the opposite party No.1 was still his wife. There is nothing in this judgment to suggest that the petitioner did make any attempt to lead any evidence in support of his plea of divorce. Now in view of the decision reported in 1989 Cal Cri LR 197; Abdul Satter v. Sahani Bibi, the provisions of Section 125 Cr. P.C. would have ceased to have any effect for a muslim woman in case she had been divorced within the meaning of Section 2(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 after the coming into operation of the said Act. The petitioner has not made out a case in the instant revisional application to the effect that the ld. Magistrate shut out the evidence that was sought to be led on behalf of the petitioner to substantiate his plea of divorce during the trial of the Misc. Case No. 149 of 1985. Even if the Magistrate had done so, the order of the ld. Magistrate allowing the Misc. Case No. 149 of 1985 could have been challenged by the petitioner before the higher Court. The petitioner, in fact, did challenge the order dated 1-11-90 allowing maintenance allowance under Section 125 Cr. P.C. in criminal motion of 1990 before the ld. Sessions Judge and had even raised the question of the ld. Magistrate having not considered the plea of divorce. But since the petitioner did not go in revision against the earlier order of the Magistrate dated 17-.1 -89 rejecting the application under the new Act based on the plea of divorce, the ld. Sessions Judge held that the petitioner was bound by the said order of rejection and affirmed the order of the ld. Magistrate granting maintenance allowance subject to some modification so far as it related to the period for which maintenance allowance would be admissible to the son of the opposite party No.1. Now, in the instant case, it cannot be

argued that there was total lack of inherent jurisdiction on the part of the ld. Magistrate in rejecting the application under the Muslim Women (Protection of Rights on Divorce) Act, 1986 rather it was a case where the court had the jurisdiction to decide the question and at best, there was a defect in its exercise. Such a defect cannot go to the root of its authority and the resultant order cannot be designated as the order of a corum non judice and held to be a nullity so that the doctrine of res judicata could be excluded from its operation. Having anxiously considered the matter in its proper perspective, I am of the view that the order dated 17-1-89 whereby the Magistrate rejected the application under the Act of 1986, the order dated 1-11-90 whereby the ld. Magistrate allowed the Misc. Case 149 of 1985 and the order dated 27-3-91 whereby the ld Sessions Judge dismissed the Criminal Motion 74 of 1990 cannot be considered to be without jurisdiction and nullities. The decision in the case of Sushil Kr. Mehta v. Gobind Ram Vohra cited on behalf of the petitioner would, in my view, not be applicable to the present case. According to the decision ; Bank of Baroda v. Fishco, which has been cited on behalf of the opposite party No. 1, the principle of res judicata applies between two stages in the same litigation so much so that the matter decided at one stage or proceeding cannot be permitted to be reagitated at the subsequent stage of that proceeding and accordingly the plea of divorce was not agitated during the trial of Misc. Case No. 149 of 1985. The decision of the Id. Magistrate recorded in his order dated 17-1 -89 rejecting the application of the petitioner under the provisions of the Act of 1986, be it right or wrong, can be said to have reached a finality by reason of the order of the Id. Sessions Judge dismissing the criminal motion No. 74 of 1990 as well as the order of this Court dismissing the application under Section 5 of the Limitation Act for filing the criminal revision 725 of 1992. The decision dated 17-1-89 was certainly a decision on an issue, be it an issue of law or of fact, and the said decision having been allowed to remain undisturbed till the filing of the application under Section 127 Cr. P.C. on 18-12-94 cannot be allowed to be disturbed by filing an application under Section 127 Cr. P.C. The application under Section 127 Cr. P.C. was, in my view, hit by the doctrine of issue estoppel as enunciated by the Apex Court in Piara Singh v. State of Punjab . Undisputedly, after the summary rejection of the earlier criminal revision No. 725 of 1992 by the High Court on 6-9-93, the petitioner had even approached the Civil Court by filing a suit being Title Suit No. 179 of 1993 praying for an injunct on restraining the opposite party No. 1 from giving effect to the order dated 1-11-90 passed by the Magistrate allowing the Misc. Case No. 149 of 1985 as well as the order dated 27-3-91 passed by the Id. Sessions Judge in criminal motion No. 74 of 1990. Those two orders did also form the subject matter of challenge of the earlier criminal revision No. 725 of 1992 filed before this Court and the petitioner having been unsuccessful in the said criminal revision 725 of 1992, virtually tried to obtain the same relief by filing an application for injunction in the civil suit. Admittedly, the injunction has been refused and the petitioner has taken the matter to the appellate court in Misc. Appeal No. 42 of 1993. It is, however, not made known to this court if the said appeal is still pending or not. There is really much substance in the contention of the opposite party No. 1 that a petition under Section 127 Cr. P.C. cannot lie for the purpose of reagitating the plea of divorce on which the application dated 21-12-88 was based. Moreover, a plain reading of Section 127 Cr. P.C. will at once make it clear that for applicability of this section, there must be a change in the circumstance following the grant of maintenance allowance under Section 125 Cr. P.C. The change must evidently be brought about only after the order granting maintenance allowance under Section 125 is passed and not before. But, in the instant case, the change in the shape of divorce is alleged to have been effected long before the order allowing the maintenance allowance was passed under Section 125 Cr. P.C. It is really not

understood how in the facts and circumstances of this case an application under Section 127 Cr. P.C. on 18-12-94 could be entertainable by the 1d. Magistrate for cancellation, variation or modification of the order that was passed in Misc. Case No. 149 of 1985. Having regard to the facts and circumstances of this case as revealed from the materials on record, I have no hesitation to hold that there is no merit in the instant revisional application and the impugned order, in my view, does not suffer from any illegality, impropriety or incorrectness so as to warrant an interference by this court in exercise of this Court's revisional or inherent jurisdiction. In the result, the revisional application is dismissed.