Supreme Court of India
Mst. Zohara Khatoon vs Mohd. Ibrahim on 18 February, 1981
Equivalent citations: 1981 AIR 1243, 1981 SCR (2) 910
Author: S M Fazalali
Bench: Fazalali, Syed Murtaza

PETITIONER:
MST. ZOHARA KHATOON

Vs.

RESPONDENT:
MOHD. IBRAHIM

DATE OF JUDGMENT18/02/1981

BENCH:
FAZALALI, SYED MURTAZA
BENCH:
FAZALALI, SYED MURTAZA
KOSHAL, A.D.
VARADARAJAN, A. (J)

CITATION:
1981 AIR 1243 1981 SCR (2) 910
1981 SCC (2) 509 1981 SCALE (1)370
CITATOR INFO :
F 1966 SC 587 (2,3)

ACT:
Criminal Procedure Code, 1973, Section 125(1), Explanation (b)-Whether Magistrate competent to award maintenance if under the personal law of the Mohomedans, the wife obtained a valid divorce and had completed the period of Iddat-"wife" whether includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried.

HEADNOTE:
The appellant was the legally married wife of the respondent. As he willfully neglected her, she filed an application before the Magistrate for maintenance under Section 125 of the Code of Criminal Procedure 1973. The Magistrate accepted the allegation of the appellant that she had been neglected by the respondent without reasonable or probable cause and awarded maintenance at Rs. 100/- per month for the appellant and the minor child.

The High Court held that clause (b) of the explanation to Section 125(1) of the Code had no application to the facts of the case and that so far as the appellant was

concerned, she was not entitled to any maintenance. It however affirmed the order of the Magistrate fixing Rs. 40/- per month as maintenance for her minor son.

In the appeal, it was contended that the view taken by the High Court is legally erroneous and is based on wrong interpretation of clause (b) of the explanation to Section 125(1) of the Code.

Accepting the Appeal,

(Per Fazal Ali & Vardarajan, JJ.)

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HELD: 1. In the instant case Section 127 does not apply at all because the respondent has not filed any application for cancellation of the maintenance on the grounds mentioned in Section 127(3)(b) of the 1973 Code but this case is squarely covered by Clause (b) of the Explanation to S. 125(i) of that Code as a result of which the appellant in the eye of law continues to be the wife of the respondent, despite the decree for dissolution of marriage. [925 H, 926 A-B]

2. It is clear that the 1898 Code by virtue of S. 488 provided a summary remedy for awarding maintenance to neglected wives irrespective of the caste, creed, community or religion to which they belonged. Sections 488 and 489 were the corresponding provisions of the 1898 Code which were couched almost in the same language as ss. 125 and 127 of the 1973 Code having some important additions that have been made under the 1973 Code. A provision like clause (b) of the Explanation to S. 125(1) of the 1973 Code was conspicuously absent in s. 488 of the old Code and has been added by the 1973 Code. [914 H, 915 A, D, 917 C-D]

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Nanak Chand v. Shri Chandra Kishore Agarwala & Ors . [1970] 1 SCR 565, Ram Singh v. State & Anr. AIR 1963 All. 355, Nalini Ranjan Chakravarty v. Smt. Kiran Rani Chakravarty AIR 1965 Pat. 442, Mahabir Agarwalla v. Gita Roy [1962] 2 Cr. L.J. 528, referred to.

3. The Mohomedan Law on the subject was that where a woman governed by the Mohomedan Law was awarded maintenance, the same would cease from the date of divorce given by the husband and the completion of the period of Iddat. [917 G-H]

In re Shekhanmian AIR 1930 Bombay 178, Syed Said v. Meera Bee 20 M.L.J. 12, Mohamed Rahimullah & Anr. AIR 1947 Madras 416, Aahimunnissa & Ors. v. Mohd. Ismail AIR 1956 Hyderabad 14, Din Mohmmad's V.I.L.R. 1883 226, referred to.

4. Although a Mohomedan wife had a right to be awarded maintenance by the Magistrate under s. 488 of the old Code, the said right ceased to exist if she was divorced by her husband and had observed the period of Iddat. This was the undoubted position of law under the 1898 Code as amended by the 1955 Amending Act. [920 A-B]

5. Clause (b) has made a distinct departure from the earlier Code in that it has widened the definition of wife and, to some extent, over-ruled the personal law of the

parties so far as proceedings for maintenance under Section 125 are concerned. Under Clause (b), the wife continued to be a wife within the meaning of the provisions of the Code even though she has been divorced by her husband or has otherwise obtained a divorce and has not remarried. It follows, therefore, that the divorce resulting from the aforesaid dissolution of the marriage is also a legal divorce under the Mohomedan Law by virtue of the statute (1939 Act). [920 E-F, 921 B]

6. Under the Mohomedan Law the commonest form of divorce is a unilateral pronouncement of divorce of the wife by the husband according to the various forms recognised by the law. A divorce given unilaterally by the husband is especially peculiar to Mohomedan Law. In no other law has the husband got a unilateral right to divorce his wife by a simple declaration because other laws, viz., the Hindu Law or the Parsi Marriage and Divorce Act, 1936, contemplate only a dissolution of marriage on certain grounds brought about by one of the spouses in a court of law. [921 C-D]

7. A wife thus had a statutory right to obtain divorce from the husband through the court on proof of the grounds mentioned in the Act. The Act provided for the wife an independent remedy which could be resorted to by her without being subjected to a pronouncement of divorce by the husband. It is, therefore, in the background of this Act that the words 'has obtained a divorce from her husband' in clause (b) of the Explanation have to be construed. Thus the High Court in considering the effect of these words seems to have over looked the dominant object of the statutory remedy that was made available to the wife under the Act of 1939 by which the wife could get a decree for dissolution of marriage on the grounds mentioned in the 1939 Act by petitioning the civil court without any overt act on the part of the husband in divorcing her. The High Court also failed to consider the legal consequences flowing from the
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decree passed by the Court dissolving the marriage, viz., a legal divorce under the Mohomedan law. [922 D-F]

8. The interpretation put by the High Court on the second limb of clause (b) is not correct. This seems to be borne out from the provisions of Mohomedan law itself. It would appear that under the Mohomedan law there are three distinct modes in which a Muslim marriage can be dissolved and the relationship of the husband and wife terminated so as to result in an irrevocable divorce. [922 F-G]

9. It is, therefore, manifest that clause (b) of Explanation to S. 125 envisages all the three modes, whether a wife is divorced unilaterally by the husband or whether she obtains divorce under the mode numbers 2 and 3, she continues to be a wife for the purpose of getting maintenance under S. 125 of the 1973 Code. In these circumstances the High Court was not at all justified in taking the two separate clauses 'who has been divorced' and

'had obtained a divorce from her husband' conjunctively so as to indicate a divorce proceeding from the husband and the husband alone and in not treating a dissolution of marriage under the 1939 Act as a legal divorce. [924 B-D]

10. A clear distinction has been made between dissolution of marriage brought about by the husband in exercising his unilateral right to divorce and the act of the wife in obtaining a decree for dissolution of the marriage from a civil court under the Act of 1939. [925 E-F]

11. The two limbs of clause (b) of the Explanation to S. 125(1) have separate and different legal incidents-one is reflected in clause (b) of sub-Section (3) of S. 127 and the other in clause (c) of sub-section (3) of S. 127. [925 G-H]

(Per A. D. Koshal, J. concurring)

1. The word 'divorce' is not defined in the Codeof Criminal Procedure and may legitimately be regarded as having been used in clause (b) of sub-section 1 of Section 125 in the dictionary sense. As ordinarily understood, 'divorce' is nothing more nor less than another name for dissolution of marriage, whether the same result from the act of parties or is a consequence of proceedings at law. It would be wrong to regard the two terms as not be synonymous with each other, unless the legislature makes a direction to the contrary. [927A, C-D]

2. According to Section 125 of the Code of Criminal Procedure, a full-fledged wife is entitled to maintenance. By reason of clause (b) even a divorced wife has that right provided that she has not re-married. If that clause envisaged only divorce by voluntary action of the husband, the second limb of the clause which makes the definition of 'wife' inclusive of a woman who has 'obtained a divorce from the husband' would be rendered otiose. The word obtained may well be used in the sense of 'procured with effort' and would certainly describe correctly a situation where something is achieved by a person through his exertion in spite of opposition from others. [928 E, F-G]

3. Divorce by the Act of the husband, is not recognised by any system of law except that applicable to Muslims. Members of the other main communities inhabiting India, i.e. Hindus, Sikhs, Buddhists, Jains, Christians, etc. have perforce to go to courts in order to obtain divorce. If clause (b) was intended to

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embrace only cases of divorce brought about by the Act of the husband, its applicability would be limited, by and large, only to Muslims, which per se appears to be an absurd proposition. [929 C-D]

4. The expression 'a woman who has obtained a divorce from her husband' has therefore to be interpreted as including a wife who has been granted a decree of dissolution of marriage by the Court. [929 E]

Deacock v. Deacock [1958] 2 All E.R. 633 referred to.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 761 of 1980.

Appeal by Special Leave from the Judgment and Order dated 20-10-1978 of the Allahabad High Court in Criminal Misc. Case No. 822 of 1978.

Jagdish Kumar Aggarwal for the Appellant. Nemo for the Respondent.

The Judgment of Murtaza Fazal Ali & A. Vardarajan JJ was delivered by Fazal Ali, J., A. D. Koshal, J. gave a concurring Opinion.

FAZAL ALI, J.-This appeal by special leave is directed against a judgment dated October 20, 1978 of the Allahabad High Court (Lucknow Bench) by which a revision filed by the respondent for setting aside an order of maintenance passed by the trial Magistrate was accepted and the said order was quashed.

The facts of the appeal lie within a narrow compass but the case involves a substantial question of law. Unfortunately, as the respondent did not appear despite service, we had to rely mainly on the arguments of the learned counsel for the appellant and had also to consider various aspects that could be stressed by the respondent if he had appeared. The appellant, Mst. Zohara Khatoon, was a legally married wife of Mohd. Ibrahim. As Mohd. Ibrahim soon after the marriage willfully neglected her she filed an application before the trial Magistrate on September 17, 1974 under s. 125 of the Code of Criminal Procedure 1973 (hereinafter referred to as the '1973 Code') in order to fix maintenance for her and her minor son. The Special Judicial Magistrate, Barabanki (U.P.), after hearing the parties, allowed the application by his order dated December 29, 1976 and fixed the maintenance at Rs. 100/- (Rupees one hundred) per month both for the wife and the child. The Magistrate also accepted the allegation of the appellant that she had been neglected by the husband without reasonable or probable cause. The order of the Magistrate was upheld by the Sessions Judge in revision.

Before the Magistrate, the respondent-husband had taken the defence that as the appellant had brought a suit for dissolution of marriage on the ground of cruelty and willful neglect which was decreed by the civil court on 15-1-1973 and she was living separately, she ceased to be the wife of the respondent and was, therefor, not entitled to maintenance under s. 125 or s. 127 of the 1973 Code. Ultimately, the husband moved the High Court under s. 482 of the 1973 Code for quashing the order of the Magistrate as it was vitiated by an error of law.

In the High Court, the argument of the appellant was that in view of clause (b) of the Explanation to s. 125(1) of the 1973 Code, she continued to be the wife despite obtaining a decree for dissolution of marriage and thus her right to maintenance would not be affected by the decree passed by the civil court. The High Court after hearing the parties was of the view that clause (b) of the Explanation referred to above would apply only if the divorce proceeded from the husband, that is to say, the said

clause would not apply unless the divorce was given unilaterally by the husband or was obtained by the wife from the husband. In other words, the High Court thought that as, in the instant case, the dissolution of marriage was brought about by the wife under the Dissolution of Muslim Marriages Act, 1939 (hereinafter referred to as the '1939 Act') the decree under the said Act did not amount to a divorce by the husband because the marriage was dissolved by operation of law only. Hence clause (b) of the Explanation to s. 125(1) had no application and the appellant was not entitled to any maintenance under s. 125 of the 1973 Code, so far as she was concerned. The High Court, however, maintained the order of the Magistrate so far as the minor son was concerned and fixed his maintenance at Rs. 40/- per month.

The learned counsel for the appellant submitted before us that the view taken by the High Court is legally erroneous and is based on a wrong interpretation of clause

(b) of the Explanation to s. 125(1) of the 1973 Code. After having gone through the various provisions of the 1973 Code, particularly ss. 125 and 127 we are satisfied that the contentions raised by the counsel for the appellant are well founded and must prevail.

In order to decide the issue in question it may be necessary to give a brief survey of the corresponding provisions of the Code of Criminal Procedure, 1898 (hereinafter referred to as the '1898 Code') to show the nature and ambit of the provisions relating to the award of maintenance. Sections 488 and 489 were the corresponding provisions of the 1898 Code which were couched almost in the same language as ss. 125 and 127 of the 1973 Code minus some important additions that have been made under the 1973 Code. The relevant portion of s. 488 of the 1898 Code may be extracted thus:-

> "If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub- Divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding (five hundred rupees) in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs."

It is not necessary to refer to the other provisions of s. 488 of the said Code as the same are not germane for the purpose of deciding this appeal. It may, however, be noted that a provision like clause (b) of the Explanation to s. 125(1) of the 1973 Code was conspicuously absent from s. 488 and has been added by the 1973 Code. We shall deal with the legal effect of this provision a little later. A perusal of s. 488 would clearly reveal that it carves out an independent sphere of its own and is a general law providing a summary machinery for determining the maintenance to be awarded by the Magistrate under the circumstances mentioned in the section. The provisions may not be inconsistent with other parallel Acts in so far as maintenance is concerned, but the section undoubtedly excludes to some extent the application of any other Act. At the same time, it cannot be said that the personal law of the parties is completely excluded for all purposes. For instance, where the validity of a marriage or mode of divorce or cessation of marriage under the personal law of a

party is concerned that would have to be determined according to the said personal law. Thus, the exclusion by s. 488 extends only to the quantum of the maintenance and the circumstances under which it could be granted. The scope of s. 488 of 1898 Code was considered by this Court in Nanak Chand v. Shri Chandra Kishore Agarwala & Ors. where the following observations were made:-

> "We are unable to see any inconsistency between the Maintenance Act and s. 488 Cr.P.C..... The law was substantially similar before and nobody ever suggested that Hindu Law, as in force immediately before the commencement of this Act, insofar as it dealt with the maintenance of children, was in any way inconsistent with s. 488 Cr. P.C.
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> The scope of the two laws is different. Section 488 provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties. Recently the question came be fore the Allahabad High Court in Ram Singh v. State (AIR 1963 All. 355), before the Calcutta High Court in Mahabir Agarwalla v. Gita Roy [1962] 2 Cr. L.J. 528 and before the Patna High Court in Nalini Ranjan v. Kiran Rani (AIR 1965 Pat.
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> 442). The three High Courts have, in our views, correctly come to the conclusion that s. 4(b) of the Maintenance Act does not repeal or affect in any manner the provisions contained in s. 488, Cr.P.C."

It would be seen that this Court approved of the decisions in the cases of Ram Singh, Mahabir Agarwalla and Nalini Ranjan mentioned in the observations extracted above. In order to understand the proper scope of s. 488 of the 1898 Code which is almost the same as that of s. 125 of the 1973 Code, it may be necessary to examine the decisions which were referred to with approval by this Court in Nanak Chand's case (supra). In Ram Singh v. State & Anr., Kailash Prasad, J. observed as follows:-

> "There is nothing in the Hindu Adoptions and Maintenance Act to suggest expressly or by necessary implication that the Act is intended to be a substitute for the provisions of s. 488 Cr. P.C. In fact the provisions of sec. 18 of the Act cannot be a substitute for s. 488 Cr.P.C. The latter provision is general and is applicable to a wife, irrespective of her religion, but the former is applicable to the case of Hindus only. It could not, therefore, be intended to be a substitute for s. 488 Cr. P. C."

To the same effect is the decision of the Patna High Court in Nalini Ranjan Chakravarty v. Smt. Kiran Rani Chakravarty where the following observations were made:-

> "Before the enactment of 1956, it was well settled that the right conferred by section 488 Cr.P.C. was independent of the personal law of the parties. The right of maintenance under section 488 was irrespective of the nationality or creed of the parties, the only condition precedent to the possession of that right being in the case of a wife the acceptance of the conjugal relation. Further, s. 488 provided for only a

> speedy remedy and a summary procedure before a Magistrate against starvation of a deserted wife or child. This section did not cover the civil liability of a husband or a father under his personal law to maintain his wife and children."

The Calcutta High Court also took the same view in Mahabir Agarwalla v. Gita Roy where the following observations were made:-

> "An alternative but not inconsistent summary remedy was provided by section 488 of the Code of Criminal Procedure not only to the Hindu wife but generally to wives irrespective of religion for recovery of maintenance from the husband. The two remedies were, however, not coextensive."

Thus, on a consideration of the authorities mentioned above, it is clear that the 1898 Code by virtue of s. 488 provided a summary remedy for awarding maintenance to neglected wives irrespective of caste, creed, community or religion to which they belonged. It was in this context that the Courts referred to above considered the effect of Hindu Adoption and Maintenance Act and other similar Acts.

This, however, does not conclude the controversy. The important question still remains: Was the Magistrate competent to award maintenance if under the personal law of the Mahomedans the wife had been validly divorced and had completed the period of Iddat ? In fact, s. 489 of the 1898 Code, as amended by the 1955 Amending Act, had empowered the Magistrate to make any alteration in the payment of the maintenance on proof of a change in the circumstances. Similarly, s. 489(2), which is extracted below, provided that the Magistrate could cancel the maintenance in consequence of a decision of any competent court:

> "(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under Section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly."

Thus, considering the scheme of ss. 488 and 489 it was generally accepted as good law by all the High Courts that where a woman governed by the Mahomedan law was awarded maintenance, the same would cease from the date of divorce given by the husband and the completion of the period of Iddat. That this is the Mahomedan law on the subject admits of no doubt and has not been controverted before us. We would however, refer to a few decisions on this point to support our point of view.

In re Shekhanmian while defining the consequences of a divorce and its impact on s. 488 of the 1898 Code a division Bench of the Bombay High Court observed thus:-

> "A talak when it becomes irrevocable puts an end to conjugal relationship which had subsisted between the parties, and the divorced wife would not be entitled to claim maintenance from her husband beyond the period of iddat from the date of such irrevocable divorce. S. 488 Criminal P.C., has in no manner abrogated this part of the

> personal law of the parties. The existence of conjugal relations in the case of Mahomedans has to be determined by reference to the provisions of the Mahomedan Law and not by considerations of equity and good conscience as understood in any other system of law."

To the same effect is the decision of the Madras High Court in Syed Said v. Meeram Bee (2) where in division Bench observed thus:

> "A Magistrate, however, exercising summary powers conferred on him by s. 488, Code of Criminal Procedure, can make or enforce an order to that effect only if the relationship of husband and wife exists between the two, but in order to determine this, and only to that extent, we must ascertain the effect in Mahomedan law of an irreversible divorce on conjugal relations."

It was further held in that case that a divorce becomes irrevocable after the wife has observed the period of iddat which is usually three months or if she was pregnant, the date of delivery so that she may be free to marry again. This view was reiterated by the Madras High Court in a later decision in In re Mohamed Rahimullah & Anr. (3) where Yahya Ali, J. Observed thus:-

> "The foundation upon which Ss. 488 & 489, Criminal P.C. rest, so far as granting of maintenance by the husband to the wife is concerned, is that the relationship of husband and wife subsists between them. When that relationship is lawfully dissolved and there is no marital tie either in reason or upon any canon of justice or even upon the language of Ss. 488 and 489 how the husband can be directed to continue to maintain his divorced wife."

The Hyderabad High Court also took the same view in Rahimunissea & Ors. v. Mohd. Ismail and after considering the entire law on the subject Bilgrami, J. Observed thus:-

> All these grounds can be sufficient or valid for refusal of maintenance to a wife with whom the tie of marriage subsists, but when this tie is dissolved, all these defences cannot be set up and the right of the wife to maintenance during the "iddat" period is absolute under the Mahomedan law; the only obligation which binds a wife during this period is that she should not remarry."

In a very early case of the Allahabad High Court-Din Mahommad's case (2)- Mahmood, J. pointed out that while the enactment regarding maintenance was of a general nature being applicable to Mahomedans as also to Hindus, Buddhists, and other communities yet the legislature never intended to restrict the Mahomedan law of Divorce. The Judge, further held that the right to maintenance came to an end when the conjugal relationship between the husband and the wife ceased to exist. In this connection, Mahmood, J. Observed as follows:

> "The enactment under which that order was made does not relate more especially to Muhammadans than to Hindus, Buddhists, Indo-Britons, Europeans, or any other

> branch of the general community, and the Legislature could never have intended by it to interfere with or restrict the Muhammadan law of divorce...The whole of Chapter XLI, Criminal Procedure Code, so far as it relates to the maintenance of wives, contemplates the existence of the conjugal relation as a condition precedent to an order of maintenance and, on general principles, it follows that as soon as the conjugal relation ceases, the order of maintenance must also cease to have any enforceable effect. When and in what manner a cessation of the conjugal relation takes place, is a question which, ex necessitate rei, must be determined according to the personal law to which the parties concerned are subject...The right to maintenance conferred by s. 536 of the Criminal Procedure Code is a statutory right, which the Legislature has framed irrespective of the nationality or creed of the parties, the only condition precedent to the possession of that right, in the case of a wife, being the existence of the conjugal relation."

Thus, a review of the decisions referred to above clearly reveals that although a Mahomedan wife had a right to be awarded maintenance by the Magistrate under s. 488 of the Code, the said right ceased to exist if she was divorced by her husband and had observed the period of iddat. This was the undoubted position of law under the 1898 Code as amended by the 1955 Amending Act.

The serious question to be determined in this appeal is as to how far the 1973 Code has made a distinct departure from the previous Code and changed the legal position of a woman after divorce. Section 125 of the 1973 Code is couched almost in the same language as s. 488 of the earlier Code with the important exception that an Explanation has been added after sub-clause (1) of s. 125 which runs thus:

> "Explanation-For the purposes of this Chapter.-
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> (a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 is deemed not to have attained his majority;
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> (b) "wife includes a woman who has been divorced by or has obtained a divorce from, her husband and has not remarried."

(Emphasis supplied) We are however not concerned with clause (a) of the Explanation. Clause (b) has made a distinct departure from the earlier Code in that it has widened the definition of wife and, to some extent, overruled the personal law of the parties so far as the proceedings for maintenance under s. 125 are concerned. Under clause (b), the wife continues to be a wife within the meaning of the provisions of the Code even though she has been divorced by her husband or has otherwise obtained a divorce and has not remarried. The decision in this case turns upon the interpretation of clause (b). The High Court has construed the words 'who has been divorced or has obtained a divorce from her husband' as signifying that in both cases the divorce must proceed from the husband and should be the act of the husband and not that of the wife. In taking this view, the High Court obviously seems to have been guided by the consideration that a dissolution of marriage brought about at the instance of the wife under the 1939 Act does not amount to a divorce by the

husband under the Mahomedan law and hence the second limb of clause (b) also does not apply. Although there may be some substance in the view taken by the High Court yet what it overlooked was whereas a dissolution of marriage under the Hindu Marriage Act may not necessarily end in a divorce but other consequences such as declaration that the marriage was a nullity, a decree for judicial separation, etc. but under the 1939 Act when the marriage is dissolved by the Court at the instance of the wife, the only result that follows is that the wife stands divorced from the husband by operation of law and no other relief can be granted by the court under the 1939 Act after a decree for dissolution is passed. It follows, therefore, that the divorce resulting from the aforesaid dissolution of the marriage is also a legal divorce under the Mahomedan law by virtue of the statute(1939 Act). That this is so would be manifest from the circumstances which we shall mention hereafter.

There can be no doubt that under the Mahomedan law the commonest form of divorce is a unilateral declaration of pronouncement of divorce of the wife by the husband according to the various forms recognised by the law. A divorce given unilaterally by the husband is especially peculiar to Mahomedan law. In no other law has the husband got a unilateral right to divorce his wife by a simple declaration because other laws, viz., the Hindu law or the Parsi Marriage and Divorce Act, 1936, contemplate only a dissolution of marriage on certain grounds brought about by one of the spouses in a Court of law.

Before the enactment of the Act of `1939 a woman under pure Mahomedan law had no right to get a decree for divorce from the husband if he refused to divorce her. This was unboubtedly the fundamental concept of divorce as laid down by the Mahomedan law. As, however, some of the Muslim Jurists and Theologists were of the view that where a husband becomes important or disappears for a large number of years or treats his wife with great cruelty, the wife should have some right to approach the Qazi for dissolving the marriage. Relying on these authorities the legislature intervened and passed the Dissolution of Muslim Marriages Act, 1939 under which the wife was conferred a legal right to move the civil court for a decree for dissolution of marriage on the grounds specified in s. 2 of the Act of 1939. This is spelt out from the statement of Objects and Reasons of the Act of 1939, the relevant portion of which may be extracted thus:

> "There is no proviso in the Hanafi Code of Muslim Law enabling a married Muslim woman to obtain a decree from the Court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumer-
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> able Muslim women in British India. The Hanafi Jurists. however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the "Maliki, Shafii or Hambali Law". Acting on this principle the Ulemas have issued fatwas to the effect that in cases enumerated in clause 3, Part A of this Bill (now see section 2 of the Act), a married Muslim woman may obtain a decree dissolving her marriage ..... As the Courts are sure to hesitate to apply the Maliki Law to the case of a Muslim woman, legislation recognizing and

> enforcing the above mentioned principle is called for in order to relieve the sufferings of countless Muslim women."

One of the grounds was that a suit could be brought if the husband had neglected or failed to provide maintenance for the wife for a period of two years.

After the Act of 1939, a wife thus had a statutory right to obtain divorce from the husband through the Court on proof of the grounds mentioned in the Act. The Act provided for the wife an independent remedy which could be resorted to by her without being subjected to a pronouncement of divorce by the husband. It is, therefore, in the background of this Act that the words 'has obtained a divorce from her husband' in clause (b) of the Explanation have to be constructed. Thus the High Court in considering the effect of these words seems to have overlooked the dominant object of the statutory remedy that was made available to the wife under the Act of 1939 by which the wife could get a decree for dissolution of marriage on the grounds mentioned in the 1939 Act by petitioning the civil court without any overt act on the part of the husband in divorcing her. The High Court also failed to consider the legal consequences flowing from The decree passed by the court dissolving the marriage, viz., a legal divorce under the Mahomedan law.

In these circumstances we are therefore, satisfied that the interpretation put by the High Court on the second limb of clause (b) is not correct. This seems to be borne out from the provisions of Mahomedan law itself. It would appear that under the Mahomedan law there are three distinct modes in which a muslim marriage can be dissolved and the relationship of the husband and the wife terminated so as to result in an irrevocable divorce.

(1) Where the husband unilaterally gives a divorce according to any of the forms approved by the Mahomedan law, viz, Talaq ahsan which consiss of a single pronounce-

ment of divorce during tuhar (Period between menstruations) followed by abstinence from sexual intercourse for the period of iddat; or Talak hasan which consists of three pronouncement made during the successive tuhrs, no intercourse taking place between three tuhrs; and lastly Talak-ul-bidaat or talalk-i- badai which consists of three pronouncements made during a single tuhr either in one sentence or in three sentences signifying a clear intention to divorce the wife, for instance, the husband saying 'I divorce thee irrevocably' or 'I divorce thee, I divorce thee, I divorce thee'. The third form referred to above is however not recognised by the Shiah law. In the instant case, we are concerned with the appellant who appears to be a Sunni and governed by the Hanafi law (vide Mulla's Principles of Mahomedan Law, Sec. 311, p. 297). A divorce or talaq may be given orally or in writing and it becomes irrevocable if the period of iddat is observed though it is not necessary that the woman divorced should come to know of the fact that she has been divorced by her husband.

(2) By an agreement between the husband and the wife whereby a wife obtains divorce by relinquishing either her entire or part of the dower. This mode of divorce is called 'khula' or Mubarat. This form of divorce is initiated by the wife and comes into existence if the husband gives consent to the agreement and releases her from the marriage tie. Where, however, both parties

agree and desire a separation resulting in a divorce, it is called mubarat. The gist of these mode is that it comes into existence with the consent of both the parties particularly the husband because without his consent this mode of divorce would be incapable of being enforced. A divorce may also come into existence by virtue of an agreement either before or after the marriage by which it is provided that the wife should be at liberty to divorce herself in specified contingencies which are of a reasonable nature and which again are agreed to be the husband. In such a case the wife can repudiate herself in the exercise of the power and the divorce would be deemed to have been pronounced by the husband. This mode of divorce is called 'Tawfeez' (vide Mulla's Mohmedan Law, Sec. 314. p. 300.

(3) By obtaining a decree from a civil court for dissolution of marriage under s. 2 of the Act of 1979 which also amounts to a divorce (under the law) obtained by the wife. For the purpose of maintenance, this mode is governed not by clause (b) but by clause

(c) of sub-section (3) of s. 127 of the 1973 Code; whereas the divorce given under modes (1) and (2) would be covered by clause (b) of sub-section (3) of s. 127.

These are the three distinct modes in which a dissolution of marriage can be brought about. It is, therefore, manifest that clause (b) Explanation to s. 125 envisages all the three modes, whether a wife is divorced unilaterally by the husband or where she obtains divorce S under mode numbers 2 and 3, she continues to be a wife for the purpose of getting maintenance under s. 125 of the 1973 Code. In these circumstance the High Court was not at all justified in taking the two separate clauses 'who has been divorced' and 'has obtained a divorce from her husband' conjunctively so as to indicate a divorce proceeding from the husband and the husband alone and in not treating a dissolution of marriage under the 1939 Act as a legal divorce. We might like to mention here that the 1973 Code has by extending the definition of wife, not excluded the various modes of divorce but has merely abrogated that part of the Mahomedan law under which the wife ceased to get maintenance if the conjugal relationship of the husband and wife came to an end. Nevertheless, the personal law is applied fully and kept alive by clause (b) of sub-section (3) of s. 127 which may be extracted thus:

> "(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 pay able 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."

This clause refers to Mode No. 1, that is to say, where the husband unilaterally divorces his wife. For the application of clause (b) two conditions are necessary-

> (1) that an application for cancellation of the maintenance is made by the husband under s. 127(2), and (2) that after the wife has been divorced by the husband she has received the whole of the sum which under any customary or personal law applicable to the parties was payable on divorce.

In other words, under the Mahomedan Law the husband could still get the maintenance cancelled after divorcing his wife according to personal law if he paid the entire dower specified at the time of marriage.

We would however? Like to point out one peculiar aspect of the provisions of s. 127. While clause (b) of sub-section (3) of s. 127 does provide for cancellation of the maintenance on payment of dower if a woman has been divorced, the said clause does not contemplate cancellation of maintenance where a woman obtains divorce from her husband through a civil court under the provisions of the Act of 1939. In this connection clause (c) of sub-section (3) of s. 127, which is extracted below, clearly provides that where a woman obtains a divorce from her husband the amount of maintenance cannot be cancelled until she voluntarily relinquishes or surrenders her rights to the same:-

> "the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof."

Thus, a clear distinction has been made between dissolution of marriage brought about by the husband in exercising his unilateral right to divorce and the act of the wife in obtaining a decree for the dissolution of marriage from a civil court under the Act of 1939.

We might further add that our conclusion that the second limb of clause (b) of the Explanation to s. 125 applies also to a situation, where a dissolution of marriage resulting in a decree for divorce brought about by the Act and at the instance of the wife, is fortified and reinforced by the language of clause (c) of sub-section (3) of s. 127 under which maintenance cannot be cancelled on the application of the husband unless the wife voluntarily surrenders her rights to maintenance or relinquishes the same and not otherwise. Thus, tho two limbs of clause (b) of the Explanation to s. 125(1) have separate and different legal incidents-one is reflected in clause (b) of subsection (3) of s. 127 and the other in clause (c) of sub-section (3) of s. 127.

In view of the reasons given and the circumstances discussed by us, it is manifest that in the instant case s. 127 does not at all because the husband has not given any application for cancellation of the maintenance on the grounds enshrined in s. 127(3)(b) of the 1973 Code but this case is squarely covered by clause (b) of the Explanation to s. 125(1) of the 1973 Code as a result of which the appellant in the eye of law continues to be the wife of the respondent, despite the decree for dissolution of marriage. The Magistrate was, therefore, fully justified in granting maintenance to the appellant. The High Court, therefore, erred in quashing the order of the Magistrate, we, therefore, allow this appeal, set aside the order of the High Court and restore that of the Magistrate granting maintenance of a consolidated amount of Rs. 100/- per month for the appellant and her minor

child. It would be open to the appellant to apply to the Magistrate for a warrant to realise the arrears of maintenance, if any KOSHAL, J.-I have had the advantage of perusing the judgment prepared by my learned brother Fazal Ali, J., with whom I find myself in general agreement. However, as I would like to highlight a particular aspect of the matter, I am appending a short note of my own.

2. Sub-section (1) of section 125 of the Code of Criminal Procedure (hereinafter referred to as the Code) confers on a Magistrate of the First Class the jurisdiction, inter alia, to order maintenance to be paid by a husband to his wife or his minor or destitute children. The case propounded by the wife in the present proceedings is that in spite of the decree of dissolution of marriage passed in her favour by a Civil Court on the 15th January, 1973, she continues to be the wife of the respondent for the purposes of the said sub-section (1) by reason of the definition of the term "wife" contained in clause (b) of the Explanation appended to that sub-section. That clause runs thus:

> "Explanation:-For the purposes of this chapter,- '(a)..... '(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not re-married."

The claim of the wife has been turned down by the High Court on the ground that this clause is inapplicable to her case inasmuch as-

> (i) the appellant has obtained only a decree of dissolution of marriage and not a divorce, and
>
> (ii) the expression "from the husband" as used in the clause extracted above envisages divorce by voluntary action of the husband which is missing in this case, the dissolution of marriage having been obtained from the court, and, therefore, not from the husband.

3. The word 'divorce' is not defined in the Code and may legitimately be regarded as having been used in clause

(b) above extracted in the dictionary sense. Webster's Third New International Dictionary states it to mean, amongst other things,-

> "(a) legal dissolution in whole or in part of marriage relation usually by a court or other body having competent authority;
>
> "(b) an absolute dissolution in a valid marriage made by decree of court for lawful cause arising after the marriage (distinguished from annulment);
>
> "(c) a formal separation of man and wife by the act of one party or by consent according to established custom."

As ordinarily understood, therefore, divorce is nothing more nor less than another name for dissolution of marriage, whether the same results from act of parties or is a consequence of proceedings at law, and it would, in our opinion, be wrong to regard the two terms as not being synonymous with each other, unless the legislature makes a direction to the contrary. We need hardly point out that section 125 of the Code contains no such direction.

4. Deacock v. Deacock, [1958] 2 All. E.R. 633 supports the view just expressed. In that case the English Court of Appeal was called upon to interpret sections 16(1) and 19(3) of the Matrimonial Causes Act, 1950 which posed a similar problem. The relevant portions of those provisions are reproduced below:

> "16(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage.
>
> "19(3) On any decree for divorce or nullity of marriage, the court may, if it thinks fit, by order direct the husband to pay to the wife, during their joint lives, such monthly or weekly sum for the maintenance and support of the wife as the court may think reasonable..."

An argument was raised that a decree for dissolution of marriage as envisaged in section 16(1) does not amount to a decree for divorce mentioned in section 19(3) and that, therefore, there was no jurisdiction in the Court to direct the husband to any the wife any main-

tenance in pursuance of the latter section. Hodson, L.J., with whom Morris, L.J., and Vaisey J., fully agreed, repelled the argument thus:

> 'It is said (and I confess that this argument does not produce very much impact on my mind) that there is a distinction between the words "dissolution of marriage" and "divorce", and that, as section 19 contains the word "divorce" and section 16 does not, there is no statutory power to apply for maintenance at 811 in the case of presumption of death.....In my view the word "dissolution relates to the marriage bond itself, whereas the word "divorce" relates to the parties to tile marriage bond; and it is apt to refer to "divorce" when speaking of parties "and dissolution" when speaking of the bond.
>
> 'As the decree in this case shows, what has been done, or what has been purported to be done, by the court was to dissolve the marriage; and the word "dissolved" is used in this and in all other decrees, as it has been used for years: the word "divorce" is not used".

Thus according to the Court of Appeal the expressions "divorce" and "dissolution" were really two facets of the same situation.

5. The matter may be looked upon from another angle in so far as section 125 of the Code is concerned. According to its provisions a full-fledged wife is obviously entitled to maintenance. By reason of clause (b) above extracted, even a divorced wife has that right provided that she has not re- married. Could then it be argued with any plausibility that a wife who has been granted a decree of dissolution of marriage by a Civil Court but has not been divorced by a voluntary act of her husband was intended by the legislature not to be entitled to the benefit of clause (b)? The answer must be an emphatic no and this answer follows from the terms of clause (b) itself. If that clause envisaged only decree by voluntary action of the husband, the second limb of the clause which makes the definition of "wife" inclusive of a woman who has 'obtained a divorce from the husband' would be rendered otiose. The word obtained' may well be used in the sense of 'procured with effort' and would certainly describe correctly a situation where something is achieved by a person through his exertion in spite of opposition from others. According to Webster, again the word 'obtain' signifies:

> "(a) to gain or attain possession or disposal of, usually by some planned action or method, "(b) to bring about or call into being, etc."

If a person sues another person for the recovery of property and the suit is resisted but ultimately decreed and the plaintiff recovers possession of the property from the defendant he may properly be described as having obtained the property from the defendant although this result has come about not because the defendant obliged the plaintiff but because of the coercive process of the court. Similarly information contained In a statement brought about by coercive methods used against a helpless person would still be information obtained from him even though he is not a willing party to the statement.

6. There is another good reason why the narrow interpretation placed by the High Court on clause (b) above extracted cannot be accepted. Divorce by the act of the husband is, broadly speaking, not recognised by any system of law except that applicable to Muslims (barring variations of personal law by custom). Members of the other main communities inhabiting India, i.e., Hindus, Sikhs, Buddhists, Jains, Christians, etc., have perforce to go to courts in order to obtain divorce. If clause (b) was intended to embrace only cases of divorce brought about by the act of the husband, its applicability would be limited, by and large, only to Muslims, which per se appears to us to be an absurd proposition.

7. For the reasons stated I would interpret the expression "a woman who has obtained a divorce from her husband" as including a wife who has been granted a decree of dissolution of marriage by the Court. That such is the case here is admitted on all hands. In the result, therefore, the appeal is accepted, the Judgment of the High Court is set aside and the order of the learned Magistrate granting an amount of Rs. 100/- per month as maintenance to the appellant and her minor child is restored.

N.K.A. Appeal allowed.