Bombay High Court
Bhagwan Raoji Dale vs Sushma Alias Nanda Bhagwan Dale on 17 April, 1998
Equivalent citations: 1999 (5) BomCR 851, I (1999) DMC 168
Author: A Savant
Bench: A Savant, S Parkar
ORDER A.V. Savant, J.

1. Heard all the learned Counsel : Mr. S.V. Kotwal for the petitioner-husband : Miss. Smita Mane for respondent No. 1 wife and Mr. D.N. Salvi, A.P.P. for respondents No. 2 State.

2. This petition has been placed before us pursuant to the order passed by learned Chief Justice as a result of the order dated 19th April, 1995 passed by G.R. Majithia, J., since the learned Judge thought that the view taken by the Division Bench of this Court in the case of Sharadchandra Satbhai v. Indubai Satbhai, 1978 Mh.L.J. 123 required reconsideration in view of the decision of the Apex Court in the case of Bai Tahira v. Ali Hussian Fissalli Chothia, . Majithia, J., observed that the question as to whether a divorced wife has a right to claim maintenance under section 125(1) of the Code of Criminal Procedure, 1973 was important. He, therefore, directed the office to place the matter before the learned Chief Justice. Consequently, the matter has been placed before us for final hearing.

3. In the facts of the case before us the short question which arises for our consideration is whether the first respondent wife against whom the petitioner has obtained a decree for divorce is entitled to get maintenance under section 125 of the 1973 Code, The question really revolves around the interpretation of Clause (b) of the Explanation to sub-section (1) of section 125 of the Code. Section 125 reads as under :

"125. (1) If any person having sufficient means neglects or refuses to maintain

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself.

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, father or mother, 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 may from time to time direct;

Provided that the Magistrate may order the father of a minor female child referred to in Clause (b) to make such allowance, until she attains her majority if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Explanation:- For the purpose of this chapter.

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 is deemed not to have attained majority :

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

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made :

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due :

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

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

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

4. Before adverting to the question of law it is necessary to set out the facts in brief.

5. The petitioner married the first respondent at Malegaon in District Nasik on 19th December, 1974. The wife left the husband's house on or about 4th May, 1978 and never went back to the matrimonial home. The husband filed Hindu Marriage Petition No. 133 of 1978 on 12th June, 1978 in the Court of Civil Judge, Senior Division, Dhule for restitution of conjugal rights alleging that the wife had deserted him without any reasonable cause and without his consent and against his wish. The husband alleged that the wife left the house leaving a writing that she was suffering from Tuber culosis and, therefore, was leaving the house and no attempt should be made to trace her. However, the husband brought her back from the State Transport Bus Stand; called her father who took her to his house for curing her ailment. However, the wife's father informed the petitioner that the wife had no desire to go back to the matrimonial home. The husband issued notice to the wife. The wife did not respond. Hence the husband filed the petition for restitution of conjugal rights on 12th June, 1998.

6. Pending the petition for restitution of conjugal rights, the wife initiated the present proceedings for maintenance under section 125 of the Code on 6th of February, 1979 before the J.M.F.C., Malegaon being Maintenance Application No. 30 of 1979. The wife alleged in her application that the husband was ill-treating her and was making unlawful demand of some valuable articles from her and had asked her father to take her away when her father took her to his house, the husband did not make any attempt to bring her back to the matrimonial home nor did he care to provide for maintenance for her. It was alleged that the husband was having a cycle shop and was earning about Rs. 5,000/- per month and, therefore, the wife should get maintenance of Rs. 500/- per month.

7. The husband resisted the application for maintenance and denied the allegations made against him. He contended that the wife had left the matrimonial home without any valid reason and though it was decided that she will come back from her father's house within a short time, she failed to do so. The petitioner contended that he had gone on several occasions to his father-in-law's house to bring his wife back but she refused to return to the matrimonial home.

8. Pending the application for maintenance, the Hindu Marriage petition, for restitution of conjugal rights was taken up for hearing. Though the wife was served with the petition, she remained absent. Issues were framed as to whether the wife had withdrawn from the society of her husband without a valid reason and whether the husband was entitled to restitution of conjugal rights. Both the issues were answered in favour of the husband and a decree for restitution of conjugal rights was passed on 31st July, 1979. The husband filed execution proceedings on 24th January, 1980, being Regular Darkhast No. 32 of 1980 but the wife failed to comply with the decree for restitution of conjugal rights. This led to the husband's filing Hindu Marriage Petition No. 264 of 1980 on 1st August, 1980 in the Court of the Assistant Judge, Dhule. The husband relied upon the earlier decree passed in the petition for restitution of conjugal rights on 31st July, 1979, the filing of Regular Darkhast No. 32 of 1980 and the failure on the part of the wife to comply with the said decree for restitution of conjugal rights. Despite service of notice of the petition for divorce, the wife remained absent at the trial. The learned Assistant Judge by his judgment and decree dated 3rd December, 1980 decreed the petition for divorce.

9. When the husband filed his say in the present proceedings for maintenance under section 125 of the Code, he relied upon the decree passed by the Civil Court initially on 31st July, 1979 for restitution of conjugal rights and the subsequent decree passed on 3rd December 1980 granting him divorce. He therefore, contended that the respondent was not entitled to apply under section 125 of the Code. Relying upon the judgment of a learned Single Judge of this Court in Smt. Sugandhabai v. Vasant Ganpat Deobhat, , the Magistrate came to the conclusion that though there was a decree for restitution of conjugal rights and a consequent decree for divorce obtained by the husband, the wife was entitled to maintain an application under section 125 of the Code. In the result, the learned Magistrate by his judgment and order dated 3rd May, 1993 granted the application and ordered the petitioner to pay Rs. 150/- per month to the wife towards her maintenance from the date of the filing of the application viz. 6th February, 1979.

10. Being aggrieved by the said judgment and order dated 3rd May, 1993 the petitioner filed Criminal Revision Application No. 135 of 1993 in the Court of the Additional Sessions Judge at Malegaon. Contentions which were raised in the trial Court were reiterated by the petitioner in the revisional Court. The learned Additional Sessions Judge by his judgment and order dated 2nd March, 1994, came to the conclusion that the trial Magistrate was justified in placing reliance on the judgment of the learned Single Judge in Smt. Sugandhabai's case (supra) and even if there was a decree for divorce in favour of the husband on the ground of desertion by the wife, the application for maintenance by the divorced wife was maintainable and that section 125(4) of the Code would not be a bar to the maintainability of such an application. The learned Additional Sessions Judge further held that the application for maintenance was filed on 6th February, 1979 whereas the Hindu Marriage Petition No. 133 of 1978 for restitution of conjugal rights was filed on 12th July, 1978 but was decreed on 31st July, 1979 and what was important was that the Hindu Marriage Petition No. 264 of 1980 for divorce was filed on 1st August, 1980 and a decree for divorce was obtained on 3rd December, 1980. In the circumstances, the learned Judge on 2nd March, 1994, dismissed the revision application with costs. We have already indicated earlier that the wife's application for maintenance, though filed on 6th of February, 1979, was decided on 3rd May, 1993.

11. Being aggrieved by the said judgment and order dated 2nd March, 1994 passed by the Additional Sessions Judge, Malegaon on Criminal Revision Application No. 135 of 1993, the husband has filed this petition on 5th May, 1994. Rule was issued on 16th August, 1994, and was made returnable on 21st November, 1994. The matter was heard by Majithia, J., in April, 1995 and the learned Judge came to the conclusion that the view expressed by the Division Bench in Sharadchandra Satbhai's case (supra) required reconsideration. That is how the matter has been placed before us.

12. We will first refer to the decisions to which reference had been made by Majithia, J., in this referring judgment. In Sharadchandra Satbhai v. Indubai Satbhai, 1978 Mh.L.J. 123 the facts were that the spouses were married in January, 1963. They lived at Indore till April, 1969. On 14th April, 1969, wife Indubai left the matrimonial home with her two minor children without informing the husband. The husband made efforts to bring her back but the wife refused to go back to the matrimonial home. The husband filed Civil Suit No. 10 of 1971 for a decree for judicial separation on the ground of the wife's desertion. The petition was decreed ex parte on 4th August, 1973. In 1974 Indubai filed application for maintenance under section 125 of the Code. The trial Magistrate

rejected the application in view of the decree passed by the Civil Court holding that the wife had deserted the husband. Against the order refusing maintenance, the wife moved the revisional Court which allowed the application relying upon Explanation (b) to sub-section (1) of section 125 which defines the wife to include a woman who has been divorced by, or has obtained a divorced from, her husband and has not remarried. The order of the revisional Court granting maintenance to the wife was challenged by husband Sharadchandra in this Court. The Division Bench took the view that since Civil Court had determined the issue of desertion and held that the wife had deserted the husband without reasonable cause and without his consent and against his wish, she was guilty of refusing to live with her husband and, therefore, she was not entitled to maintenance under section 125 of the Code. Reliance was placed by the Division Bench on sub-section (4) of section 125 and the petition filed by the husband was allowed. This Court considered Explanation (b) to sub-section (1) of section 125 where the word "wife" has been defined to include a woman who has been divorced by, or has obtained divorce from, her husband and has not remarried but observed that this was subject to sub-section (4) of the section 125 of Code.

13. In Bai Tahira v. Ali Hussain Fissalli Chothia, the spouses were married in 1956. Bai Tahira was the second wife of Ali Hussain. He had a son by her. Ali Hussain divorced Bai Tahira around July 1962. There was dispute about a flat in Bombay where the matter was compromised providing for the flat vesting in the wife absolutely and the wife agreeing that she had no claim or right whatsoever in the other properties of the husband. The 'mehar' money of Rs. 5,000/- and the 'iddat' money of Rs. 180/- was adjusted in the said compromise terms. However the wife moved an application under section 125 of the Code for a monthly allowances for the maintenance of herself and her child. Asserting that she was a divorcee, she claimed that she was entitled to maintenance. The trial Magistrate awarded a monthly allowance of Rs. 300/- for the child and Rs. 400/- for the wife. The Sessions Judge, on a revision by the husband, took the view that under section 125, the Court had no jurisdiction to consider whether the applicant was a "wife" and dismissed her claim. The High Court summarily dismissed the wife's revision which resulted in the wife's approaching the Apex Court. The Apex Court considered the definition of the word "wife" in Clause (b) of the explanation to sub-section (1) of section 125 and held that a 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 Code. As stated earlier, the husband had divorced the wife around July 1962. In our view, therefore, Bai Tahira's case was squarely covered by the first limb or Clause (b) of the Explanation to section 125(1) viz. wife includes a woman who has been divorced by her husband. The second limb or Clause (b) deals with the wife who has obtained a divorce from her husband. Having held this, the Apex Court considered the effect of section 127(3)(b) of the Code. Section 127 deals with alteration in allowance and reads as under:

"127.(1) On proof of a change in the circumstance of any person, receiving, under section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit :

Provided that if he increases the allowance, the monthly rate of five hundred rupees in the whole shall not be exceeded.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made under section 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 -

(a) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage :

(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.

(c) 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.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a monthly allowance has been ordered to be paid under section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowance in pursuance of the said order."

14. It will be evident from Clause (a) of sub-section (3) of section 125 that it deals with the woman who has, after the date of divorce, remarried which was not the position in Bai Tahira's case. Clause (b) of sub-section (3) was pressed into service on behalf of the husband in Bai Tahira's case. Reliance was placed on the compromise terms under which the amount of the 'mehar' money and 'iddat' money was adjusted and the wife had declared that she had no claim or right whatsoever against the husband or against any of his properties. Dealing with this contention of the husband, the Apex Court observed in para 12 of the judgment at page 366 as under :

"12..... 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 section 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 be pedantic but purposeful..."

The Apex Court concluded its reasoning by observing as under at the end of para 12 on page 366 :

"..... The proposition, therefore, is that no husband can claim under section 127(3)(b) absolution from his obligation under section 125 towards a divorced wife except on proof of payment of sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance."

It was in this view of the matter that the Apex Court allowed the wife's appeal and restored the order passed by the trial Magistrate granting her maintenance at the rate of Rs. 400/- per month.

15. In the case before us, the principle question is whether the respondent can claim the benefit of the extended definition of the word "wife" appearing in Clause (b) of the Explanation to section 125(1). In Bai Tahira's case, the wife was divorced by the husband, her case was clearly covered by the first limb of Clause (b) of the Explanation. In the case before us, the husband had filed a petition for restitution of conjugal rights on 12th June, 1978. He obtained a decree on 31st July, 1979. He filed Darkhast proceedings for execution of the said decree. Having failed to obtain execution, he filed petition for divorce on 1st August, 1980 and obtained a decree on 3rd December, 1980. Admittedly, there is no appeal against any of the decree obtained by the husband. Those decrees have become final. The conclusion arrived at by the Civil Court is that the wife had withdrawn herself from the society of her husband without any reasonable cause and without the concept or wish of the husband. She had failed to comply with the decree for restitution of conjugal rights and there was no legal impediment for granting the decree for divorce.

16. A close scrutiny of the phraseology used in Clause (b) of the Explanation to section 125(1) shows that it is in two parts. The first part deals with a wife who has been divorced by her husband which, in our view would, normally, apply to parties professing the Muslim religion or whereunder a customary law applicable to some Hindus, the husband is entitled to unilaterally divorce the wife. This is because the words used are that the. "woman has been divorced by the husband". The second part deals with the case whether the wife has obtained a divorce from her husband. This contemplates the wife moving the Court for a decree for divorce and the wife obtaining a decree for divorce from her husband. Undoubtedly, in either of the two situations falling is Clause (b), the wife has not remarried. If this is the true interpretation of Clause (b) of the Explanation, then in our view, the respondent's case cannot fall under the said Clause (b). On the date when the Magistrate passed the order in the application under section 125 viz. on 3rd May, 1993, the respondent was a divorcee. But she was not falling in any of the two categories contemplated by Explanation (b) of section 125(1). In our view, therefore, the respondent cannot draw any support from the ratio of the decision of the Apex Court in Bai Tahira's case.

17. In the light of what we have stated above, we do not think that the view taken by the Division Bench of this Court in Sharadchandra Satbhai's case requires reconsideration. As stated earlier, in Sharadchandra Satbhai's case also, as in the present case, the wife left the matrimonial home. The husband filed a suit for judicial separation and obtained a decree on the ground that the wife had deserted. Relying upon this fact, the learned Magistrate had dismissed the application under section 125 for maintenance. The Revisional Court had allowed the wife's application against which the

husband had approached this Court. This Court allowed the husband's application and, in the result, dismissed the wife's application for maintenance. While arriving at its conclusion, the Division Bench in Sharadchandra Satbhai's case considered the effect of Explanation (b) to section 125(1) as also sub-section (4) of section 125. Para 8 of the judgment at page 126 may usefully be reproduced.

"8. It is, however, open to a wife who is unable to maintain herself and her husband who has sufficient means to maintain her but nevertheless neglects or refuses to do so, to make an application under section 125, Criminal Procedure Code, 1973, and seek an order for maintenance, subject to the conditions and limitations of that section. Explanation (b) of section 125(1) clarifies that even if she is a divorcee, she can claim maintenance provided she is not remarried. Sub-section (4) disentitles a wife to receive allowance in certain cases, one of them being "if without any sufficient reason, she refuses to live with her husband". This sub-section governs the whole of section 125. Now, in a case like the present one, when the Civil Court has determined the issue of desertion and held that the wife has left her husband without reasonable cause and against his wish and without his consent can it be said that she is still entitled to maintenance under section 125 and not hit by sub-section (4)? It is plain and simple that she has refused to live with her husband without any sufficient reason and, therefore, disentitled herself to receive maintenance under section 125. The effect of the decree for judicial separation on this particular ground of desertion cannot be overlooked by the Magistrate dealing with an application under section 125 because he has to bear in mind the disability created by sub-section (4) of that section. The fact that a decree for judicial separation has been passed in favour of the husband on the ground of desertion means that the wife is guilty of refusing to live with her husband. In our judgment, Indubai is not entitled to maintenance under section 125, Criminal Procedure Code, 1973, as she has no reasonable ground not to live with her husband. The approach of the learned Additional Sessions Judge overlooks the object and purpose of sub-section (I) of section 125. It is true that a divorcee is entitled to approach the Magistrate under section 125 for speedy remedy. So could a wife against whom a decree for judicial separation is passed, but a wife who has deserted her husband within the meaning of the Explanation to section 10(1) of the Hindu Marriage Act, 1955, as discussed above, is not entitled to apply under section 125 of Criminal Procedure Code, 1973".

We are in respectful agreement with the view expressed by the Division Bench in Sharadchandra Satbhai's case.

18. We now deal with some of the cases to which a brief reference is necessary. In Baburao Akaram Kalaskar v. Kusum Baburao Kalaskar, 1980 Mh.L.J 871 the spouses were married on 12th May, 1965 and lived together till August 1969 when the wife left the husband's house and went to her parents house. She lived there for about two and half years and filed a petition under section 10 of the Hindu Marriage Act alleging cruel treatment meted out to her by her husband and desertion by the husband who was alleged to have married a second wife. Pending the petition under section 10, the wife filed an application under section 125 of the Code. Pending her application under section 125 her petition under section 10 was dismissed on 28th September, 1977. The Magistrate, however, granted her maintenance in the proceedings under section 125. Revision filed by the husband was dismissed by the Sessions Court and the husband approached the High Court under section 482 of Criminal Procedure Code contending that in view of the earlier order passed in a petition under

section 10 of the Hindu Marriage Act, the application under section 125 was liable to be dismissed. The learned Single Judge S.W. Puranik, J., took the view that on the same set of facts as were alleged in the two proceedings one under the Hindu Marriage Act and the other under section 125 of the Code, there was no change of circumstance from 1969. The earlier decision of the Civil Court showed that the husband had ill-treated the wife and that he had not remarried and further that he had not driven the wife out of the matrimonial house or withdrawn himself from her society. It was implicit in this decision of the Civil Court that it was the wife who was living away from the husband without a valid cause. In this view of the matter, this Court allowed the husband's petition and dismissed the wife's application for maintenance under section 125.

19. In Smt. Shantabai Saitwal v. Jindas Baburao Saitwal, 1985(2) Crimes 901 (Bom.), the spouses were married for about 35 years and, thereafter, separated. In September 1978, the wife filed application under section 125 of the Code praying for maintenance. The trial Magistrate granted her Rs. 200/- per month as maintenance. The husband filed revision application which was dismissed on 31st July, 1979. In the meanwhile the husband had filed a petition for divorce on the ground of adultery and desertion. The petition was dismissed by the learned trial Judge on 9th December, 1978. The husband filed an appeal in the Madhya Pradesh High Court which, by its judgment and order dated 31st November, 1979, allowed the appeal and granted a decree for divorce on the ground of desertion. The husband- thereafter applied under section 127 of the Code on 18th July, 1980 praying for cancellation of the order of maintenance in view of the changed circumstances. The trial Magistrate rejected the application on 19th March, 1981. In the result, the order of maintenance stood cancelled. The wife, therefore, approached this Court in revision. Reliance was placed by the wife on Explanation (b) of section 125(1) contended that even a divorcee can claim maintenance. Relying upon the ratio of the Division Bench decision in Sharadchandra Satbhai's case (supra), the learned Single Judge D.N. Mehra, J., took the view that the fact that there was a decree for divorce obtained by the husband on the ground of desertion clearly meant that the husband had proved that the wife had left him without any reasonable cause and without his consent and against his wish and, therefore, she was not entitled for maintenance under section 125 of the Code. In the result the wife's application was dismissed.

20. In Kalidas Durgaji Shinde v. Parwatibai Kalidas Shinde, , the spouses were married for about 6 years and the wife had alleged ill treatment and cruelty on the part of the husband. The wife went and stayed with her brother. Attempts to bring about reconciliation failed. The husband thereafter filed petition for restitution of conjugal rights, as has been done in the case before us. He obtained a decree for restitution of conjugal rights. Since the decree for restitution of conjugal rights was not obeyed, the husband filed a suit for divorce and obtained a decree for divorce. In the application for maintenance under section 125 of the Code, the husband denied his liability to pay maintenance in view of the above facts. The trial Magistrate held that the wife had not proved that the husband had refused and neglected to maintain her and hence rejected her application. The Sessions Judge took the view that since the wife was a divorcee, she was entitled to claim maintenance in view of Explanation (b) to section 125(1). He therefore, awarded Rs. 50/- per month to her. The husband approached this Court in revision and the main contention was that merely because she was a divorcee, by itself, the status of a divorcee cannot invest her with a right to seek maintenance. This Court considered the decision of the Apex Court in Bai Tahira's case and the Division Bench decision

of this Court in Sharadchandra Satbhai's case, judgment. Relying upon the fact that there was a decree for restitution of conjugal rights and thereafter a decree for divorce obtained by the husband during the pendency of the proceedings under section 125 and holding that there was no refusal and neglect to maintain the wife since she had deserted the husband as held by the Civil Court, the application for maintenance of the wife was dismissed by the learned Single Judge- M.S. Deshpande, J. The argument that a divorcee would automatically be entitled to claim maintenance was rejected and it was held that Explanation (b) to section 125(1) only gives an extended meaning to the term "wife" and does not enlarge the rights of a wife if in course of time she became a divorcee. In the result, the husband's revision application was allowed.

21. It is true that in Smt. Sugandhabai v. Vasant Ganpat Deobhat, 1992(1) Mh.L.J.427: 1992 Cri.L.J. 1838, a learned Single Judge M.S. Vaidya, J., has taken the view that a decree for divorce in favour of the husband on the ground of discretion by the wife would not disentitle her from claiming maintenance under section 125 of the Code. The learned Judge was disposing of two cases by a common judgment and order. In Criminal Application No. 46 of 1989 the wife's application for maintenance was dismissed by the trial Magistrate on 3rd March, 1979 on the ground that neglect of the wife by the husband was not proved. Wife's revision was dismissed by the Sessions Court on the same ground on 4th January, 1980. The husband then filed Hindu Marriage Petition No. 25 of 1980 alleging desertion by wife. The petition was decreed on 30th September, 1982 and divorce was granted to the husband. No application for maintenance or permanent alimony was preferred by the wife had, hence, there was no occasion for making an order under section 25 of the Hindu Marriage Act, 1955. Though the wife had failed earlier in her application under section 125 in both the courts, she filed a fresh application in the year 1982 after the husband had obtained a decree for divorce and claimed maintenance on the ground that she was a divorcee but was unable to maintain herself. The trial Magistrate dismissed the application on 18th October, 1985 on the ground of res judicata. Revision was also dismissed by the Sessions Court on 25th January, 1988. The wife approached this Court. In the second case decided by M.S. Vaidya, J., being Criminal Application No. 585 of 1991, the marriage had taken place on 17th March, 1979. Child was born on 6th March, 1980. The wife had filed the petition for restitution of conjugal rights on 3rd January, 1983 and obtained a decree on 29th April, 1983. Thereafter she applied under section 125 of the Code on 23rd November, 1983. The application was granted only so far as the child was concerned but the wife's claim was rejected on the ground that she had deserted the husband. The husband thereafter preferred Hindu Marriage Petition No. 334 of 1987 for divorce. The same was decreed on 1st December, 1988 and divorce was granted to him on ground of desertion. The wife's appeal to the District Court was dismissed on 30th July, 1990. The wife had also, in the meanwhile, filed a revision against the dismissal of her claim of maintenance. That revision also was dismissed on 19th January, 1989. The wife, therefore, approached this Court in revision. The learned Single Judge considered the view of the Division Bench in Sharadchandra Satbhai's case as also the view expressed by D.N. Mehta, J., in Shantibai Saitwal's case but came to the conclusion that the ratio of the Division Bench decision was inapplicable to the facts of the case before him and further that D.N. Mehta, J., had misapplied the ratio of the Division Bench decision in Sharadchandra Satbhai's case. Vaidya, J., referred to the decision of the Gujarat High Court in Patel Dharamshi Premji v. Bai Sakar Kanji, A.I.R. 1986 Guj. 150 where it was held that under section 25 of the Hindu Marriage Act, 1955 permanent alimony can be granted even to an erring wife and the mere fact that the wife did not comply with the decree for

restitution of conjugal rights and that was the cause for passing the decree against her, cannot by itself, disentitle her to claim permanent alimony under section 25 of the Hindu Marriage Act. Relying upon some other decisions with which we do not think it necessary to burden this judgment, Vaidya, J., came to the conclusion that the ratio of the Division Bench decision in Sharadchandra Satbhai's case was not applicable to the two cases before him. In para 14 of the judgment in Sugandhabai's case at page 1844 a reference is made to the decision of the Apex Court in Bai Tahira's case. The learned Single Judge set aside the orders passed by two courts below which were against the wife and remanded the matter back to the Magistrate with a direction to allow the parties to adduce evidence. With respect, we find it difficult to agree with the view expressed by Vaidya, J., in Smt. Sugandhabai's case in view of our discussion in paras 14 to 17 above and in particular the reasons mentioned in paras 15 and 16. We are in agreement with the view expressed by the Division Bench in Sharadchandra Satbhai's case (see para 12 and 17 above). We are also in agreement with the view expressed by the learned Single Judge in the three cases discussed above (i) Baburao Kalaskar's case, decided by Puranik J. (para 18 above), (ii) Smt. Shantabai Saitwal's case decided by Mehta, J., (para 19 above) and (iii) Kalidas Shinde's case decided by Deshpande, J., (para 20 above).

22. At this juncture we think it necessary to make a reference to some of the Apex Court decisions which have a bearing on the issue. As far back as in 1981 the Apex Court had an occasion to consider the scheme of the provisions of section 125(1) with particular reference to the extended definition of the word "wife" appearing in Explanation (b) to section 125(1) of the Code in Mst. Zohara Khatoon v. Mohd. Ibrahim, . The wife, Zohara Khatoon made an application under section 125 of the Code on 17th September, 1974 praying for maintenance for herself and her minor son. The trial Magistrate by his order dated 29th December, 1976 granted Rs. 100/-per month for both. The Magistrate accepted the wife's case that the husband had neglected to maintain her. The order of the Magistrate was confirmed by the Sessions Judge in revision. The husband had pleaded in the trial Court that the wife had sued for dissolution of marriage on the ground of cruelty and wilful neglect under the Dissolution of Muslim Marriage Act, 1939 and the suit was decreed by the Civil Court on 15th January, 1973. Since the wife was living separately she had ceased to be the wife and was not entitled to maintenance. Since husband had failed in both the courts he moved the High Court under section 482 of the Code. The wife had contended in the High Court that in view of Explanation (b) to section 125(i), she continued to be the wife despite obtaining a decree for dissolution of marriage. The High Court came to the conclusion that Explanation (b) would apply only if the divorce proceeded from the husband i.e. to say that the said Clause would not apply unless the divorce was given unilaterally by the husband or obtained by the wife from the husband. The High Court, therefore, rejected the application of the wife while maintaining the order in favour of the minor son. The wife approached the Apex Court. The Apex Court discussed the old provisions contained in section 488 of the 1898 Code and the change brought about in the 1973 Code. It discussed its earlier judgment in Nanak Chand v, Chandra Kishore Agarwal, where the view expressed by the Allahabad, Calcutta and Patna High Court was considered. A reference was made to some more decisions of the Madras, Hyderabad, Allahabad High Court and also of this Court. In (re Shekhanmain), A.I.R. 1930 Bom. 178. In para 17 onwards at page 517, the Apex Court considered the two categories falling under Explanation (b) to section 125(1) viz. (i) a woman who has been divorced by her husband and (ii) a woman who has obtained a divorce from her husband, in either

case, her not having remarried. While referring to the fact that the first category viz. a woman who has been divorced by her husband, would normally apply to a case where a divorce is given unilaterally by her husband which is peculiar to Mohammedan law, the learned Judge-Fazal Ali, J., expressed the view that the High Court was in error in not appreciating the fact that the wife had obtained a divorce on the ground of cruelty under the Dissolution of Muslim Marriages Act, 1939 and, therefore, her case was clearly covered by the second category in Explanation (b) viz. a woman who has obtained divorce from her husband. If that was so, she was clearly entitled to the grant of maintenance and the High Court was in clear error in not appreciating the distinction between the two categories of woman included in the definition of wife under Explanation (b) to section 125(1).

23. The Apex Court, in Mst Zohara Khatoon's case, then made a reference to the distinction between Clauses (b) and (c) of sub-section (3) of section 127 of the Code in arriving at its conclusion as above. Clause (b) of sub-section (3) of section 127 would apply where the divorced wife falls in the first category of Explanation (b) to section 125(1) viz. a woman who has been divorced by her husband. On the other hand Clause (c) of sub-section (3) of section 127 would apply to a woman who falls in the second category of Explanation (b) to section 125(1) viz. a woman who has obtained a divorce from her husband. These observations are to be found in para 28 of the judgment at page 521-522. In Zohara Khatoon's case the appellant-wife had obtained a decree for dissolution of marriage under the Dissolution of Muslim Marriages Act, 1939. The Apex Court came to the conclusion that she was entitled to make an application for maintenance and, therefore, her appeal was allowed and the order of the High Court was set aside.

24. In his concurring judgment A.D. Koshal, J., referred to the dictionary meaning of the word "obtained" appearing in the second part of Explanation (b) to section 125(1). The learned Judge held that the expression "a woman who has "obtained" a divorce from her husband" would include a wife who has been granted a decree for dissolution of marriage by the Court since that was the admitted fact in Zohara Khatoon's case, in as much as, she had filed a suit for dissolution of marriage on the ground of cruelty under the Dissolution of Muslim Marriages Act, 1939. It was, therefore, held that she was entitled to claim maintenance under section 125 of the Code. Observations to this effect are to be found in paras 36 to 39 of the judgment at pages 524-525.

25. We are bound by the observations of the Apex Court and it is clear to us that the respondent is not a woman falling in either of the two categories contemplated in Explanation (b) to section (1). Admittedly, the parties before us are governed by Hindu Law. Assuming that under some customary law, a Hindu could unilaterally divorce his wife, no such facts exist before us. The first part of explanation (b) viz. wife includes a woman who has been divorced by her husband is, therefore, wholly inapplicable to the first respondent. The second part viz. wife includes a woman who has obtained a divorce from her husband is equally inapplicable since, unlike Zohara Khotoon's case, it is not the respondent-wife who had moved the Matrimonial Court of Divorce; it was the petitioner-husband who initially filed a petition for restitution of conjugal rights; obtained a decree; tried to obtain execution thereof and having failed to do so, filed a suit for divorce and obtained a decree for divorce on 3rd December, 1980. The petition for maintenance was allowed as late as on 3rd May, 1993 by the trial Magistrate. We must hasten to add that in Bai Tahira's case (supra) the Apex Court was dealing with a case where the respondent-husband had unilaterally divorced the

wife apparently because the parties were governed by Muslim Law. This is clear from the set out in para 2 of the judgment in Bai Tahira's case at page 363 of A.I.R. 1979 S.C. None of the said situations exists before us and hence we find it difficult to apply the ratio of the decision of the Apex Court either in Bai Tahira's case, or in Zohara Khatoon's case, to the facts of this case. We are dealing with a case where, admittedly, the husband approached the Court on 12th June, 1978 for restitution of conjugal rights alleging desertion by the wife without reasonable cause and without his consent and against his wish. It was pending such a petition for restitution of conjugal rights that the wife thought it fit to apply for maintenance on 6th February, 1979 under section 125 of the Code. The petition for restitution of conjugal rights was decreed on 31st July, 1979. No appeal was filed against the said decree. Regular Darkhast No. 32 of 1980 was filed by the husband on 24th January 1980. Having failed to obtain execution, the husband filed Hindu Marriage Petition No. 264 of 1980 on 1st August 1980 and obtained a decree for divorce on 3rd December, 1980. No appeal was filed against the decree either. All these facts and the documents in support thereof were placed before the learned Magistrate who has decided the application for maintenance as late as on 3rd May, 1993 and has granted the same. In our view, reliance placed by the trial Judge as also by the learned Additional Sessions Judge on the decision of Vaidya, J., in Sugandhabai v. Vasant Deobhat, 1992(1) Mah.L.J. 427 : 1992 Cri.L.J. 1838 was wholly erroneous.

26. Apart from the legal position emerging from the decisions referred to above, it appears to us that, in the facts and circumstances proved in this case and particularly in the light of the decree for restitution of conjugal right, the wife was not entitled to obtain maintenance even when the marriage was subsisting. In this behalf sub-section (4) of section 125 needs to be considered. If the respondent-wife had refused to live with her husband without any sufficient reason, she would not have been entitled to receive any allowance from her husband under section 125 of Code. Sub-section (4) of section 125 clearly states that no wife shall be entitled to receive an allowance from her husband under section 125 if (i) she is living in adultery or (ii) without any sufficient reason she refuses to live with her husband or (in) they are living separately by mutual consent. The fact that the husband obtained a decree for restitution of conjugal rights on 31st July, 1979 in a petition filed by him on 12th June, 1978 would, in our view, clearly disentitle the wife from receiving maintenance in view of the mandate of sub-section (4) of section 125. It is true that Explanation (b) to section 125(1) states that for the purpose of Chapter IX the wife includes a woman who has been divorced by, or has obtained a divorce from her husband has not remarried. However, the Apex Court has set at rest the controversy as to whether the express "wife" in sub- section (4) of section 125 can have the extended meaning of including a woman who has been divorced. If the relationship of husband and wife has come to an end as a result of the decree for divorce, there can be no question of a divorced woman living in adultery or without sufficient reason refusing to live with her husband. After divorce there is no occasion for a woman to live with her husband. There would be no question of husband and wife living separately by mutual consent because after divorce there is no need or consent to live separately. This has been clearly stated by the Apex Court in Vanmala v. H.M. Rangnath Bhatta, . We have come to the conclusion that on the date on which the learned Magistrate passed the order dated 3rd May, 1993, the respondent-wife was not entitled to obtain maintenance since she did not fall in any of the two categories contemplated by Explanation (b) to section 125(1) of the Code. In this view of the matter, it is not even necessary for us to consider the effect of provisions of sub-section (4) of section 125 in the facts of the case before us.

27. It appears to us further that if the wife is at fault and if the husband succeeds in obtaining a decree for restitution of conjugal rights, as long as the marriage subsists, the wife would not be entitled to claim maintenance in view of sub-section (4) of section 125. Would it, then be permissible to saddle the husband with maintenance of such a wife has been divorced pursuant to a decree passed by a Competent Court as a result of the failure on the part of the wife to obey the decree for restitution of conjugal rights. In our view the answer must be in the negative. Granting maintenance to such a wife would be tantamount to permitting a person to take advantages of one's own wrong. Finding of the Civil Courts in the two matrimonial petitions, one for restitution of conjugal rights and other for divorce is that the wife was in the wrong. That finding has not been challenged in a Superior Court. The two decrees are final. We must, therefore, proceed on the footing that the wife was in the wrong. If our view, therefore she is not entitled to maintain an application by taking advantages of the extended meaning in Explanation (b) to section 125(1) of the Code.

28. There is yet another facet of the matter which needs a mention. Under sub-section (2) of section 127 where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly. Shri Kotwal the learned Counsel for the husband rightly contended that in the face of the two decrees passed by the Civil Court, even if there were an earlier order granting maintenance to the wife, on the husband's obtaining a decree for divorce on the basis of a finding that the wife was in the wrong, the Magistrate would be obliged to cancel the order of maintenance.

29. The view that we are taking may be against the wife but it is not as if the wife is without any remedy. Section 25 of the Hindu Marriage Act, 1955 empowers the Court exercising jurisdiction under the Hindu Marriage Act, at the time of passing of the decree or at any time subsequent thereto, to direct the spouse that he shall pay maintenance to the applicant under section 25 of said Act. In the present case, at the time of passing of the decree for divorce on 3rd December, 1980, the respondent-wife made no such application. Assuming that in a given set of facts, unlike the present case, the divorced wife is entitled to obtain maintenance, nothing prevents her from invoking the jurisdiction of the competent Civil Court under section 25 of the Hindu Marriage Act, 1955.

30. Shri Kotwal went to the extent of contending that under section 18(1) of the Hindu Adoption and Maintenance Act, 1956 also, a divorced wife may be entitled to claim maintenance subject to the conditions mentioned under sub-sections (2) and (3) of the said section. It is not necessary for us to decide this question and hence we express no opinion on the question as to whether under section 18(1) of the Hindu Adoption and Maintenance Act, 1956, the word "wife" includes a divorcee.

31. In the light of the above discussion, we may sum up our conclusion as under. It is not every divorced wife who can claim maintenance under section 125(1) of the Code. A woman who has been divorced by her husband is included in the first part of Explanation (b) to section 125(1). She can claim maintenance under section 125(1). In this category would normally, fall the case of a Muslim woman who has been unilaterally divorced by her husband in accordance with Muslim Personal Law. This category may also include a woman who, under the customary law applicable to some Hindus, has been unilaterally divorced by her husband. The second category falling under

Explanation (b) of section 125(1), who can claim maintenance under the said section, consists of a woman who has obtained divorce from her husband, meaning thereby that the wife has initiated proceedings for obtaining divorce from the husband, as indicated in para 24 above. In this view of the matter, we are of the opinion that the Division Bench decision of this Court in Shardchandra Satbhai v. Indubai Satbai, 1978 Mh.L.J. 123, does not require reconsideration and we are in agreement with the ratio of the said decision. We also approve of the decision rendered by three learned Single Judges of this Court in the three cases discussed above (i) Baburao Kalaskar case, decided by Puranik, J., (para 18 above), (ii) Smt. Shantabai Saitwal's case, decided by Mehta, J., (para 19 above) and (iii) Kalidas Shinde's case, decided by Deshpande, J., (para 20 above). We are unable to persuade ourselves to agree with the view expressed by Vaidya, J., in Smt. Sugandhabai v. Vasant Deobhat, 1992 Cri.L.J. 1838. For the reason discussed above, we are not in agreement with the view expressed by Vaidya, J., in the said case.

32. In the view that we have taken, the question referred for our decision must be answered against the respondent-wife. In our view, in the facts and circumstances of the case, where the husband had obtained a decree for restitution of conjugal rights and the wife had failed to comply with the said decree resulting in the husband obtaining a decree for divorce, the respondent-wife does not fall in any of the two categories contemplated by Explanation (b) to section 125(1) of the Code. In the circumstances, the application for maintenance made by the wife was liable to be rejected as not maintainable. Since we have come to the conclusion that the application of the respondent-wife was not maintainable in law, it is not necessary for us to refer the case back to a learned Single Judge since nothing remains to be decided on merits of the matter.

33. In the circumstances, rule is made absolute in terms of prayer (b). The orders passed by the two courts granting maintenance to the wife are hereby quashed and set aside.

34. Before we part, we must record our sincere appreciation of the able assistance rendered to us by all the learned Counsel who appeared before us.

S.S. Parkar, J.

35. I have heard the judgment delivered by my learned brother Savant, J., which just concluded. Though I am in agreement with the reasoning as well as the conclusion arrived at therein, I would like to add few words of my own with a view to emphasize certain aspects of the provision. In my view the controversy regarding applicability of sub-section (4) of section 125 of Criminal Procedure Code was raised in the matter due to the wrong assumption that every divorce woman including the one against whom a decree of divorce has been obtained by her husband is entitled to claim maintenance under section 125(1) of the Code by virtue of Explanation (b) thereto. The question whether defence under sub-section (4) is available or not, which is the subject of the controversy, arises only after it is held that application for maintenance under section 125(1) of the Code is maintainable.

36. The question which is referred to is "whether a divorcee wife has a right to claim maintenance under section 125(1) of the Code ?" That some divorcee women are entitled to claim maintenance

under section 125(1) is beyond doubt. In my opinion each and every divorced wife is not entitled to claim maintenance under the said provision. The real question which arises in the facts of this case is whether a woman against whom a decree of divorce has been obtained by her husband, from the Competent Court, is entitled to claim maintenance under section 125(1) of the Code.

37. In order to find an answer to this question as reframed by me, one has to see Explanation (b) to section 125(1) of the Code of Criminal Procedure which reads as under: -,-

"Explanation---For the purpose of this Chapter,"

(b) "Wife" includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried."

Explanation (b) can be divided into two parts: (i) a woman who has been divorced by her husband and (ii) a woman who has obtained a divorce from her husband, both subject to the condition that they not remarried. The legislature has very cautiously and guardedly used different phraseology to describe two types of divorcee women to be included in the definition of wife". One who has been divorced by her husband meaning woman who has been divorced unilaterally by her husband as under Muslim Personal Law or under Customary Law which may be prevalent among some section of Hindus. In the second part of the explanation the wording used is "or who has obtained a divorce from her husband", meaning woman who has obtained a decree of divorce from a Competent Court of law by proving the ground which entitles her to obtain divorce against the husband for some fault on the part of her husband. If it is the husband who was in the wrong because of which the wife had obtained "divorce from a Court of law, there can be no manner of doubt that, such a wife is entitled to claim maintenance. The question is then whether a woman, who has been divorced by a decree of divorce passed by a Court of taw at the instance of her husband, is entitled to claim maintenance under section 125 of the Code of Criminal Procedure. Her case surely would not fall under the second limb of Explanation (b) as it is not she who has obtained a divorce from her husband but it is the husband who is stated to have obtained divorce against her from a Court of law.

38. The next thing which we have to consider is whether the case of such a wife or woman can fall in the first limb of Explanation (b). Here also the answer should be in negative for the simple reason that the wording used by the legislature is not a woman against whom a decree of divorce was obtained by her husband but the woman who has been divorced by her husband. If the legislature had wanted to include a woman against whom a decree of divorce is obtained by her husband, the legislature would have used the appropriate phraseology to cover such woman as done in the second limb of the explanation to cover the case of a woman who herself obtains divorce from her husband. The fact that different phraseology has been used for the first limb of Explanation (b) would mean that the legislature never intended to include woman against whom decree of divorce was obtained by her husband from a Court of law by proving some fault on the part of the wife. The words used by the legislature in the said explanation would not justify different interpretation. On the contrary, the words are very clear which do not include a woman whose marriage has been dissolved by decree of divorce at the instance of her husband. If the interpretation which was placed by some of the courts is accepted so as to include woman against whom divorce was obtained by her husband from a Court

of law, it would certainly lead to a very anomalous situation. If such a woman against whom decree of divorce was obtained by the husband is included in the extended definition of wife under section 125(1) of the Code of Criminal Procedure it would mean that the woman who was wrong doer or was guilty of desertion or cruelty against her husband would be entitled to claim maintenance after a decree of divorce is passed against her, though undisputedly, she would not be entitled for maintenance before such divorce was granted by virtue of sub-section (4) of section 125 of the Code of Criminal Procedure. To hold that a woman against whom a decree of divorce was obtained by the husband is entitled for maintenance, would go not only against the express words of Explanation (b) to section 125(1) of the Code of Criminal Procedure but also would create an anomalous situation as pointed out above. Happily the legislature itself has taken care to see that such incongruous position does not arise by using appropriate phraseology.

39. Mr. Kotwal's argument, however, was slightly different. He also assumed that such divorcee woman was covered by the explanation but strongly contended that defence under sub-section (4) of section 125 must be available to him otherwise it would lead to anomalous situation. The said argument, in my view is not available as Supreme Court in Vanmala's case, has clearly held that expression wife in sub-section (4) does not include a divorced woman, and therefore, defence under sub-section (4) is not available to a husband in an application for maintenance made by a divorced woman.

40. Though wording used in the explanation is 'includes', it does not in my view, make the expression wife inclusive in the explanation. The additional categories of women sought to be covered by the explanation are, in my view exhaustive, in the context. The word includes has been used here to mean extends to the categories mentioned in the explanation. Even if it is assumed that the categories of divorcee women mentioned in the explanation are inclusive then also the explanation cannot be held to cover a woman against whom a decree of divorce has been obtained by her husband for the aforesaid incongruous situation it may lead to. The legislature cannot be deemed to have intended to enact a law which may lead to an anomaly as indicated above.

41. This view finds support, though indirectly from the judgment of the Supreme Court in the case of Mst. Zohara Khatoon v. Mohd. Ibrahim, . I mst hasten to add that case pertained to a Muslim wife and the question which we are considering in this petition was neither raised nor decided in that matter viz., whether a woman against whom a decree of divorce has been obtained by the husband is entitled to claim maintenance under section 125 of the Code of Criminal Procedure. However, the observations of the Supreme Court with regard to the distinction made between two categories of dissolution of marriages in Explanation (b) to section 125 of the Code would be of some assistance in interpreting the said explanation. In para 27 of the said judgment, it has been observed by the Supreme Court as follows:

"Thus, a clear distinction has been made between dissolution of marriage brought 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." (Dissolution of Muslim Marriages Act, 1939).

The said distinction has been further elaborated in para 28 of the said judgment when it was observed by the Supreme Court, "thus, the two limbs of Clause (b) of the explanation to section 125(1) have separate and different legal incidents."

42. Similarly in para 38 of the judgment, Justice Koshal in his concurring judgment observed as follows:

".....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 taw by customs). Members of the others 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."

Thus according to Supreme Court first limb of explanation (b) would cover cases of only unilateral divorce by husband under Muslim law and customary divorce recognised by Hindu law.

43. Present reference was made in view of the controversy which was raised in several judgments with regard to the applicability of sub-section (4) of section 125 of the Code in the case of a woman against whom the husband had obtained a decree of divorce, on the assumption that she was entitled to claim maintenance under section 125(1) of the Code of Criminal Procedure. In some judgments delivered by the Single Judge this Court has taken the view that defence available under sub-section (4) of section 125 to husband would not be available in case of a divorcee wife. Such view has been taken in the cases like Sushila Namdeo v. Namdeo Bahenkar, 1991 Mh.L.J. 536 and followed in Smt. Sugandhabai v. Vasant Ganpat Deobhat, 1992(1) Mh.L.J. 427 : 1992 Cri.L.J. 1838. The contrary view, that the defence under sub-section (4) of section 125 of the Code of Criminal Procedure would be available to the husband even when his divorcee wife applies for maintenance has been taken by the Single Judges in some cases like Smt. Shantabai Saitwal v. Jindas Baburaa Saitwal, reported in 1985(2) Crimes 901 and in Kalidas v. Parvatibai, . In all the above four cases where the divergent views have been taken, undisputed position in that the wife against whom the husband had obtained decree of divorce had claimed maintenance under section 125(1) of the Code. While in the first set of cases of Sushila Namdeo and Sugandhabai, the defence under section 125(4) that the wife was living separately without any sufficient reason has been held not be available to the husband, assuming that such a wife was covered by the explanation, in the second set of cases of Shantibai v. Saitwal and Kalidas v. Parvatibai, learned Single Judges had taken in view that such a defence would be available to her husband when his divorcee wife applies for maintenance assuming again that such a wife was covered by the explanation. As I said earlier, the controversy was raised on a wrong assumption in all the four cases and other cases of similar type that such divorced woman was covered by the explanation (b) to section 125(1) of the Code which assumption, according to me is not warranted by the explanation and, therefore, the controversy raised in that behalf was futile.

44. In the recent judgment of the Supreme Court in the case of Vanmala (Smt) v. H. M. Rangnath Bhatta, , the Supreme Court has held that defence under sub-section (4) of section 125 is not

available to the husband when his divorcee wife claims maintenance. While interpreting sub-section (4) of section 125 of the Code of Criminal Procedure, in para 3 of the judgment, the Supreme Court has observed as follows:

"On a plain reading of this section it seems fairly clear that the expression wife in the said sub-section (4) does not have the extended meaning of including a woman who has been divorced. This is for the obvious reason that unless there is a relationship of husband and wife there can be no question of a divorcee woman living in adultery or without sufficient reason refusing to live with her husband. After divorce where is the occasion for the woman to live with her husband ? Similarly there would be no question of the husband and wife living separately by mutual consent because after divorce there is no need for consent 16 live separately. In the context, therefore, sub-section (4) of section 125 does not apply to the case of a woman who has been divorced or who has obtained a decree of divorce. In our view, therefore, this contention is not well founded."

45. In para 4 of the aforesaid judgment, the Supreme Court has referred to the decisions of various High Courts taking similar view. None of those cases pertain to a woman against whom a decree of divorce had been obtained by her husband and, therefore, the view taken by us does not go contrary to the decision and the observations of the Supreme Court in the above decision. Even the judgment of the Supreme Court in the case of Gurmit Kaur v. Surjit Singh @ Jeet Singh, reported in 1996(1) S.C.C. 390 deals with a woman who was divorced by virtue of agreement by mutual consent between the parties and takes precisely the same view with regard to the non-application of sub-section (4) of section 125 in the case of divorced wife as in the case of Vanmala v. Ranganath Bhatta (supra).

46. The aforesaid observations make it clear that defence under sub-section (4) of section 125 of the Code would not be available to the husband even if otherwise his divorced wife is entitled to claim maintenance under the extended meaning of the expression "wife".

47. Although the opening words of the explanation purport to extend the expression "wife" to the divorcee woman, not only for the purpose of section 125(1) but "for the purpose of i.e. entire "chapter", the same has to be extended provided the context otherwise justifies and, therefore, the explanation has to be read mutatis mutandis or if the context permits and that is what has been precisely done by the Supreme Court in Vanmala's and Gurmit Kaur's case (supra). To read the expression "wife" to cover a divorcee woman for the purpose of sub-section (4) of section 125, would be to create an inconsistency which cannot be reconciled.

48. The view taken in the case of Shantabai v. Saitwal, 1985(2) Crimes 901 and another case of Kalidas s/ o Durgaji Shinde v. Parwatibai w/ o Kalidas Shinde, is mainly based on the decision of the Division Bench of this Court in the case of Sharadchandra Satbhai v. Indubai Satbhai, Mh.L.J. 123 : 1 M.C. 341. The view taken in Sharadchandra's case by the Division Bench cannot be said to be a wrong view because that was not the case of a divorcee woman but the maintenance was claimed by a woman who was still under the lawful wedlock against whom only a decree for judicial separation was obtained by her husband. The view which we have taken here does not in any way contradict the view taken in Sharadchandra's case. The learned Single Judges were, therefore, not justified in applying the ratio of Sharadchandra's case in cases of divorcee women as former case pertained to

the wife who was yet to be divorced. In that view of the matter decision of the Division Bench of this Court in Sharadchandra's case would not require reconsideration as stated in the terms of reference of this case. If the Division Bench in Sharadchandra's case can be said to have held that defence under sub-section (4) of section 125 is applicable in an application for maintenance by a divorced woman the same is obiter and can no longer be a good law in view of the decision of the Supreme Court in Vanmala's case.

49. Reliance placed on the decision of the Supreme Court in Bai Tahira v. Ali Hussanin Fissalli Chothiaa, was also not justified. The ratio of that case is not that each and every woman whether divorced by the husband either by his unilateral act or even after having obtained divorce by the husband from a Court of law would be entitled to claim maintenance. That was a case where the wife was divorced by her husband by his unilateral act, the parties being Muslim and such wife is undoubtedly covered by the first limb of explanation (b) of section 125(1). Reliance on the said decision for the view canvassed in the reference, was therefore, not justified.

50. For the aforesaid reasons I have no manner of doubt that the woman against whom the husband has obtained a decree of divorce is not a wife within the meaning of section 125(1) and, therefore, is not entitled to claim maintenance.

51. This is also clear from the statement of objects of the Joint Committee of Parliament for the introduction of explanation in the new Code whereby departure has been made from the provisions in the old Code by extending the right to claim maintenance to divorced woman. In para 3 of the judgment of the Division Bench in the case of Sharadchandra v. Indubai reported in 1978 Mh.L.J. 123 : 1 Matrimonial Cases 341, the statement of objects for the introduction of explanation to section 125(1) of the Code has been quoted from the minutes of the Joint Committee of Parliament which reads as follows:

"To protect a wife from unscrupulous husband from compelling the Magistrate to dismiss the petition for maintenance from obtaining divorce during pendency of her petition under section 125, Criminal Procedure Code. A divorce can be made easy under the personal law applicable to some of the communities in India. This causes several hardships to poor section of the community who become helpless."

52. The said statement of objects makes clear as to which divorcee women were intended to be covered by the expression "wife" for the purpose of claiming maintenance under section 125(1) of Criminal Procedure Code. The whole emphasis is in respect of wife who is divorced by her unscrupulous husband and a woman under whose personal law divorce is easy which would mean unilateral divorce or divorce under customary law, which may be resorted to by unscrupulous husbands, in order to defeat the right of wife for maintenance, and also woman who had obtained divorce from the Court of law against her husband, obviously not for her own wrong but for the wrong committed by her husband. The said statement of objects does not contemplate the case of a woman against whom the decree of divorce was obtained by her husband. In fact, when the words of the section are clear, there is no need to take aid of the statement of objects. However, I have made reference to it only with a view to emphasize the interpretation which we have placed on the

explanation and in support of our view that such woman was not intended to be included within the extended meaning of the expression "wife".

53. Since in this case petitioner-husband had obtained decree of divorce against respondent wife, the latter is not entitled to claim maintenance, from and after the date of divorce. Hence this writ petition must succeed.

54. Petition allowed.