Bombay High Court
Smt. Yamunabai Anantrao Adhav vs Anantrao Shivram Adhav And ... on 22 April, 1982
Equivalent citations: (1982) 84 BOMLR 298
Author: Rege
Bench: B Gadgil, D Rege, M Chandurkar
JUDGMENT Rege, J.

1. This Criminal Revision Application has come up before this Full Bench on a Reference by the Division Bench (Dharmadhikari and Puranik, JJ.) since on the question involved in this application, it disagreed with the view taken by this Court in its decision by earlier Division Bench (Shah and Kanade, JJ.) in the case of Bajirao v. Tolanbai (1979 Mah LJ 693) : (1980 Cri LJ 473) and thought the same required reconsideration.

2. The question involved, shortly, was :- Whether a Hindu woman, whose marriage was null and void under section 11 of the Hindu Marriage Act, 1955, by reason of contravention of Section 5(i) of the said Act, viz. the person with whom she had undergone a marriage had a wife living at the time of the said marriage, was entitled to claim maintenance under section 125 of Code of Criminal Procedure from such a person on the basis that she was his wife.

3. Few basic facts, not in dispute are :- The marriage of the petitioner - Yamunabai - with the respondent No. 1 was performed on 16-6-1974 after undergoing necessary rites under the Hindu law, which was the personal law of the parties. The said marriage was also registered as required under the Hindu Marriage Act, 1955. However, at the time when the said marriage was performed, respondent's first wife Lilabai was alive and the said marriage between them was subsisting. The petitioner stayed with the respondent No. 1 for a week and thereafter stayed at 1st respondent's house at his village with his first wife Lilabai and her mother. She alleged ill-treatment and left the respondent's house. She then made an application to the Magistrate under section 125 of the Code of Criminal Procedure (hereinafter for the sake of brevity referred to as 'the Code') for maintenance being application No. 157 of 1976. The Magistrate dismissed the said application on the ground that she was not a wife of the respondent as her marriage with the respondent was null and void under section 11 read with Section 5(i) of the Hindu Marriage Act. A revision application to the Sessions Court against the said order of the Metropolitan Magistrate was also dismissed by the learned Additional Sessions Judge relying on the aforementioned decision of this Court in Bajirao's case (1980 Cri LJ 437). Against the said order of the Additional Sessions Judge, the present Revision Application has been filed.

4. Initially this application came before Padhye, J. who in view of the said decision in Bajirao's case referred it to the Division Bench. The Division Bench (Dharmadhikari and Puranik JJ.), by its referring order has referred the matter to this Full Bench as it disagreed with the view taken by this Court earlier in Bajirao's case (1980 Cri LJ 473).

5. As mentioned above, a Division Bench of this Court in its decision in the case of Bajirao v. Tolanbai, (1979 Mah LJ 693) : (1980 Cri LJ 473) on almost similar facts had taken the view that in such circumstances a Hindu woman was not a legally wedded wife, as her marriage with the

respondent was null and void and therefore, cannot claim maintenance under section 125 of the Cr.P. Code on the basis that she was a 'wife'.

6. The reference order shows that the said Division Bench disagreed with the above view earlier taken by the Court in Bajirao's case (1980 Cri LJ 473) because of the object of the Section 125 of the Code, as mentioned by the Supreme Court in its decision in the case of Bhagwan Dutt v. Kamala Devi and in the case of Bai Tahira v. Ali Hussain F. Chothia and certain observations of the Supreme Court in the case of Zohra Khatoon v. Md. Ibrahim to the effect that.

"While enacting Section 125 of Code there was distinct departure from the old Code and the present Code had widened the definition of the term 'wife' and to some extent overruled the present law of the parties so far as proceedings for maintenance under section 125 of the Code were concerned."

The said Division Bench, therefore, appears to have felt that the term 'wife' as appearing in Section 125 of the Code should be broadly construed and not merely restricted to a 'legally wedded wife' and for purpose of claiming maintenance, it should be treated as sufficient if she proves that her marriage was solemnised after following the ceremonies prescribed under the personal law and she has been treated as a wife by the person from whom maintenance was claimed and they were living as husband and wife and were being treated by the public as such.

7. The basic question before us, therefore, is whether the term 'wife' used in Section 125 of the Code was to mean only a legally wedded wife, as held by this Court earlier in Bajirao's case or whether it was to be given an extended meaning, as suggested in the Referring Order ?

8. In fact, the only contention of the learned Counsel for the petitioner before us was that looking to the object of Section 125 of the Code, which was to prevent vagrancy, the term 'wife' in Section 125 of the Code should be given a wider or extended meaning so as to include therein not only a 'de jure' or legally wedded wife, but also a 'de facto' wife such as in this case where all the marriage rites prescribed under Hindu Law, by which the parties were governed, were performed, the marriage was registered and the parties had lived as husband and wife, though for one week only after the marriage. The very same contention which was also raised before the Division Bench in Bajirao's case (1980 Cri LJ 473) was negatived by the court.

9. Before dealing with the said contention, the position in law, as arising under Section 125 of the Code and certain provisions of Hindu Marriage Act, which was the personal law governing the parties in this case, be stated :

10. Section 125 of the Code, 1973, in relation to which the present question arises, empowers the Magistrates in certain circumstances stated therein to order maintenance, not exceeding Rs. 500/- p.m., to wives, legitimate or illegitimate children or parents, who are unable to maintain themselves. The said provisions of Section 125 are couched in the same language as Section 488 of the old Code of 1898 with a difference of substance only in two matters. They are :-

(1) Section 125, apart from making provision for wives and children, created a new category of persons viz. parents as being entitled to maintenance under the Code, which was not there under section 488 of the old Code, and;

(2) Under explanation Clause (b) to Section 125(1) 'a divorced woman' on certain conditions was specifically included in the term 'wife' while under Sec. 488 of the old Code a 'divorced woman' was not entitled to maintenance."

11. The object of the provisions of Section 488 of the old Code, corresponding to Section 125 of the present Code was well stated by the Supreme Court in its decision in the case of Bhagwan Dutt v. Smt. Kamladevi as under :-

"Sections 488, 489 and 490 constitute a family. They have been grouped together under Chapter XXXVI of the Code of 1898 under the caption 'of the maintenance of wives and children'. This Chapter in the words of Sir James Fitzstephen provides a mode of preventing vagrancy or at least, preventing its consequences. These provisions are intended to fulfil a social purpose. Their object is to compel a man to perform the moral obligation which he owes to the society in respect of his wife and children by providing a simple, speedy, but limited relief. They week to ensure that neglected wife and children are not left beggered and destituted on scrap heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence. Thus Section 488 is not intended to provide for a full and final determination of status and personal rights of the parties. The jurisdiction conferred by the section on the Magistrate is more in the nature of a preventive rather than a remedial jurisdiction. It is certainly not punitive. As pointed out in Thompson's case 6 N.W.P. 205, the scope of Chapter XXXVI is limited and the Magistrate cannot, except as thereunder provided, usurp the jurisdiction in matrimonial disputes possessed by the Civil Courts Sub-section (2) of S. 489 expressly makes the orders passed under Chapter XXXVI of the Code subject to any final adjudication that may be made by a Civil Court between the parties regarding their status and Civil rights."

Above observations restrict the object of Section 488 to the protection of only wives and children.

12. While dealing with the scope of Section 488 the Supreme Court in its decision in the case of Mst. Zohra Khatoon v. Md. Ibrahim with which we will have an occasion to deal later, has in terms pointed out :-

"A perusal of Section 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 marriage or mode of divorce or cessation of marriage under the personal law of the parties is concerned that would have to be determined according to the said personal law. Thus, the exclusion by Section 488 extends only to the quantum of maintenance and the circumstances under

which it could be granted."

13. The object of Section 125 of the present Code, which corresponds to Section 488 of the old Code, equally remains the same and the said observations of the Supreme Court, though relating to the provisions for maintenance, inter alia, of wives under section 488 of the old Code would apply with equal force to the provisions for maintenance of wives under S. 125.

14. With that, we may at this stage also refer to certain relevant provisions of Hindu Law relating to marriages, which in this case is the personal law of marriages governing the parties. Till the coming into force of Hindu Marriage Act, 1955, the Hindu Law of Marriages was not codified and in respect of marriages, as in other cases, Hindus were governed by their personal law as to be found in Shastras and customs. However, whatever might have been the personal law of Hindus in respect of marriages prior to codification of such law under the Hindu Marriage Act, 1955, on and from coming into force of the said Act on 18-5-1955, the provisions of the said Act only and no other law constituted their personal law relating to marriages and any question regarding the personal law of Hindus, relating to marriages was to be determined only with reference to the provisions of the said Act and no other.

15. The said Act provides conditions for the solemnization of marriage (S. 5). The ceremonies for the solemnization of marriage (Sec. 6) and the registration thereof. It also provides for circumstances under which the parties to the marriages could obtain decree for judicial separation (S. 10) and divorce (S. 13) and cases in which marriage is null and void (S. 11) which may be so declared by a decree of nullity and cases in which it was voidable (S. 12) where it was required to be annulled also by a decree of nullity. It also, inter alia, under section 25 provides for the grant of permanent alimony or maintenance on application to a husband or wife, as the case may be, at the time of passing any decree or subsequent thereto.

16. In this case, we are particularly concerned with Section 5(i) providing for one of the conditions of marriage and Section 11 providing for the consequences of the contravention of the condition.

17. Section 5(i) provides :-

"A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled :-

(i) neither party has a spouse living at the time of marriage :

Section 11 of the Act provides, inter alia, that any marriage after the commencement of the Act shall be null and void if it contravened inter alia the said condition under section 5(i) ".

18. In this case, there is no dispute that the marriage solemnized between the petitioner and the respondent No. 1 had contravened the provisions of Section 5(i), for at the time of the said marriage the first respondent had a wife Lilabai living and the said marriage between them was subsisting. The result, therefore, was that by reason of Section 11 of the said Act marriage between the petitioner and the 1st respondent was null and void. The consequences of such a marriage being null

and void or 'voidipso jure' was that although the marriage was solemnized by performing necessary ceremonies and was registered the same was in law rendered nugatory as if not having taken place at all and consequently the parties to the same did not get a legal status of husband and wife. Accordingly, in such a case the woman cannot be considered to be a legally wedded wife of the man. The fact that Section 11 provides for filing of a petition by either party to have the marriage declared null and void by a decree of nullity did not make the marriage valid till the decree was passed as was the case in voidable marriages under S. 12 of the Act as in such a case obtaining of a decree of nullity was not a condition precedent for the marriage being null and void.

19. The said position is also clear from the provisions of Sections 16 and 17 of the Act. Section 16 seeks to protect children of the marriage which was null and void under section 11 of the Act, though illegitimate, as if they were legitimate, by giving them a limited right of inheritance only to their parents' property. While Section 17 of the Act provides that such a marriage in contravention of Section 5(i) of the Act was void and the provisions of Sections 494 and 495 of Indian Penal Code relating to an offence of bigamy were to apply. In view of the said provisions of the Hindu Marriage Act, it is quite clear that in this case the petitioner's marriage to the first respondent, being admittedly in contravention of S. 5(i) of the Act, was null and void under section 11 of the Act and, therefore, the petitioner could not be considered to be a legally wedded wife, of the respondent.

20. The only controversy, therefore, that survived was as regards the import of the term 'wife' in Section 125(1) of the Code.

21. As mentioned above, a Division Bench of the Court has earlier in its decision in Bajirao's case (1979 Mah LJ 693) : (1980 Cri LJ 473) held that the term 'wife' in Section 125 only meant a legally wedded wife. In doing so the Court observed :-

"A woman whose marriage is invalid, cannot get the status of a wife and, therefore, if the marriage of the parties is void by reason of contravention of Section 5(i), (iv) and (v) of the Hindu Marriage Act, the woman is not competent to apply for maintenance under section 125, Criminal Procedure Code, which merely speaks of a 'wife'. The second wife whose marriage is void in view of Section 5(i) of the Hindu Marriage Act, cannot thus apply for maintenance under section 125 of the Code. The meaning of 'wife' cannot be extended to the case of a void marriage. In the absence of a clear intention in the provisions itself and having regard to the background in which the provisions of Section 125 Cr.P.C. 1973, were enacted, a woman cannot claim maintenance under the section unless she proves that she is the legally wedded wife of defendant against whom she brings the action."

22. It is the correctness of this view that is challenged before us both under the Referring Order and by the learned counsel for the petitioner.

23. It may be pointed out at this stage that the same view of the term 'wife' as appearing in Section 488 of the old Code has been taken by other High Courts viz., by Mysore High Court in the case of Smt. Savithriamma v. V. N. Ramnarasimhaiah (1963) 1 Cri LJ 131 by Patna High Court in Bansidhar Jha v. Chhabi Chatterjee , by the Allahabad High Court in Naurang Singh Chuni Singh v. Sapla Devi and by Gujarat High Court in Bai Bhanbai Mavji v. Kanbi K. Devraj even when the provisions of

Hindu Marriage Act, 1955 were in force. A similar view on this aspect was also taken by this court (Masodkar J.) in the case of Smt. Rajeshbai v. Smt Shantabai though we are not concerned in this case with the correctness of the other findings of the Court therein.

24. Under the provisions of Section 488 of the old Code, corresponding to S. 125 of the new Code a Magistrate can make an order of maintenance only in favour of wives, legitimate or illegitimate children or parent and no other. Therefore, before determining the application made to him on the basis that the applicant was 'wife' of the respondent, the Magistrate was required first to ascertain whether the applicant was a wife of the respondent and in case of dispute, record a finding. A plain dictionary meaning of the term 'wife' was either 'a married woman' or a 'a woman who is tied to a man in wedlock'. No woman could give herself a status of a 'wife' of another unless she was legally and validly married to the other.

25. As pointed out by the Supreme Court in aforecited decision in Zohra Khatoon's case in application under S. 488 of the old Code or Section 125 of the new Code consideration of the personal law of the parties as to the validity of marriage was not excluded and, therefore, the Magistrate exercising powers under S. 125 will have to determine whether the marriage of the woman-applicant to the respondent was valid in accordance with her personal law to give her a status of a wife.

26. In this case the personal law of the parties regarding marriages was as laid down in Hindu Marriage Act, 1955 Since, admittedly, at the time of marriage between the parties one of the conditions for the validity of the marriages, as contained in Section 5(i) of the Act was contravened or not complied with, the said marriage was, under section 11 of the Act, null and void, as if it had not taken place. In the absence of such a legal and valid marriage, a mere fact that the parties had lived together, as husband and wife to the knowledge of the public or otherwise, as contended by the learned counsel for the petitioner and suggested in the Referring Order, could not confer on such a woman a status of a 'wife', however, otherwise one may term such a woman. The fact of the parties having lived together as husband and wife for a long time would be relevant to raise only a presumption in law of they being husband and wife. However, even such presumption itself was rebuttable on proof of marriage being invalid. That question, however, would not arise in this case. On the facts, therefore, the petitioner could not be considered to be the 'wife' of the respondent to claim maintenance under section 125.

27. This position in law was supported also by the other provisions in the section itself. Firstly, while specifically providing for both legitimate and illegitimate children it restricts the Magistrate's power to make order for maintenance in favour of a 'wife' only and does not extend it in favour of any other woman though not legally and validly married to the respondent. Secondly, explanation (b) to Section 125(1) expressly, includes in the terms 'wife' appearing in the section, also a divorced woman. A divorced woman cannot exist unless initially she was legally wedded wife, for under the provisions of Hindu Marriage Act by which the parties in this case are governed or under any other personal law a question of divorce either by a decree or otherwise would not arise unless initially the marriage was legal and valid. The question of a divorced woman would never arise in cases where the decree of nullity is passed for either the marriage being null and void or voidable. This specific

inclusion of a divorced woman in the term 'wife' which was not there before, would clearly show that the term 'wife' would only mean legally wedded wife.

28. On the plain reading of Section 125 of the Code, therefore, in this case the petitioner's marriage with the respondent No. 1 being admittedly null and void under section 11 of the Hindu Marriage Act, 1955, who was not his legally wedded wife, with the result that the petitioner cannot be termed as a 'wife' of the respondent No. 1 to entitle her to an order of maintenance under said Section 125.

29. In spite of this position in law, the learned counsel for the petitioner has contended that the term 'wife' appearing in Section 125(1) of the Code should be given a wider import and should be read to include not only a legally wedded wife, but also a de facto wife i.e. a woman who had undergone the necessary ceremonies of marriage as required under the personal law governing the parties, was treated by the husband as such and had lived together as such husband and wife to the knowledge of the public.

30. This contention he has sought to support on two counts. Firstly, he has relied on the provisions of Section 25 of the Hindu Marriage Act, 1955, which according to him provides for maintenance even to a party to the marriage which was null and void on a decree of nullity, declaring the marriage as null and void being passed only on the basis that they were husband and wife.

31. This Court in Bajirao's case (1980 Cri LJ 473) while negativing the said contention, had observed provisions as follows :-

"While construing provisions of Section 125 of Criminal Procedure Code, it is not proper to introduce the concept arising out of provisions of Section 15(1), Hindu Marriage Act. While Section 25(1) is intended for parties who are Hindus, Section 125 Criminal Procedure Code is secular in character and applies to persons belonging to all religions. The jurisdiction contemplated by Section 25(1) Hindu Marriage Act and of Section 125, Criminal Procedure Code are distinct and specified. It is not possible to assign different meaning to the word 'wife' for persons belonging to different religion or governed by different personal laws. An extended meaning cannot, therefore, be given to the word 'wife' in Section 125, Criminal Procedure, Code, on the basis of Section 25(1) Hindu Marriage Act."

32. To support his contention that a woman under a null and void marriage was entitled to maintenance, the learned counsel for the petitioner has relied on the decision of this Court, (Kania J.) in the case of Govindrao Ramji v. Anandibai Govindrao where it was held that Section 25(1) conferred a right of maintenance and the term 'wife and husband' used in the section would include within their scope a woman and a man professing Hindu faith who have gone through a ceremony of marriage which would in law have conferred the status of husband and wife but for the provisions of Section 11 read with Section 5(i) making the marriage null and void. The learned counsel for the respondent has pointed out that the Division Bench of the Madras High Court in its decision in the case of A. P. K. Narayanswami Reddiar v. Padmanabhan had taken a contrary view and the decision of our Court in Govindrai's case would require reconsideration. We do not think it necessary to consider that question in this case and would proceed on the footing that the position on law under

section 25(1) of the Hindu Marriage Act was as stated in that decision.

33. However, even the decision as it is cannot help the appellant-petitioner. The said decision firstly shows that the conclusion of the court that even a party to a null and void marriage under section 11 of the Hindu Marriage Act 1955 was entitled to maintenance under section 25 of the said Act was mainly based on the wording of the section which in its part gave discretion to the Court to award maintenance at the time of passing any decree which would also include a decree of nullity declaring marriage null and void under S. 11. The Court there thought of giving liberal construction to the words 'husband and wife' appearing therein as it found that the said words were used in a loose sense and the wording of the section was not happy as even in other cases where decree for divorce or annullment of marriage in the case of voidable marriage was passed, after such decree was passed the parties could not be termed as 'husband and wife'. However, it was evident from the following observations of the Court at page 27 of the report that while holding so the Court was aware that the parties to such a null and void marriage did not have a lawful status of husband and wife. The observations were :-

"In other words, in my view, the word 'wife' and 'husband' in sub-section (1) of Section 25 of the Act would include within their scope a woman and man professing the Hindu faith who have gone through a ceremony of marriage which would in law have conferred the status of wife or husband on them but for the provisions of Section 11 read with Clauses (i), (iv) and (v) of Section 5 of the Act."

34. But even otherwise, it is clear that the provisions of Section 125 of the Code being of a secular nature applicable to persons of all communities in India independently of the civil liability of the husband under his personal law to maintain his wife, it interpretation cannot be based or controlled by importing therein the concept of maintenance under the personal law as applicable to a particular community only. The Supreme Court in the aforecited case of Bhagwan Dutt v. Kamala Devi while dealing with the provisions of Section 488 vis-a-vis Section 23 of the Hindu Adoptions and Maintenance Act, 1956, had observed at page 87 (of AIR) :-

"The scope of the two laws is different Section 488 provides for a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal laws of the parties."

35. The Supreme Court in Zohra Khatoon's case had also pointed out that Section 488 carved out an independent sphere of its own and is a general law providing a summary machinery in determining maintenance to be awarded and although the said provisions may not be inconsistent with the other parallel Acts providing for maintenance, the section excludes to some extent application of other Acts in the matter of quantum and circumstances under which it could be granted.

36. Even, if therefore, the provisions of Section 25(1) of the Act which was a personal law applicable to Hindus only were to create a right of maintenance also in favour of a woman who was a party to a null and void marriage, such right of her, if any, shall have to be restricted to the provisions under the said Act only. The Magistrate dealing with the application for maintenance by a woman under S. 125 of the Code on the basis of she being a wife of the respondent, was not required to ascertain

whether she was otherwise entitled to maintenance under any other Act. There was also nothing in that section to hold that the law conferred on such a woman a status of a 'wife'. Further, as pointed out by the Supreme Court in the aforecited decisions, the scope of Section 488 of the old Code or S. 125 of the present Code, which were of a secular nature, providing maintenance for wives, being quite different from that of any other Act, which would include Section 25 of the Hindu Marriage Act, the said provisions would exclude the application of any other Act and cannot be interpreted with reference to Section 25 of the Hindu Marriage Act which was only a personal law of Hindus.

37. The learned counsel for the petitioner has further sought to support his said contention by relying on three decision of the Supreme Court, viz :-

1. Bai Tahira v. Ali Hussain Chathia .

2. Fuzlunbi v. K. Khader Vali .

3. Zohra Khatoon v. Md. Ibrahim .

In fact, the first two decisions viz. in Rai Tahira's case and in Bai Fuzlunbi's case, have no relevance whatsoever to the point at issue. The only question at issue in both the said decisions was as to the interpretation of the provisions of sub-section (2) and sub-section 3(b) of Section 127 of the Cr.P.C. empowering the Magistrate to cancel the order of maintenance already made under section 125 in favour of a woman who was divorced, particularly when, as mentioned in sub-section 3(b) she had either before or after the order received the whole of the sum which under any customary or personal law applicable to the parties was payable on such a divorce.

38. No question as to the meaning to be given to the term 'wife' in S. 125(1) arose for determination in those decisions. The Court held that the said provisions of S. 127(3)(b) must be so interpreted that the amount received by a woman on or before divorce under personal law under section 127(3)(b) must be such as to amount to reasonable substitute for the amount payable as maintenance under section 125 of the Code. The purpose of payment under customary or personal law must be to obviate destitution and the scheme of Section 127(3)(b) was to recognise such substitution. It, therefore, observed :-

"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 the sum stipulated by customary or personal law whose quantum in more or less sufficient to do duty for maintenance allowance."

39. Since no question as to the meaning to be given to the term 'wife' in Section 125(1) arose for determination in those decision, it is, not necessary to deal with the said two decisions any further.

40. The third decision in Zohra Khatoon's case , observations wherein are relied upon, both by the learned counsel for the appellant as well as in the Referring Order in support of the contention that the term 'wife' in Section 125 of the Code should be given a broad meaning may be dealt with in

some detail.

41. In that case, where the parties were Muslims, the question was as regards the interpretation of Clause (b) of explanation to sub-section (1) of Section 125 of the Code which read as follows :-

Explanation :-

"For the purpose of this Chapter. -

(a) x x x

(b) 'wife' includes a woman who has been divorced by or has obtained a divorce from her

There the appellant, a Muslim lady, was married to the respondent. On the plea that she was ill-treated by the respondent, she filed an application before a Magistrate under section 125 of the Code, for maintenance for herself and her child. The Magistrate allowed her application and fixed maintenance for her and the child, holding that she was neglected by the respondent-husband without any reasonable or probable cause. The Magistrate negatived the respondent's contention that since the appellant wife had filed a suit against him for dissolution of marriage which was decreed by the Civil Court and since she was living separately, she had ceased to be his wife and was, therefore, not entitled to maintenance under section 125 or Section 127 of the Code. In the revision application against the said order filed by the respondent-husband, the High Court set aside the order of the Magistrate. The High Court interpreted the said Clause (b) of the Explanation as covering a divorce proceedings from the husband only i.e. if the divorce was given unilaterally by the husband or was obtained by the wife from the husband, and did not cover divorce in the case before the Court since it was obtained at the instance of the wife in a suit filed by her for dissolution of marriage under Dissolution of Muslim Marriage Act, 1939. The High Court, therefore, held that in that case applicant woman did not come under clause (b) of the Explanation and was not entitled to maintenance under Section 125 of the Code. Therefore, in that case the Supreme Court was only concerned with the question of interpretation of clause (b) of the Explanation to Section 125(1) and the correctness of the narrow interpretation put by the High Court on the said explanation. For dealing with the said only question, the Court firstly dealt with the position in law in relation to S. 488 of the said old Code, which has been set out above where the said clause (b) of the Explanation did not exist.

42. The Court further considered whether under the said provisions of S. 488 of the old Code the Magistrate was competent to award maintenance if under the personal law of the Mohmedans the wife had been validly divorced and had completed the period of Iddat ? On review of the decision, the Court found that although the Mohmedan 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 Iddat, as the right under Section 488, which was a statutory right, so far

as it related to wives, contemplated existence of conjugal relation as a condition precedent to an order of maintenance.

43. In the background of the said position in law regarding maintenance of wife under section 488 of the Code, prior to the introduction of the said Explanation (b) of Section 125(1) by including 'divorced woman' in the term wife, the only question the court proceeded to consider, was as to how for the Code of 1973 by introducing the said explanation made a departure from the previous Code and from the personal law of the parties i.e. Mohammedan Law, in the position of woman after divorce. The Court was, therefore, only considering the effect of clause (b) of the Explanation on the rights of a woman who was divorced i.e. of a woman who was initially a legally wedded wife but had ceased to be so by reason of divorce. It was not concerned there with the rights of any other woman.

44. Only in that regard that Court, while considering the interpretation of the said clause (b) of the Explanation, observed at page 1248 of the report :-

"Cl. (b) had made distinct departure from the earlier Code, in that it had widened the definition of wife and to some extent overruled the personal law of the parties, so far as the proceedings for maintenance under section 125 are concerned. Under Clause (b) 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 otherwise obtained a divorce and has not remarried."

45. On the basis of the said observations of the Court, the learned counsel for the petitioner-appellant has contended that it was permissible to give to the term 'wife' in Section 125(1) a still wider connotation so as to include therein not only a divorced woman, as specifically mentioned in the Explanation, but also a woman who although not a legally wedded wife under the personal law governing her had undergone marriage ceremony and lived with the man as husband and wife.

46. In our view, the said observations of the Supreme Court cannot be read out of context, as suggested by the learned counsel, as indicating that the term wife could also mean and include even a woman who was not legally wedded and therefore not a wife. The observations were to be read as restricted to the wording of Clause (b) including in the term 'wife' a 'divorced woman'. The Court made the said observations as it found that before the said explanation was introduced neither the Mohammedan Law by which the parties were governed, nor Section 488 permitted maintenance on the cessation of conjugal relations on divorce, and to that extent only explanation made departure from the earlier law. On the other hand, the fact that under Clause (b) of the Explanation a divorced woman was specifically included in the term 'wife' to give her a right of maintenance, would show that the term 'wife' would mean only a legally wedded wife, but for which there would not exist a divorced woman. In our view, therefore, there was nothing in the above quoted observations of the Supreme Court to support the said contention of the learned counsel for the appellant.

47. It was further contended by the learned counsel for the appellant and suggested in Referring Order that since Explanation (b) contains inclusive definition of wife, there was no reason why it should not be extended to other cases. Firstly, the said explanation does not seek to give any

definition of the term 'wife'. It seeks to include specifically in the term 'wife' a divorced woman, who, but for the said mention could not have been entitled to maintenance under section 125 of the Code. As pointed out by the Supreme Court in the Bhagwan Dutt's case (AIR 1975 SC 85) the object of the section is to provide a summary remedy for the protection of wives, children and parents. The jurisdiction of the Magistrate under the said provisions extends to making an order of maintenance in favour of only those persons mentioned in the section viz. wives, children legitimate and illegitimate and parents, and no other persons falling outside the said categories.

48. The learned counsel for the appellant has further relied on a decision of the Gauhati High Court in the case of Boli Narayan Pawye v. Sidheswari Morang (1981 Cri LJ 764) which appears to take a similar view as propounded by the appellant. The Court there relying only on the aforecited two decision of the Supreme Court in Bai Tahira's case and in Fuzlunbi's case and on the basis that a void marriage was one which required declaration of the Court to be so and did not disentitle a woman to get maintenance in the absence of final declaration to the effect from a competent Court, observed at page 676 (of Cri LJ) :-

"A woman who comes in the life of a man gives herself to the man, takes the family life of the man and the man uses her as such, recognises her as his wife, must come within the fold of the term wife, absence of ceremonial marriage notwithstanding. Acceptance of a woman as a wife, declaration of the status directly or indirectly and acceptance of status by the woman are enough to bring her within the provisions of S. 125."

49. Firstly, the said observation of the Court are obiter and were not relevant as on the facts the Court had held that the marriage between the parties though performed in a customary manner, was valid. If the marriage was once held to be valid in law, the woman could get a status of a wife and on the other things existing would be entitled to claim maintenance under S. 125. Secondly, as we have pointed out above, two decisions of the Supreme Court in Bai Tahira's case and in Fuzlunbi's case relying on which the Court had made the said observations do not anywhere deal with the question of extended meaning to be given to the term 'wife', as suggested by the Gauhati High Court. However, at the same time the Court does not appear to have considered the decision of the Supreme Court in Zohra Khatoon's case cited above. Thirdly, the view of the Court appears to have been based more on a rebuttable presumption that may arise by reason of a long and continuous cohabitation between the parties as husband and wife, that they were presumed to be husband and wife. But even that presumption was rebuttable, by the proof that in law the marriage solemnized between the parties was illegal or void. Further according to us the said observations are based on misconception of law that void marriage like voidable marriage was valid till it was so declared by a competent Court. For all these reasons, with respect, we are unable to agree with the view taken by the single Judge of the Gauhati High Court in the aforesaid decision.

50. In our view, therefore, contention of the learned counsel for the appellant cannot be accepted. The view taken by this Court in Bajirao's case (1979 MLJ 693) : (180 Cri LJ 473) appears to be correct. The term 'wife' appearing in Section 125(1) of the Code means only a legally wedded wife. In the result, the appeal stands dismissed. The orders of the lower courts are confirmed. However, under the circumstances of the case respondent No. 1 is directed to pay to the petitioner costs of

proceedings fixed at Rs. 1000/-.

51. Appeal dismissed.