Kerala High Court
Mariyumma vs Mohammed Ibrahim on 28 June, 1978
Equivalent citations: AIR 1978 Ker 231
Author: S Poti
Bench: P N Pillai, P S Poti, G Vadakkel
JUDGMENT Subbamonian Poti, J.

1. This revision is against an order passed by the Judicial Magistrate of the First Class, Kodungalloor in a petition under Section 125 of the Cr. P. C. for the award of maintenance moved by a divorced woman and her 3 children. The Magistrate found that the children are eligible to get maintenance at the rate of Rs. 45/-, Rs. 35/-and Rs. 30/- per mensem respectively while the first petitioner the divorcee was not entitled to any maintenance. This was so found because, according to the court below, adultery on the part of the first petitioner had been proved by the evidence in the case and that disentitled her to the award of any maintenance. This revision comes up before the Full Bench because a single Judge of this Court directed reference to the Full Bench in view of the important questions arising for decision in the case.

2. The revision is by all the petitioners in the court below. The first petitioner claims that she too must be found entitled to maintenance until her remarriage while on behalf of petitioners 2 to 4 she claims enhancement of the quantum of maintenance awarded by the court below.

3. Evidently the learned Magistrate who declined to award maintenance to the first petitioner on the ground that she was living in adultery, was relying on Section 125 (4) of the Cr. P. C. The questions before us as urged by learned counsel Sri P. V. Ayyappan, appearing for the petitioners are (1) whether Section 125 (4) would be applicable to the case of a woman who 'had been divorced or whether it is applicable only to the female epouse in a subsisting marriage and (2) whether the words "is living in adultery" in Section 125 (4) should be taken to indicate that proof must be not of any past conduct but of the present.

4. Section 125 of the Code of 1973 has to some extent altered the scheme of maintenance envisaged in the corresponding Section 488. Under the repealed Code it is only the 'wife' as the term is generally understood the female spouse in a subsisting marriage that could seek maintenance from the husband. But Section 125 (1) of the new Code obliges a person who refuses or neglects to maintain a woman who was his wife and who had been divorced to maintain her if she is unable to maintain herself. Such obligation is to last until she remarries. The scope of the term wife is enlarged to take in the case of such a woman and this is by Explanation (b) to Section 125 (1). Explanation (b) to that sub-section reads thus :

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

(a) ... ...

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

5. The effect of the Explanation is evidently to read the term wife in Chap. IX of the Code as meaning not only the wife as generally understood but also a woman who has been divorced but who has not remarried. It may be noticed that Section 125 (1) deals with the obligation of a 'person' and not of a husband or of a father or of a son. The scope of the Explanation is not to create a jural relationship between the divorced woman and the erstwhile husband. No new obligation outside the scope of the Code is sought to be imposed either on the divorced woman or her erstwhile husband by reason of the Explanation. The object of the Explanation is only to enable such a divorced woman to claim maintenance from her erstwhile husband until her remarriage. The very object of the provision in Section 125 of the Code is to provide for a minimum obligation on the part of a person to maintain his wife, children parents and his divorced wife who is not remarried under certain circumstances. In regard to some of his dependants there may be a similar obligation under the civil law, but in awarding maintenance in civil proceedings considerations other than those which arise in the matter of a petition under Section 125 of the Code may arise. The auantum of maintenance may also differ in such proceedings. The provision in Section 125 is intended as a measure to prevent vagrancy and the responsibility is cast upon a husband or a father of a son as the case may be to give maintenance to the wife or to the children or to the parents. The Parliament, in its wisdom, has thought fit to include a woman who has been divorced by her husband as also one of those entitled to the benefits of Section 125 (1), such benefit to subsist until her remarriage. It is not because she has any claim based on her status as a divorced wife. She is under no obligation to make any return to her erstwhile husband for the maintenance provided to her by Section 125 (1) of the Code. The Explanation does not result in casting on her any marital obligation. Naturally so since on the dissolution of the marriage the marital tie is broken. It is in this background that we may have to consider the scope of Section 125 f4) and in that context we may refer to Sub-section (5) of Section 125 also. These sub-sections run as follows:

"125 (1) ... ...

(2) ... ...

(3) ... ...

(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."

6. Sub-section (4) of Section 125 provides for cases where a wife is to be denied maintenance on certain grounds notwithstanding the provisions in Section 125 (1). Where an order under Section 125 (1) has been passed subsequent circumstances may disentitle the wife to continue to receive such maintenance. Those are circumstances akin to the circumstances contemplated under Section 125 (4). Provision is made to meet this situation in Section 125 (5). The circumstances which may

disentitle a wife to receive maintenance (1) wife living in adultery (2) the wife without sufficient reasons, refuses to live with her husband and (3) the spouses are living separately by mutual consent.

7. The learned Magistrate seems to have assumed without deliberating on it that in view of the Explanation (b) to Section 125 (1) of the Code the term wife under Section 125 (4) would take in a woman Who has been divorced and if so when 'living in adultery' is proved as against such a woman that would be sufficient to disentitle her to maintenance. It may be mentioned that parties here are Muslims, They were married in the year 1963. They seem to have fallen out by about 1975. By that time six children had been horn in that marriage. 3 of them died and the other 3 survived. On 4-6-1976 the husband divorced the wife by pronouncing 'talak' and that was communicated to the wife on 5-6-1976. The petition for maintenance was filed on 24-7-1976. This was so filed because the new Code of 1973 gave the right to claim maintenance even to a divorced woman. The erstwhile husband opposed the claim for maintenance on the ground that the wife divorced by him was living in adultery, that she was living in adultery even during the subsistence of the marriage and it was such adultery that was the cause of the divorce. It was alleged that the woman was living in the same manner after the divorce. The court below found it to be true. There is of course no reason to interfere with this finding of fact in revision. Therefore we may take it as proved for the purpose of this case that at the time of divorce the first petitioner was living in adultery. There is some evidence to indicate that she was living the same life thereafter too. But counsel for the petitioners would say that such evidence is unreliable and proof must be of the fact that the woman is living in adultery on the date of the petition and not once upon a time.

8. Now we will come to the question whether we should read Section 125 (4) as applicable to any person other than the female spouse in a subsisting marriage. It is true that the Explanation enlarges the scope of the term wife for the purpose of Chap. IX. But that, as we have indicated earlier, does not create any jural relationship between a divorced woman and her erstwhile husband. Evidently the object of the Explanation is to obviate repeated reference to the wife as well as the wife who has been divorced in appropriate places in the relevant sections. The operation of the Explanation is only to read the term wife in Chap. IX, as referring to wife as well as a divorced woman who has not remarried, if such, reference would not be inappropriate, Though a divorced woman may be understood by the term wife by reason of the Explanation the person who was her husband prior to such divorce will not be comprised within the term 'husband'. Section 125 (4) refers to the right of the wife to receive an allowance from her husband. If the definition has not the effect of treating the person who is really: not a husband as the husband, then Sub-section (4) will not be applicable to the case' of a divorced woman. There are other indications in Sub-section (4) which make the sub-section inapplicable to a divorced woman. A woman whose marital tie does not subsist cannot be guilty of adultery much less can she be said to be living in adultery. She may live a promiscuous life. But that would not render her guilty of adultery, for, adultery is a term that denotes an offence against the institution of marriage. The inclusive definition of the term 'wife' will not be sufficient to read promiscuous or immoral living of a divorced woman as of one living in adultery.

There is no obligation on the part of a divorced woman to live with her erstwhile husband. In fact, one would not expect such a woman to do so. Even if she is willing her erstwhile husband may not be willing to oblige her. The provisions of the Code do not and are not intended to cast an obligation on him to permit his divorced wife to live with him. Sub-section (4) of Section 125 conceives refusal to live with the husband without sufficient reason as sufficient justification for refusing maintenance. This presupposes a right and an obligation to live with the husband. Such a right and an obligation cannot be assumed in the case of divorced woman nor can a corresponding obligation in the erstwhile husband to keep the woman in his house be assumed. If so such a ground available for refusing allowance contemplated in Section 125 (4) becomes inapplicable to the case of a divorced woman.

So is the case with the provision that if the husband and wife are living separately by mutual consent the wife shall not be entitled to receive the allowance. No question of mutual consent would arise in the case of parties to a marriage which is dissolved. That clause is also evidently inapplicable to the case of a divorced woman.

It is agreed that if we construe the term wife in Section 125 (4) as referring to a divorced woman also the same construction must apply to Section 125 (5). That would yield anomalous results. Assume that the same sub-section applies to a divorced woman who has not remarried. It would mean that provision is made for cancelling the order for maintenance in the case of such a woman in that sub-section. But there is a specific provision dealing with that matter and that is Section 127 (3) of the Code. That section deals with circumstances under which an order for maintenance obtained by a divorced woman could be cancelled. That subsection gives an indication that Section 125 (5) covers only the case of a female spouse under a subsisting marriage. If that be so that should be the case with Section 125 (4) also.

The way we have construed Section 125 (4) will only promote the object of the provisions in Section 125. The scope of the obligation of a person to maintain is extended in the new Code to embrace cases which were not within its scope under the repealed Code. One of the classes of persons brought in additionally within the scope of the section is women who have been divorced.. While the legislature expected the erstwhile husbands to maintain them if the other conditions of the section applied, the legislature could not have expected them to perform any marital obligation for that reason or to keep the vow of chastity or loyalty to their erstwhile husbands. That would be unreasonable and unrelated to the object of providing for maintenance. Counsel Sri T.V. Prabhakaran appearing for the first respondent submitted that a 'wife' in the proper sense of the term is obliged not to live in adultery if she is to claim maintenance and if so it would be unreasonable to read more freedom in a divorced woman. The question is not one of freedom. In the case of a wife she has her solemn obligations to her husband just as he has his obligations towards her. To ask him to discharge his obligation without reference to her conduct may not be in the interest of promotion of matrimonial harmony. Hence his obligation to maintain his wife has been linked with the discharge of her obligations by her. Such a situation does not arise in the case of a divorced woman since she has no obligation to perform.

We find nothing unreasonable in reading Section 125 (4) in the manner we have done. That would be the construction consistent with the object of the Code and it appears to us that to construe it in the manner canvassed by counsel for the first respondent would lead to anomalous results while at the same time not promoting any objective.

The reference to the Full Bench was evidently necessitated by reason of a decision of the Division Bench of this Court in Kunhi Moyin v. Pathumma, 1976 Ker LT 87 in which a different view on the scope of Section 125 (4) has been expressed by the Bench. Of course, that was in a different context. The learned Judges were dealing with the challenge to the validity of Section 125 and while answering the challenge the learned Judges discussed about the scope of the section. Evidently it appears to have, been argued before the learned Judges that since Section 125 (4) and (5) as they stand apply to a divorced woman also that was objectionable. The Division Bench was attempting to point out how it may not be objectionable. It is in this context that the Division Bench said thus in regard to Section 125 (4) of the Code:

"25. We may also answer another argument based upon Section 125 (4) and (5). These sub-sections read as follows :

"(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."

Sub-section (4) therefore says that a wife will not be entitled to receive maintenance if she is living in adultery or without sufficient reason refuses to live with her husband. According to Mr. Sukumaran Nair, this sub-section read along with the new definition, would sadly reflect the wisdom of the law making body, since when a wife ceases to be a wife, there is no question of her living in adultery, because adultery postulates existence of the legal status of a wife. He also submitted that it is revolting to commonsense to contend that an ex-wife can be asked to live with her husband.

26. We will answer this argument. The husband has two defences open to him when claim for maintenance is made by his wife. First, to prove that she is living in adultery. Second, if he satisfies the Court that she refuses to live with him without sufficient cause or if they are living separately by mutual consent. The contention of Sri Sukumaran Nair that an ex-wife cannot, in law, live in adultery, cannot be accepted if the definition of wife in the new Code embraces all the sub-sections of Section 125. If that be so, when the wife -- who is living in adultery -- files an application for maintenance, the husband can successfully contend that she, though an ex-wife, is living in adultery and therefore is not entitled to maintenance. After all the liability to maintain ex-wives is till they get remarried.

27. The second limb of the argument also has no basis. If the wife refuses to live with him, without sufficient cause, no maintenance will be granted. It is contended that after divorce, no husband will like his wife to live with him. Need not necessarily be so. By this section, indirectly a very welcome and salutary object can be achieved. It is possible for a husband and wife, who have been separated for a short period, to get reconciled. To illustrate this point, we will take the instance of a Muslim husband and wife. Under the pure Islamic law, a divorce can become irrevocable only after the third pronouncement of Talaq. Revocable divorce is on two occasions. There can be revival of conjugal relationship during the period of waiting. "The divorced women should keep themselves waiting for three courses," This is so provided to give an opportunity to the parties to recant. If the wife, after the first Talaq files an application for maintenance there is a chance of reconciliation. The husband can ask the wife to live with him and the wife can join him again. Therefore it cannot be said that the new definition offends Sub-sections (4) and (5) of Section 125. When we refer to the above illustration, we are not unaware of Talaq-ul-bidant or talak-i-badi, which consists of three pronouncements made during a single tuhr (period between menstruations) by which an irrevocable divorce comes into existence immediately it is pronounced. We cannot redeem Muslim wives from this bondage, since we ordinarily interpret law and do not make law.

28. Therefore, we hold that the definition of wife given in Section 125 (1) and the legal fiction implied therein apply to the entire section."

In para 26, of the judgment the learned Judges seem to assume that the definition of wife in the new Code is to be applied to all the sub-sections of Section 125. The learned Judges seem to assume without discussing the question that acts which may be said to constitute 'living in adultery' during wedlock will continue to be of that character even after divorce. That will amount to giving a meaning different from the recognised meaning to the term 'adultery' and the term 'husband'. That would be beyond the scope of the section and is not warranted merely because the definition of the term wife takes in a divorced woman too. Though there is no requirement of joint residence in the case of a divorced wife with her divorced husband the learned Judges seem to assume that the Idea behind Sub-section (4) of Section 1'25 is to promote a process of reconciliation between the divorced spouses. We see no justification to assume so. On the other hand, the question is whether there is an obligation on any of the parties to the divorce to live with the other and whether any one of the parties can insist upon the exercise of right to live with the other even where the other is not willing. We are afraid, the answer can only be in the negative. Sub-section (4) cannot hence logically apply to the case of a divorced woman.

We feel that since the learned Judges were concerned not with a case where they had to apply Section 125 (4) to an instance such as the one before us but were only considering the validity of the section, there was no occasion to examine the section in the manner we have done here. With great respect to the learned Judges, we hold that Section 125 f4) of the Code will apply only to the female spouse in the subsisting marriage.

In the view we have taken above we are not called upon to consider the question whether "is living in adultery" in Section 125 (4) calls for proof of present conduct and not proof that the wife was" living in adultery. Hence we do not want to go into the evidence on that question, In the case before us the

first petitioner would therefore be entitled to maintenance. The question is, what should be the quantum to be awarded to the petitioner. There is a prayer by her to enhance the amount of maintenance awarded to the children, Evidence shows that the husband in drawing only a salary of Rs. 465/- per mensem out of which, after recoveries, he is receiving less than Rs. 300/- per mensem. He has properties, the total extent of which is less than 1 acre. The income from the properties is, according to him, Rs. 500/-per annum. There is no other evidence on this. Therefore his monthly income available for meeting his expenses and of those who are to be maintained by him is only about Rs. 350/- per mensem. Already Rs. 110/- has been allowed as maintenance to the three children. We do not think that any enhancement is called for in the circumstances. In fact the husband is left with very little for himself. He is a school teacher. He has to maintain himself too. Therefore we are not in a position to allow to the first petitioner what we would have normally ordered as maintenance if the opposite party was shown to be capable of meeting such obligation. The liability to maintain under Section 125 (1) of the Code is dependant upon one's ability to meet the obligation. Taking all these into account, an amount of Rs. 25/- need alone be awarded to the first petitioner. The Revision Petition is thus allowed by directing payment of Rs. 25/- per mensem to the first petitioner as maintenance till her remarriage. No costs.