

Bombay High Court

Smt. Gita vs Sushree Geeta on 20 January, 2009

Bench: R. C. Chavan

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

NAGPUR BENCH, NAGPUR

Criminal Application No.663 of 2008

And

Criminal Writ Petition No.58 of 2008

Criminal Application No.663 of 2008

Smt. Gita w/o Chandrashekhar Pandit,
Aged about 47 years,
Occ.: Nil,

R/o Gorelal Chowk,
Tah. & District Gondia.

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... Applicant

Versus

Shri Chaqndrashekhar s/o Rameshwar
Pandit,
Aged about 49 years,
Occ.: Legal Practitioner,

R/o Nandurbar,
Tah. & District Nandurbar.

... Non-Applicant

Shri S.V. Sirpurkar, Advocate for Applicant.
Shri S.P. Bhandarkar, Advocate for Non-Applicant.

Criminal Writ Petition No.58 of 2008

Chandrashekhar s/o Rameshwar Pandit,
Aged 49 years,

Occ.: Advocate,
R/o Nandurbar,
Tahsil Nandurbar,
District Nandurbar.

... Petitioner

Versus

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Sushree Geeta d/o Ramnath Sharma,
(earlier Smt. Geeta w/o Chandrashekhar Pandit),

Aged Major,
Occ.: Landlady,
R/o Bazar Chowk,
Gondia.

... Respondent

Shri S.P. Bhandarkar, Advocate for Petitioner.
Shri S.V. Sirpurkar, Advocate for Respondent.

CORAM : R.C. Chavan, J.

Date of Reserving the Judgment : 13-1-2009.

Date of Pronouncing the judgment : 20-1-2009 Judgment :

1. These proceedings by wife and husband respectively against each other raise a short legal point.
2. It is not in dispute that Gita was married to Chandrashekhar, an Advocate on 8-12-1985. Marital discord led Gita to seek maintenance under Section 125 of the Code of Criminal Procedure by an application made in the year 1987. By an order dated 19-11-1992, Gita was granted maintenance at the rate of Rs.500/- per month. In 1990, Chandrashekhar filed a petition for decree of divorce from Gita on the ground of cruelty.

Decree of divorce was granted finality by judgment dated 1-3-2001 in Second Appeal No.129 of 1999 decided by Aurangabad Bench of this Court.

3. It may be useful to recount how this litigation proceeded. Petition for divorce by husband on the ground of cruelty was contested by wife, who also filed a counter-claim for restitution of conjugal rights. The Trial Court as well as the First Appellate Court rejected husband's claim for divorce and decreed wife's claim for restitution of conjugal rights, as may be seen from copy of decree in Hindu Marriage Petition No.76 of 1987 of Court of Civil Judge, Senior Division, Dhule, re-numbered as Hindu Marriage Petition No.2 of 1990 in the Court of Civil Judge, Senior Division, Nandurbar, which was included in the compilation filed by husband. In spite of the fact that the decree specifically recounts that wife had made a counter-claim for restitution of conjugal rights and had paid court fee of Rs.37.50 (37.50 ?) on the said counter-claim, which is also duly included in the bill of costs, a substantial question of law seems to have been raised in the following words as can be seen from para 6 of the judgment in Second Appeal :-

"(ii) Whether in the absence of any prayer for restitution of conjugal rights, it was open for the courts below to pass a decree for restitution of conjugal rights against the appellant ?"

4. The learned counsel for husband, arguing the Second Appeal, reiterated this, as may be seen from para 13 of the judgment. Up to para 31, the judgment recounts arguments advanced. In paras 32 to 35, there is discussion about disobedience to decree for restitution of conjugal rights operating as a bar for husband's getting decree of divorce. In para 36, the judgment considers ground of cruelty on account of false complaints. The Court observed that in Second Appeal, the Court would not re-appreciate evidence. The Court then proceeded to hold that both the Courts below had perversely held that cruelty was not proved, in the following words in para 37 :

"37. Another aspect of "mental cruelty" is with regard to the false allegation regarding impotency of appellant husband and making this allegation in public is also a serious act of "cruelty". Therefore, I am of the clear view that both the lower appellate Courts have acted perversely in arriving at a finding that husband had failed to establish "cruelty" entitling him to a decree of dissolution of marriage, especially when the same is coupled with the factor of irretrievable breakdown of marriage over a long period."

5. In para 39, about absence of prayer for restitution of conjugal rights, the Court observes as under :

"39. In this context, it will also be noted that both the Courts below had admittedly granted a decree for restitution of conjugal rights, without there being any prayer made in that behalf by respondent-wife, which substantial question of law also, I answer in favour of the Appellant."

Ultimately, the Court granted decree of divorce on the ground of cruelty "coupled with the factor of irretrievable breakdown of marriage".

6. This account of the litigation speaks volumes about the manner in which matters are conducted in this Court. Either there was really no counter-claim for restitution of conjugal rights by the wife, and in that case, the learned counsel for husband, who has placed copy of decree of Civil Court for my perusal, would have to ask himself if a wrong copy was placed before this Court and why. If the copy is indeed the correct copy, it would be a sad comment on the assistance of officers of the Court to Judges.

In that case, the husband's counsel would not only have raised a false ground in the Second Appeal that there was no claim for restitution of conjugal rights, but would have falsely reiterated the same, leading the Court to accept it - a case of *suppresio veri* as well as *suggestio falsi*. If there was claim for restitution of conjugal rights by the wife, and decree for the same was reversed in Second Appeal erroneously holding that there was no such claim, the plight of wife could well be imagined.

7. Reverting to the facts which led the parties to this Court in the present proceeding, Gita filed an application bearing No.113 of 2000 for enhancement of maintenance from Rs.500/- to Rs.1,500/- per month before the learned Judicial Magistrate First Class, Gondia. Chandrashekhar too filed Application No.82 of 2001 for cancellation of order of maintenance in view of the fact that decree of divorce was passed on his petition. By common judgment dated 19-7-2007, the learned Judicial Magistrate First Class rejected husband's application and allowed wife's application partly, increasing maintenance allowance to Rs.1,250/- per month by common judgment dated 19-7-2007. Revision applications by both the parties were dismissed by common judgment dated 20-

11-2007 by the learned Additional Sessions Judge, Gondia.

8. Aggrieved thereby, the husband has filed Criminal Writ Petition No.58 of 2008 seeking quashing of order directing him to pay maintenance, and the wife has filed Criminal Application No.663 of 2008 for enhancement of maintenance allowance to Rs.5,000/- per month.

9. I have heard the learned counsel for both the husband and wife.

10. The learned counsel for husband relied on a judgment of Division Bench of this Court in Bhagwan Raoji Dale v. Sushma alias Nanda Bhagwan Dale and another, reported at 1998(2) Mh.L.J. 819, upon a reference by a learned Single Judge where the Bench held that when the husband had obtained a decree for restitution of conjugal rights, which the wife failed to comply leading to a decree of divorce, such wife would not be entitled to maintenance as she would not fall under any of the two categories in Explanation (b) to Section 125(1) of the Code of Criminal Procedure. Explanation (b) to Section 125(1) of the Code of Criminal Procedure reads as under :-

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

In Sharadchandra Satbhai v. Indubai Satbhai, reported at 1978 Mh.L.J. 123 (with which the learned Single Judge disagreed), the Court held that even a divorced wife was entitled to maintenance, but this right was subject to sub-section (4) of Section 125, which inter alia disentitles a wife, who, without sufficient reason, refused to live with her husband. In that case, wife was held to have deserted her husband without reasonable cause and his petition for judicial separation on this ground had been decreed.

The learned Single Judge felt that this was in conflict with pronouncement of the Supreme Court in Bai Tahira v. Ali Hussain Fissalli Chothia, reported at 1979 Mh.L.J. 95. Bai Tahira had been divorced by her husband in July 1962. The Apex Court held that she was entitled to maintenance.

11. The Division Bench in Bhagwan Raoji considered both these judgments, as also the significance of the expression in Explanation (b) to Section 125(1) of the Code of Criminal Procedure, viz. "who has been divorced by" or "has obtained divorce from", which has been again used in clauses (c) and (d) of Section 127(3) of the Code of Criminal Procedure. The Division Bench then considered whether the respondent before them could claim benefit of extended definition of 'wife' in Explanation (b) to Section 125(1), since she had suffered an ex parte decree of restitution of conjugal rights on 31-7-1979, followed by ex parte decree of divorce on 3-12-1980 for failure to comply with decree for restitution of conjugal rights in spite of husband's filing an execution proceeding. The Division Bench then held as under in paras 16 and 17 of the judgment :

"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 in clause (b), the wife has not remarried. If this is the true interpretation of clause (b) of the Explanation, then in our view, the respondents'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 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 refused 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 had 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 (1) 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."

12. The Division Bench then took a review of several judgments on the subject. In paras 27, 31 and 32, the Court then concluded as under :

"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 if 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. In 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."

"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) to 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 Sharadchandra Satbhai vs. Indubai Satbhai, 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'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). We are unable to persuade

ourselves to agree with the view expressed by Vaidya, J. in Smt. Sugandhabai vs. 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."

In separate but concurring judgment in para 38, an Hon'ble Judge, who was a member of the Bench, observed as under :-

"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 the 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."

13.. The learned counsel for husband also relied on a judgment of the same Hon'ble Single Judge in Satyawar Laxman Jagtap v. Vimal Satyawar Jagtap and others, reported at 2000(1) Mh.L.J. 419, where similar view was taken.

14. The learned counsel for wife submitted that this view may no longer be regarded as good law in view of categorical pronouncement of the Apex Court in Rohtash Singh v. Ramendri (Smt) and others, reported at (2000) 3 SCC 180. Parties were married on 10-5-1980. In 1991, wife left husband's house and refused to return. Husband filed a petition for dissolution of marriage on the ground of desertion. On 15-7-1995, the Family Court granted a decree of divorce on the ground of desertion.

Wife had claimed maintenance under Section 125 of the Code of Criminal Procedure. Family Court granted maintenance in spite of decree of divorce on the ground of desertion. High Court dismissed husband's revision leading to his filing Special Leave Petition before the Hon'ble Supreme Court. It was specifically argued that in the face of decree of divorce on the ground of desertion, in view of provisions of Section 125(4) of the Code of Criminal Procedure, maintenance could not be granted. It may be useful to quote the observations of the Apex Court in paras 6 to 12 of the judgment which squarely deal with the questions raised in the present case :-

"6. Under this provision, a wife is not entitled to any maintenance allowance from her husband if she is living in adultery or if she has refused to live with her husband without any sufficient reason or if they are living separately by mutual consent. Thus, all the circumstances contemplated by sub-section (4) of Section 125 Cr.P.C.

presuppose the existence of matrimonial relations. The provision would be applicable where the marriage between the parties subsists and not where it has come to an end. Taking the three circumstances individually, it will be noticed that the first circumstance on account of which a wife is not entitled to claim maintenance allowance from her husband is that she is living in adultery. Now, adultery is the sexual intercourse of two persons, either of whom is married to a third person. This clearly supposes the subsistence of marriage between the husband and wife and if during the subsistence of marriage, the wife lives in adultery, she cannot claim maintenance allowance under Section 125 of the Code of Criminal Procedure."

"7. The second ground on which she would not be entitled to maintenance allowance is the ground of her refusal to live with her husband without any sufficient reason. This also presupposes the subsistence of marital relations between the parties. If the marriage subsists, the wife is under a legal and moral obligation to live with her husband and to fulfil the marital obligations. She cannot, without any sufficient reason, refuse to live with her husband. "Sufficient reasons" have been

interpreted differently by the High Courts having regard to the facts of individual cases. We are not required to go into that question in the present case as admittedly the marriage between the parties came to an end on account of a decree for divorce having been passed by the Family Court. Existence of sufficient cause on the basis of which the respondent could legitimately refuse to live with the petitioner is not relevant for the present case. In this situation, the only question which survives for consideration is whether a wife against whom a decree for divorce has been passed on account of her deserting the husband can claim maintenance allowance under Section 125 CrPC and how far can the plea of desertion be treated to be an effective plea in support of the husband's refusal to pay her the maintenance allowance."

"8. Admittedly, in the instant case, the respondent is a divorced wife. The marriage ties between the parties do not subsist. The decree for divorce was passed on 15-7-

1995 and since then, she is under no obligation to live with the petitioner. But though the marital relations came to an end by the divorce granted by the Family Court under Section 13 of the Hindu Marriage Act, the respondent continues to be a "wife" within the meaning of Section 125 CrPC on account of Explanation (b) to sub-

section (1) which provides as under :

"Explanation.--For the purposes of this chapter--

(a) * * *

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

"9. On account of the explanation quoted above, a woman who has been divorced by her husband on account of a decree passed by the Family Court under the Hindu Marriage Act, continues to enjoy the status of a wife for the limited purpose of claiming maintenance allowance from her ex-husband. This Court in Capt.

Ramesh Chander Kaushal v. Veena Kaushal observed as under : (SCC p. 74, para 9) "9. This provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39. We have no doubt that sections of statutes calling for construction by courts are not petrified print but vibrant words with social functions to fulfil. The brooding presence of the constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance. So viewed, it is possible to be selective in picking out that interpretation out of two alternatives which advance the cause - the cause of the derelicts."

"10 Claim for maintenance under the first part of Section 125 CrPC is based on the subsistence of marriage while claim for maintenance of a divorced wife is based on the foundation provided by Explanation (b) to sub-

section (1) of Section 125 CrPC. If the divorced wife is unable to maintain herself and if she has not remarried, she will be entitled to maintenance allowance. The Calcutta High Court had an occasion to consider an identical situation where the husband had obtained divorce on the ground of desertion by the wife but she was held entitled to maintenance allowance as a divorced wife under Section 125 CrPC and the fact that she had deserted her husband and on that basis a decree for divorce was passed against her was not treated as a bar to her claim for maintenance as a divorced wife. (See: Sukumar Dhibar v. Anjali Dasi). The Allahabad High Court also, in the instant case, has taken a similar view.

We approve these decisions as they represent the correct legal position."

"11. Learned counsel for the petitioner then submitted that once a decree for divorce was passed against the respondent and marital relations between the petitioner and the respondent came to an end, the mutual rights, duties and obligations should also come to an end. He pleaded that in this situation, the obligation of the petitioner to maintain a woman with whom all relations came to an end should also be treated to have come to an end. This plea, as we have already indicated above, cannot be accepted as a woman has two distinct rights for maintenance. As a wife, she is entitled to maintenance unless she suffers from any of the disabilities indicated in Section 125(4). In another capacity, namely, as a divorced woman, she is again entitled to claim maintenance from the person of whom she was once the wife. A woman after divorce becomes a destitute. If she cannot maintain herself or remains unmarried, the man who was once her husband continues to be under a statutory duty and obligation to provide maintenance to her."

"12. Learned counsel for the petitioner then contended that the maintenance has been allowed to the respondent from the date of the application. The application under Section 125 CrPC was filed by the respondent during the pendency of the civil suit for divorce under Section 13 of the Hindu Marriage Act. It is contended that since the decree of divorce was passed on the ground of desertion by the respondent, she would not be entitled to maintenance for any period prior to the passing of the decree under Section 13 of the Hindu Marriage Act. To that extent, the learned counsel appears to be correct. But for that short period, we would not be inclined to interfere."

In view of this pronouncement of the Supreme Court, it is not necessary to refer to the judgments of Kerala, Himachal Pradesh, Delhi and Orissa High Courts, which were cited by the learned counsel for the wife.

15. It may be seen that the Apex Court has held that even a wife, who is divorced on the ground of desertion, is entitled to maintenance and she does not get disentitled under sub-section (4) of Section 125 of the Code of Criminal Procedure Code. Thus the very basis of the judgment of the Division Bench in Sharadchandra Satbhai v. Indubai Satbhai, reported at 1978 Mh.L.J. 123, which was approved by the Division in Bhagwan Raoji Dale v. Sushma alias Nanda Bhagwan Dale and another, reported in 1998(2) Mh.L.J. 819, goes away. In Sharadchandra, the wife was held disentitled to maintenance specifically on account of the provisions of Section 125(4) of the Code. In

fact Sharadchandra is not an authority for the interpretation sought to be put on expression used in Explanation (b) to Section 125(1) of the Code. There is absolutely no warrant for concluding that a woman "who has been divorced" refers to only women who have been divorced under the Muslim Law or customary law, or that woman "who has obtained a divorce from her husband" refers to only those wives who have obtained a decree of divorce. since the Explanation (b) was intended to include divorced wives and since apart from judicial proceedings, divorce is also possible according to personal or customary law applicable to parties. A woman "who has been divorced" would include any woman who has been divorced not only according to personal or customary law, but one who has been divorced on a decree in proceeding initiated by her husband. And, the expression "a woman who has obtained divorce" would not be restricted to only those wives who apply for a decree of divorce (as has been observed in para 16 of the judgment in Bhagwan Raoji - 1998(2) Mh.L.J. 819) but may also include those who can and do obtain divorce under customary or personal law. It may be recalled that even under Mohamadan Law, "Khula" is a form of divorce granted at the instance of a Muslim wife. The distinction sought to be made in paras 16 and 38 of the judgment in Bhagwan Raoji can no longer be held as good law since it cannot stand with the conclusion drawn by the Supreme Court in Rohtash Singh v. Ramendri (Smt) and others, reported at (2000) 3 SCC 180.

16. The learned counsel for husband submitted even if a wife, who is divorced on the ground of desertion, is held entitled to maintenance, the same may not hold good in respect of a wife divorced on the ground of her cruelty (Cruelty in the present case is her allegation that husband is impotent). First, the phraseology used in Explanation (b) to Section 125(1) of the Code would not admit of creating classes of divorced wives. A divorced wife is a divorced wife, whatever may be the reasons for divorce and whatever may be the procedure adopted or forum chosen. If wife divorced on the ground of desertion, who has a better reason to be disentitled, because a husband cannot be said to have refused or neglected to maintain her, is held entitled to maintenance as divorced wife, since she herself deprived husband of the chance to maintain her, wives divorced for other reasons would certainly be entitled to be maintained, since as held by the Supreme Court in Rohtash Singh, (i) such woman, being a divorced wife in terms of Explanation (b) to Section 125(1) of the Code would be deemed to be 'wife'; (ii) such a woman would be under no obligation to reside with the husband, having been divorced; and (iii) would therefore be entitled to separate maintenance. In view of this, husband's petition challenging grant of maintenance to his wife on the ground that having been divorced on account of cruelty, she is not entitled to maintenance, would have to be dismissed. It may be useful to recall that in the Second Appeal, this Court had found it necessary to take the support of irretrievable breakdown of marriage also to prop up the case of cruelty for granting divorce.

17. As for wife's application for enhancing maintenance allowance to Rs.5,000/- per month, both the Courts below, upon consideration of evidence tendered, have held her entitled to Rs.1,250/- per month. The findings are in tune with the facts proved and do not call for any interference in exercise of inherent powers under Section 482 of the Code. She could always apply for increase of maintenance allowance by making out a case for such increase in the Trial Court. Hence, even this application has to be rejected.

18. Both Criminal Application No.663 of 2008 and Criminal Writ Petition No.58 of 2008 are dismissed.

JUDGE Lanjewar