

**MOHD. AHMED KHAN V. SHAH BANO BEGUM &
ORS [1985] INSC 99; AIR 1985 SC 945; 1985 (3) SCR
844; 1985 (2) SCC 556; 1985 (1) SCALE 767 (23 April
1985)**

CHANDRACHUD, Y.V. ((CJ) CHANDRACHUD, Y.V. ((CJ) MISRA RANGNATH
DESAI, D.A.

REDDY, O. CHINNAPPA (J) VENKATARAMIAH, E.S. (J)

CITATION: 1985 AIR 945 1985 SCR (3) 844 1985 SCC (2) 556 1985 SCALE (1)767

CITATOR INFO :

F 1986 SC 587 (4) RF 1987 SC1103 (10) D 1988 SC 644 (5,6)

ACT:

Muslim Personal Law-Concept of divorce-Whether, on the pronouncements of "talaq" and on the expiry of the period of iddat a divorced wife ceases to be a wife.

Code of Criminal Procedure Code, 1973 (Act II of 1974) Sections 125(1) (a) and Explanation (b) thereunder, Section 125 (3) and the Explanation, under the proviso thereto and section 127 (3) (b), scope and interpretation of-Correctness of three Judges.' Bench decision reported in [1978] INSC 199; (1979) 2 SCR 75 and [1980] INSC 111; (1980) 3 SCR 1127 to the effect that section 125 of the code applies to Muslims and divorced Muslim wife is entitled to maintenance-Whether there is any conflict between the provisions of section 125 and that of the Muslim Personal Law on the liability of the Muslim husband to provide for the maintenance of his divorced wife.

Code of Criminal Procedure, 1973, section 127 (3) (b) read with section 2 of the Shariat Act XXVI of 1937-Whether section 127 (3) (b) debars payment of maintenance to a divorced wife, once the Mahar or dower is paid-Whether the liability of the husband to maintain a

divorced wife is limited to the period of "iddat" Nature of Mahr or dower-Whether Mehr is maintenance.

HEADNOTE:

Under section 125 (1) (a), if any person, having sufficient means neglects or refuses to maintain his wife, unable to maintain herself, a Magistrate of the first class may, upon proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife at such monthly rate not exceeding five hundred rupees in the whole. Under Explanation (b) thereunder ' wife" includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. Under the explanation below sub section 3 of section 125, if a husband has contracted marriage with another woman or keeps a mistress it shall be considered to be a just ground for his wife's refusal to live with him. Keeping this in view, if in the trial arising out of 845 an application made under section 125, and if the husband offers to maintain his wife on condition of living with him, the Magistrate may consider any of the grounds of the wife's refusal to live with her husband before ordering the maintenance. Under section 127 (3) (b), the Magistrate shall cancel the order passed by him under section 125, in favour of a woman who has been divorced by, or has obtained a divorce from her husband if the woman who has been divorced by her husband has received, whether before or after the date of the said order, the whole of the sum, which, under any customary or personal law applicable to the parties was payable on such divorce.

The appellant, who is an advocate by profession was married to the respondent in 1932. Three sons and two daughters were born of that marriage In 1975, the appellant drove the respondent out of the matrimonial home. In April 1978, the respondent filed a petition against the appellant under section 125 of the Code of Criminal Procedure, in the Court of the Judicial Magistrate (First class) Indore, asking for maintenance at the rate of Rs. 500 per month, in view of the professional income of the appellant which was about Rs. 60,000 per annum. On November 6, 1978, the appellant divorced the respondent by an irrevocable "talaq" and took up the defence that she had ceased to be his wife by reason of the divorce granted by him; that he was, therefore, under no obligation to provide maintenance for her; that he had already paid maintenance for her at the rate of Rs. 200 per month for about two years, and that, he had deposited a sum of Rs. 3,000 in the court by way of "dower or Mahr" during the period of "iddat". In August 1979, the Magistrate directed the appellant to pay a princely sum of Rs. 25 per month to the respondent by way of maintenance. In a revisional

application filed by the respondent the High Court of Madhya Pradesh enhanced the amount of maintenance to Rs. 179.20 per month. Hence the appeal by special leave by the husband. The view taken in the earlier two three Judges' Benches of the Supreme Court presided over by Krishna Iyer, J. and reported in [1978] INSC 199; [1979] 2 SCR 75, and [1980] INSC 111; [1980] 3 SCR 1127, to the effect that section 125 of the Code applies to Muslims also and that therefore, the divorced Muslim wife is entitled to apply for maintenance was doubted, by the Bench consisting of Fazal Ali and Varadarajan, JJ., since in their opinion the said decisions required reconsideration by a larger Bench consisting of more than three judges as the decisions are not only in direct contravention of the plain and unambiguous language of section 127 (3) (b) of the Code which far from overriding the Muslim law on the subject protects and applies the same in case where a wife has been divorced by the husband and the dower specified has been paid and the period of iddat has been observed but also militates against the fundamental concept of divorce by the husband and its consequences under the Muslim law which has been expressly protected by section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 — an Act which was not noticed in the said two decisions.

Judgment

The Judgment of the Court was delivered by CHANDRACHUD, C.J. This appeal does not involve any question of constitutional importance but, that is not to say that it does not involve any question of importance.

Some questions which arise under the ordinary civil and criminal law are of a far-reaching significance to large segments of society which have been traditionally subjected to unjust treatment. Women are one such segment. 'Nastree swatantramahati' said Manu, the Law giver: The woman does not deserve independence. And, it is alleged that the 'fatal 850 point in Islam is the 'degradation of woman'(1). To the Prophet is ascribed the statement, hopefully wrongly, that 'Woman was made from a crooked rib, and if you try to bend it straight, it will break; therefore treat your wives kindly.

This appeal, arising out of an appealation filed by a divorced Muslim woman for maintenance under section 125 of the Code of Criminal Procedure, raises a straightforward issue which is

of common interest not only to Muslim women, not only to women generally but, to all those who, aspiring to create an equal society of men and women, lure themselves into the belief that mankind has achieved a remarkable degree of progress in that direction. The appellant, who is an advocate by profession, was married to the respondent in 1932. Three sons and two daughters were born of that marriage. In 1975, the appellant drove the respondent out of the matrimonial home. In April 1978, the respondent filed a petition against the appellant under section 125 of the Code in the court of the learned Judicial Magistrate (First Class), Indore asking for maintenance at the rate of Rs 500 per month. On November 6, 1978 the appellant divorced the respondent by an irrevocable talaq.

His defence to the respondent's petition for maintenance was that she had ceased to be his wife by reason of the divorce granted by him, to provide that he was therefore under no obligation maintenance for her, that he had already paid maintenance to her at the rate of Rs. 200 per month for about two years and that, he had deposited a sum of Rs. 3000 in the court by way of dower during the period the of iddat.

In August, 1979 the learned Magistrate directed appellant to pay a princely sum of Rs. 25 per month to the respondent by way of maintenance. It may be mentioned that the respondent had alleged that the appellant earns a professional income of about Rs. 60,000 per year. In July, 1980, in a revisional application filed by the respondent, the High Court of Madhya Pradesh enhanced the amount of maintenance to Rs. 179.20 per month. The husband is before us by special leave.

Does the Muslim Personal Law impose no obligation upon the husband to provide for the maintenance of his divorced wife ? Undoubtedly, the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so, for reasons good, bad or indifferent.¹ Indeed, for no reason at all. But, is the only price of that privilege the dole of a pittance during the period of iddat ? And, is the law so ruthless in its inequality that, no matter how much the husband pays for the maintenance of his divorced wife during the period of iddat, the mere fact that he has paid something, no matter how little, absolves him for ever from the duty of paying adequately so as to enable her to keep her body and soul together ? Then again, is there any provision in the Muslim Personal Law under which a sum

¹ 'Selections from Kuran'-Edward William Lane 1843, Reprint 1982, page xc (Introduction) 851

is payable to the wife 'on divorce' ? These are some of the important, though agonising, questions which arise for our decision.

The question as to whether section 125 of the Code applies to Muslims also is concluded by two decisions of this Court which are reported in *Bai Tahira v. Ali Hussain Fidalli Chothia* and *Fazlunbi v. K. Khader Vali*. These decisions took the view that the divorced Muslim wife is entitled to apply for maintenance under section 125. But, a Bench consisting of our learned Brethren, Murtaza Fazal Ali and A. Varadarajan, JJ. were inclined to the view that those cases are not correctly decided. Therefore, they referred this appeal to a larger Bench by an order dated February 3, 1981, which reads thus:

"As this case involves substantial questions of law of far-reaching consequences, we feel that the decisions of this Court in *Bai Tahira v. Ali Hussain Fidalli Chothia & Anr*² and *Fuzlunbi v. K. Khader Vali & Anr*³ require reconsideration because, in our opinion, they are not only in direct contravention of the plain and unambiguous language of s. 127(3)(b) of the Code of Criminal Procedure, 1973 which far from overriding the Muslim Law on the subject protects and applies the same in case where a wife has been divorced by the husband and the dower specified has been paid and the period of iddat has been observed. The decision also appear to us to be against the fundamental concept of divorce by the husband and its consequences under the Muslim law which has been expressly protected by s. 2 of the Muslim Personal Law (Shariat) Application Act, 1937—an Act which was not noticed by the aforesaid decisions. We, therefore, direct that the matter may be placed before the Honorable Chief Justice for being heard by a larger Bench consisting of more than three Judges."

Section 125 of the Code of Criminal Procedure which deals with the right of maintenance reads thus:

125 Order for maintenance of wives, children and parents

(1) If any person having sufficient means neglects or refuses to maintain—

² 1979 (2) SCR 75.

³ 1980 (3) SCR 1127.

- (a) his wife, unable to maintain herself,
- (b) ...
- (c) ...
- (d) ...

a Magistrate of the first class may, upon proof of such neglecter refusal, order such person to make a monthly allowance for the maintenance of his wife ... at such monthly rate not exceeding five hundred rupees in the whole as such Magistrate think fit.

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 has not remarried.
- (2)
- (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided.....

Provided further that if such person offers to maintain his wife on condition of her living with him.

and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section

notwithstanding such offer, if he is satisfied that there is just ground for so doing.

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

Section 127(3)(b), on which the appellant has built up the edifice of his defence reads thus:

127 Alteration in allowance

(1)

(2)

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from her husband, the Magistrate shall, if he is satisfied that—

(a).....

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the Sum which, 854 under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,—

(i) in the case where such sum was paid before such order, from the date on which such order was made.

(ii) in any other case, from the date of expiry of the period, if any, for Which maintenance has been actually paid by the husband to the woman.

Under section 125(1)(a), a person who, having sufficient means, neglects or refuses to maintain his wife who is unable to maintain herself, can be asked by the court to pay a monthly maintenance to her at a rate not exceeding Five Hundred rupees. By clause (b) of the Explanation to section 125(1), 'wife' includes a divorced woman who has not remarried. These provisions are too clear and precise to admit of any doubt or refinement. The religion professed by a spouse or by the spouses has no place in the scheme of these provisions. Whether the spouses are Hindus or Muslims, Christians or Parsis, pagans or heathens, is wholly irrelevant in the application of these provisions. The reason for this is axiomatic, in the sense that section 125 is a part of the Code of Criminal Procedure, not of the Civil Laws which define and govern The rights and obligations of the parties belonging to particular, religions, like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act. Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion professed by the neglected wife, child or parent? Neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves are the objective criteria which determine the applicability of section 125. Such provisions, which are essentially of a prophylactic nature, cut across the barriers of religion.

True, that they do not supplant the personal law of the parties but, equally the religion professed by the parties or the state of the personal law by which they are governed, cannot have any repercussion on the applicability of such laws unless, within the framework of the Constitution, their application is restricted to a defined category of religious groups or classes. The liability imposed by section 125 to maintain close relatives who are indigent is founded upon the individual's obligation to the society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be clubbed with religion. Clause (b) of the Explanation to section 125(1), which defines 'wife' as including a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope.

Section 125 is truly secular in character.

Sir James FitzJames Stephen, who piloted the Code of Criminal Procedure, 1872 as a Legal Member of the Viceroy's Council, described the precursor of Chapter IX of the Code in which section 125 occurs, as 'a mode of preventing vagrancy or at least of preventing its

consequences. In *Jagir kaur v. Jaswont Singh*,⁴ Subba Rao, J. speaking for the Court said that Chapter XXXVI of the Code of 1898 which contained section 488, corresponding to section 125, "intends to serve a social purpose". In *Nanak Chand v. Shri Chandra Kishore Agarwala*,⁵ Sikri, J., while pointing out that the scope of the Hindu Adoptions and Maintenance Act, 1956 and that of section 488 was different, said that section 488 was "applicable to all persons belonging to all religions and has no relationship with the personal law of the parties".

Under section 488 of the Code of 1898, the wife's right to maintenance depended upon the continuance of her married status. Therefore, that right could be defeated by the husband by divorcing her unilaterally as under the Muslim Personal Law, or by obtaining a decree of divorce against her under the other systems of law. It was in order to remove this hardship that the Joint Committee recommended that the benefit of the provisions regarding maintenance should be, extended to a divorced woman, so long as she has not remarried after the divorce. That is the genesis of clause (b) of the Explanation to section 125(1), which provides that 'wife' includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. Even in the absence of this provision, the courts had held under the Code of 1898 that the provisions regarding maintenance were independent of the personal law governing the parties. The introduction of the definition of 'wife', so as to include a divorced woman lends even greater weight to that conclusion. 'Wife' means a wife as defined, irrespective of the religion professed by her or by her husband. Therefore, a divorced Muslim woman, so long as she has not remarried, is a 'wife' for the purpose of section 125. The statutory right available to her under that section is unaffected by the provisions of the personal law applicable to her.

The conclusion that the right conferred by section 125 can be exercised irrespective of the personal law of the parties is fortified, especially in regard to Muslims, by the provision contained in the Explanation to the second proviso to section 125(3) of the Code. That proviso says that if the husband offers to maintain his wife on condition that she should live with him, and she refuses to live with him, the Magistrate may consider any grounds of refusal stated by her, and may make an order of maintenance notwithstanding the offer of the

⁴ 1964 (2) SCR 73, 84.

⁵ 1970 (1) SCR 565.

husband, if he is satisfied that there is a just ground for passing such an order. According to the Explanation to the proviso:

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

It is too well-known that "A Mahomedan may have as many as four wives at the same time but not more. If he marries a fifth wife when he has already four, the marriage is not void, but merely irregular".⁶ The explanation confers upon the wife the right to refuse to live with her husband if he contracts another marriage, leave alone 3 or 4 other marriages. It shows, unmistakably, that section 125 overrides the personal law, if is any there conflict between the two.

...

Before we conclude, we would like to draw attention to the Report of the Commission on marriage and Family Laws, which was appointed by the Government of Pakistan by a Resolution dated August 4, 1955. The answer of the Commission to Question No.5 (page 1215 of the Report) is that "a large number of middle-aged women who are being divorced without rhyme or reason should not be thrown on the streets without a roof over their heads and without any means of sustaining themselves and their children." The Report concludes thus:

In the words of Allama Iqbal, 'the question which is likely to confront Muslim countries in the near future, is whether the law of Islam is capable of evolution—a question which will require great intellectual effort, and is sure to be answered in the affirmative'.

For these reasons, we dismiss the appeal and confirm the judgment of the High Court. The appellant will pay the costs of the appeal to respondent 1, which we quantify at rupees ten thousand. It is needless to add that it would be open to the respondent to make an application under section 127 (1) of the Code for increasing the allowance of maintenance granted to her on proof of a change in the circumstances as envisaged by that section.

⁶ See Mulla's Mahomedan Law, 18th Edition, paragraph 25S, page 285, quoting Baillie's Digest of Moohummudan Law; and Ameer Ali's Mahomedan Law, 5th Edition, Vol. II, page 280