

**AIR 1979 SC 362 : (1979) CriLJ 151 : (1979) MhLj 95 : (1979) MPLJ 132 : (1979) 81
PLR 218 : (1979) 2 SCC 316 : (1979) SCC(Cri) 473 : (1979) 2 SCR 75 : (1979) 11 UJ
150**

Supreme Court of India

Case No: Criminal Appeal No. 332 of 1977

Bai Tahira

APPELLANT

Vs

Ali Hussain Fissalli
Chothia and Another

RESPONDENT

Date of Decision: Oct. 6, 1978

Acts Referred:

Constitution of India, 1950 " Article 15(3), 37, 39, 58#Criminal Procedure Code, 1973 (CrPC)
" Section 125, 125(1), 125(4), 127, 127(3)

Citation: AIR 1979 SC 362 : (1979) CriLJ 151 : (1979) MhLj 95 : (1979) MPLJ 132 : (1979) 81
PLR 218 : (1979) 2 SCC 316 : (1979) SCC(Cri) 473 : (1979) 2 SCR 75 : (1979) 11 UJ 150

Hon'ble Judges: V.R. Krishna Iyer, J; V.D. Tulzarurkar, J; R.S. Pathak, J

Bench: Full Bench

Advocate: M.C. Bhandare, A.N. Karkhanis, Malini Paduval and S. Bhandare, for the Appellant;
G.L. Sanghi A.K. Verma and M.N. Shroof, for the Respondent

Final Decision: Allowed

Judgement

Krishna Iyer, J.

In this appeal, by special leave we are called upon to interpret a benign provision enacted to ameliorate the economic

condition of neglected wives and discarded divorces, namely Section 125, Code of Criminal Procedure. Welfare laws must be so read as to be

effective delivery systems of the salutary objects sought to be served by the Legislature and when the beneficiaries are the weaker sections, like

destitute women, the spirit of Article 15(3) of the Constitution must belight the meaning of the Section. The Constitution is a pervasive omni

presence brooding over the meaning and transforming the values of every measure. So Section 125 and sister clauses must receive a

compassionate expansion of sense that the words used permit.

The Brief Facts :

2. The Respondent (husband) married the Appellant (wife) as a second wife, way back in 1956, and a few years later had a son by her. The initial

warmth vanished and the jealousies of a triangular situation erupted, marring mutual affection. The Respondent divorced the Appellant around July

1962. A suit relating to a flat in which the husband had housed the wife resulted in a consent decree which also settled the marital disputes For

instance, it recited that the Respondent had transferred the suit premises, namely, a flat in Bombay, to the Appellant and also the shares of the Co

operative Housing Society which built the flat concerned. There was a reference to mehar money (Rs. 5,000/- and "iddat" money, Rs. 180) which

was also stated to have been adjusted by the compromise terms. There was a clause in the compromise :

The Plaintiff declares that she has now no claim or right whatsoever against the Defendant or against the estate and the properties of the Defendant

And another term in the settlement was that the Appellant had by virtue of the compromise become the absolute owner of the flat and various

deposits in respect of the said flat made with the co-operative housing society.

3. For some time there was flickering improvement in the relations between the quondam husband and the quondam wife and they lived together.

Thereafter, again they separated, became estranged. The Appellant, finding herself in financial straits and unable to maintain herself, moved the

Magistrate u/s 125 of the Code of Criminal Procedure, 1973, for a monthly allowance for the maintenance of herself and her child She proceeded

on the footing that she was still a wife while to the Respondent rejected this status and asserted that she was a divorcee and therefore Ineligible for

maintenance. The Magistrate, who tried the petition for maintenance, held that the Appellant was a subsisting wife and awarded monthly

maintenance of Rs. 300/- for the son and Rs. 400/- for the mother for their subsistence, taking due note of the fact that the cost of living in

Bombay, where the parties lived, was high, and that the Respondent had provided residential accommodation to the Appellant.

4. This order was challenged before the Sessions Judge by the aggrieved husband, who on a strange view of the law that the Court, u/s 125, had

no jurisdiction to consider whether the Applicant was a wife, dismissed the petition in allowance of the appeal. The High Court designed to bestow

little attention on the matter and summarily dismissed a revision petition. This protracted and fluctuating litigation misfortune has led to the appeal,

by special leave, before this Court.

The Questions Mooted :

5. Shri Bhandare, appearing for the Appellant, contended that the Courts below had surprisingly forgotten the plain provision in the Explanation (b)

to Section 125(1) of the Code which reads :

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

On this foundation, he urged that accepting the contention of the Respondent that the Appellant was a divorcee, his client was still entitled to an

allowance. This is obviously beyond dispute on a simple reading of the sub section and it is curious how this innovative and sensitive provision with

a benignant disposition towards destitute divorcees has been over looked by all the courts below We hold that every divorcee, otherwise eligible,

is entitled to the benefit of maintenance allowance and the dissolution of the marriage makes no difference to this right under the current Code. In

the normal course, an order for maintenance must follow, the quantum having been determined by the learned Magistrate at the trial level.

6. However, Shri Sanghi, appearing for the Respondent, sought to sustain the order in his favour on three grounds : They are of public importance

since the affected party in such a fact situation is the neglected divorcee He first argued that Section 125(4) would apply in the absence of proof

that the lady was not living separately by mutual consent His next plea was that there must be proof of neglect to maintain to attract Section 125

and his third contention was that there was a settlement by consent decree in 1962, whereby the mehar money had been paid and all claims

adjusted, and so no claim for maintenance could survive. The third contention is apparently based upon a contractual arrangement in the consent

decree read with Section 127(3) (b) which reads :

(b) the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the

sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,--

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

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

We must state, however, that there was no specific plea, based upon the latter provision, set up anywhere in the courts below or urged before us.

But if one were to locate a legal ground to raise the contention that the liability to pay maintenance had ceased on account of the payment of

mehar, it is Section 127(3) of the Code. So we must deal with the dual sub-heads of the third ground.

7. The meaning of meanings is derived from values in a given society and its legal system. Article 15(3) has compelling, compassionate relevance in

the context of Section 125 and the benefit of doubt, if any, in statutory interpretation belongs to the ill-used wife and the derelict divorcee. This

social perspective granted, the resolution of all the disputes projected is easy. Surely, Parliament, in keeping with Article 15(3) and deliberate by

design, made a special provision to help women in distress cast away by divorce. Protection against moral and material abandonment manifest in

Article 39 is part of social and economic justice, specified in Article 58, fulfilment of which is fundamental to the governance of the country

(Article 37). From this coign of vantage we must view the printed text of the particular Code.

8. Section 125 requires, as a sine qua non for its application, neglect by husband or father The Magistrate's order proceeds on neglect to maintain

; the Sessions Judge has spoken nothing to the contrary ; and the High Court has not spoken at all. Moreover, the husband has not examined

himself to prove that he has been giving allowances to the divorced wife His case, on the contrary, is that she has forfeited her claim be cause of

divorce and the consent decree. Obviously, he has no case of non-neglect. His plea is his right to ignore. So the basic condition of neglect to

maintain is satisfied. In this generous jurisdiction, a broader perception and appreciation of the facts and their bearing must govern the verdict not

chopping little logic or tinkering with burden of proof.

9. The next submission is that the absence of mutual consent to live separately must be made out if the hurdle of Section 125(4) is to be overcome.

We see hardly any force in this plea. The compulsive conclusion from a divorce by a husband and his provision of a separate residence as

evidenced by the consent decree fills the bill. Do divorcees have to prove mutual consent to live apart? Divorce painfully implies that the husband

orders her out of the conjugal home. If law has" nexus with life this argument is still born.

10. The last defence, based on mehar payment, merits more serious attention. The contractual limb of the contention must easily fail. The consent

decree of 1962 resolved all disputes and settled all claims then available. But here is a new statutory right created as a projection of public policy

by the Code of 1973, which could not have been in the contemplation of the parties when in 1962 they entered into a contract to adjust their then

mutual rights No settlement of claims which does not have the special statutory right of the divorcee u/s 125 can operate to negate that claim.

11. Nor can Section 127 rescue the Respondent from his obligation. Payment of mehar money, as a customary discharge, is within the cognisance

of that provision. But what was the amount of mehar? Rs. 5000/- interest from which could not keep the woman's body and Soul together for a

day, even in that city where 40% of the population are reported to live on payments, unless she was ready to sell her body and give up her soul

The point must be clearly understood that the scheme of the complex of provisions in Chap IX has a social purpose. Ill-used wives and desparate

divorcees shall not be driven to material and moral dereliction to seek sanctuary in the streets. This traumatic horror animates the amplitude of

Section 127 Where the husband, by customary payment at the time of divorce, has adequately provided for the divorcees, a subsequent series of

recurrent doles is contra-indicated and the husband liberated. This is the teleological interpretation, the sociological decoding of the text of Section

127. The keynote thought is adequacy of payment which will take reasonable care of her maintenance.

12. The payment of illusory amounts by way of customary or personal law requirement will be considered in the reduction of maintenance rate but

cannot annihilate that rate unless it is a reasonable substitute. The legal sanctity of the payment is certified by the fulfilment of the social obligation,

not by a ritual exercise rooted in custom. No construction which leads to frustration of the statutory project can secure validation if the court is to

pay true homage to the Constitution The only just construction of the section is that Parliament intended divorcees should not derive a double

benefit. If the first payment by way of mehar or ordained by custom has a reasonable relation to the object and is a capitalised substitute for the

order u/s 125--not mathematically but fairly--then Section 127(3)(b) subserves the goal and relieves the obligor, not pro tanto but wholly. The

purpose of the payment "under any customary or personal law" must be to obviate destitution of the divorcee and to provide her with herewithal to

maintain herself. The whole schema of Section. 127(3)(b) is manifestly to recognise the substitute maintenance arrangement by lump sum payment

organised by the custom of the community or the personal law of the parties There must be a rational relation between the sum so paid and its

potential as provision for maintenance to interpret otherwise is to stultify the project. Law is dynamic and its meaning cannot be pedantic put

purposeful. The proposition, therefore, is that no husband can claim u/s 127(3)(b) absolution from his obligation u/s 125 towards a divorced wife

except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance

allowance.

13. The conclusion that we therefore reach is that the appeal should be allowed and it is hereby allowed and the order of the trial court restored.