

## Biswanath Saha Vs Sikha Saha

**Court:** Calcutta High Court

**Date of Decision:** June 7, 1986

**Acts Referred:** Criminal Procedure Code, 1973 (CrPC) â€” Section 125  
Hindu Marriage Act, 1955 â€” Section 13

**Citation:** (1986) CriLJ 1199 : (1986) 2 RCR(Criminal) 449

**Hon'ble Judges:** Shamsuddin Ahmed, J

**Bench:** Single Bench

### Judgement

Shamsuddin Ahmed, J.

This Revisional Application is directed against order dated 5-10-85 passed by the learned Judicial Magistrate, 2nd

Court at Barrackpore, 24 Parganas in Misc. Case No. 94 of 1982 u/s 125 Cr. P.C. The petitioner's case is that he married the O.P. wife and

lived together for some time. As she became pregnant she was sent to her father's place. During her stay at her father's place she used to

misbehave with the petitioner and also used to treat him with cruelty and insulted. After the birth of a new baby when he went to see the baby she

insulted him but the O.P. warned him and asked him not to go there. She also refused to return to the petitioner's house with the baby. After some

reconciliation the petitioner took her back but only for some time. On 6th December 1978 she left with the child deserting the petitioner. He was

compelled to file a suit for a decree of divorce. On 20-1-83 the suit was decreed ex parte u/s 13(1)(ia), (ib) of the Hindu Marriage Act. The O.P.

was not allowed maintenance pendente lite or permanent alimony. She of course did not appear before the learned Judge and prayed for the same.

She filed an application u/s 125 of the Cr. P.C. alleging that the O.P. was ill treated by the petitioner and she was compelled to take shelter at her

father's place. O.P. refused to maintain her and the baby. Accordingly she filed the application and prayed for maintenance for herself as well as

for the baby. The O.P. petitioner before me appeared before the learned Magistrate and denied the allegation made. The case was that he is

dependent on his father and he has no means to maintain his wife and the baby separately. His further case was that he has obtained a decree of

divorce against the O.P. and in this circumstances she was not entitled to any maintenance.

2. The learned Magistrate found that divorced wife is entitled to maintenance. Accordingly the wife petitioner was entitled to order for maintenance

in her favour. The learned Magistrate also dealt with the question of the means of the O.P. husband and ultimately found that since he is an able

bodied man he is bound to maintain his wife and his child. Accordingly he ordered that the O.P. husband would pay maintenance at the rate of Rs.

125/- to the wife petitioner and Rs. 50/- to the baby from the month of March 1983. Being aggrieved the respondent petitioner has come up in this

revisional application.

3. Mr. Basu submitted that since the petitioner has obtained a decree of divorce against the O.P. u/s 13(i)(ia) and (ib) of the Hindu Marriage Act

petitioner is not entitled to an order of maintenance u/s 125 in view of the provisions of Section 125(4) which provides that 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 reasons she refused to live with her

husband or if they are living separately by mutual consent. The words ""entitled to receive an allowance"" in Sub-section (4) make it clear that the

provision of this Sub-section (4) must be read together with Sub-section (1) to determine the entitlement of the wife to receive maintenance. Mr.

Bose sought to impress that since Section 13(i)(ib) a Hindu marriage may be dissolved by the decree of divorce on the ground that the other party

has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. The decree of

divorce clearly shows that the learned 6th Addl. District Judge, Alipore found that" the O.P. had deserted the husband for at least two years

before the presentation of that divorce suit. Desertion as found by the learned Judge includes a finding that the wife refused to live with her husband

without any sufficient reason. Accordingly Mr. Bose submits that she will not be entitled to an order of maintenance in her favour.

4. Desertion has not been defined in the Hindu Marriage Act. Essence of desertion is forsaking and abandonment of one spouse by the other

without reasonable cause and without consent and against the wish of the other. It is a total repudiation of obligation of marriage. When the

Matrimonial Court decreed the suit for divorce on the finding that the wife has deserted the petitioner for a continuous period for more than two

years it has to be accepted that she refused to live with her husband without any sufficient reason. The question therefore is if this finding of the

Matrimonial Court is binding on the learned Magistrate while dealing with an application u/s 125 Cr. P.C. The factors to be considered by the

learned Magistrate in dealing with an application u/s 125 are those which are prevailing at least on the date of the order. As it appears the suit was

decreed on 14-1-1983. The impugned order u/s 125 was passed on 5-10-85. Therefore on the date of order there was no obligation on the part

of the wife to live with her husband. Accordingly Sub-section (4) of Section 125 will have no application in the facts of the instant case. It is true

that even though the husband has obtained a decree of divorce against the wife on the ground that she refused to live with him without any sufficient

reasons even then she (he) will have to suffer an order u/s 125 Cr. P.C. The erring party in such cases even though the wife, the husband has to

maintain her for no fault of his own. Since Section 125 Cr. P.C. was meant to prevent destitution and vagrancy. Even in such a case the wife will

be entitled to an order. Section 125(1) has provided that wife includes a woman who has been divorced by or has obtained a divorce from her

husband and has not remarried. Accordingly, the expression ""wife"" for the purpose of Section 125 includes a divorced woman and the ground of

divorce is not a matter for consideration. Accordingly, I do not find that the learned Magistrate has made any error in granting the maintenance to

the petitioner on the ground that she is a divorced woman. The other point urged by Mr. Bose is that the learned Magistrate ought not to have

granted maintenance on the ground that the husband was not able to maintain the wife. On this the learned Magistrate has found that the husband is

an able bodied man and is (has) accordingly granted maintenance. The amount awarded by the learned Magistrate does not appear to be any

heavy amount. Rs. 125/- for the wife and Rs. 50/- for the baby is a small amount compared to a day to day requirement of an individual in the

present circumstances. In view of what has been found above I find no reason for my interference and this application is accordingly rejected.