

Bai Tahira

Vs

Ali Hussain Fidaalli Chothia and Another

Criminal Appeal No. 332 of 1977

(V. R. Krishna Iyer, V. D. Tulzapurkar, R. S. Pathak JJ)

06.10.1978

JUDGMENT

KRISHNA LYER, J. -

1. A Prefatory Statement

1. 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 divorcees, namely, Section 125, Cr. P.C. 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 omnipresence 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. 5000 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 under Section 125 of the Criminal Procedure Code, 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 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, under Section 125, had no jurisdiction to consider whether the applicant was a wife, dismissed the petition in allowance of the appeal. The High Court deigned 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 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 overlooked 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, specificated in Article 38, 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 because 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 under Section 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 cognizance 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 pavements, 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 Chapter IX has a social purpose. Ill-used wives and desperate 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 divorcee, 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 key-note 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 under Section 125 - not mathematically but fairly - then Section 127(3)(b) subserves the goal and relieves the obliger, 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 wherewithal to maintain herself. The whole scheme 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 but purposeful. The proposition, therefore, is that no husband can claim under Section 127(3)(b) absolution from his obligation under Section 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.

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