

GUJARAT HIGH COURT

Hajuben Suleman

Vs.

Ibrahim Gandabhai

Criminal Revision No. 216 of 1976

(D.P. Desai, J. and N.H.Bhatt,JJ.)

31.08.1976

JUDGMENT

D.P. Desai, J.

1. This matter arises out of an application filed under Section 127(3) of the Code of Criminal Procedure, 1973 (hereafter referred to as "the Code"), and raises an interesting question of general importance. The matter has been referred to the Division Bench by our learned brother A.D. Desai, J. The facts may now be stated.

2. Petitioner No. 1 in this application is divorced wife of opposite party No. 1 and petitioner No.2 is their daughter. The parties are Mohmedans. The wife filed Misc. Criminal Application No. 313 of 1974 before the learned Judicial Magistrate, First Class, Bhavnagar under Section 125 of the Code for monthly allowance both in respect of herself and her minor daughter, petitioner No. 2, for the purpose of their main tenancy. In this application, the learned Magistrate, by his order dated August 20, 1975 fixed monthly allowance for the wife at Rs. 50/- and that for the daughter at Rs. 25/-. It was awarded from the date of the application. Thereafter, the wife had to file Misc. Criminal Application No. 293 of 1975 for recovery of arrears of maintenance of Rs. 765/- from 9-12-1974 to 5-11-1975. The husband, as against this application, filed Misc. Criminal Application No. 315 of 1975 stating inter alia that the petitioner wife was divorced on April 10, 1974 by giving Talaq according to Mohmedan law. He further alleged that the factum of his having given divorce by Talaq to the petitioner has been accepted in Maintenance Application i.e. Misc. Criminal Application No. 313 of 974 where the monthly allowance was fixed. It was further alleged that the Court in that case held that the petitioner was entitled to the maintenance allowance only till she received her customary dues and that during the pendency of the application for maintenance, the husband had deposited into the Court an amount of Rs. 100/- as maintenance for the Iddat period on July 23, 1975. It was further alleged that the amount of Mahar was paid to the petitioner wife at the time of marriage. Then it was alleged that even

though customary dues of Rs. 100/- were paid to the petitioner during the pendency of the earlier application, through oversight, that fact was not brought to the notice of the Court, with the result that the Court passed an order of monthly allowance on August 20, 1975 as stated above. On these grounds, therefore, the husband prayed for cancellation of the order of monthly allowance.

3. Now, one thing must be made clear as regards the averments made by the husband in his Misc. Criminal Application No. 315 of 1975 that the Court in the previous proceedings held that the wife was entitled to maintenance only till she received customary dues. On going through the judgment in Misc. Criminal Application No. 313 of 1974 by which monthly allowance was fixed, we find nothing to show that the Court ever made an observation to the above effect. Therefore, the averments which give an impression that in the earlier proceedings viz. Misc. Criminal Application No. 313 of 1974, the Court made a conditional order about payment of monthly allowance limited till the time the husband paid customary dues to the wife, are not borne out by the order of the Court in that proceeding. A contention was raised before the Court in paragraph 6 regarding Section 127(3)(b) of the Code on behalf of the husband at the time of arguments. The Court rejected that contention in the following words:

"Shri Lalani submitted at the time of argument that he pays the amount of Iddat to day; but there is no evidence that he paid it. Hence the Court can pass the order as the ingredients of Section 127(3)(b) of the Code of Cri. Procedure are not established.

The final order also is not limited in point of time till the wife was paid the customary dues by the husband.

4. Misc. Criminal Application No. 315 of 1975 given by the husband for cancellation of the order of monthly allowance was heard together with Misc. Criminal Application No. 293 of 1975 given by the wife for the recovery of the arrears of monthly allowance. The learned trial Magistrate raised issues; and issue No. 3. is in the following terms:

"1. Whether the applicant proves that he has paid the customary dues to the applicant?"

He answered it in the affirmative; and in the course of his judgment, he observed that the petitioner wife had admitted that Rs. 27-50 were agreed by way of Mahar. Hence she received Rs. 27-50 as and by way of Mahar As regards the amount for the period of Iddat, the husband deposited Rs. 100/- on 23-7-1975; and the wife was not able to say what is the amount of Iddat. Therefore, said the learned Magistrate, there was no reason to disbelieve the opponent-husband; and the customary dues were paid before the passing of the order on 20-8-1975. On this ground, the learned Magistrate cancelled the order of monthly allowance under Section 127 (3) (b) of the Code from the date of the original order i.e. from August 20, 1975. This, in effect denied to the wife whole of the amount which she had become entitled to get under the order passed in her application for maintenance, being Misc. Criminal Application No. 313 of 1974.

5. Mr. J.G. Shah and Mr. H.P. Sompura who do not appear for any of the parties in these proceedings, were given liberty to intervene in view of the fact that the question as to interpretation of the provisions of Clause (b) of Sub-section (3) of Section 127 of the Code is of general importance. Along with the learned advocates for the parties in this case they were also heard. Mr. Shah supported the contentions raised on behalf of the petitioner-wife; whereas Mr. Sompura supported the contentions raised on behalf of the opposite-party husband.

6. The new provision of Section 125 of the Code made radical departure in one respect from the old one. The Legislature in its wisdom thought it fit to give a right of monthly allowance to a divorced wife also till she remarries. Evidently, the laudable object of this provision was to see that many a divorced wives who do not desire to remarry, do not become destitute as a result of the divorce. Another important provision made was to specify in clear words that a wife unable to maintain herself was entitled to monthly allowance for her maintenance under Section 125. Previously there was some divergence of opinion on this point in cases which arose under Section 488 of the old Code. The Legislature by introducing the words "unable to maintain herself in Clause (a) of Section 125(1) made it clear that only the wives who were unable to maintain themselves were entitled to monthly allowance. In this context, a divorced wife who would come to the Court for claiming monthly allowance would also be a wife who is unable to maintain herself. Therefore, as observed above, provisions for divorced wives have been made in order to see that they, who are unable to maintain themselves, do not become destitute after divorce. Thus, the object of this provision being to secure welfare of married as well as divorced women, has to be kept in the background while interpreting the provisions of Section 127(3) of the Code. We may now reproduce the relevant provisions of Sections 125 and 127 of the Code;

"125. (1) If any person having sufficient means neglects or refuses to maintain:

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or 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 or such child, father or mother, as such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in Clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married is not possessed of

sufficient means. Explanation-For the purposes of this Chapter:

(a) 'minor' means a person who, under the provisions of the Indian Majority Act, 1875 is deemed not to have attained his majority;

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

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

(3) X X X X

(4) 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 reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

127. (1) On proof of a change in the circumstances of any person, receiving, under Section 125 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit;

Provided that if he increases the allowance, the monthly rate of five hundred rupees in the whole shall not be exceeded.

(2) Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under Section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(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) the woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;

(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;

(c) the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.

(4) At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a monthly allowance has been ordered to be paid under Section 125,

the Civil Court shall take into account the sum which has been paid to, of recovered by, such person as monthly allowance in pursuance of the said order."

7. We are concerned with the interpretation of Sub-section (3) of Section 127, more particularly Clause (b) thereof. Evidently, this provision which seeks to confer power on the Court to cancel an order of monthly allow passed by it in certain specified contingencies, has to be confined strictly within the narrow limits laid down by Sub-section (3). This is because the provision for maintenance of wives, whether married or divorced, who are unable to maintain themselves is a social welfare measure applicable to all people irrespective of caste, creed, community or nationality.

8. With the aforesaid background, we will now proceed to examine the provisions of Sub-section (3) of Section 127. A bare reading of Clauses (a),(b) and (c) of that provision shows that three fact situations have been contemplated by the Legislature in which the Magistrate is given the power to cancel the order for monthly allowance. These fact situations are shown by the words (1) has remarried in Clause (a), (2) has received in Clause (b) and (3) had voluntarily surrendered in Clause (c) Clauses (a) and (c) of the said provision do not postulate any difficulty because they contemplate the fact situation brought about by a voluntary and irrevocable act on the part of the divorced wife. Thus, Clause (a) contemplates the act of the wife in getting remarried and Clause (c) contemplates the act of the wife in obtaining a divorce from her husband and surrendering her rights to maintenance after divorce. Both these even qualities, as observed earlier, are brought about by a voluntary and irrevocable act on the part of the wife. If this is the obvious position to be kept in mind with regard to the scope and content of Clauses (a) and (c) of Sub-section (3) of Section 127, we see no reason why we should adopt a different standard in ascertaining the scope and content of Clause (b); and it is in this context that we are called upon to give proper interpretation to the words "has received" occurring in Clause (b) of Sub-section (3) of Section 127. If we accept the test of a voluntary act done by the wife in interpreting these words also, it is clear that these words contemplate a voluntary act of actual receipt of the whole of the sura contemplated by Clause (b). Mere tender of an amount by the husband, which the wife is not prepared to accept, would not, thus fall under Clause (b). The simple reason is that the fact situation contemplated by Clause (b) does not exist in such a case. One of the meaning of the word '-receive" given in the Shorter Oxford Dictionary is "to take in one's hand, or into one's possession (something held out or offered by another)." Another meaning is "to accept (something offered or presented)." Giving this meaning to the words "has received" occurring in Clause (b) of Sub-section (3) it is clear that one of the eventualities conferring jurisdiction on the Magistrate to cancel an order of monthly allowance can come into existence only on doing of a voluntary act by the wife of actually accepting the amount offered as contemplated by Clause (b). It is to be noted that the Legislature has not used words indicating mere offer by the husband of the amount contemplated by Clause (b) as sufficient to bring into existence the fact situation contemplated or bring into existence the eventuality on which the power of the Magistrate to cancel the order of maintenance is based. It appears that the Legislature has advisedly used the

words "has received" in order to indicate and at the same time restrict the power of cancelling the order of monthly allowance to cases where the wife by a voluntary act on her part of receiving the amount contemplated by Clause (b) brings about the eventuality contemplated for exercise of the said power. In these circumstances, a mere tender of the amount payable on divorce under customary or personal law applicable to the parties without receipt of that amount by the wife, would not be sufficient to clothe the Magistrate with the power of cancelling the order of monthly allowance. As in the case of Clauses (a) and (c), Clause (b) also contemplates a voluntary act on the part of the wife for bringing into existence the eventualities in which a Magistrate can exercise the power conferred by Sub-section (J) of Section 127 of cancellation of the order of monthly allowance. This approach which we adopt would be in conformity with the need for strictly confining the power conferred under Sub-section (3) of Section 127 within the narrow limits contemplated by the Legislature. Any liberal interpretation of the words "has received" so as to make an offer as equivalent to payment is uncalled for in this case. It is not the act of tendering or offering the amount payable on divorce according to customary or personal law applicable to the parties which brings into existence the power of the Magistrate under Sub-section (3). We, therefore, hold that in order to exercise power conferred by Clause (b) of Sub-section (3) of Section 127, it has to be found as a fact that the wife has done a voluntary act of receiving the whole sum contemplated to be payable by Clause (b). If the wife shows her unwillingness to receive the amount tendered, the provisions of Clause (b) are not applicable.

9. An attempt was made by Mr. D.U. Shah for the opposite party-husband to show that we should give a liberal construction to the words "has received" occurring in Clause (b) of Section 127(3). In his submission, we should hold that a tender of the amount payable under the customary or personal law applicable to the parties on divorce would be equivalent to receipt of the same by the wife. It is not possible in 'view of the reasons given earlier, to accept this contention. Mr. Sompura supporting the contention on behalf of the husband drew our attention to some portions of Lok Sabha Debates when the provisions as they are now contained in Sub-section (3) of Section 127 were moved by way of amendment. It appears from the account of debates held on December 11, 1973 to be found in the Journal "The Indian Advocate" July-December 1975 at page 24, that one Honourable Member of Lok Sabha entertained an apprehension that the provisions of Clause (b) would adversely affect Muslim women in view of their personal law providing for maintenance on divorce. The Honourable Minister who moved the amendment gave the following reply:

"Shri Ram Niwas Mirdha: I will tell you the purpose of this amendment.

As I said, under customary or personal law of certain communities, certain sums are due to a divorced woman. Once they are paid the Magistrate's order giving maintenance could be cancelled. Now whether the maintenance should be reasonable or unreasonable, is not the point. The Hon. Member has not disputed this. He has said that it should be reasonable and it should be given in that light. "I am not in the position of accepting the Hon. Member's own view and commentary on the Holy Quran."

(Emphasis supplied).

In our opinion, there is nothing in the aforesaid speech of the Honour-/ able Minister moving the amendment suggesting that a mere tender of the amount would be sufficient to bring into existence the power of the Magistrate to cancel the order. In fact, the Honourable Minister in his speech also contemplated the eventuality of actual payment of the amount; and the Legislature has used the words "has received." In our opinion, therefore, there is no reason why we should give a meaning to these words different from the one given by us above. We have also to bear in mind that this provision has not been made only in respect of cases where the spouses are Muslims. The provision is general in nature; and is applicable to spouses of all communities in whose case customary or personal law applicable to them provides for payment of a sum on divorce.

10. In view of the above interpretation of Clause (b) of Section 127(3), it is clear that in the present case, there was no voluntary act of receiving the amount of monthly allowance by the petitioner wife even as per the binding given by the learned Magistrate. The order of monthly allowance passed by the learned Magistrate is based on the deposit of Rs. 100/- on July 25, 1975 into the Court by the opposite-party husband as the amount of maintenance payable during Iddat period. It is thus clear that the order passed by the learned Magistrate is without jurisdiction, because the eventuality which brought into existence his power of cancelling the order viz. voluntary act of receiving the amount contemplated by Clause (b) is missing in the present case.

11. In view of these reasons, the order passed by the learned Magistrate in Misc. Criminal Application Nos. 293 and 315 of 1975 cancelling the order of monthly allowance passed in favor of the petitioner wife, under Section 127(3)(b) of the Code is set aside. Misc. Criminal Application No. 293 of 1975 given by the wife for realization of arrears of maintenance will now proceed further; and the learned Magistrate will dispose it off in accordance with law. Misc. Criminal Application No. 315 of 1975 given by the husband praying for cancellation of the order of monthly allowance payable the wife will stand dismissed. Rule made absolute in these terms. Rule made absolute.