

## KERALA HIGH COURT

Kunhi Moyin

Vs

Pathumma

(A Lakshmanan, C.J. K Sankaranarayanan, J.)

01.12.1975

### JUDGEMENT

#### **A Lakshmanan, C.J.**

( 1. ) THE criminal revision petition as well as the writ petitions come before us on reference since important questions of law are involved in these cases. The main questions that arise in the writ petitions are the following; (1)Whether S. 125 of the Code of Criminal Procedure, 1973 is violative of Art. 14 and 19 of the Constitution; (2)Whether S. 125 offends the fundamental rights under art. 25; (3) Whether a wife who was divorced or who obtained divorce before the Act came into force can seek the benefit of the section. In other words, whether this section can be retrospective in operation. (4) Whether the definition of wife in S. 125 (1) offends s. 125 (4) of the Code. The prayer in the petitions is to declare Explanation (b)to S. 125 (1) of the Code of Criminal Procedure, 1973, for short, the Code, ultra vires the Constitution, that it is in conflict with the personal law of muslims and for other incidental reliefs. To put it shortly, the question agitated before us is that since the new Code confers on wives, who have been divorced or who have obtained divorce and remain unmarried, a right of maintenance, the relevant portion of the section has to be struck down.

( 2. ) THE constitutional validity of the section is challenged on the basis of Art. 14 and 19 and also as violative of Art. 25 of the constitution. The challenge under Art. 14 is not at present available to any person with the Proclamation of Emergency by the President of India and by virtue of the Notifications dated 25-6-1975 and 27-6-1975 issued by the President of India, under Art. 359 (I) of the Constitution. Art. 359 reads as follows: "359 (1 ). Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any Court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order. (2) An order made as aforesaid may extend to the whole or any part of the territory of India. (3) Every order made under clause (1) shall, as soon as may

be after it is made, be laid before each House of Parliament". According to this article, after the issuance of an order by the President, as contemplated therein, the right to move any Court for the enforcement of such of the rights in Part III of the Constitution, as are mentioned in the Notification, is suspended and no party can thereafter move a court for the enforcement of any such right. If any person moves the Court for such relief, the Court will decline to entertain it. All proceedings pending in any Court for enforcement of such rights shall remain suspended. This will be for the period during which the proclamation is in force or for such shorter period as may be specified in the order. The notifications under Art. 359 (1) were issued on 25-6-1975 and 27-6-1975. Therefore, all the petitions filed after 25-6-1975 will have to be dismissed and all petitions pending on that date will have to be adjourned sine die. The learned Advocate-General, who appeared for the state, contended further, that all interim orders passed in the writ petitions pending on the date of the notifications have to be vacated, since not to do so would be indirectly taking away the effect and purpose of Art. 359.

( 3. ) IN support of the contention that even interim orders passed in petitions pending before a Court have to be vacated, the learned advocate-General sought support from the decisions of the Supreme Court reported in *Makhan Singh v. State of Punjab*<sup>1</sup> *Mohan choudhury v. Chief Commissioner, Tripura*<sup>2</sup> and *Ghulam Sarwar v. Union of India*<sup>3</sup> The learned Advocate-General also relied upon various text books to reinforce his case that the Court as far as possible should try to effectuate the purpose of the statute and not to destroy it. we think it will be enough to refer to the following, for the purpose of disposal of this aspect of the case. In AIR. 1964 S C. 381 (supra), it is thus observed: "since the object of Art. 359 (1) is to suspend the rights of the citizens to move any court, the consequence of the Presidential order may be that any proceeding which may be pending at the date of the Order remains suspended during the time that the Order is in operation and may be revived when the said Order ceases to be operative; and fresh proceedings cannot be taken by a citizen after the order has been issued, because the Order takes away the right to move any Court and during the operation of the Order, the said right cannot be exercised by instituting a fresh proceeding contrary to the Order. If a fresh proceeding falling within the mischief of Art. 359 (1) and the Presidential Order issued under it is instituted after the Order has been issued, it will have to be dismissed as being incompetent. In other words, Art. 359 (1) and the Presidential Order issued under it may constitute a sort of moratorium or a blanket ban against the institution or continuance of any legal action subject to two important conditions. The first condition relates to the character of the legal action and requires that the said action must seek to obtain a relief on the ground that the claimant's fundamental rights specified in the Presidential Order have been contravened and the second condition relates to the period during which this ban is to operate. The ban operates either for the period of the proclamation or for such shorter period as may be specified in the Order". Several other arguments are advanced in that case regarding the scope and ambit of Art. 359 (1), which are discussed in paragraphs, 15, 19 and 26. We do not think it necessary to refer to those arguments here. Suffice it to say, that the ratio of the case is that Art. 359 (1) and the Presidential Order issued under it, constitute a sort of moratorium or blanket ban against the continuance or institution of any legal action for

enforcement of any such rights mentioned in the notifications, To keep alive an interim order passed by Court and adjourn pending matters sine die would in effect be to make the notifications issued under Art. 359 (1) ineffective and will create an anomalous situation. For example, A and B, both entitled to identical reliefs, move the Court for enforcement of their rights under Art. 14 of the Constitution. A files a petition and obtains a stay order prior to the issuance of notification under Art. 359 (1) while, B moves the Court a day after the notification. B's petition will have to be dismissed, since it was moved after the notification came into effect. A's petition will have to be suspended and adjourned sine die keeping alive interim orders passed. This cannot be allowed. Although an interim order of stay is an order passed on a prima facie satisfaction such an order cannot be allowed to be in force in view of the wide language and wide import of Art. 359 (1) of the Constitution and notifications issued thereunder. ;

#### Cases Referred.

1(AIR. 1964 S. C. 381)

2(AIR. 1964 S. C. 173)

3 (AIR. 1967 S. C. 1335 )