

Court No. - 52

Case :- CRIMINAL REVISION No. - 2509 of 2014

Revisionist :- Jubair Ahmad

Opposite Party :- Ishrat Bano

Counsel for Revisionist :- Abhishek Kumar

Counsel for Opposite Party :- A.G.A., Manvendra.Singh., S.K.Nigam.

Hon'ble Pradeep Kumar Srivastava,J.

1. This criminal revision has been preferred against the impugned judgment and order dated 14.07.2014 passed by Principle Judge, Family Court, Kaushambi in Case No. 150 of 2014 (Smt. Ishrat Bano Vs. Jubair Ahmad) under section 125 Cr.P.C. by which opposite party no. 2 Ishrat Bano (divorced wife) has been awarded Rs. 3000/- per month from the date of judgment as maintenance.

2. Before the learned court below, the wife gave an application under section 125 Cr.P.C. stating that she was married with revisionist according to Muslim Personnel Law on 22.10.1998. After marriage she went to her husband's house and performed her matrimonial obligation. A daughter Km. Saniya was born from their wedlock. In the year 1999 her husband and his family members demanded Motorcycle, Refrigerator and Rs. 25000/- in dowry and on account of non-fulfillment of dowry, she along with her daughter was expelled from matrimonial house after being beaten and since then, she and her daughter are living with her parents. The husband divorced her on 27.09.2001 and till the presentation of this application she has not remarried. Earlier one application was given by her, bearing case no. 34 of 2002, under section 125 Cr.P.C. which was decided and Rs 800/- per month applicant (wife) and Rs. 500/- per month to her daughter was awarded from date of application till the date of divorce. After divorce she did not remarry. The Supreme Court has now laid down a law that a divorced Muslim lady is entitled for maintenance under section 125

Cr.P.C. When she came to know this law she immediately filed this petition. She is a domestic women and totally dependent on her father. In April 2010 her father died and since then she is in a serious financial trouble and is not able to maintain herself. The husband is a teacher in a Government school and is earning Rs. 25,000/- in a month and therefore, she claim Rs. 10,000/- as maintenance.

3. The opposite party filed a written statement and admitted the marriage and birth of daughter. He has also stated that on 27.09.2001 after he divorced her wife, by the order of the court he gave maintenance of 13 months and expenses till the period of *iddat*. The amount of dower Rs. 11,786/- was paid by him on the very first night of their marriage. Thereafter, nothing remained payable by him to her nor she is entitled to any further maintenance. She is an independent mind women and she always insisted him to live with her parents which he could not do because of his responsibility towards his family and brothers. The wife is arrogant enough and told him to either live with her parents or give her divorce. She is not there to cook food for his family members and she was married with him because of his job. She regularly mentally harassed him and forced by this situation, he divorced her. He also filed a suit for restitution of conjugal rights numbered as 305 /2005 (Jubair Ahmad Vs. Ishrat Bano) in Allahabad and due to which she got angry and lodged false Criminal Case in Case Crime No. 134 of 2000, under section 498A, 323 IPC and section 3/4 Dowry Prohibition Act. But the same was found to be false during investigation and final report was submitted. He thereafter, solemnized second marriage in 2003 and with the second wife, he has two children. He is bearing the expenses of his daughter from the opposite party. She is also educated enough to earn and she gives tuition and earn Rs. 5000/- to Rs. 7000/- and she also works as beautician and earns Rs. 3 to 4 thousand in a month and as such she is earning Rs. 10 to 11 thousand in a month. Just to further harass him this application has been filed

which is not maintainable and is liable to be dismissed.

4. From the side of wife, the judgment dated 09.07.2002 in Case No. 34/2002 (Ishrat Bano vs. Jubair Ahmad), under section 125 Cr.P.C. passed by Civil Judge (JD), Kaushambi has been filed. She has also examined herself as PW-1. The husband has filed question answer dated 02.08.2000 and resignation letter of Ishrat Bano from her school. He has examined himself as DW-1 and DW-2 Akbar Ali has also been examined in support.

5. On the basis of the pleadings of the parties the learned court below found following points for consideration in this case:

- (1) *Whether the application under section 125 Cr.P.C. of the applicant Ishrat Bano, a divorcee, is maintainable?*
- (2) *Whether the applicant is living separately with the respondent for reasonable cause and the opposite party has neglected the applicant in providing maintenance?*
- (3) *Whether the applicant is not able to maintain herself?*
- (4) *Whether the opposite party is capable of maintaining the applicant?*

6. After considering the evidence of the parties, the learned court below passed the impugned judgment.

7. Aggrieved by the impugned judgment this revision has been filed challenging the impugned judgment on the ground that earlier a case under section 125 Cr.P.C. for maintenance was filed by the wife bearing Case No. 34 of 2002 which was decided on 09.07.2002 and by that order, the maintenance claim of the wife was rejected on the ground that being Muslim she is not entitled for maintenance after divorce beyond period of *Iddat* and by this impugned Judgment, the said judgment has been reviewed, which is contrary to law. Successive petition for maintenance is not maintainable. When an application has been filed and heard and decided on merit, a second application for the same relief is not permissible under law. The judgment is totally

pervasive and it is not correct that the revisionist did not pay maintenance after the date of divorce, as applicant was directed to make payment of maintenance since the date of presentation of application till the date of divorce at the rate of Rs. 800/- per month and that order was fully complied with. Moreover, his old mother, his two younger unemployed brothers and two daughters of second wife and second wife of the revisionist are dependent upon him and being only earning person of family he cannot afford to pay the maintenance to the divorced wife, more so, she is not entitled under law for such maintenance. After the disposal of the first maintenance application on 09.07.2002, in year 2012 almost after the lapse of 10 years this present application was filed by the wife. In view of the provisions of the Muslim Women (Protection of Rights on Divorce) Act 1986, the revisionist is not liable to maintain the wife after the divorce beyond the period of *Iddat*, but the learned court below did not consider this statutory provision and passed the impugned judgment which is liable to be set aside.

8. The point for consideration no. 2 appears to have been unnecessarily framed as admittedly the applicant is a divorced wife and therefore, she is living separately from the ex-husband after divorce with her parents. The husband has himself admitted that a demand for maintenance was made in the earlier application and the same was paid and beyond the period of *Iddat*, he has not provided any maintenance to the applicant. Therefore, on point number 2, the facts being admitted, there is no need for giving a finding.

9. So far as point no. 4 is concerned, the husband is a teacher in a Government School and it has been admitted by the husband that his basic pay is Rs. 14,000/-, therefore, his ability to maintain and provide maintenance is very much established. There is no cogent evidence with regards to any income of the applicant. The fact that she is giving tuition or she is running a beauty parlor is not established by any cogent

evidence. Therefore, the finding on issue number 2, 3 and 4 did not require reconsideration.

10. The legal issue as argued by the counsel to the revisionist is when an earlier application for maintenance has been decided between the parties after full contest and the maintenance awarded in that case has been fully paid by the husband, a second application in view of a subsequent Supreme Court judgment is not maintainable and no maintenance can be awarded on the basis of the second application. The further argument is that the divorced Muslim wife is not entitled to maintenance under the law applicable to parties and the subsequent application is barred by the principle of res-judicata. In support of this submission, the learned counsel to the revisionist has taken reference of the judgment in **Pradeep Kumar Maskara vs State of WB**, (2015) 2 SCC 653 and **Kalinga Mining Corp v Union of India**, (2013) 5 SCC 252.

Scope of the Right of Muslim Divorced Wife to Claim Maintenance

11. In **Mohd. Ahmed Khan v. Shah Bano Begum**, AIR 1985 SC 945, the issue before the court was that where a Muslim woman had been divorced by her husband and paid her mahr, would it indemnify the husband from his obligation to pay maintenance under the provisions of Section 125 Cr.P.C.. A Five-judge Bench of the Supreme Court held that the Code of Criminal Procedure controls the proceedings in such matters and overrides the personal law of the parties and in case of conflict between the terms of the Code and the rights and obligations of the individuals under personal law, the Code would prevail.

12. In this case the husband appealed against the judgment of the High Court directing him to pay to his divorced wife Rs. 179/- per month as maintainence under section 125 of CrPC, enhancing the sum of Rs. 25 per month originally granted by the Magistrate. The parties had been married for 43 years before the ill and elderly wife had been thrown out of her husband's residence. For about two years the husband

paid maintenance to his wife at the rate of Rs. 200/- per month. When these payments ceased she petitioned under Section 125 Cr.PC. The husband immediately dissolved the marriage by pronouncing triple talaq. He paid Rs.3000/- as deferred mahr and a further sum to cover arrears of maintenance and maintenance for the iddat period and he sought thereafter to have the petition dismissed on the ground that she had received the amount due to her on divorce under the Muslim law applicable to the parties. The important feature of the case was that the wife had managed the matrimonial home for more than 40 years and had borne and reared five children and was incapable of taking up any career or independently supporting herself at that late stage of her life - remarriage was an impossibility in that case. The husband, a successful Advocate, with an approximate income of Rs. 5,000/- per month provided Rs. 200/- per month to the divorced wife, who had shared his life for half a century and mothered his five children and was in desperate need of money to survive.

13. The Supreme Court, reiterating the view expressed earlier in **Bai Tahira v. Ali Hussain Fidaalli Chothia, (1979) 2 SCC 316** and **Fuzlunbi v. K. Khader Vali (1980) 4 SCC 125**, held:

“The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat but if she is unable to maintain herself after the period of iddat, she is entitled to take recourse to Section 125 of the Code. The outcome of this discussion is that there is no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife, who is unable to maintain herself.”

14. After the decision in **Shah Bano**, the Parliament enacted the Muslim Women (Protection of Rights on Divorce) Act,1986 (hereinafter referred as Act) to protect the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands

and to provide for matters connected therewith or identical thereto. A "divorced woman" is defined under Section 2(a) of the Act to mean a divorced woman who was married according to Muslim Law, and has been divorced by, or has obtained divorce from her husband in accordance with Muslim Law; " Iddat period" is defined under Section 2(b) of the Act to mean, in the case of a divorced woman,- (i) three menstrual courses after the date of divorce, if she is subject to menstruation; (ii) three lunar months after her divorce, if she is not subject to menstruation; and (iii) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy whichever is earlier.

15. Section 3 of the Act overrides all other laws and provides that a divorced woman shall be entitled to - (a) a reasonable and fair provision and maintenance to be made and paid to her within the period of iddat by her former husband; (b) where she maintains the children born to her before or after her divorce, a reasonable provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children; (c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim Law; and (d) all the properties given to her before or at the time of marriage or after the marriage by her relatives, friends, husband and any relatives of the husband or his friends.

16. The constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 was upheld in **Danial Latifi vs Union of India, AIR 2001 SC 3958**. The Supreme Court laid emphasis that in interpreting the provisions where matrimonial relationship is involved, the social conditions prevalent in our society should be taken into consideration. In society, apparently there exists a great disparity in the matter of economic resourcefulness between a man and a woman. The Court observed:

"Our society is male dominated both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life - a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the wakf boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. Bearing this aspect in mind, we have to interpret the provisions of the Act in question."

17. Referring to various religious texts of Islam and opinions of eminent authors of Muslim Personal Law on the concept of *mata* or provision, the Supreme Court pointed out that a careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair provision for maintenance. Parliament seems to intend that the divorced woman gets sufficient means of livelihood, after the divorce and, therefore, the word 'provision' indicates that something is provided in advance for meeting some needs. In other

words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her clothes, and other articles. The Court said that the wordings of Section 3 of the Act appear to indicate that the husband has two separate and distinct obligations : (1) to make a 'reasonable and fair provision' for his divorced wife; and (2) to provide 'maintenance' for her. The emphasis of this section is not on the nature or duration of any such 'provision' or 'maintenance', but on the time by which an arrangement for payment of provision and maintenance should be concluded, namely, 'within the iddat period'. If the provisions are so read, the Act would exclude from liability for post-iddat period maintenance to a man who has already discharged his obligations of both 'reasonable and fair provision' and 'maintenance' by paying these amounts in a lump sum to his wife, in addition to having paid his wife's mahr and restored her dowry as per Section 3(1)(c) and 3(1)(d) of the Act. The words 'a reasonable and fair provision and maintenance to be made and paid' as provided under Section 3(1)(a) of the Act cover different things. The use of two different verbs - "to be made and paid to her within the iddat period", clearly indicates that a fair and reasonable provision is to be made while maintenance is to be paid. It is why no such expression has been used in section 4 of the Act, which empowers the magistrate to issue an order for payment of maintenance to the divorced woman against various of her relatives.

18. Therefore, the Supreme Court held:

"While upholding the validity of the Act, we may sum up our conclusions: Court holds that - 1) A Muslim husband is liable to make a reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act. 2) Liability of Muslim husband to his divorced

wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to iddat period.”

19. In **Shabana Bano v. Imran Khan (2010) 1 SCC 666**, in a petition for maintenance under section 125, one of the objections raised by the husband was that he has already divorced the wife prior to filing of petition in accordance with Muslim Law and under the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 she is not entitled to any maintenance after the divorce and after the expiry of the iddat period. The learned Family Court partly allowed the wife's application directing the husband to pay Rs.2000/- per month as maintenance allowance from the date of institution of petition to the date of divorce, and thereafter to the period of iddat but amount of maintenance thereafter was denied. The order was upheld by the High Court. The question that arose for consideration before the Supreme Court was whether a Muslim divorced wife would be entitled for maintenance from her divorced husband under Section 125 of the Cr.P.C. and, if yes, then through which forum?

20. The Supreme Court mentioned that the purpose the Family Court Act was essentially to set up family courts for the early settlement of family disputes, emphasizing on conciliation and achieving socially desirable results without adherence to rigid rules of procedure and evidence. The Act seeks to exclusively provide within jurisdiction of the family courts the matters relating to maintenance, including proceedings under Chapter IX of the Cr.P.C. Section 7 of the Family Act deals with Jurisdiction and Section 20 of the Family Court Act makes it crystal clear that the provisions of this Act shall have overriding effect on all other enactments in force dealing with this issue. Therefore, a Family Court established under the Family Act shall exclusively have jurisdiction to adjudicate upon the applications filed under Section 125 of Cr.P.C. Thereafter, the Court referred to the various provisions of the Muslim Women (Protection of Rights on

Divorce) Act and quoted with approval the following observation made in **Danial Latifi (supra)**:

“A comparison of these provisions with Section 125, CrPC will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their right, loses its significance. The object and scope of Section 125, CrPC is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled,..... .”

21. The Supreme Court referred **Iqbal Bano v. State of UP (2007) 6 SCC 785** which followed **Vijay Kumar Prasad v. State of Bihar, (2004) 5 SCC 196** to hold that proceedings under Section 125, Cr.P.C. are civil in nature and laid down that a petition under Section 125 of the Cr.P.C. filed by a divorced woman would be maintainable before the Family Court as long as appellant does not remarry and the amount of maintenance to be awarded under Section 125 of the Cr.P.C. cannot be restricted for the iddat period only. It was held:

*“Cumulative reading of the relevant portions of judgments of this Court in **Danial Latifi, (2001 AIR SCW 3932) (supra)** and **Iqbal Bano, (2007 AIR SCW 3880) (supra)** would make it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women.*

In the light of the aforesaid discussion, the impugned orders are hereby set aside and quashed. It is held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of the Cr.P.C. after the expiry of period of iddat also, as long as she does not remarry.”

22. In **Shamim Bano v. Asraf Khan (2014) 12 SCC 636**, again the issue was whether the appellant's application for grant of maintenance under Section 125 of the Code is to be restricted to the date of divorce and because of filing of an application under Section 3 of the Act after the divorce for grant of mahr and return of gifts would disentitle the wife to sustain the application under Section 125 of the Code.

23. Referring to **Shabana Bano (supra)** in which, following **Danial Latifi (supra)**, it has been ruled that '*The appellant's petition under Section 125, CrPC would be maintainable before the Family Court as long as the appellant does not remarry. The amount of maintenance to be awarded under Section 125, CrPC cannot be restricted for the iddat period only*', the Supreme Court held:

"The aforesaid principle clearly lays down that even an application has been filed under the provisions of the Act, the Magistrate under the Act has the power to grant maintenance in favour of a divorced Muslim woman and the parameters and the considerations are the same as stipulated in Section 125 of the Code."

24. Regarding the plea that the wife had already taken recourse to Section 3 of the Act after divorce took place and obtained relief, the application for grant of maintenance under Section 125 of the Code would only be maintainable till she was divorced, the Court pointed out that during the pendency of her application under Section 125 of the Code the divorce took place and on the application of wife under Section 3 of the Act, the learned Magistrate directed for return of the articles, payment of quantum of mahr and also thought it appropriate to grant maintenance for the iddat period. Thus no maintenance had been granted to the wife beyond the iddat period by the learned Magistrate as the petition was different. That apart, the authoritative interpretation in **Danial Latifi (supra)** was not available. Saying that it would be travesty of justice if the wife is made remediless and therefore, if an application under Section 3 of the Act for grant of maintenance is filed, the

parameters of Section 125 of the Code would have been made applicable. The Court observed:

“Another aspect which has to be kept uppermost in mind is that when the marriage breaks up, a woman suffers from emotional fractures, fragmentation of sentiments, loss of economic and social security and, in certain cases, inadequate requisites for survival. A marriage is fundamentally a unique bond between two parties. When it perishes like a mushroom, the dignity of the female fame gets corroded. It is the law's duty to recompense, and the primary obligation is that of the husband.”

25. In **Shamima Farooqui v. Shahid Khan** AIR 2015 SC 2025, the application of wife for grant of maintenance was resisted by the husband alleging that he had already given divorce to her and has also paid the Mehar to her. The Supreme Court referred with approval the view expressed in **Shamim Bano v. Asraf Khan (supra)**, **Shabana Bano v. Imran Khan (supra)**, **Danial Latifi (supra)** and **Khatoon Nisa v. State of UP (2002) 6 SCALE 165** and laid down that there can be no shadow of doubt that the divorced Muslim woman is entitled to claim maintenance under Section 125, CrPC.

27. Thus from the above discussion, it is clear that after the passing of the Act, from the judgment in **Danial Latifi (supra)** to **Shamima Farooqui (supra)**, it is clear that the Supreme Court has interpreted the provisions of the Act and section 125 of the Code in such a way so as to give recognition to the right of divorced Muslim wife to claim maintenance under section 125 even for the period beyond iddat period and for the whole life unless she is disqualified for the reasons such as entering into marriage with someone else. Therefore, I find no force in the argument that the divorced Muslim wife is not entitled to maintenance beyond iddat period.

Inability to Pay and Quantum of Maintenance

28. In every petition, generally, a plea is advanced by the husband

that he does not have the means to pay, for he does not have a job or his business is not doing well. In this case it has been submitted on behalf of the revisionist that after more than 10 years from the date of decision of the first case, this application has been filed. The revisionist has already married after divorce from the respondent wife and he has children by her second wife and moreover he has to support his ailing parents and other members of the family. Therefore, for him it will not be possible to spare money for his divorced wife against her maintenance. Regarding such pleas, the judicial response has been always very clear that it is the personal liability of the husband to pay maintenance to his wife which includes the divorced wife. The husband is not discharged from his this liability on such grounds. Thus, in **Chander Prakash Bodhraj v. Shila Rani Chander Prakash AIR 1968 Delhi 174**, it was laid down:

“An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodies person to show to the Court cogent grounds for holding that he is unable to reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. When the husband does not disclose to the Court the exact amount of his income, the presumption will be easily permissible against him.”

29. Further in **Jabsir Kaur Sehgal v. District Judge Dehradun (1997) 7 SCC 7**, the Supreme Court laid down the following yardstick for determining the liability as well as the amount of maintenance:

“The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived

with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate.”

30. In **Shamima Farooqui (supra)**, the Supreme Court referred to the aforesaid observation on the point and held the reduction of 50% in the amount of maintenance made by the High Court is based on no reasoning and is illegal and not sustainable under law. Upholding and restoring the order passed by the learned Family Court, it was observed by the Supreme Court:

“Be it clarified that sustenance does not mean and can never allow to mean a mere survival. A woman, who is constrained to leave the marital home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. And that is where the status and strata of the husband comes into play and that is where the legal obligation of the husband becomes a prominent one. As long as the wife is held entitled to grant of maintenance within the parameters of Section 125, CrPC, it has to be adequate so that she can live with dignity as she would have lived in her matrimonial home. She cannot be compelled to become a destitute or a beggar.”

31. Saying such pleas to be '*only bald excuses*' and have '*no acceptability in law*', the Court said:

“If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125, CrPC, unless disqualified, is an absolute right.”

32. In the present case, the admitted fact on behalf of the husband is that he is a teacher in a government school and his monthly basic pay is 14000/- and naturally, if DA is added, the monthly income would reach to 25 to 30 thousands. It is pertinent to mention that the wife, alleging

the income of the husband to be 25 thousands monthly, has claimed 10 thousands monthly maintenance. The learned Family Court has awarded 3000/- monthly as maintenance to wife which is not at all in the higher side. It is held that the amount of maintenance must be according to status of parties and to satisfy the minimum and basic needs of the wife. Being a teacher, the plea of the husband regarding his financial constraint cannot be given any weight.

Applicability of the Principles of Res-judicata and Maintainability of Second Application

33. The other limb of argument is regarding maintainability of second application and applicability of principle of res-judicata. It is admitted case that a case was filed by the wife under section 125 Cr.P.C. claiming maintenance for herself and her daughter as case no. 34 of 2002 which has been decided by the judgment dated 09.07.2002 by Civil Judge (Junior Division), Kaushambi and copy of the judgment has been filed by the wife. The husband divorced the respondent wife on 27.09.2001 and thereafter the said case was decided keeping in view the provisions of the Act, and the husband was directed to give maintenance till the date of divorce. The application for the maintenance of the daughter, however, was allowed, granting a maintenance of Rs. 500/- monthly to her. Therefore, it has been argued that when the claim of maintenance has been rejected after contest by the court below, a further application demanding maintenance under section 125 Cr.P.C. is not permissible and the same is barred by the principle of res-judicata. Therefore, the question for consideration before the court is that the decision in the earlier case will preclude the husband and prevent the wife from claiming maintenance under section 125 Cr.P.C. From the perusal of the said judgment, it appears that the learned court below took the view that Muslim divorced wife in a case pending under section 125 Cr.P.C. can be awarded maintenance till the period of Iddat and not beyond it. Clearly the said judgment is based on

the provisions of the Act.

34. Section 125 of the Code of Criminal Procedure has been enacted to achieve a social object and the object is to prevent vagrancy and destitution and to provide speedy remedy to deserted or divorced wife, minor children and infirm parents in terms of food, clothing and shelter and minimum needs of one's life. The Supreme Court has been always of the view that maintenance to the wife is an issue of gender justice and the obligation of the husband is on a higher pedestal. In **Capt. Ramesh Chander Kaushal v. Veena Kaushal**, AIR 1978 SC 1807, the Supreme Court remarked:

“The brooding presence of the Constitutional empathy for the weaker sections like women and children must inform interpretation if it has to have social relevance.”

35. In **Chaturbhuj vs Sita Bai** (2008) 2 SCC 316, the Supreme Court expressed the view that section 125 is a measure of social justice and is specially enacted to protect women and children and it gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The Supreme Court observed:

“Section 125, CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Veena Kaushal (1978) 4 SCC 70 falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat (2005) 3 SCC 636.”

36. In **Shabana Bano v. Imran Khan** (supra) in a petition for

maintenance under section 125, one of the objections raised by the husband was that he has already divorced the wife prior to filing of petition in accordance with Muslim Law and under the provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 she is not entitled to any maintenance after the divorce and after the expiry of the iddat period. The Supreme Court however held that even after the disposal of application under section 3 of the Act, the divorced wife is entitled to claim maintenance under section 125 beyond the iddat period and till she remarries. The same view has been followed in **Shamim Bano v. Asraf Khan (supra)**. Reiterating the same view, in **Shamima Farooqui (supra)**, the Supreme Court made very following observation:

“When the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort. Sometimes the faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her the misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm, for she cannot be allowed to resign to destiny.”

37. In **Nagendrappa Natikar vs Neelamma**, AIR 2013 SC 1541, the question was whether a compromise entered into by husband and wife under Order XXIII, Rule 3 of the Code of Civil Procedure (CPC) agreeing for a consolidated amount towards permanent alimony and thereby giving up any future claim for maintenance, accepted by the Court in a proceeding under Section 125 of the Code of Criminal Procedure (CrPC), would preclude the wife from claiming maintenance in a suit filed under Section 18 of the Hindu Adoptions and Maintenance Act, 1956 ? In this case, after the petition was disposed on the basis of compromise, the respondent wife filed a Misc. Application under Section 127, Cr.P.C. before the Family Court for cancellation of the earlier order and also for awarding future maintenance. While the application under Section 127, Cr.P.C. was pending, respondent wife

also filed a suit before the Family Court under Section 18 of the Hindu Adoption and Maintenance Act claiming maintenance at the rate of Rs.2,000/- per month. Both the petitions were resisted by the husband stating that the parties had already reached a compromise with regard to the claim for maintenance. The question of maintainability was raised as a preliminary issue. The Family Court held by its order dated 15.9.2009 that the compromise entered into between the parties in a proceeding under Section 125, Cr.P.C. would not be bar in entertaining a suit under Section 18 of the Act. The suit was then finally heard on 30.9.2010 and the Family Court decreed the suit holding that the respondent is entitled to monthly maintenance of Rs.2,000/- per month from the defendant husband from the date of the filing of the suit. The High Court also confirmed the same.

38. Upholding the judgment, the supreme court pointed out that section 25 of the Contract Act provides that any agreement which is opposed to public policy is not enforceable in a Court of Law and such an agreement is void, since the object is unlawful. The Court held that *'Proceeding under Section 125, Cr.P.C. is summary in nature and intended to provide a speedy remedy to the wife and any order passed under Section 125, Cr.P.C. by compromise or otherwise cannot foreclose the remedy available to a wife under Section 18(2) of the 1956 Act'* and observed:

"Section 125, Cr.P.C. is a piece of social legislation which provides for a summary and speedy relief by way of maintenance to a wife who is unable to maintain herself and her children. Section 125 is not intended to provide for a full and final determination of the status and personal rights of parties, which is in the nature of a civil proceeding, though are governed by the provisions of the Cr.P.C. and the order made under Section 125, Cr.P.C. is tentative and is subject to final determination of the rights in a civil court."

39. **Badshah v. Sou. Urmila Badshah Godse**, AIR 2014 SC 869, though related to standard of proof of legal marriage in a case under

section 125 of the Code, the Supreme Court made a very emphatic observation regarding the ambit and object of the law provided by section 125 of the Code.

"Thirdly, in such cases, purposive interpretation needs to be given to the provisions of Section 125, Cr.P.C. While dealing with the application of destitute wife or helpless children or parents under this provision, the Court is dealing with the marginalized sections of the society. The purpose is to achieve "social justice" which is the Constitutional vision, enshrined in the Preamble of the Constitution of India. Preamble to the Constitution of India clearly signals that we have chosen the democratic path under rule of law to achieve the goal of securing for all its citizens, justice, liberty, equality and fraternity. It specifically highlights achieving their social justice. Therefore, it becomes the bounden duty of the Courts to advance the cause of the social justice. While giving interpretation to a particular provision, the Court is supposed to bridge the gap between the law and society."

40. The Supreme Court further observed:

"Of late, in this very direction, it is emphasized that the Courts have to adopt different approaches in "social justice adjudication", which is also known as "social context adjudication" as mere "adversarial approach" may not be very appropriate. There are number of social justice legislations giving special protection and benefits to vulnerable groups in the society. Prof. Madhava Menon describes it eloquently: "It is, therefore, respectfully submitted that "social context judging" is essentially the application of equality jurisprudence as evolved by Parliament and the Supreme Court in myriad situations presented before courts where unequal parties are pitted in adversarial proceedings and where courts are called upon to dispense equal justice. Apart from the social-economic inequalities accentuating the disabilities of the poor in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker party. In such a situation, the Judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication."

41. It further observed:

“The law regulates relationships between people. It prescribes patterns of behavior. It reflects the values of society. The role of the Court is to understand the purpose of law in society and to help the law achieve its purpose. But the law of a society is a living organism. It is based on a given factual and social reality that is constantly changing. Sometimes change in law precedes societal change and is even intended to stimulate it. In most cases, however, a change in law is the result of a change in social reality. Indeed, when social reality changes, the law must change too. Just as change in social reality is the law of life, responsiveness to change in social reality is the life of the law. It can be said that the history of law is the history of adapting the law to society's changing needs. In both Constitutional and statutory interpretation, the Court is supposed to exercise direction in determining the proper relationship between the subjective and objective purpose of the law.”

42. Therefore, the Court held:

“Provision of maintenance would definitely fall in this category which aims at empowering the destitute and achieving social justice or equality and dignity of the individual. While dealing with cases under this provision, drift in the approach from "adversarial" litigation to social context adjudication is the need of the hour.”

43. In the case in hand, admittedly the first case was filed by the wife on 18.8.2000 and the husband gave divorce during the proceeding on 27.9.2001. Therefore, the learned court below disposed the application of the wife treating the same to be under the provision of section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986. As such, the claim of the wife under section 125 was not decided nor any maintenance beyond the period of iddat was granted nor fair and reasonable provision was made towards the maintenance of wife. It is to be noted that that in both **Shamim Bano v. Asraf Khan (supra)** and **Shabana Bano v. Imran Khan (supra)**, the application under section 3 of the Act was disposed and it was held that an application of the wife

under section 125 is maintainable and not barred and maintenance to divorced wife was awarded. There are other decisions also to the effect that even a compromise decree in which the wife has accepted lump sum alimony will not bar such application. As such and in view of the above discussion and referred decisions of the Supreme Court, I find that the second application of the wife is maintainable and not barred. When the Supreme Court has interpreted and clarified the law and has laid down that the Muslim divorced wife can still claim maintenance under section 125 of the Code despite the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 1986, her claim cannot be defeated on the basis of earlier decision of the court below and the earlier judgment cannot operate as res-judicata.

44. It is to be noticed that the right of maintenance available to wife from husband is absolute right and even divorce cannot effect this right unless the wife is disqualified on account of remarriage or her sufficient earning. Section 125 of the Criminal Procedure Code has been enacted with a specific purpose to protect women and children and to prevent vagrancy and destitution among them. This law is not community centric or religion centric and perhaps, one of the most secular enactment ever made in the country. It is an instrument of social justice and aims to render justice on the basis of equality to wife in particular, may be divorced including a divorced Muslim wife. Gender justice is a constitutional promise and the provision of maintenance provided under section 125 of the Code is one of the tools to translate the constitutional promise into social reality. Moreover, Article 21 of the Constitution guarantees every person a right to live with dignity and a dignified life is not possible unless a fair and reasonable provision is made by the husband towards the maintenance of his divorced wife. Therefore, while interpreting and applying this beneficial legislation, the Constitutional vision of equality, liberty and justice, more particularly social justice to the women and marginalized sections of society, must

be present when the courts are dealing with an application of destitute wife or helpless children and aged and infirm parents. Social justice adjudication or social context adjudication requires application of equality jurisprudence where the parties to a litigation are unequally situated in terms of socio-economic structure and dilution of the technical procedure often followed in adversarial system.

45. In view of the above discussion, I find that the view and approach of the learned Family Court is completely justified and legal and there is no material irregularity or illegality or jurisdictional error in the impugned judgment and order. Hence, the revision has got no force and is liable to be dismissed.

46. The revision is **dismissed**. Stay, if any shall stand vacated.

47. The office is directed to send a copy of this judgment to the learned Family Court for information and necessary compliance.

Order date- 18.10.2019

Bhanu

(Hon'ble Pradeep Kumar Srivastava, J.)