

(1984) 11 MAD CK 0006
In the Madras High Court
Case No : Criminal M. P. 3227 of 1983

Ameer Amanullah

APPELLANT

Vs

Padikkaru Maniam Beevi, Erayar Mydeen Beevi (represented by mother and guardian for 1st Respondent) and State of Public Prosecutor

RESPONDENT

Date of Decision : 19-11-1984

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 482

Citation : (1985) LW(Cri) 111

Hon'ble Judges : S.A. Kader, J

Bench : Single Bench

Advocate : J. Rajakalifulla, for the Appellant; A. Packiaraj, for Respondents 1 and 2 and The Public Prosecutor, for the Respondent

Judgement

S.A. Kader, J.—This is a petition u/s 482, Code of Criminal Procedure in C.C. No. 968 of 1983 on the file of the Judicial Second Class

Magistrate II, Sri villiputhur.

2. The Petitioner herein, who is a Muslim, married the first Respondent on 19th October, 1975 and they begot the second Respondent. He then

discarded both the Respondents when the first Respondent was ancient and she had still-birth. The Petitioner herein divorced the first Respondent

on 21st October, 1981 and took a second wife on 9th November, 1981. On the application filed by the Respondents, the Sub-Divisional Judicial

Magistrate, Srivilliputhur, awarded maintenance in the sum of Rs. 100 per mensem to the first Respondent and Rs. 50 per mensem to the second

Respondent. The said order was confirmed by the Sessions Judge, Ramnad at Madurai in Cr.R.C. No. 60 of 1982. Execution of the order is now

pending before the Judicial Second Class Magistrate II, Srivilliputhur and it is to quash this proceeding the Petitioner seeks to invoke the inherent powers of this Court.

3. The main thrust of the argument of Mr. Hajee P.K. Jamal Mohamed, the learned Counsel for the Petitioner is against the constitutional validity of

Explanation(b) in Section 125 of the Code of Criminal Procedure under which wife includes ""a woman who has been divorced by, or has obtained

a divorce from, her husband and has not remarried."" It is contended that the Petitioner, who is a Muslim, is governed by his personal law by virtue

of the Muslim Personal Law (Shariat) Application Act 26 of 1973, that under his personal law he is bound to maintain his divorced wife only

during her period of iddat and that the liability imposed on him by Section 125, Cr.P.C, to maintain her till she remarries is violative of his personal

law and is therefore bad. It is also contended that this new provision offends Art. 25 of the Constitution which guarantees freedom of conscience

and the right freely to profess, practise and propagate religion.

4. The law of divorce amongst Muslims as administered in this country confers absolute, unfettered and arbitrary power on the husband to cut

asunder the matrimonial tie giving rise to notorious instances of marital caprice, despite the dictum of the Prophet of God that of all things that have

been permitted by the law the worst is divorce. That this is not the true import of Islamic law admits of no doubt, but the correct exposition on the

law has not yet seen the light of the day in the judicial or the legislative forum.

5. The provision in the Code of Criminal Procedure for the maintenance of wife and children gives expression to the fundamental and natural duty

of a man to maintain his wife and children who are unable to maintain themselves. This statutory obligation imposed upon a man and the statutory

right conferred upon the wife and the children transcends the personal law and operates irrespective of caste, creed or religion. This is really

founded on the doctrine of public policy, for, the protection of destitute woman and children and the prevention of their vagrancy are matters of

public interest, on which depend the safety and security of the society as a whole. The responsibility of the State towards this unfortunate section of

the community overrides and has necessarily to override the personal law of its citizens. Explanation (b) in Section 125 of the Code, which extends

the benefit of maintenance to divorced wives until they remarry, is a bold step in the right direction, and a landmark in social legislation. It is one of

the beneficent and progressive pieces of legislation in recent times. The derelict Muslim husband cannot take umbrage under his personal law in

order to defeat his statutory obligation under the Code of Criminal Procedure.

6. The further contention that this new provision is violative of Article 25 of the Constitution is also untenable. Article 25 runs thus:

Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and

the right freely to protect, practise and propagate religion.

In my view, the liability imposed upon the husband to maintain his divorced wife so long as she remains unmarried cannot be said to offend his

freedom of conscience or affect the profession or practice of his religion. Islam holds women in high esteem and regard. The Holy Quran and the

traditional sayings of the Apostle of God enjoin on men the duty of treating women with honour and dignity. I cannot think of any concept of Islam

which can be said to be even remotely offended by this salutary provision intended for the benefit of women, divorced and destitute. Further, as

pointed out by the Bench of the Kerala High Court in Kunhi Moyn v. Pathumma 1976 M.L.J. (Crl.) 405 the new definition in S. 125(1) of the

Code of Criminal Procedure comes within the "providing for social welfare and reform" legislation contained in Article 25(2) of the Constitution

and hence the challenge under Article 25 is not available to the Petitioner.

7. The last line of argument advanced by Mr. Hajee P.K. Jamal Mohamed is that Section 125, Cr.P.C, is repugnant to Article 14 of the

Constitution, which enshrines in itself the principle of equality before the law and the equal protection of the laws. This contention is based on Sub-

sections (4) and (5) of S. 125, Cr.P.C It is urged that while the wife who lives in adultery is disentitled to claim maintenance by virtue of Sub-

sections (4) and (5) a divorced wife incurs no such disability as she does not enjoy the status of a wife and there is thus an invidious discrimination

between the two Sub-sections (4) and (5) of Section 125 run as follows:

(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.

There is no doubt in my mind, that these two Sub-sections apply only to a wife and not to a divorced wife. The legal fiction imported in the

Explanation (b) in S. 125 cannot be extended to these Sub-sections. For, a divorced woman is not a wife and there is no question of her

committing adultery. There is also no question of her refusing to live with her former husband or she and her former husband living separately by

mutual consent. With due deference. I am unable to accept the view of the Bench of the Kerala High Court in Kunhi Moyn v. Pathumma 1976

M.L.J. (Crl.) 405 that the new definition of wife in Section 125 , Cr. P. C. and the legal fiction implied therein applied to the entire section. But it is

idle to argue that there is any infringement of Article 14 of the Constitution. Equality before the law and the equal protection of the laws mean that

among equals the law should be equal and should be equally administered and that the like should be treated alike. They do not mean that things

which are different should be treated as though they are the same and that every law must have universal application, for, all persons who are not,

by nature of circumstances, in the same position. A wife does not stand in the same position as a divorced wife. In the case of the former the

matrimonial tie exists; in the case of the latter it is extinct and that makes the vital difference. They are not equals and the doctrine of equality before

the law or the equal protection of the laws cannot be invoked as between them. This contention must also fail.

8. No other point is urged before me.

9. In the result, the petition fails and is dismissed.