Before : I. S. Tiwana & B. S. Nehra, JJ.

RANJIT KAUR,—*Petitioner.*

versus

PAVITTAR SINGH,—*Respondents.*

Criminal Misc. No. 5684-M of 1990.

29th May, 1991.

Code of Criminal Procedure, 1973 (*II of* 1974)—*S.* 125—*Indian Contract Act,* 1872—*S.* 23—*Hindu Marriage Act,* 1955—*Ss.* 12 & 13—*Divorce by mutual consent—Wife relinquishing right to maintenance in her statement before the trial Court—Wife subsequently claiming maintenance under S.* 125 *of Cr.P.C.—Statutory right under S.* 125 *is not ousted by any agreement to the contrary—Any agreement which over-rides the right under S.* 125 *is opposed to public policy.*

Held, that statutory right of wife to maintenance cannot be bartered, away or negatived by the husband by setting up an agreement to the contrary. Such an agreement in addition to its being against public policy would also be against the clear intendment of S. 125. Therefore, giving effect to an agreement which over-rides S. 125 would tantamount to not only giving recognition to something which is opposed to public policy but would also amount to negation of it. The agreement of the type referred to in this case may not *per se* be illegal but it cannot be given effect to being a negation of the statutory right.

(Para 4)

Held, further, that the jurisdiction of the Magistrate under S. 125 is not ousted by any agreement between the parties if the facts and circumstances of the case otherwise justify the grant of maintenance. In other words, in every such case the Magistrate is bound to examine whether there has been neglect or refusal on the part of the husband to maintain the wife.

(Para 4)

Petition u/s 482 *of the Code of Criminal Procedure praying that the petition as prayed for be allowed and the orders of the Court below be quashed and the respondent be ordered to pay maintenance allowances to the petitioner and the respondent be also ordered to pay interim maintenance during the pendency of this petition. Any other relief or direction to which this Court thinks fit and proper be also issued in favour of petitioner.*

Ashok Singla, Advocate, *for the Petitioner.*

H. S. Gill, Advocate, *for the Respondents.*

JUDGMENT

I. S. Tiwana, J.

(1) The matter is before us on a reference to answer the following question:—

> "Whether a wife who has voluntarily surrendered her right to maintenance in divorce proceedings, would not be entitled to claim subsequently maintenance allowance under Section 125 of the Code of Criminal Procedure."

It arises from the following facts:—

(2) As a result of the proceedings initiated by Ranjit Kaur petitioner under Sections 12 and 13 of the Hindu Marriage Act, the learned Additional District Judge, Sangrur,—*vide* his order dated 1st June, 1987, granted a decree of divorce on the basis of mutual consent of the parties. During those proceedings, she made this statement:—

> "I have heard the above statement of respondent and is correct. I cannot live in the house of respondent as wife. Our child resides with respondent for which I have no objection and there is his benefit in living with the respondent. I relinquish my rights to my maintenance and to take child. I can avail the legal remedies for taking my articles back."

Thereafter she filed the present application under Section 125 of the Code of Criminal Procedure on 13th August, 1987 claiming maintenance from the respondent at the rate of Rs. 1,500 per month. She highlighted therein that whereas the respondent is a man of means, she is unable to maintain herself and is living as a parasite on her widowed mother. The respondent besides contesting the claim of the petitioner on merits has also taken the plea that she has no *locus standi* to file the present application as she had voluntarily relinquished her right to maintenance during the above noted proceedings under the Hindu Marriage Act. The trial Magistrate and the Additional Sessions Judge, Sangrur, have upheld the latter mentioned objection of the respondent primarily in the light of Section 127 (3) (c) of the Code of Criminal Procedure. The petitioner impugnes these orders by way of this petition under Section 482 of the Code of Criminal Procedure.

(3) What persuaded the learned single Judge to refer the above noted question to a larger Bench is his reluctance to accept the view expressed in an earlier single Bench judgment of this Court in *Shri Darshan Singh* v. *Maninder Kaur* (1) its controversial nature and the likelihood of it being raised in large number of cases in times to come.

(4) An adequate appreciation of the question posed is possible only in knowing the scope and intendment of Section 125 of the Code of Criminal Procedure and more particularly sub-section (1) thereof with which we are primarily concerned in the instant case. It obliges a person having sufficient means to maintain the persons specified in Clauses (a) to (d) in case neglect or refusal to such maintenance on his part is established. As pointed out by the Supreme Court in *Captain Ramesh Chander Kaushal* v. *Mrs. Veena Kaushal and others* (2), this provision is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution. Therefore, this underlying object of the provision has to guide its interpretation. The purpose of the Section is not to punish anybody for the past neglect but to prevent future vagrancy by compelling those who can do so to support those who are unable to support themselves and have a moral claim to such a support. In brief, the object is to prevent starvation and vagrancy leading to the commission of various crimes. To achieve this object, the Section provides a cheap and speedy remedy. The Law Commission of India in its 41st report dealing with the revision of the Criminal Procedure Code also noticed that primary object or justification for placing provisions relating to maintenance of wives and children which is primarily a civil matter, in the Code is that a remedy more speedy and economical than the one available in the Civil Courts is provided for them. The Commission also while negativing the suggestion that an order under this Section be made appealable, opined that a right of appeal will result in unduly protracted proceedings and defeat the primary object of this Section which is to provide a speedy remedy for destitute wives and children. This, however, does not mean that it is the only or the most satisfactory remedy open to the persons specified in Clauses (a) to (d) of this Sub-section. They are entitled to file a regular civil suit for maintenance in which case there is no

(1) 1987 (2) N.L.R. 386.
(2) A.I.R. 1978 S.C. 1807.

limit at all to the sum which may be claimed and awarded as maintenance. In such a suit their right can even be made a charge on the property or the estate of the person liable to maintain them. At the same time, the right under this Section is neither over-ridden by similar right under other laws, that is, Hindu Adoption and Maintenance Act or by Hindu Marriage Act nor is effected by the personal law, if any, governing the parties. In nut-shell, it is a statutory right which the legislature has framed irrespective of the nationality, caste or creed of the parties. The statutory liability imposed by this Section is, therefore, distinct from the liability under any other law. Thus, where it is proved to the satisfaction of the Court that there is a refusal or neglect on the part of the husband to maintain his wife, children or parents, none of them can be deprived of the maintenance. This right being a right to survival or livelihood essentially survives and lives every moment of life of the person entitled to be maintained. The use of the words "and to pay the sum to such person as the Magistrate may from time to time direct", in the last part of Sub-section (1) (earlier to proviso to the same), clearly indicate this. Therefore, this satutory right of a wife to maintenance cannot be bartered, done away with or negatived by the husband by setting up an agreement to the contrary. Such an agreement in addition to its being against public policy would also be against the clear intendment of this provision. Though the phrase "public policy" or "opposed to public policy" has neither been defined in the Contract Act or anywhere else, yet by now in the light of various authoritative pronouncements of different Courts, including the final one, (*Central Inland Water Transport Corporation Ltd. and another* v. *Taran Kanti Sengupta and another* (3), it has come to acquire a definite meaning. It connotes some matter which concerns the public good and the public interest. In any case, it can broadly stated to be equivalent to the policy of law. Therefore, giving effect to an agreement which over-ride this provision of law, that is, Section 125 Code of Criminal Procedure, would tentamount to not only giving recognition to something which is opposed to public policy but would also amount to negation of it. The law makes a clear distinction between a void and illegal agreement and a void but legal agreement. In the former case, the legislature penalises it or prohibits it. In the later case, it merely refuses to give effect to it. That is what exactly Section 23 of the Contract Act provides for. We are thus clearly of the opinion that the agreement of the type referred to in the question posed may not *per se* be illegal but it cannot be given effect to being a negation of

(3) A.I.R. 1986 S.C. 1571.

the statutory right as provided for in this Section and being opposed to public policy. Further the matter seems to be concluded by an authoritative pronouncement of the Apex Court in *Bai Tahira* v. *Ali Hussain Fissalli Chothia and another* (4). The facts of the case were that in a suit relating to a flat in which the husband had housed the wife resulted in a compromise decree which also settled the marital disputes. The decree 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 buit the flat concerned. There was a reference to mehar money (Rs. 5,000 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."

Later, during the course of proceedings initiated by the wife under Section 125 of the Code, one of the contentions raised to defeat her claim related to the above noted contractual arrangement as recorded in the consent decree. The Supreme Court negatived the contention with the following observations :—

> "No settlement of claims which does not have the special statutory right of the divorce under Section 125 can operate to negate that claim."
>
> ....

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 satatutory 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 rela-

(4) A.I.R. 1979 S.C. 362.

tion 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 obligor, 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.*" (Emphasis supplied). Though the above noted observations of their Lordships of the Supreme Court, while dealing with the content and scope of Section 125 of the Code, are in the context of Section 127(3)(b), yet that to our mind makes no difference in principle when the matter is examined and treated as one under Section 127(3)(c), the provision which has been relied upon by the lower Courts to negative the claim of the petitioner-wife. Both clauses (b) and (c) of this Sub-section relate to the cancellation of pre-existing order under Section 125 of the Code of Criminal Procedure. These provisions in the light of the above noted pronouncement of the Supreme Court can never annihilate or defeat the right of the wife to future maintenance. Darshan Singh's case (supra), which has been noticed in the order of reference, was primarily decided by the learned Judge on a concession being given by the learned counsel for the respondent, that is, the wife. It, therefore, lays down no principle of law. As has been pointed out earlier, the jurisdiction of the Magistrate under this Section is not ousted by any agreement between the parties if the facts and circumstances of the case otherwise justify the grant of maintenance. In other words, in every such case the Magistrate is bound to examine whether there has been neglect or refusal on the part of the husband to maintain the wife. If the Magistrate finds that the wife is being so neglected or so refused to be maintained despite the agreement for grant of maintenance at a particular rate or denying the same, he is duty bound to award appropriate maintenance under this Section. The agreement pleaded being opposed to public policy and against the

clear intendment of this Section cannot be enforced or be a shield in a Court of law.

(5) Therefore, in the light of the foregoing discussion, our answer to the question posed in the opening part of this judgment is in the negative as indicated above.

R.N.R.

(FULL BENCH)

Before : I. S. Tiwana, S. S. Sodhi & A. S. Nehra, JJ.

SHER SINGH GHUMAN (RETD.) AND OTHERS,—*Petitioners.*

versus

THE STATE OF HARYANA AND ANOTHER,—*Respondents.*

Civil Writ Petition No. 345 of 1990.

9th October, 1991.

Constitution of India, 1950—Art. 14—Panjab Agricultural Produce Markets Act, 1961—S. 43—Haryana State Agricultural Marketing Board and Market Committees' Employees Pension, Provident Fund and Gratuity Rules, 1989—Persons retiring prior to notification of 1989 rules are not entitled to the benefit of the said rules—1989 rules made prospective—Persons retiring prior to 1989 and those thereafter form a separate class—Provident Fund and Gratuity on the one hand and pension on the other are distinct concepts—The former is a one-time payment on retirement whereas pension is a continuing obligation—Prospectivity of the 1989 rules does not result in invidious discrimination—Fixation of date of enforcement of rules is not arbitrary.

Held, that pension is a term applied to periodic money payments to persons who retire at a certain age and usually continues to be paid for the rest of their lives, gratuity or provident fund is to be paid once at the time of retirement. Persons getting pension can be said to have a continuing right and the State a corresponding obligation to provide for such retirees but they cannot be equated with persons who are entitled to the payment of gratuity or provident fund which in the very nature of things have to be paid only once i.e. at the time of retirement. Therefore, in the instant case, there was no continuing right with the petitioner or continuing obligation on the part of the respondent-Board to provide anything for such retirees on the date the impugned rules came into force i.e. 24th of July, 1989.

(Para 5)