FROM SHAH BANO TO SUBANU

I Introduction

THE JUDGMENT in *Begum Subanu alias Saira Banu* v. *A.M. Abdul Gafoor*,[1] was delivered by the Supreme Court on 3 April 1987. Within a couple of days it was flashed across the country by the media. A national daily in its editorial comment has hailed it as a "trend setting" judgment.[2] It has pushed the law towards "a secular connotation"[3] and ushered in changes "that should fall more strictly in the domain of law-makers and community leaders."[4] In substance, the Supreme Court has held that the right of a Muslim husband to a polygamous marriage does not restrict the reach of section 125 of the Code of Criminal Procedure 1973.[5] In other words, the court has delinked the wife's right to maintenance from the husband's right to remarry. Be that as it may, this decision, apart from its own intrinsic merit which is the subject of our present critique, has come into the spotlight by virtue of its close proximity to the judgment in *Shah Bano Begum*,[6] which in effect had held that a Muslim husband was bound to pay maintenance to his divorced wife whatever might be the dictates of his personal law based on religious injunctions.[7]

II Resume of the facts

The appellant wife was married to the respondent Muslim husband on 11 May 1980. A daughter was born out of this union on 9 May 1981. Thereafter on grounds of neglect and failure to provide maintenance, she petitioned under section 125 of the code seeking maintenance for herself and the infant child of the marriage in her custody. The petition was dismissed by the magistrate for she failed to establish adequate justification for living separately. Thereupon, a revision was preferred to the sessions court. During its pendency, the respondent husband took another woman as his second wife on 18 October 1984. Even in view of this later development, the court declined to order maintenance because the husband expressed willingness to take the first wife back along with the second wife. However, in so far as the child in her custody was concerned, the sessions judge ordered

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1. A.I.R. 1987 S.C. 1103, per A.P. Sen and S. Natarajan JJ. Hereinafter referred to as *Begum Subanu*.
2. "More on Muslim Law", *The Tribune*, 9 April 1987, p. 4.
3. *Ibid.*
4. *Ibid.*
5. Hereinafter referred to as the "code".
6. *Mohd. Ahmed Khan* v. *Shah Bano Begum*, A.I.R. 1985 S.C. 945.
7. Cited in *Begum Subanu*, *supra* note 1 at 1107.

maintenance at the rate of Rs. 100 per month.

Aggrieved by the decision of the sessions court, the appellant approached the High Court by invoking its inherent powers to secure the ends of justice under section 482 of the code. But to her dismay, it declined to interfere in view of the concurrent findings of the courts below. For redressal of her grievance, she eventually approached the Supreme Court by special leave to appeal under article 136 of the Constitution.

III Propoundings of the Supreme Court

The Supreme Court considered the provisions of section 125 of the code, including especially the second proviso read with the explanation appended to sub-section (3). The cumulative effect of relevant provisions of this section may be abstracted as follows:

(*i*) If a person of sufficient means neglects or refuses to maintain his wife, who is unable to maintain herself, he could be ordered by the appropriate magistrate to make a monthly allowance for her maintenance.[8]

(*ii*) If such person offers to maintain his wife on the condition that she lives with him, and she refuses to do so, the magistrate may consider any grounds of refusal stated by her, and make an order notwithstanding that offer if he is satisfied that there is just ground for doing so.[9]

(*iii*) In the event of the husband having contracted marriage with another woman or where he keeps a mistress, it may be considered to be just ground for his wife's refusal to live with him.[10]

For answering the petition in the light of these provisions of the code, the court in *Begum Subanu* raised at the very outset two questions of a generic nature :[11]

> Is a Muslim wife whose husband has married again worse off under law than a Muslim wife whose husband has taken a mistress to claim maintenance from her husband ?
>
> Can there be a discrimination between Muslim women falling in the two categories in their right to claim maintenance under S. 125, Criminal P.C. 1973 ?

To the Supreme Court, these are the "fundamental questions of startling nature", which "run as undercurrents beneath the placid waters of this seemingly commonplace action for maintenance by a Muslim wife against her husband."[12] Besides, in view of the rival contentions of the parties

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8. Section 125(1) (*a*) of the code.

9. Second proviso to section 125(3)

10. Explanation appended to the second proviso to section 125(3). Hereinafter referred to as "explanation".

11 *Begum Subanu, supra* note 1 at 1105.

12. *Ibid.*

[before it, the Supreme Court has also posed the following specific questions :[13]

> [W]hether the second marriage of the respondent confers a right upon the appellant to live separately and claim maintenance and secondly whether her rights stand curtailed in any manner because of the personal law governing the parties permitting a husband to marry more than one wife. The further question to be decided is whether even if the respondent is liable to pay maintenance, he stands absolved of his liability after his offer to take back the appellant and maintain her.

For answering the generic as well as specific questions, in the opinion of the court, "the Explanation calls for a more intrinsical (*sic*) examination than has been done hitherto."[14] Until now, according to it, the courts in construing the explanation have been confined only to its first limb, namely, "if a husband has contracted marriage with another woman." In other words, the second limb stipulating that "if a husband keeps a mistress" had escaped their notice. Accordingly, keeping both the limbs in view, the court propounded as follows :[15]

> The Explanation places a second wife and a mistress on the same footing and does not make any differentiation between them on the basis of their status under matrimonial law.[16]
>
> The Explanation has to be construed from the point of view of the injury to the matrimonial rights of the wife and not with reference to the husband's right to marry again.

In view of these propoundings, the appellant wife was held to be entitled to the maintenance order by ignoring the respondent's right to take another wife pursuant to his personal law.[17] In presence of his second wife, the respondent's offer, which was short of setting up a separate residence for the appellant enabling her "to live in peace and with dignity," was also held inconsistent with the purport of the explanation.[18] In consequence, the Supreme Court ordered maintenance at the rate of Rs. 300 p.m. for the appellant to be paid with effect from an anterior date, namely, 18 October 1984—the date when the respondent took another wife. The court also

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13. *Id.* at 1106.
14. *Id. at* 1107, 1108.
15. *Ibid.*
16. According to the Supreme Court in *Begum Subanu*, the reason for treating the two alike is that, "(f) rom the point of view of the neglected wife, for whose benefit the Explanation has been provided, it will make no difference whether the woman intruding into her matrimonial life and taking her place in the matrimonial bed is another wife permitted under law to be married and not a mistress. The legal status of the woman to whom a husband has transferred his affections cannot lessen her distress or her feelings of neglect". See *id.* at 1108.
17. See *id.* at 1109.
18. *Ibid.*

enhanced maintenance for the minor daughter in the custody of the appellant from Rs. 100 to Rs. 200 per month with effect from the new year (1987).

IV A critique of Begum Subanu

For evaluating the Supreme Court decision in *Begum Subanu*, the present critique has been directed mainly against its specific propoundings.[19] In this respect, we may begin with the contention which the court has made after its intrinsic examination of the provisions of section 125 of the code :[20]

> The Explanation has, therefore, to be seen in its full perspective and not disjunctively. Otherwise it will lead to discriminatory treatment between wives whose husbands have lawfully married again and wives whose husbands have taken mistresses....

In this view of the matter, the court had earlier stated that the explanation places a second wife and a mistress on the same footing and does not differentiate between them on the basis of their status under matrimonial law.[21]

The question of the husband taking a mistress was certainly not there on the facts of the case in hand. It could, at best, be only inferred from the defence argument of the respondent husband that he had taken another woman as his wife (and not merely as a mistress). Perhaps, it was in this context that the Supreme Court seemed to pursue its propounding and stated :

> In fact from one point of view the taking of another wife portends a more permanent destruction of her matrimonial life than the taking of a mistress by a husband.[22]

It is respectfully submitted that this proposition of the Supreme Court is untenable *de facto* as well as *de jure*. Realising the context of the Muslim personal law in the light of which the argument of second marriage is raised for counteracting the claim of separate residence, we must bear in mind that all along in the reformative movement in Islamic law attempts have been made to approximate all casual relationships between a man and woman (the relationship between a husband and mistress is just one instance of this *genre*) to the institution of marriage. The concept of *muta* marriage and that of limited polygamy are instances of this pragmatic approach. The rationale for this is of course the societal interest in saving children from avoidable bastardisation.

Another propounding of the Supreme Court which seems to flow from the first one is that the explanation has to be construed from the point of view of the injury to the matrimonial right of the wife and not with reference

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19. See *supra* note 15 and the accompanying text.
20. *Id.* at 1108.
21. See *supra* note 15 and the accompanying text.
22. *Id.* at 1108.

to the husband's right to marry again.[23] This can also be seriously questioned by simply stating that the clear object of section 125 of the code (which includes the explanation appended to the second proviso of sub-section (3)) is not to recompense for 'the injury to the matrimonial right of the wife.' Unarguably, its limited objective is to make a provision of maintenance in favour of a neglected and needy wife *who is unable to maintain herself from her own resources.* If she has the resources, it needs to be stressed, she is outside the pale of section 125 regardless of the injury to the matrimonial rights caused by her heedless husband.

The latter part of the proposition relating to the husband's right to marry again, in the considered view of the Supreme Court, is inconsequential for the construction of the explanation. However, for the proper appreciation of this proposition, let us bear in mind the following: *First*, there is no gainsaying that the explanation clearly justifies the separate living of the first wife in case the husband has either contracted a marriage with another woman or keeps a mistress. *Second*, the explanation appended to sub-section (3) of section 125 of the present Code of 1973 is in fact there on the statute book since the year 1949—prior to 1973 as a part of its predecessor section 488 of the Code of 1898.[24] However, since the year 1955, with the enactment of the Hindu Marriage Act, the principle of monogamy came to be introduced amongst the Hindus. In consequence, if a Hindu solemnised a second marriage during the subsistence of the first, the former was void *ab initio*. But no such corresponding change has been effected in the personal law of the Muslims in India. The end result is that a Muslim husband can legally take a second wife while the first marriage is still subsisting. In view of this position, the pertinent question to be asked is: Is it not still possible to reconcile the two seemingly conflicting rights ?

The Constitution Bench of the Supreme Court in *Shah Bano Begum*,[25] while examining the question relating to the rights of the divorced Muslim wives to claim maintenance under section 125 of the code, perused the explanation under reference in the instant case. The Bench, *inter alia*, held:[26]

> The explanation confers upon the wife the right to refuse to live with her husband if he contracts another marriage, leave alon 3 or 4 other marriages. It shows, unmistakably, that *section* 125 *overrides the personal law if there is any conflict between the two.*

In view of this categorical stand of the Supreme Court, we still ask : Is it not possible to reconcile and harmonise the two conflicting legal interests

23. *Ibid*
24. Added by section 2 of the Act of 1949.
25. *Supra* note 6.
26. *Id.* at 949. (Emphasis added).

except by making one override the other ? While recognising the first wife's right to separate residence under the explanation, should the court be oblivious of the needs of the second legally wedded wife ? While attempting to safeguard the lot of one woman (the first wife), is it prudent or even equitable to lose sight of the interest of another person of the same species (the second wife), and that too for no fault of hers ? And, mind you, it is just possible, a Muslim husband, if pushed to the limit, could thwart the court maintenance order by divorcing the claimant wife through *talaq*. In that eventuality, the first wife would be obliged to seek the so-called protection under the Muslim Women (Protection of Rights on Divorce) Act 1986 !

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