

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Revision No. 547 of 2009**

Smt. Motim Bai Borkar, W/o Arjun Singh Borkar, aged about 42 years, At Present R/o House of Kala Bai, Pandhar Dalli Rajhara, Police Station Rajhara, District Durg (C.G.)

---- Applicant/Petitioner**versus**

Arjun Singh Borkar, S/o Sukhram Borkar, aged about 53 years, R/o 45 B.X. Type, Township, Dalli Rajhara, Police Station Rajhara, Tahsil Balod, District Durg (C.G.) (B.S.P. Employee Senior Dumper Operator, Dalli Mines)

---- Respondent

For Applicant/Petitioner	:	Shri P.P. Sahu, Advocate
For Respondent	:	Shri Arvind Singh, Advocate

Hon'ble Shri Deepak Gupta, Chief Justice**Order on Board****13/01/2017**

1. This criminal revision is directed against the order dated 6.10.2009 passed by the Second Additional Principal Judge, Family Court Durg, where by the petition filed by the Petitioner under Section 125 of the Code of Criminal Procedure (for short 'CrPC') for grant of maintenance was dismissed only on the ground that the Petitioner who claims to be the wife had failed to prove that her earlier marriage had been dissolved by formal decree of divorce.
2. Briefly stated facts of the case are that Petitioner Smt. Motim Bai Borkar was admittedly married to one Chunniram Meshram. One daughter was born out of the wedlock. Petitioner Motim bai had claimed that this marriage between her and Chunniram has been dissolved by customary divorce on 15.10.2002. Respondent Arjun

Singh Borkar was also married to one Kala Bai who died on 27.1.2000.

3. It is not disputed that marriage was solemnized between Arjun Singh and Motim Bai on 9.6.2003. This marriage was performed by having public function. The husband and wife lived together for two years. Thereafter in the year 2006, the wife made a complaint that the husband used to beat her. In December, 2006, she also a complained that her husband had beaten her and turned her out of the house. Motim Bai claiming to be the wife of Arjun Singh filed a petition under Section 125 of the Cr.P.C. This petition was contested mainly on the ground that the marriage between Arjun Singh and Motim Bai was not a valid marriage since Motim Bai had not obtained a valid divorce from her first husband Chunniram. The learned trial Court held the issue in favour of the husband and came to the conclusion that since no divorce has been proved by wife from first husband therefore, she could not claim maintenance.
4. It is argued by Shri P.P. Sahu that Motim Bai and her first husband Chunniram had divorced each other by mutual consent as per custom, however, no such custom is proved on record. Unless custom is proved, customary divorce cannot be accepted to be legal.
5. Having held so, I am clearly of the view that Arjun Singh, the second husband cannot escape from his liability to maintain his wife. The reason is that he married Motim Bai knowing fully well that she had a female child from earlier husband and at the time when he got married, he did not ask to produce a decree of divorce and at that

time he was willing to marry her probably on oral submission that she had obtained a divorce. It is not a case where the wife had hoodwinked the husband.

6. The Apex Court in (2014) 1 SCC 188 (Badshah vs. Urmila Badshah Godse) has held as follows:

13.3 *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 hapless 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. The Preamble to the Constitution of India clearly signals that we have chosen the democratic path under the 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.

14. 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” (*Keynote address on “Legal Education in Social Context” delivered at National Law University, Jodhpur on October 12, 2005*).

15. 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.

16. 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 purposes of the law.

17. Cardozo acknowledges in his classic (*Benjamin N. Cardozo: The Nature of Judicial Process*)

“....no system of *jus scriptum* has been able to escape the need of it”, and he elaborates:

“It is true that codes and statutes do not render the Judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. ... There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had nonetheless a real and ascertainable pre-existence in the legislator’s mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judge’s troubles in ascribing meaning to a statute. ...”

Says Gray in his lectures (*John Chipman Gray: The Nature and Sources of the Law*):

“The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the Judges have to do is, not to determine that the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.” ”

18. The court as the interpreter of law is supposed to supply

omissions, correct uncertainties, and harmonise results with justice through a method of free decision—*libre recherche scientifique* i.e. “free Scientific research”. We are of the opinion that there is a non-rebuttable presumption that the legislature while making a provision like Section 125 CrPC, to fulfill its constitutional duty in good faith, had always intended to give relief to the woman becoming “wife” under such circumstances. This approach is particularly needed while deciding the issues relating to gender justice. We already have examples of exemplary efforts in this regard. Journey from *Shah Bano (Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556)* to *Shabana Bano (Shabana Bano v. Imran Khan, (2010) 1 SCC 666)* guaranteeing maintenance rights to Muslim women is a classical example.

20. Thus, while interpreting a statute the court may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. It is this mischief rule, first propounded in *Heydon case*[1584 3 Co Rep 7a] which became the historical source of purposive interpretation. The court would also invoke the legal maxim construction *ut res magis valeat quam pereat* in such cases i.e. where alternative constructions are possible the court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation should be avoided. We should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. If this interpretation is not accepted, it would amount to giving a premium to the husband for defrauding the wife. Therefore, at least for the purpose of claiming maintenance under Section 125 CrPC, such a woman is to be treated as the legally wedded wife.

7. Section 125 Cr.P.C. has been introduced to prevent destitute women who are deserted by the husband from becoming vagabonds. The woman is not at fault. She had obtained a divorce from her first husband. There is a document on record to show that a written divorce was entered into between her and her husband. However as held by me above, this divorce is strictly not in accordance with law. Even so when the second husband married the petitioner knowing fully well that her earlier marriage had not ended in a valid divorce,

then he is estopped from raising a plea under Section 125 Cr.P.C. that the second marriage is invalid. A person cannot approbate and reprobate at the same time. The Respondent husband having married the lady lived together as husband and wife and cohabited with her 2 ½ years, now cannot be permitted to turn around and say that the Petitioner is not his legally wedded wife. The lady must have served the husband for 2 ½ years. They have had sexual relations during 2 ½ years. No lady would have entered into this relationship if she had known that she would not be treated as the wife. The Apex Court in *Badshah* (supra) has clearly laid down that the Court must interpret the law in a liberal manner and the construction must be purposive to help poor and destitute women. Therefore I am clearly of the view that the learned trial Court gravely erred in dismissing the petition.

8. Next comes the question as what amount should be fixed as maintenance. On the record of the case, there is a salary slip of the husband, who was at the relevant time working in Bhilai Steel Plant and his gross pay was Rs.27,322/-. After deductions are being made for CPF and income tax etc, the net pay was at Rs.13,020/-. Keeping in view all the facts, I assess the maintenance payable to the wife at Rs. 4,000/- per month. This maintenance amount shall be payable from the date of filing the petition under Section 125 of Cr.P.C. However it may not be possible for the husband to pay all the arrears together, the husband shall with effect from the month of February pay a sum of Rs. 8,000/- each month till all entire arrears are paid off. Thereafter, he shall pay Rs.4,000/- per month as maintenance to the wife. Learned counsel for the wife is directed to supply bank account

number of the wife to learned counsel for the husband within two weeks from today so that the husband on or before 15th of each month can deposit the amount in the account of the wife directly so that there is no dispute with regard to the amount paid.

9. With these observations, the revision petition is allowed and disposed of.

Sd/-

(Deepak Gupta)
CHIEF JUSTICE