CASE NO.:
Appeal (crl.) 488 of 2008

PETITIONER:
Chand Patel

RESPONDENT:
Bismillah Begum & Anr

DATE OF JUDGMENT: 14/03/2008

BENCH:
Altamas Kabir & J.M.Panchal

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO. 488 OF 2008
(@ Special Leave Petition(Crl.) No.3989 of 2006)

ALTAMAS KABIR,J.

1. Leave granted.
2. The application for condonation of delay in filing the Special Leave Petition is allowed and the delay in filing the same is condoned.
3. This appeal raises an interesting question of law as to whether a marriage performed by a person professing the Muslim faith with his wife's sister, while his earlier marriage with the other sister was still subsisting, would be void in law or merely irregular or voidable even though the subsequent marriage may have been consummated.
4. The facts which give rise to the aforesaid question, in brief, are set out hereunder.
5. The respondent No.1 herein, Bismillah Begum, filed an application for her maintenance and for the maintenance of her minor daughter, Taheman Bano, under Section 125 of the Code of Criminal Procedure, against one Chand Patel, in the Court of the Judicial Magistrate, First Class, Chincholi, being Criminal Misc. No.6 of 2001. In her petition she claimed that she was the legally wedded wife of the appellant herein and that her marriage with the appellant had taken place about eight years prior to the filing of the said petition. Her further case was that the marriage was consummated and two years after the marriage a daughter was born from the wedlock and she has been made petitioner No.2 in the application for maintenance. The petitioner No.2 Taheman Bano being a minor, is under the care and guardianship of her mother, the petitioner No.1, in the said application.
6. In her petition the respondent No.1 herein categorically admitted that the appellant herein was married to her elder sister, Mashaq Bee, and that the appellant, with the consent of his first wife married the respondent No.1 and a Nikahnama was also

executed but the same had been misplaced. It was also admitted that the appellant herein lived with his first wife Mashaq Bee and the respondent No.1 under one roof and the appellant had even accepted the petitioner No.2 as his daughter and had brought her up.

7. That with the passage of time the relationship between the appellant and the respondent No.1 began to deteriorate and he started neglecting the respondents who have no means to support themselves. The respondent No.1 prayed for maintenance for herself and for her minor daughter @ Rs.1,000/- per month for each of them from the date of filing of the petition.

8. The case made out on behalf of the respondent No.1 was denied on behalf of the appellant herein. He categorically denied that he had married the respondent No.1. The defence put up by the appellant was not accepted by the learned Trial Court, which prima facie came to a finding that the respondent No.1 was, in fact, the wife of the appellant and that the petitioner No.2 is his daughter. The Trial Court also came to the finding that the appellant had neglected the respondents and had failed to maintain them, which he was in law required to do, and accordingly, directed the appellant to pay Rs.1,000 per month to the respondent No.1 towards her life support maintenance and to the respondent No.2 till she reached adulthood.

9. The aforesaid decision was challenged by the appellant herein in the revision filed by him, being Criminal Revision No.76 of 2003, in the Court of the District and Sessions Judge at Gulbarga. The respondent No.1 herein, both on her own behalf and on behalf of her minor daughter, also filed Criminal Revision No.96 of 2003 before the same learned Judge and both the revision petitions were taken up together for disposal and wee disposed of by a common order. After considering several decisions of different High Courts and this Court the learned Fourth Additional District Judge, Gulbarga, dismissed both the revision petitions and confirmed the order passed by the Judicial Magistrate, First Class, Chincholi, in Criminal Misc. No.6 of 2001. While arriving at the aforesaid decision, the learned revisional Court held that the personal law of the parties could not come in the way of a Muslim to pray for and obtain maintenance under Section 125 of the Code of Criminal Procedure since an obligation is cast upon the appellant herein to maintain his wife and children till the marriage between them was declared null and void by a competent court. While referring to various decisions of different High Courts, the revisional Court relied to a large extent on a decision of this Court in the case of Nanak Chand Vs. Chandra Kishore Aggarwal and others (AIR 1970 SC 446) in which it was, inter alia, held that Section 488 of the old Code which corresponds to Section 125 of the new Code is

applicable to all persons belonging to all religions and has no relationship to the personal law of the parties. The learned Judge also referred to the decision of this Court in the case of Re- Hussain Saheb (1985 Criminal Law Journal 1505 (A.P.) (W.P. No.858 of 1985) wherein it was held that the provisions of maintenance of a divorced wife under Section 125 of the Code of Criminal Procedure could not be struck down on the ground of inconsistency between the said provisions and the personal laws of the parties. On the basis of the above, the learned Additional Sessions Judge held as follows:

"Thus in the above said dictum the personal law of the Muslim no way coming in the way of Muslim to maintenance of the respondent. Moreover the Magistrate cannot go into validity of the marriage while dealing u/Section 125 of Cr.P.C. The petitioner must maintain the wife and children till the marriage between them declares null and void by the competent court. Therefore, by relying upon the rulings of the Hon'ble Supreme Court the marriage between the petitioner and respondent No.1 is presumed to be legal and validity of the marriage cannot be decided under proceedings u/sec. 125 of Cr.P.C. or Section 391 of Cr.P.C. Therefore, I do not find any illegality or irregularity committed by the Magistrate while granting maintenance to the respondents. Hence I answer Point no.1 and 2 in the negative."

10. Subsequently, the appellant herein filed an application under Section 482 of the Criminal Procedure Code for setting aside the order dated 28.6.2003 passed by the Judicial Magistrate 1st Class in Criminal Misc. No.6 of 2001. From the order disposing of the said petition it is apparent that the High Court had occasion to look into the orders passed both by the Trial Court as well as the revisional Court and after considering the same was of the view that there was no merit in the petition and dismissed the appellant's application under Section 482 of the said Code.

11. Much the same arguments as had been advanced before the Courts below have been advanced on behalf of the respective parties in these proceedings.

12. On behalf of the appellant it has been urged that the Muslim law specifically prohibits 'unlawful conjunction' which has been interpreted to mean that a man could not marry his wife's sister in his wife's life time. It was urged that in the instant case the appellant had from the very initial stage

denied having married the respondent No.1 herein, who is his wife's younger sister and that he did not have any sexual relations with her, thereby disputing the paternity of the respondent No.2 through him. It was also submitted that since such unlawful conjunction is prohibited, even if the marriage had been performed the same was void in law and did not confer any rights either on the respondent No.1 or on respondent No.2 since from the very inception the marriage was void and invalid.

13. In support of his aforesaid contention Mr.Raja Venkatappa Naik, learned counsel for the appellant, firstly referred to the decision of this Court in Rameshchandra Rampratapji Daga Vs. Rameshwari Rameshchandra Daga,(2005) 2 SCC 33, in which this Court had occasion to consider, inter alia, the provisions of Sections 11 and 12 as also Section 5(i) of the Hindu Marriage Act, 1955. The facts of the said case are to some extent similar to the facts of this case, although, the same involved the provisions of the Hindu Marriage Act, 1955. In the said case the wife was first married to someone but according to her the customary rituals of the marriage had not been completed, inasmuch as, during the marriage ceremony the family members quarrelled over dowry. She, thereafter, filed a petition for divorce but did not prosecute the same and no decree of divorce was passed in the said proceedings. However, in accordance with the prevalent customs in the Maheshwari community, a chhor chithhi or a document of dissolution of marriage was executed between the wife and the said person and it was also registered. The said documents were shown and also given to the person with whom the second marriage was performed and a daughter was also born from the second marriage. According to the wife, her second husband began to ill treat her, and, ultimately, she had to file proceedings in the Family Court for grant of a decree of judicial separation and maintenance of Rupees Three thousand per month both for herself and for her minor daughter. The second husband filed a counter petition seeking a declaration that his marriage with his present wife was a nullity on the ground that on the date of the second marriage her earlier marriage with her previous husband had not been dissolved by any Court in accordance with the provisions of the Hindu Marriage Act, 1955. The Family Court allowed the petition of the wife and granted a decree of judicial separation as also the maintenance claimed by her and dismissed the counter petition filed by the husband. The High Court, however, reversed the finding of the Family Court and held that since the first marriage of the present wife with the previous husband had not been dissolved by the Court, the second marriage was in contravention of Section 5(i) of the aforesaid Act and was, therefore, a nullity under Section 11 of the Act. The High Court granted a decree of separation holding

that the marriage was a nullity, though it maintained the decree granted in respect of maintenance to the respondent No.1 and her daughter.

14. Dismissing the two appeals preferred both by husband and the wife, the Supreme Court held that in the facts of the case the Courts below were fully justified in granting maintenance both to the wife and the daughter since the evidence of the wife had been rightly believed by the Courts below. The High Court accepted the validity of the document of dissolution of marriage executed between the parties and also took into consideration the fact that they had lived as husband and wife for about 9 years. On such consideration, both the appeals came to be dismissed.

15. Mr. Naik also relied on another decision of this Court in the case of Savitaben Somabhai Bhatiya vs. State of Gujarat and others, (2005) 3 SCC 636, in which it was observed that the legislature had considered it necessary to include within the scope of Section 125 of the Code an illegitimate child, but it had not done so in respect of a woman not lawfully married. It was observed that however desirable it may be, to take note of the plight of the unfortunate woman, the legislative intent being clearly reflected in Section 125 of the Code, there was no scope for enlarging its scope by introducing any artificial definition to include a woman not lawfully married in the expression "wife".

16. On the basis of the aforesaid two decisions, learned counsel for the appellant submitted that having regard to the letter and spirit of Section 125 of the Code, the Courts below had erred in granting maintenance to the respondent No.1 when her marriage itself was void from its very inception.

17. Mrs. K. Sarada Devi, learned counsel for the respondents, however, questioned the decision of the High Court on the ground that in a proceeding under Section 125 of the Code, the Court was not required to adjudicate upon the validity of a marriage and on a prima facie view it could pass an order for maintenance of both the wife and her daughter. She however, also contended that the marriage between the parties had been solemnised inspite of the existing facts which were known to both the parties. She urged that it was the appellant who, despite having married her elder sister, not only chose to marry the respondent No.1 as well, but was now taking recourse to technicality to avoid payment of maintenance which he was required to pay under the provisions of Section 125 of the Code.

18. She urged that till such time as the marriage between the appellant and the respondent No.1 was not declared to be void by a competent Court of law, it continued to subsist and all rights flowing from a valid marriage continued to be available to the respondent No.1 and her minor daughter till

such time a competent Court of law directed such marriage to be invalid and void.

19. The answer to the question, which we are called upon to answer in this case, will depend on the legal status of the union effected by the appellant with the respondent No.1. Though the factum of marriage between them was denied by the appellant, the courts below negated the appellant's case and proceeded on the basis that a marriage had been performed between them. If the marriage which was said to have been performed between the appellant and the respondent No.1 is held to be void then, in such event, the respondent No.1 will not be entitled to maintenance from the appellant under Section 125 Crl.P.C. If, on the other hand, the marriage is held to be irregular, then in such event, the marriage will subsist for all purposes, unless declared to be void by a competent court. Till such a declaration is made, along with the respondent No.2, the respondent No.1 will also be entitled to maintenance under Section 125 Cr.P.C. Although, the law applicable in this case is under the personal law of Muslims, it has many similarities with the provisions of Sections 11 and 12 of the Hindu Marriage Act, 1955. Section 11 of the 1955 Act, defines "Void Marriages" and provides that any marriage solemnized after the commencement of the Act shall be null and void and on a petition presented by either party thereto, be so declared by a decree of nullity if it contravened any one of the conditions specified in clauses (i), (iv) and (v) of Section 5 of the Act. In Yamunabai Anantrao Adhav vs. Anantrao Shivram Adhav (AIR 1988 SC 644), this Court had held that marriages covered by Section 11 are void ipso-jure, that is void from the very inception and have to be ignored as not existing in law at all. A marriage in contravention of Section 11 must be treated as null and void from its very inception.

20. Section 12 of the 1955 Act defines "voidable marriages" and provides that any marriage solemnized before or after the commencement of the Act shall be voidable and may be annulled by a decree of nullity on any of the grounds enumerated in the Section. In the case of a marriage covered by Section 12 of the 1955 Act, the marriage is not void ipso-jure from its inception, but a decree would have to be obtained from the competent court declaring the marriage to be void and so long as such declaration is not made, the marriage will continue to subsist.

21. Under the Muslim law also a distinction has been drawn between void marriages and irregular marriages. The same has been dealt with in Mulla's "Principles of Mahomedan Law" in paragraphs 260 to 264. Paragraphs 260, 261 and 262 deal with complete prohibition of marriage between a man and the persons included therein and any marriage in violation of such provision would be void from its very inception

(batil). Paragraph 263 which is relevant for our purpose reads as follows:-

"263. Unlawful conjunction \026 A man may not have at the same time two wives who are so related to each other by consanguinity, affinity and fosterage, that if either of them had been a male, they could not have lawfully intermarried, as for instance, two sisters, or aunt and niece. The bar of unlawful conjunction renders a marriage irregular, not void."

22. The above provision fell for the consideration of different High Courts and the earliest decision is that of the Calcutta High Court in the case of Aizunnissa vs. Karimunissa (ILR 1895 23 Calcutta page 130) which was decided on 23rd July, 1895. After discussing the various authorities on the subject the Calcutta High Court took the view that a marriage with a wife's sister while the earlier marriage was still subsisting was void and the children of such marriage were illegitimate and were not entitled to inherit. It was held that the sister of a person's wife was prohibited from the very inception and a marriage contracted with her would from the very inception be void (batil).

23. The said decision subsequently came to be considered by the Bombay High Court in the case of Tajbi Abalal Desai vs. Mowla Alikhan Desai (39 Indian Cases 1917 page 603) and was decided on 6th February, 1917. The Bombay High Court differed with the decision rendered in Aizunnissa's case (supra) and placing reliance on the views expressed in Fatawa-i-Alamgiri held that a marriage with the sister of an existing wife was not void (batil) but irregular (fasid). The reasoning adopted was that marriage with a permanently prohibited woman had always been considered by the exponents of Muslim law to be void and has no legal consequence, but marriage with a temporarily prohibited woman if consummated may have legal consequences. The logic behind the aforesaid reasoning was that a marriage with the sister of an existing wife could always become lawful by the death of the first wife or by the husband divorcing his earlier wife and thereby making the marriage with the second sister lawful to himself. The Bombay High Court after considering various authorities, and in particular Fatawa-i-Alamgiri, ultimately observed as follows:-

"Taking the whole current of authority and the general trend of informed thought on this subject, it points clearly to some such distinctions having always been recognized by the Muhammadan Law. Where that is so and a particular case on the borderland of such distinctions, to which it may be

doubtful whether they can be applied in the ordinary way, arises, surely the Courts would be well advised to accept the authoritative statement of the law as it was then understood by the authors of the Fatawa-i-Alamgiri. It is impossible to say that that statement conflicts with the textual authority of the Kuran. Speaking generally, it appears to us to harmonize with the course the law took during the intervening period, and to be in consonance with the soundest practical principles. It has the support of such a great modern text-book writer as Baillie. The eighth chapter of his first book appears to us to reach conclusions by unanswerable reasoning, and while those conclusions may be his own, they are the conclusions of a writer of profound knowledge intimately versed at first hand with all the best writings of Muhammadan lawyers. The modern Muhammadan tex-book writers, Ameer Ali, Tyabji and Abdur Rahim, are in substantial agreement. All authority appears to us to point one way. Against this is nothing but the judgment of the Calcutta High Court in Aizunnissa's case and after having given it and the materials upon which it avowedly rests our most careful and respectful attention, we find ourselves wholly unconvinced by its reasoning and unable to agree with the law it lays down."

24. The aforesaid question also fell for the consideration of the Oudh Chief Court in the case of Mussammat Kaniza vs. Hasan Ahmad Khan (92 Indian Cases 1926 page 82) decided on 24th November, 1925 and by the Lahore High Court in Taliamand vs. Muhammad Din (129 Indian Cases 1931 page 12) decided on 16th July, 1930, and also by the Madras High Court in Rahiman Bibi Saheba vs. Mahboob Bibi Saheba (ILR 1938 page 278) which was decided on 1st September, 1937. All the said courts favoured the view taken by the Bombay High Court in Tajbi's case (supra) and were of the view that the decision of the Calcutta High Court in Aizunnissa Khatun's case (supra) was incorrect.

25. Paragraph 264 which deals with the distinction between void and irregular marriages reads as follows:-

"264. Distinction between void and irregular marriages \026

(1) A marriage which is not valid may be either void or irregular.

(2) A void marriage is one which is unlawful in itself the prohibition against the marriage being perpetual and absolute. Thus a marriage with a woman

prohibited by reason of consanguity, affinity, or fosterage is void, the prohibition against marriage with such a woman being perpetual and absolute.

(3) An irregular marriage is one which is not unlawful in itself, but unlawful "for something else," as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses. Thus the following marriages are irregular, namely \026

(a) a marriage contracted without witness;

(b) a marriage with a fifth wife by a person having four wives;

(c) a marriage with a woman undergoing iddat;

(d) a marriage prohibited by reason of difference of religion;

(e) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried.

The reason why the aforesaid marriages are irregular, and not void, is that in cl.(a) the irregularity arises from a accidental circumstance; in cl. (b) the objection may be removed by the man divorcing one of his four wives; in cl.(c) the impediment ceases on the expiration of the period iddat; in cl.(d) the objection may be removed by the wife becoming a convert to the Mussalman, Christian or Jewish religion, or the husband adopting the Moslem faith; and in cl(e) the objection may be removed by the man divorcing the wife who constitutes the obstacle; thus if a man who has already married one sister marries another, he may divorce the first, and make the second lawful to himself."

26. Paragrph 266 deals with the effects of a void (batil) marriage and provides that a void marriage is no marriage at all. It does not create any civil rights or obligations between the parties. The offspring of a void marriage are illegitimate. Paragraph 267 which deals with the effects of irregular (fasid) marriages reads as follows:-

"267. Effect of an irregular (fasid) marriage \026

(1) An irregular marriage may be terminated by either party, either before or after consummation, by words showing an intention to separate, as where either party says to the other "I have relinquished you". An irregular marriage has no legal effect before consummation.

(2) If consummation has taken place \026

(i) the wife is entitled to dower, proper or specified, whichever is less;

(ii) she is bound to observe the iddat, but the duration of the iddat both on divorce and death is three courses;

(iii) the issue of the marriage is legitimate. But an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife (Baillie, 694, 701)."

27. On consideration of the decisions of the various High Courts referred to hereinabove and the provisions relating to void marriages and marriages which are merely irregular, we are also of the view that the decision rendered by the Bombay High Court in the case of Tajbi's case (supra) is correct. Since a marriage, which is temporarily prohibited may be rendered lawful once the prohibition is removed, such a marriage is in our view irregular (fasid) and not void (batil).

28. The answer to the question raised at the very outset, therefore, is that the bar of unlawful conjunction (jama bain-al-mahramain) renders a marriage irregular and not void. Consequently, under the Hanafi law as far as Muslims in India are concerned, an irregular marriage continues to subsist till terminated in accordance with law and the wife and the children of such marriage would be entitled to maintenance under the provisions of Section 125 of the Code of Criminal Procedure.

29. The decisions cited during the hearing of this case do not really come to the aid of the parties, except to the extent that a marriage which is merely irregular or voidable continues to subsist till it is set aside or declared to be void in accordance with law.

30. In view of what has been stated hereinabove, we hold that the unlawful conjunction and/or marriage between the appellant and respondent No.1 continues to subsist not having been declared void by any competent forum and that accordingly, the respondent No.1 and the respondent No.2 will both be entitled to maintenance under Section

125 of the Code of Criminal Procedure. There is, therefore, no reason to interfere with the order passed on 20.6.2005 by the Karnataka High Court in Criminal Petition No. 3002 of 2004 or that of the Judicial Magistrate, First Class, Chincholi, on 28.6.2003 in Criminal Misc. No. 6 of 2001. The appeal is accordingly dismissed and the interim stay granted on 14.8.2006 is vacated.

31. The appellant shall pay to the respondents all the arrears of maintenance, within a period of six months from the date of this Judgment and will also go on paying the current maintenance with effect from the month of March, 2008. In addition, the appellant will also pay to the respondent No.1 a sum of Rs.10,000/- towards the cost of litigation.

JUDIS