

Wife Right to Maintenance under The Criminal Procedure Code, 1973

Abstract

The provision of maintenance under section 125 Criminal Procedure Code, 1873 is to provide speedy, effective, inexpensive remedy to save wife /child / parent as the case may be, who are unable to maintain themselves. It is a special provision made in view of Article 15(3) and 39 of the constitution and to stop the vagrancy and destitution of the very persons. On analysis of overall provision of the section 125 to 128 Cr. P.C. and observation from real life situation some lacunas have been found which needed to be overcome like awarding maintenance from date of application, speedy proceeding and awarding the maintenance as per the status enjoyed by the husband instead of meager amount in the name of maintenance.

Keywords: Maintenance, Interim Maintenance, Vagrancy, Destitution.

Introduction

A provision under Section 125 Cr.P.C. has been made to prevent the destitution and vagrancy of the wife after she has been deserted (animus desidendi) by the husband. Earlier there was provision regarding the maintenance in the personal laws but in those provisions it takes many years to get the relief. So, to ameliorate the suffering of wife a speedy, effective and inexpensive remedy is created in the form of provision under Section 125 Cr.P.C., 1973 (Here after 'Cr.P.C.' for brief)

Aim of the study

Aim of the study on this very topic to improve the short comings in the maintenance proceedings under section 125 to 128 Cr. P.C. after analyzing the full aspect of these provisions and real life situation.

Report of Law Commission of India, 1965

These provisions ensure a protection of equality of sexes and protective discrimination in favour of weak, viz neglected or divorced wife abandoned children and needy and hopeless parent. They are in a way aimed at preventing starvation and vagrancy relating to Commission of Crime.

Spirit of Article 15(3) and Article 39

Provision for the maintenance U/s 125 Cr.P.C. falls under the sweep of constitution and are in spirit of article 15(3) and Article 39 i.e. the Special Provision made for the women and for social justice.

Nature of Maintenance Proceeding

Though the subject matter of section 125-128 is civil in nature, the primary justification for their inclusion in the Cr.P.C. is that a remedy more speedy and economical than that available in the civil court is provided for by these sections for benefit of needy persons. Failure to maintain one's wife and children is not made defaulter accused. Also, an application Under Section 125 is not a complaint within the meaning of Section 2(d) of Cr.P.C.

Additional and Independent Right

The right to maintenance wife under Section 125 Cr.P.C. is not in derogation of the right of maintenance available of the wife under the other laws but Magistrate may consider the amount of maintenance awarded under other laws to wife and accordingly grant the maintenance.

Secular Provision

The Hon'ble Supreme Court in the case of **Mohammed Ahmed Khan Vs. Shah Bano Begum**¹ opined that the provision of Section 125 is truly secular in the character and is different from personal laws of the parties. The court further held that such provisions are essentially of Prophylactic character and cut across & barrier of religion. The court further opined that the liability imposed by section 125 Cr.P.C. to maintain close relative who are indigent is founded upon the individual obligation to the society to prevent the vagrancy & destitution.



Pooja

Research Scholar,
Deptt. of Law,
B.P.S. Women University,
Khanpur, Kalan, Haryana

However subsequently, parliament passed by the Muslim women's (protection of right on divorce) Act, 1986, which provides other remedies for the Muslim women and allowance them to use the remedy provided by Section 125 Cr.P.C. only if the husband consents to it and the provision of section 5 are complied with. The validity of provision of the Act of 1986 was for the consideration before the constitution bench in the **Danial Latifi Versus Union of India**² in this case by reading down the provision of the Act, the validity of the act was upheld and it was observed that under the Act itself when parties agree the provision of S. 125 Cr.P.C. could be invoked as contain in Section 5 of the Act and even otherwise, the Magistrate under the Act has the power to grant maintenance in favour of divorced women and parameters and consideration are the same as those in Section 125 Cr.P.C.

Section 125 in The Code Of Criminal Procedure, 1973

125³. Order for maintenance of wives, children and parents.

1. If any person having sufficient means neglects or refuses to maintain-
 - a. his wife, unable to maintain herself, or
 - b. his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or
 1. Subs. by Act 45 of 1978, s. 12, for" Chief Judicial Magistrate" (w. e. f, 18- 12- 1978).
 - c. his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or
 - d. his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means. Explanation.- For the purposes of this Chapter,-
 - (a) " minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875); is deemed not to have attained his majority;
 - (b) " wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.
2. Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.
3. If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order,

issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month' s allowances remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due: Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such

Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife' s refusal to live with him.

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.

Essential Terms Wife

Here wife means only a wife from lawful marriage or divorced wife. A wife of void and voidable marriage does not have the right U/s 125 Cr.P.C. to get maintenance, but as held in **Badshah Vs. Sou. Urmila Badshah Godse**⁴ where it was held by the Hon'ble Supreme Court if husband have deliberately hidden his earlier wife from the subsequent wife and have misrepresent to her about her earlier marriage he will be bound to give the maintenance under Section 125 Cr.P.C. He cannot be allowed to take advantage of his own wrong.

Unable to Maintain

Here the wife is entitled to maintenance only if she is unable to maintain her from her income means she does not have the sufficient income to maintain herself as per the status she has enjoyed with her husband. Here only qualification of the wife is not the criteria to assume her to be able to maintain, but only her earning have to consider. As opined by the Hon'ble Supreme Court in the case of **Neeta Rakesh Jain Vs. Rakesh Jeetmal Jain**⁵ on 20/07/2010. Hon'ble Court find it a fit case for the maintenance to the wife when she is doing PHD with support of her sister.

Neglect or Refusal by the Husband

If husband having sufficient means i.e. the income but he neglect or refused to maintain the wife then wife filed a petition before the family court and if there is no family court then before the Judicial

Magistrate First Class and he on the prima-facie satisfaction of fulfillment of requirement of U/s 125 Cr.P.C. may initially fix and interim maintenance and award litigation expenses. During the pendency of proceedings within 60 days from the service to the respondent of the summon.

Here the Trial Court will consider the case prima-facie it need not go into the detail of matrimonial dispute.

Amount of Maintenance to Be Awarded

Earlier before the amendment of 2001 the amount of maintenance to be awarded to the wife was fixed amounting to Rs.500/- but after the amendment the amount to be awarded to wife has been left at the discretion of the Judicial Magistrate First Class. But he cannot use his discretion arbitrarily, but have to consider the means of husband and status enjoy by the wife in the family of husband. But in **Vijay Kumar Vs. State of Punjab & others**⁵. The Hon'ble High Court held that maintenance to wife and child @ 50% of gross salary after deduction of tax is appropriate.

But in some cases, it is found that the husband voluntarily takes retirement or voluntarily resign from his job to show him unemployed, so that to avoid the bonafide right of maintenance of wife and child. As held by Supreme Court in the case of **Shamima Farooqui Vs. Sahid Khan**⁷ in such cases the last withdrawn salary of the husband should be considered by the Court while fixing the maintenance or interim maintenance of wife/children or parents as the case may be.

But there may be the cases where the husband is not a salaried person and there is no documentary proof of his income, status then unless he is physically or mentally unable to earn his income shall be assumed keeping in view of his qualification and minimum wages of skilled, unskilled or semi-skilled worker as prescribed by the Govt.

Maintenance from Which Date

Section 125 left it on the discretion of Judicial Magistrate First Class to award the maintenance from the date of order or date of application, but he cannot use his discretion arbitrarily it must be reasoned order as per the requirement of section 354 clause (6) Cr.P.C.. In the case of **Jaminiben Hiranbhai Viyas & others Vs. Hiranbhai Rameshchandra Viyas & others**⁸ The Hon'ble Supreme Court reverse the order of High Court and award the maintenance from the date of application instead of date of order as the Lower Court order was not reasoned order and so not complied with the requirement of Section 354 Clause (6) of Cr.P.C.

Consequence of Failure to Comply with The Order⁹

Magistrate may issued a warrant for levying the amount due in the manner provided for the levying fine or may sentence in for the whole or any part of the each month allowance as remaining unpaid maximum upto 1 month. But even after such sentence the husband is not excluded from his liability to pay the maintenance.

Here application for issue the warrant must be within 1 year of default.

Husband offers Maintain His Wife

A wife is assumed to be lived and enjoy the company of husband and fulfill her matrimonial obligation, but her dignity should be maintained. If wife denied such offer the Magistrate will consider the ground of refusal and can award the maintenance or deny it when without any ground, she refused to live with him. Second marriage of the husband is a proper ground to refused to live with him.

Burden of Proof of Lawful Marriage

As per section 101 of Indian Evidence Act, 1872 the burden one proving the lawful marriage is prima facie lies on the wife, but it is not a strict burden of proof on her. Her burden is not to establish the lawful marriage beyond reasonable doubt, but of preponderance of possibilities as lies in the civil cases.

When Wife Loose Her Right to Maintenance or Interim Maintenance or Litigation Expenses or Magistrate May Cancel The Order of Maintenance

1. If wife lives in the adultery i.e. having sexual intercourse with a man who is not his spouse.
2. If without any sufficient reason she refuses to live with her husband
3. If they are leaving separately by mutual consent.
4. However under Section 126 clause (3) the Magistrate may cancel the order on the proof of following¹⁰ :-
5. Divorce wife remarriage, the order of maintenance may be canceled from the date of remarriage.
6. When the divorce wife has received, whether before or after the date of maintenance order the whole of the sum under any customary or personal law applicable to the parties may be payable on such divorce.
7. Where divorce wife has voluntarily surrender her right to maintenance after her divorce

Relevant Judgments

Shamima Farooque Vs. Shaid Khan¹¹

It was held that the obligation of the husband is on hire pedestal when the question of maintenance of wife and children arises.

Shabana Bano Vs. Imran Khan¹²

It was held that divorce women be entitled to claim maintenance from his divorced husband, even after the expiry of period of Iddat or as long as she is not remarry.

Savita Ben Somabhai Bhatia Vs. State of Gujarat¹³

It was held that Section 125 Cr.P.C. has been enacted for social justice and specifically protect woman and children and also old and infirm parents. Section 125 promote the spirit of Article 39 and Article 15(3) of the Indian Constitution. The primary burden of proving the existence of lawful marriage would lie upon the wife and once she has proved prima-facie proof of such lawful marriage then the court shall not strict with her, rather it may raise the presumption of lawful marriage under Section 114 of Indian Evidence Act and it may be used by the Court as a proof of her lawful marriage and the burden of rebutting that presumption would lie upon respondent husband. Even a long cohabitation can be sufficient to raise the presumption of section 114 and if not rebutted the

lawful marriage will be presumed and hence proved. The court in such cases will be tilted in the favour of petitioner wife and will not put an extremely strict burden upon her to prove the lawful marriage.

Jaminiben Hiranbhai Viyas & others Vs. Hiranbhai Rameshchandra Viyas & others¹⁴

In this case The Hon'ble Supreme Court altered the order of maintenance from the date of order to the date of application as it was not a reasoned order as per the requirement of Section 354 clause (6) Cr.P.C.

Procedure

Section 126¹⁵

1. Proceedings under section 125 may be taken against any person in any district-
 - (a) where he is, or
 - (b) where he or his wife, resides, or
 - (c) where he last resided with his wife, or as the case may be, with the mother of the illegitimate child.
2. All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is to be made, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed for summons-cases: Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is willfully avoiding service, or willfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.
3. The Court in dealing with applications under section 125 shall have power to make such order as to costs as may be just

Vijay Kumar Parsad Vs. State of Bihar¹⁶

It was held by the Hon'ble High Court that the place of making application by the wife and child under Section 126 of the Code is enlarged the venue of proceeding for the maintenance. Now instead of place where they were last residing the venue of the proceeding may be placed where the wife is residing on the date of making the application. The change was though necessary because of certain observations made by the law commission, taking note of the fact that often deserted wives are compelled to live with their relatives far away from the place where husband and wife last resided together.

Whether Enquiry U/S 125-126 is Trial

Enquiry U/s 125-126 is not a trial nor the result of such enquiry can be considered as conviction or acquittal. The section 300 of Cr.P.C. does not apply and a second application U/s 125 Cr.P.C. is not barred and so was held in case of **Naffes Ara Vs. Saadaf Ali¹⁷**

Alteration or Cancellation of The Order

Section 127¹⁸

On proof of a change in the circumstances of any person, receiving, under section 125 a monthly

allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as case may be, the Magistrate may make such alteration in the allowance he thinks fit:

1. Where it appears to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.
2. Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce from, her husband, the Magistrate shall, if he is satisfied that-
 - a. The woman has, after the date of such divorce, remarried, cancel such order as from the date of her remarriage;
 - b. The woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,-
 - (i) in the case where, such sum was paid before such order, from the date on which such order was made,
 - (ii) in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;
 - c. the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.
3. At the time of making any decree for the recovery of any maintenance or dowry by any person, to whom a monthly allowance has been ordered to be paid under section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowance in pursuance of the said order.

Change in The Circumstances

As per **Bhagwan Dutt Vs. Kamla Devi¹⁹** The phrase 'change in the circumstances' refers to change in pecuniary or other circumstances of party paying or receiving the allowances which would justify and increase or of amount originally fixed.

As held in **Ramdev Pandey Vs. Savitri Pandey²⁰**, Enhancement of maintenance prior to date of filing application under Section 127 of Cr.P.C. held to be appropriate as petitioner had concealed material fact and thus played a fraud with the court. When he filed response to the application of respondent in first instance.

Execution of Order

Section 128²¹

A copy of the order of maintenance or interim maintenance and expenses of proceeding, as the case may be shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance for the maintenance or the allowance for the interim

Remarking An Analisation

maintenance and expenses of proceeding, as the case may be is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance or as the case may be expenses, due.

Any order made under Section 125 Cr.P.C. can be executed by Magistrate with in whose jurisdiction the person against whom the order is made may be. These place may be outside the jurisdiction of Magistrate, who passed the order. In *Kishori Lal Vs. Shanti Devi*²² and order for the payment of maintenance was obtained from the Magistrate at Lahore before the partitioned of India and Pakistan. After partition the husband came to Delhi the executing order of maintenance by the Magistrate of Delhi held to be valid.

Other Legislation Related To Maintenance of Wife

1. Hindu Adoption and maintenance Act, 1956
2. Protection of Women from Domestic Violence Act, 2005
3. Hindu Marriage Act, 1955
4. The Muslim Women (Protection of rights on Divorce) Act, 1986
5. Indian Divorce Act, 1986
6. Parsi Marriage and Divorce Act, 1936

Lacunaus

1. The provision of section 125 Cr. P.C. gives the discretion to the magistrate to fix the maintenance either from date of order or date of application. In many cases maintenance are being fixed from date of order even after pendency of cases for many years.
2. With the increase in salary of husband wife have to file petition under section 127 Cr. P.C. again and again every year as per increase in the salary.
3. Sometime there is collaboration between the spouses for the maintenance proceeding to obtain some extra benefit for example to get age relaxation in the government job for women.
4. Sometime wife use this provision as a vengeance against the husband by setting idly even have the capacity to earn.
5. Many time husband files false income proof to hide his income.
6. Some times wife get maintenance from date of order even after the pendency of many year of litigation which mitigate the spirit of justice.

Suggestions

1. Maintenance must be awarded from the date of application instead date of order as it takes many years in finalizing the case in the lower Court and wife should not be suffer because of system's Lacunas or delays. NCW also recommended the maintenance must be awarded from the date of application instead of date of order.
2. The proceeding under Section 125 Cr.P.C. must try to conclude as earlier as possible otherwise it may also affect the future of the wife and children because delay in justice sometime amount to injustice.

3. As usually seem the summons are avoided by the husband so court should recognize the service by new method just as whatsapp etc.
4. Wife should not be pressurized to file petition again and again U/s 127 but if the nature of job of husband shows a regular increase in his income than accordingly an order must made in finalizing the case that wife/child or parents as the case may be, will be entitled to a fixed percentage of increase every year i.e. future prospectus should be considered as it will also save the time of the courts and save from unnecessary litigation.
5. Court must see the justification of wife for refusing to live with the husband even the husband offered to maintain her on the condition to live with her.
6. Court should take step to prevent any fraud or misrepresentation on the part of party and even parties should follow the good practices.

Conclusion

The provision of maintenance under the Cr.P.C. is brought to provide speedy, effective, inexpensive remedy to save, the wife/child/parent as the case may be, who are unable to maintain, them from vagrancy and destitution. It is a special provision made in the favour of wife or children or parent in the view of Article 15(3) and 39 of constitution of India. These provision fall under the Chapter IX of Cr.P.C. and provides quasi Judicial Provisions. Chapter IX is a self contain provision i.e. for the proceeding of Chapter IX no other provision have to be applied excepting the provision related to summon cases. Here the examination of petitioner U/s 125 Cr.P.C. shall not done on oath. Section 125 Cr.P.C. has been created for the purpose of faster proceedings therefore, Magistrate shall conduct the proceeding in the swift manner. Against an order made under Section 125 a revision can be filed not a appeal. The Hon'ble High Court shall not interfere in the proceeding of U/s 125 under its inherent power U/s 482 because the Hon'ble High Court has revision powers, but there are some lacunas in the Section 125 that should be fulfilled as the awarding maintenance from the date of order is not good in the view of pendencies of cases for the long years it must be always awarded from the date of filing the application. As practically it takes many years in solving a case, which some time become injustice, so it should be tried to finalize the case as early as possible. Amount of maintenance be awarded to the wife must be such that she should be able to enjoy equal status to the husband and live with dignity.

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