CHAPTER FOUR

RIGHT OF MAINTENANCE UNDER THE CODE OF CRIMINAL PROCEDURE – THE CONCEPTUAL PERSPECTIVES

Public concern on wife battering gave the Magistrate courts, jurisdiction over matrimonial matters in England.¹ The experience and success of Magistrate’s jurisdiction over domestic matters thrusted interest on English rulers in India to practice the same in Indian sub-continent. The attempt was not only a success but served also as a unifying measure of varying religious and linguistic groups prevalent in India. Prior to this, personal civil matters were governed only under the personal law of varying communities. The position in India was the same as that of England then. Women here were denied property rights by way of succession. The prevalence of polygamy among Hindu and Muslim communities caused them also much hardship. The indissoluble concept of marriage held good and divorce was an anti-thesis among Hindu jurisprudence. Though the moral obligation to maintain one’s wife, children and parents stood recognized in the ancient Hindu system, its enforcement was least resorted to, in the then existing social conditions. When the criminal law provided at this juncture maintenance, as an inexpensive summary relief, this served an easy access to the vast needy class.

English Criminal Law was first established in British India in the year 1860. It was then the Penal Code that was passed into law as Act XLV of 1860. This was followed by the Act XXV of 1861 in the field of Criminal Procedure. This happens to be the first of three successive versions of the Code of Criminal Procedure. When the Penal Code was passed into law it was felt that a Code of Criminal Procedure would be natural, not to say necessary, addition to it. Such a code was accordingly prepared and the same was passed into law as the Act XXV of 1861. It brought together a large part of the laws and regulations then in force more or less in the manner of an English Consolidation Act. But the code was incomplete, and was also obscure and confused in its arrangement. When Sir James Fitz Stephen was legal member of council, the code was again redrawn, re-arranged and made to include a considerable number of subjects which, upto that time, had been either omitted or were provided under other enactments. The new Code became law as Act X of 1872. Yet another edition of the Code of Criminal Procedure had become law as Act X of 1882. This happened to be the revised version of the English Criminal Procedure. It had come into force on the 1st January, 1883. It gave for the first time a uniform law of procedure for the whole of India. The act was amended several times and most extensively in 1955 to simplify the procedure and speed up the trials. With the constitution of Law Commission and based on its report a detailed examination of the Code of Criminal Procedure, 1898 was done. This resulted in the suggestion of revamping the law to assure a fair trial, to avoid delay in investigation and to simplify the procedure. To suit the suggestions a draft bill, bill No.XLV of 1973 was introduced and this came to be passed as the Code of Criminal Procedure, 1973. The code was effectively put to use
in British India for nearly a century that as on now the code exists in its present form passed as Act of 1973.

4.2 MAINTENANCE UNDER SECTION 125

The code is mainly an adjectival law. The object of the code is to provide a machinery for the punishment of offenders violative of the substantive law. In fact, the two codes are to be read together. Some terms are specifically defined in the Criminal Procedure Code, but in the absence of such definition, the definitions set out in the Indian Penal Code are to be adopted. The code also provides machinery for punishment of offences under other enactments. It is however worth noting that the code is not purely an adjectival law. Other than principal provisions, there exist a great variety of subjects which are not purely procedural but nevertheless connected with criminal procedure. They are more substantive besides being procedural. Chapters VIII, X, XI and IX are of this nature. The first three are entitled under the caption 'Prevention of Offences' while chapter IX provides for order of maintenance to a set of people in the matrimonial circle. The chapter consisting of provisions 125 to 128 should be considered as a whole and is self-contained in nature.²

Section 125 is a provision of its kind. This existed as Section 488 in the old code of 1882. It is one of the major provisions of the code to be put in maximum use and also one which has undergone major changes by several amendments from the date of its inception. It is worthy to note that a provision of secular application was incorporated in the procedural law of

India when the whole Indian society was caste ridden and orthodoxial. Section 125 and the sister clauses (Sections 126 & 127) in very abstract sense impose a legal duty on persons who have a moral obligation to take care certain of his relations. Inversely, it provides maintenance as a right to all those dependents who but for these benefit would be driven towards destitution. The right can be enforced on failure by one to take care of his near relatives. The object of this provision as is spoken by Sir James Fitz Stephen, the pilot of this legislation, is "preventing vagrancy or at least preventing its consequences".

The object of the provision is to serve social justice. It is enacted to protect derelict women and children and fall within the constitutional sweep of Article 15(3) reinforced by Art.39 of the Constitution. The provision is for the benefit of women, children and parents towards preventing their starvation. The prime object is to prevent vagrancy by compelling a person who despite means, neglects or refuses to maintain his wife or child or father or mother unable to support themselves. The object of the provision is to compel a man to perform the moral obligation which he owes to society in respect of his wife and children. By providing a simple, speedy but limited relief it seeks to ensure that the neglected wife and children are not left beggared and

7. Supra n.4.
destituted on the scrap heap of society and thereby driven to a life of vagrancy, immorality and crime for their subsistence.7a The relief provided under Section 125 of the Criminal Procedure Code can be enforced through the Magistrate Courts, spread all over the country. By affording an effective and speedy remedy without much expenditure, it intends to save the party entitled for maintenance from initiating a prolonged litigation before civil courts. It is more like enforcement of a moral duty which every father or husband or son owe towards their children or wife or parents respectively. The object is not to punish them for their past neglect but to prevent vagrancy which may set in because of failure on their part.8 It thus compels those who have a moral duty and who could support those people who are unable to do so.9

4.2.1 Scope of the Provision

The scope of Section 125 is very limited for it contemplates the passing of an order for maintenance alone where it is imminent but does not purport to protect rights which are purely conjugal, paternal or of civil nature. The order passed, if any, under this Section is subject to final adjudication by the competent civil court.10 It is also significant to note that the liability to pay maintenance under this Section is distinct from that under the personal law or civil law or custom governing the parties.11 It is a

7a. Supra n.6, p.85.
measure in the alternative provided for destitute wives, discarded children and neglected parents. Again this is a distinct statutory right, which the legislature has recognized irrespective of the nationality or the creed of the parties. The existence of conjugal relationship is a condition precedent in the case of wife to make her eligible for an application under Section 125. The personal law of the parties has its relevance in ascertaining the validity of the marriage\(^{12}\) and the existence of the status viz. husband or wife.

### 4.2.2 Nature of the Proceeding

A peculiar mode of procedure is devised for the enforcement of Section 125 of the Code. The right provided thereunder, though invoked before a criminal court, the proceedings are not strictly criminal proceedings.\(^{13}\) The proceedings though of civil nature, the Civil Procedure Code does not apply.\(^{14}\) The courts follow a summary procedure. Neglect to maintain a wife or child or parent is not an offence and an application under Section 125 is not a complaint.\(^{15}\) The provisions are not of penal nature but intended towards enforcement of a duty the default of which may lead to vagrancy.\(^{16}\) They are more preventive rather than remedial in nature and are certainly not punitive.\(^{17}\) The proceedings not being strictly criminal, the

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17. Supra n.6.
person against whom proceedings are initiated is not an accused. The allowance of maintenance imposed as against the respondent is not punishment under the penal law of our country. Hence, the reason that an appeal does not lie as against an order of maintenance.

4.2.3 Maintenance - Meaning

Maintenance means appropriate food, clothing and lodging that are necessary for one's sustenance. But in an extended meaning, it includes also the expenditures that are incurred towards health and education. In case of children mere maintenance of the body is not sufficient. Provision has to be made for the child's development of mind and conscience.

4.3 PARTIES ENTITLED TO CLAIM OF MAINTENANCE

The self-contained provisions of the maintenance law under Criminal Procedure Code are protective of a class of people who but for this assistance would be left beggared and destitutes. Section 125 thus imposes an individual obligation towards the society to maintain some of his close relatives. The remedy as a statutory right is made available to all neglected wives, discarded divorcees, abandoned children and hapless parents regardless of their religion, community and nationality. The Supreme Court in the cases of Nanak Chand and Mohd. Ahmed Khan

22. Supra n.20.
clarified the applicability of this provision to all sections of the people irrespective of their personal law. It is more like a uniform law in this respect. Subject to fulfillment of certain conditions, a class of members in the family relation related either by blood or marriage are entitled to avail themselves of maintenance under Section 125 of the Criminal Procedure Code. The class of people to whom the right is extended are:

a) Wife
b) Children, legitimate or illegitimate and
c) Parents.

4.3.1 Wife’s Right of Maintenance

The word ‘wife’ has been defined in the law lexicon as a married woman. But the phrase ‘wife’ under Section 125 of the Code includes two class of married women, viz. a woman of valid subsisting marriage and a divorced woman.

4.3.1.1 Wife - A Woman of Subsisting Marriage

The word wife means only a legitimate wife and excludes other such relations. The claimant must be a legally wedded wife. The legality of the marriage is to be tested in the light of the personal law applicable to the parties. When marriage is denied by the husband, the factum of marriage should be properly proved. The burden of proof is on the applicant. But the standard of proof is not so heavy as in civil cases or towards prosecution of offences under Sections 494, 495, 496 and 497 of the Indian

23. Ibid.
24. Supra n.16.
25. Supra n.12.
Penal Code. Where there exists ground, a valid marriage could be presumed.\textsuperscript{26} When a person signed the school admission register as father of the child, the marriage stands proved by his admission\textsuperscript{27}. Proof of valid and subsisting marriage is essential to claim maintenance. Where \textit{prima facie} marriage is established, the court would order maintenance and the burden of proof will be on the party who disputes the validity of the marriage.\textsuperscript{28} A Christian woman married to a Hindu male was held entitled to maintenance.\textsuperscript{29} But a \textit{Suyamariyadhai} form of marriage by two Roman Catholics and their living together as husband and wife for over five years was held to be not valid.\textsuperscript{30} Execution of a registered document and making a declaration therein that the parties would be living as husband and wife would not confer the status of husband and wife.\textsuperscript{31} Whatsoever relation may be between a man and a woman, the woman is not entitled to claim maintenance unless she proves that she is in the status of wife, while she is presenting an application under Section 125. Long years of union or illicit relationship does not confer such right on the woman. Where there is no valid marriage, a woman is not entitled to claim maintenance even if she lived with a man for 12 years and has also borne him a child.\textsuperscript{32} When claim for maintenance was made by a woman who entered into marriage with a

\begin{thebibliography}{99}
\bibitem{26} Gokul Chand v. Parwin Kumari, AIR 1952 SC 231.
\bibitem{27} S.A. Kaiser v. Noor Sahan, 1980 Cr.L.J. 611.
\bibitem{28} Mohan ram v. Badamo Devi, 1974 Cr.L.J. 227.
\bibitem{29} Govindan Nadar Sreedharan v. Retna Bai Pushpa Bai, 1978 Cr.L.J. 1213.
\bibitem{30} Divyanathan v. Jayarani, 1984 Cr.L.J. NOC 10 (Mad).
\bibitem{31} Punnakkal Sreedharan v. Vellali Padmini 1992 Cr.L.J. 3562 (Ker).
\bibitem{32} Ambalam v. Andiammal 1939 Cr.L.J. 228.
\end{thebibliography}
man who was married already, the applicant was branded as 'illegitimate wife' and the claim was declined.  

The applicant wife can seek aid of Section 50 of the Indian Evidence Act, 1872 to prove a marriage. Once a marriage was admitted by the husband and all ceremonies of marriage were performed, the court could not go into the question of legality of the marriage. The right is provided only to an abandoned wife and not to abandoned mistress, howsoever faithful she may have been to her paramour, and however badly she may have been treated by him.

For a wife to claim maintenance there should be a valid marriage between the parties. Only a wife is entitled to claim maintenance and a woman without attaining such status is precluded from seeking maintenance. A marriage proved illegal does not confer the status of wife on a woman and the right to get maintenance. The invalidity may arise out of solemnisation of a marriage in contravention of the provisions of the statute governing the parties. The chief grounds are as follows:

(i) Marriage solemnised when the spouse from a subsisting marriage, living;
(ii) Marriage between parties within prohibited relationship;
(iii) Marriage between parties who are sapindas;

34. All Personal Laws provide these elements for a valid marriage.
(iv) Marriage between parties who have not attained the statutory marital age; and

(v) Non performance of such rites and ceremonies as followed by the members.

Of the grounds that invalidate a marriage, the chief and controversial one is bigamous marriage. Under the old Code of 1898, a Hindu second wife whose marriage is solemnised prior to 1955 was not denied maintenance. Neither the marriage was void nor she denied the status as wife. But the subsequent marriage was a valid ground for either of the wives to refuse live with her husband and claim maintenance. After 1955, any such marriage solemnised during the survival of a living spouse, the marriage can be declared null and void and the second wife denied the status of wife. Her claim for maintenance is also not entertained. The same is the result when a wife takes second husband. But it is the woman who suffers the viles of male chauvinism. The case of Yamunabai\(^\text{35}\) is a pathetic example of this sort.

Yamunabai was factually married to Anantrao by observance of rites under the Hindu personal law in the year 1974. Anantrao had earlier married one Smt. Lilabai who was alive and the marriage was subsisting when he married Yamunabai. She was not informed of the existence of the first marriage. Yamunabai lived with Anantrao for a week and thereafter left the house on grounds of illtreatment. She made an application under Section 125 of the Code which was dismissed. The matter which was taken to Bombay High Court was unsuccessful. Yamunabai ultimately

\(^{35}\) Supra n.12.
approached the Supreme Court through a special leave petition to seek justice. The issue involved before the court was whether a Hindu woman who married after the coming into the force of the Hindu Marriage Act 1955, a Hindu male having a living lawfully wedded wife can maintain an application for maintenance under Section 125 of the Criminal Procedure Code.

The Supreme Court interpreted the language of Section 125 in the light of Section 11 read with Section 5(i) of the Hindu Marriage Act 1955 and ruled that the marriage being void from the very inception, she was not a wife and hence not entitled to maintenance. The Court did not concede the fact of intentional suppression of the early marriage by the respondent. The plea of estoppel was also turned down as being not available to defeat the provisions of law. The Court rejected the contention that the term 'wife' in Section 125 should be given a wider and extended meaning so as to include not only a lawfully wedded wife but also a woman married in fact by performance of necessary rites or following the procedure laid down under the law. When pointed to the extension of the benefit to a divorced woman the court distinguished the law in respect of divorced woman then, and at present. The extension of the benefit to the divorced woman being through statutory amendment, pointed the absence of any such provision to extend the benefit to the appellant.

36. Ibid.
37. Ibid.
38. Ibid.
The Supreme Court ought to have realised a social realism and the plight of such victims, while giving a technical interpretation to the wife. A woman who has been kept in the dark about the husband's first marriage should not be made to suffer without any fault of hers. Her life has already been ruined because of the fraud committed by her 'husband'. Why should she be again made to suffer destitution and denied maintenance. No injustice will be caused if the erring husband is made to bear the liability. It is interesting to note that the legislature has extended the benefit towards a woman whose marriage has come to a cession on divorce. Similarly illegitimate children born out of wedlock are also provided with the relief. But unfortunately no such benefit is extended towards a woman of void marriage.

The word 'wife' means only a legitimate wife and excludes other such relations. A marriage proved illegal does not confer the status of wife to a woman and the right to get maintenance. The Hindu second wife whose marriage is void under Section 5 and 11 of Hindu Marriage Act is not entitled to maintenance. Similarly a wife taking second husband without divorcing her first husband is not entitled to maintenance, from the second husband as her marriage is illegal and void. But a woman who has been accepted and declared as wife notwithstanding absence of ceremorial marriage is considered to be a wife. It is true, the validity of marriage has to be established to avail maintenance. Personal laws prescribe qualifications

39. Supra n.16.
40. Supra n.12.
to make a marriage valid and sustainable. But when illiteracy among women in rural Indian society is rampant and when even among educated elite population legal awareness is lacking, the reality at times is shocking. The decision of the Supreme Court in Yamunabai goes against the interest of women who fall victims of matrimonial gambling. On the facts and legality the case deserves a review by the apex court.

The object of Section 125 is to prevent destitution and culmination of vagrancy.\textsuperscript{43} Again the remedy provided by the Magistrate while exercising the domestic jurisdiction under Section 125 Cr.P.C., is only very limited. The options are always open to the respondent to question the legality of the marriage before a competent civil court. Women have no absolute say in deciding their marital options and all arrangements pertaining to marriage inclusive of the choosing of her partner is predominantly done by elders, or close family relatives. Suppression of earlier marriage is a common affair, for this brings the man all fortune along with a new bride. Again, all communities excepting that of Christians consider polygamy as a regulated customary practice. It derives support either from religious belief, or divine command. After marriage when reality is known it is the woman who suffers the most. In the orthodox Indian society she can neither think of marrying again nor can seek permanent asylum at her parents house. She has the option only to lead a hostile life with the same male member who cheated her and ruined her future for the rest of her life, or else, take a career towards preventing which Section 125 Cr.P.C. has been formulated. Hence a re-thinking is imminent for necessary changes.

\textsuperscript{43} Supra n.16.
either in the Code or in the judicial approach. If not, this will lead to punishing a victim twice, once by her so called husband and again by the judiciary.

When there is ground to presume a valid marriage, pleadings on the part of the defendant that the marriage is void, will not automatically disentitle the wife from getting maintenance. Unless the marriage on its face is stamped with indisputable illegality and the invalidity stares on the face, the court cannot dismiss the claim of maintenance. The controversy on the validity of the marriage by pleadings of the parties is settled by the Supreme Court in *Sumitra Bai v. Bhikhan*.

Both the parties in the case adopted a technical approach on the factum of marriage. In an application for maintenance for herself and her minor daughter, the wife averred that at the time of marriage, the fact that her husband was already married was not known to her and on the knowledge of this the relationship strained and her husband neglected her. The plea of the husband on the other hand was that that marriage was void for want of ceremonial rites and by reason of fraud. He averred that the lady was pregnant by some one else which fact was concealed at the time of marriage and when he came to know of this she did not want to live with him. The Court did make the point clear that when pleadings show to prove the existence of a marriage at the time of marriage of the petitioner, the subsequent marriage will be a nullity and the provision can in no way extend the benefit.

45. AIR 1985 SC 765.
46. Ibid.
The approach taken by the Supreme Court in *Vimala v. K. Veeraswamy*\(^47\) is worth and deserves to be followed in such circumstances and this will go in consonance with the objective of Section 125 Cr.P.C. The ruling is being looked upon as one to rectify the injustice caused to a woman of second marriage in *Yamunabai*.

In *Vimala v. K. Veeraswamy*\(^48\), the appellant and the respondent got married according to Hindu rites and customs on June 30, 1983. On complaints of desertion and ill-treatment, the appellant moved the court for maintenance under Section 125 of the Code. The respondent resisted the claim on the ground that the appellant was not a legally wedded wife and that he had earlier married one Veeramma. The learned Magistrate awarded a monthly allowance of Rs.500/- holding that the first marriage had not been proved. On revision by the respondent the order was set aside as against which the appellant approached the Supreme Court by special leave.

The appellant nowhere had admitted the subsistence of a valid marriage which would render the marriage illegal. The respondent admitted his marriage with the appellant according to Hindu rites but claimed that the same was repudiated as void on the ground of the existence of his earlier marriage. The Court observed that Section 125 of the Code by an extended meaning to the term 'wife' includes divorced woman, who does not enjoy the status of wife. A second wife whose marriage is void on account

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47. (1991) 2 SCC 375.

of the survival of the first marriage is not a legally wedded wife and hence not entitled to maintenance. But the law can be applied only when the first marriage was proved to be valid and legal. The burden of proving the same was on the respondent who having not relieved the burden by tendering strict proof of fact in issue, the Supreme Court restored the order of the lower court and awarded maintenance.

Much recently the Supreme Court in *Dwarika Prasad Satapathy v. Bidyut Prava Dixit and another* has ruled so as to extend the benefit of Section 125 even to a woman who is not married in strict consonance with the required procedures under law. The stand so far established by the courts is that only when the marriage is valid before law, maintenance can be provided to a wife. But liberalising the stand, the Supreme Court with a view to protect women who are victims of seduction by unscrupulous male members in the society has ordered maintenance in favour of such a woman.

In the above case a woman, Prava Dixit, has been seduced by one Dwarika Prasad Satapathy and this ultimately resulted in sexual relationship to end in pregnancy of the girl. On the mediation of elderly people, inspite of protest Satapathy married the woman in a temple. Within days of marriage a child was born. Satapathy neither cared to take his wife and child to his family nor provided them any assistance. Dixit filed a petition for maintenance which was ordered in her favour. The order was revised by the revisional court which cancelled the maintenance on the plea by her husband that the necessary ceremonies had not been followed and hence the marriage was not

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valid. When the matter reached the Supreme Court, Satapathy having not
denied the relation and the birth of a child out of this and ceremony that was
arranged for the marriage, the court ruled though the strict procedures were
not followed, this amounted to establish a marriage and the relation of
husband and wife. Reading the provision in the light of its objectives the court
decreed maintenance in her favour.

4.3.1.2 Divorced Woman's Right to Maintenance

The right of a wife to maintenance under Section 488 of the repealed
Code was based upon the existence and continuance of the conjugal
relations. It was a condition precedent to a claim for maintenance. The
factum of marriage or the cessation thereof was to be ascertained by
reference to personal law of the parties. The right provided under the
provision could be defeated by the husband by giving divorce. When divorce
is a common affair in certain communities, this could well be made under
their personal law. The Joint Committee took a study of this matter. The
commission felt that in several instances, after a wife filed a petition under
this Section on the ground of neglect or refusal on the part of her husband to
maintain her, the unscrupulous husband frustrated her object by divorcing
her forthwith. This compelled the Magistrate to dismiss the petition. Since
divorce can be made easily under the personal laws applicable to some
of the communities in India, this caused much hardship to the poorer sections
of the community. The Commission hence suggested for extending the
benefit of the provision to a woman who has been divorced from her
husband, so long as she has not remarried after the divorce and proposed
for necessary amendments towards securing social justice to women who
belong to the poorer class.
To fall in line with the suggestions, when the new Code was drafted in the year 1973, vide an explanatory clause (b) to Section 125 changes were brought in. Now the Act provides that the term 'wife' includes a woman who has been divorced by her husband or has obtained a divorce from her husband and has not remarried. Though a divorce puts an end to the marital relationship for the purposes of this provision, the phrase 'wife' takes a wider meaning and includes a woman who is divorced or who obtains divorce either judicially or non judicially and who has not remarried. The provision with an extended meaning for 'wife' has its application to the needy class of all communities inclusive of Muslims.\(^49\) The remedy is made available even to a woman who gets divorce on her own volition. For a Muslim woman the remedy was made available even if she got a decree for dissolution of marriage under the Dissolution of the Marriages Act, 1939.\(^50\) Doubts as to the application of this provision to Muslim woman has been raised before the Supreme Court on more than one instance.\(^51\) In Zohara Khatoon case\(^52\) when the issue was raised again, the Supreme Court did consider the entire law on the subject and held that a Muslim wife whose marriage was dissolved by a decree of dissolution passed at her instance was entitled to maintenance.\(^53\) Yet again, the issue was

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52. *Supra* n.50.
53. *Ibid*.
raised before the Supreme Court in *Shahbano Begam v. Ahmed Khan*.\(^{54}\) The Court having already established the principle that Section 125 of the Code is applicable to all inclusive of Muslim in *Bai Tahira v. Ali Hussain Fidaali Chothia*\(^{55}\) and *Fazlumbi v. K. Khader Ali*\(^{56}\), re-emphasized the stand when the debate arose before it again.

On 23 April 1985 the Supreme Court of India confirmed the judgement of the Bhopal Magistrate Court which awarded Shahbano, a 75 year old Muslim divorced woman, a princely sum of Rs.25/- to be enforceable as against her husband, Ahmed Khan, a rich advocate by profession. The amount stood revised to Rs.179.10 per month by the High Court. The Supreme Court gave specific ruling on three points touching upon the Muslim personal law. Firstly, Section 125 was held to be applicable to Muslims also. Second, Quran does impose an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. And thirdly, reverting the stand taken in *Bai Tahira*\(^{57}\), held that `Mehr` is not a sum payable on divorce and hence does not fall within the meaning of Section 127 (3) of the Code.

The Supreme Court's decision gave rise to ugly happenings in the history of India. The controversy that arose over the judgement pressurized the central government to come with a bill to exclude the Muslim

\(^{54}\) Supra n.20.

\(^{55}\) Supra n.49.

\(^{56}\) 1980 Cr.L.J. 1249 (SC).

\(^{57}\) Supra n.49.
communities from the application of Section 125 Cr.P.C. This has come in the form of Muslim Women (Protection of Rights on Divorce) Act 1986. The one and only objective of this enactment was to nullify the judgement of the Supreme Court in *Shah Bano*. Even after the passing of the Act there is divided opinion among the High Courts as to the application or exclusion of Muslim divorced women from the purview of Section 125 Cr.P.C. A plain reading of the special Act will go to show its hasty drafting and its retrograde nature. It is unfortunate that the law still remains in the statute book of a country that proclaims social justice.

4.3.2 Children's Right of Maintenance

Children are considered national assets. Their proper moulding alone will make them proper citizens of tomorrow. The society and as well as the parents have a due role to play towards making a child. Neglect by parent or failure on their part to take proper care of their children should not drive them to take a criminal career. Section 125 provides for maintenance to children who are neglected or not cared for by their parents.

A father has a moral duty to maintain his child. In recognition of this, Section 125 Cr.P.C. entitles children whether legitimate or illegitimate to get maintenance from their father. Section 125(1) (b) extends this statutory right towards minor children born within or outside matrimonial wedlock, while clause (c) of the same proviso provides maintenance to a major child who though has attained the age of majority is not able to maintain itself, because of physical or mental abnormality or injury. With regard to married daughters, the liability to maintain lies with the husband. But in case of her being minor or married and her husband having no
sufficient means until the time she attains majority, the father may be required to pay maintenance allowance.

The earlier Code of 1898, vide Section 488 purposely omitted any reference as to age or minority of a child to be a qualification for claim of maintenance. Nor does it clarify the position of major children and married daughters. The phrase ‘unable to maintain itself’ was given utmost importance and that too, more peculiarly, to children of minor age alone, whether legitimate or illegitimate. The object might be to provide maintenance to all children, whether minor or major, until the time they are able to maintain themselves. But, this gave rise to the divergence of opinion among the courts in India. Some were of the view that the word ‘child’ means one who has not attained majority\textsuperscript{58}, while others were of the opinion that inability of the child to maintain itself is vital and the age of the claimant is immaterial.\textsuperscript{59}

The Supreme Court in \textit{Nanack Chand v. Chandra Kishore}\textsuperscript{60} favoured the later liberal interpretation and held that ‘child’ in Section 488 does not mean a minor son or daughter and the real limitation is contained in the expression ‘unable to maintain itself’. The court further said that though it is very unlikely to happen a son of 77 years unable to maintain himself can claim maintenance from a father who is 97 and has means. Inability of children to maintain themselves because of imbecility or deformity or other

\begin{itemize}
\item \textsuperscript{58} Amirthammal v. K. Marimuthu, AIR 1967 Mad. 77.
\item \textsuperscript{59} Saraswati v. Madhavan, AIR 1961 Ker. 297.
\item \textsuperscript{60} 1970 Cr. L.J. 522.
\end{itemize}
handicaps is well within the ambit of the phrase 'unable to maintain itself'. The conflict was set at rest by the new code which made the position clear regarding minority. The word 'minor' is now defined in the explanation to mean a person who has not attained the age of 18 years. This goes in accordance with the provisions of the Indian Majority Act of 1875. Under Section 125 (1), all minor children who are legitimate or illegitimate, naturally born or adopted, married or unmarried are entitled for maintenance. In the case of minors, the inability to maintain themselves is apparent and the reason is not clear for the incorporation of the words 'unable to maintain itself' along with sub clause (b) of Section 125(1) which insists strict proof for the same. In the case of major children only those who suffer from mental or bodily disability which in turn disable them from maintaining themselves maintenance can be awarded. Thus the provision now gives greater emphasis on the inability of the child rather than its age.

4.3.2.1 Legitimate Children

Legitimacy is the status described to children born of valid marriage. All societies favour procreation within some form of legally sanctioned marriage. Marriage laws and customs universally condemn births out of wedlock and brandies them as illegitimates. Proof of marriage is essential to give legitimate status to child. The basis of an application for maintenance of a child is paternity irrespective of the legitimacy, or illegitimacy. Maternity may not be in dispute in a proceeding under Section 125 and neither has she any such obligation in respect of her children. The husband

61. Ibid.
of a valid marriage in case of legitimate children, and the father of the child in case of illegitimates, has been fixed with the liability. The burden of proving the paternity is on the applicant. If the paternity is not established the child is not entitled for maintenance. The rule regarding paternity is well reflected by the maxim 'Pater est quem nuptiae demonstrant' meaning that he is the father whom the marriage indicates. In favour of this principle Section 112 of Indian Evidence Act raises a legal presumption towards legitimacy.

Birth of a child during the existence of a valid marriage or within 280 days after the dissolution of the marriage and the mother remaining unmarried until then will confer on the child legitimate status. This conclusive presumption cannot be rebutted other than proof of non-access. Birth of a viable child after 28 weeks duration of pregnancy being not biologically an improbable and impossible event, vide a presumption under Section 112 of the Indian Evidence Act, the child was awarded maintenance. Section 125 Cr.P.C. does not provide for a preliminary enquiry as to the paternity of the child. But in maintenance proceedings the lower courts had followed a common practice to order preliminary enquiry as to the paternity of the child. This practice was deprecated by the Supreme Court in Gautam Gundu v. State of West Bengal wherein the court observed that this will tend to defeat the very object of Section 112 of Indian Evidence Act and would ultimately result in bastardizing a child. So legitimacy is not in issue to be

64. 1993 Cr.L.J. 3233.
probed into in a proceeding under Section 125 Cr.P.C. and if the child is otherwise eligible it must be provided with maintenance.

4.3.2.2 Illegitimate Children

Children born out of wedlock are branded as illegitimates. All societies condemn such birth and it is these children who suffer the most both socially and economically, though they had no control over the circumstance of their birth. Illegitimate children are provided with maintenance from the early inception of this provision in the Procedural Code. The inclusion of illegitimate children within the ambit of this benevolent provision is highly reformative. The avowed object behind this is to prevent destitution. But for the conduct of the parent, the child would not have born. Punishing the child by denial of maintenance for the amoral act of its creators is unjust. Moreover, in the case of legitimate children, parental or familial affinity may be there for the child in conditions of suffering. But in the case of illegitimate children, who in most of the circumstances face social ridicule and lack parental affection, from either or both, the suffering would be extreme. This would also provide maximum opportunity to be driven as destitutes and in turn take up a criminal career. Hence the extension of the right infavour of illegitimate children also.

Neither the status nor the character of the mother is relevant for claim of maintenance on behalf of illegitimate child. Where a man or woman were held to be not legally married, but the child born out of their company, the child was declared illegitimate and provided with maintenance.65 The

65. Supra n.31.
character of a woman, howsoever bad does not disentitle the illegitimate child if she proves that the man against whom she proceeds was the father of the child.\textsuperscript{66} Where the marriage was declared void, the claimant was awarded maintenance for her daughter.\textsuperscript{67} When paternity was proved by corroborative evidence, maintenance was awarded to a girl born to an unmarried woman as against the alleged father.\textsuperscript{68}

Both legitimate and illegitimate children are entitled to claim for maintenance under the Section 125 of the Criminal Procedure Code. When the paternity is established, the court is duty bound to pass an order of maintenance as against the respondent. Whereas, courts without any valid reason remit back the cases for fresh trial to ascertain facts as to the relationship between the mother and the respondent. Though followed by summary procedure cases under Section 125 prolong for years at the lower courts and when taken for revision leads to further delay in tendering the limited summary relief. Remittance of the cases for ascertainment of insignificant facts are on the increase and this prevents access to timely relief. This has to be checked, for this will cause much hardship to the claimant and result in unreasonable delay in the remittance of the limited summary remedy. Not in all cases interim maintenance is awarded. In the absence of such orders any delay by re-trial will defeat the very objective of Section 125. Remittance should be resorted to only when it is legally deserved. In a case before the Orissa High Court \textsuperscript{69}, when the wife failed to

\textsuperscript{66} Dr. Chattukutty v. Janaki Amma, 1972 Cr.L.J. 696.

\textsuperscript{67} Motiram v. Ist Addi. District Judge, 1992 Cr.L.J.1007 (All).

\textsuperscript{68} Chaya v. K.G. Channappa Gowda, 1993 Cr.L.J. 767 (Kant).

\textsuperscript{69} Latdei v. Bishnu Charan Panda, 1996 Cr L.J. 156 (Ori).
establish the marriage which fact will go to prove the illegitimate status of the child instead of ordering remedy for children, the court remitted back the petition for ascertainment of the fact of illegitimacy of the child.

4.3.3 Parents’ Right of Maintenance

The right of parents to claim maintenance was not recognized under the Code of Criminal Procedure until 1973. The corresponding provision in Section 488 of Criminal Procedure Code, 1898 did not make any provision to safeguard the right of either the father or the mother. This drew the attention of the Joint committee of the Parliament while redrafting the new code. The Committee considered the condition and felt that the right of the parents not possessed of sufficient means, to be maintained by their son should be recognized by making a provision. The Committee also suggested that where the father or mother is unable to maintain himself or herself the order for payment of maintenance may be directed to a son who is possessed of sufficient means. If there are two or more children, the parents may seek the remedy against any one or more of them. When the new code was drafted the right of such infirm parents was recognised. Interestingly the code uses the phrase 'father' or 'mother', but not parent. Perhaps the intention behind this might be to fix the obligation only on legitimate children and not on those issues born out of wedlock. The term mother in a restrictive sense means only a natural mother. Doubt may arise whether the phrase ‘mother’ used under Section 125 of the Code includes adoptive and step mothers. The personal law of Hindus includes step mother in its usage of the term mother.70 Section 3(20) of the General

70. Section 20 of the Hindu Adoption and Maintenance Act, 1956.
Clauses Act refers 'father' to include adoptive fathers. Courts have recognized the right of adoptive mothers to claim maintenance under Section 125. But the position of step mother is still unsettled. Section 125 is a beneficial provision intended to curb social evil. Towards fulfilling this objective the term mother must be given a liberal interpretation to include step mothers also. Judicial opinion on this is not convergent. The High Courts of Orissa and Allahabad have construed the word liberally and provided relief under Section 125 to step mother also. Whereas the Madhya Pradesh and Andhra Pradesh High Courts held that the term mother includes only natural and adoptive mothers but not a step mother. And hence rejected the petition claiming maintenance.

As referred earlier the non usage of the phrase 'parent' under Section 125 (1) (d) raises a doubt as to whether father or mother of an illegitimate child has any right to claim maintenance as against their children. No opinion has come so far from the judiciary. The global changes in the sanctity of marriage and motherhood definitely enjoin a need for protection of atleast the mother. She must be provided a right under Section 125 to be enforceable as against her child born out of wedlock.

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The code enables the Magistrate to make an order against a son for the payment of monthly allowance of maintenance to his father or mother who is unable to maintain himself or herself. The facts that need to be asserted before the court are:

(i) The father or mother is unable to maintain himself or herself, and

(ii) The person against whom the claim is sought has sufficient means to maintain his father or mother and yet has neglected or refused to maintain them.

The provision is one of general application and is not related to the personal law of the parties. Implicit in the provision is the statutory recognition of the obligation that a son who has sufficient means is bound to maintain his father or mother who is unable to maintain himself or herself. Moral indignation has no role to play towards enforcement of the right under this provision. Though the duty to maintain as between father and son is reciprocal, a son cannot refuse payment of maintenance to his father on the ground that his father has not fulfilled his parental obligation towards him at his younger age. An issue of interest of this sort was raised before the Patna High Court in Pandurang Baburao Dabhade v. Baburao Bhaurao Dabhade and another.76

A father who had no source of income claimed maintenance from his son. The son admittedly was fairly well placed in the employment in Central Government. He contested the claim on the ground that after the death of his mother he and his younger brother were left uncared for by the father.

76. 1980 Cr.L.J. 256.
who had married for the second time and that he was brought up and educated initially by his maternal grandfather and then by his aunt. The father having failed to fulfill his parental obligation of bringing up his children, the father did not have any right to claim maintenance and throw the responsibility of maintaining him at his children. The Trial Court and the Revisional Court negatived the claim, where after the appellant approached the High Court. The Court did admit the fact of neglect by the father when applicant was much younger and was imminently in need of care. The Court further observed "Section 125(1) does not contemplate that the obligation to maintain an aged, infirm parent who is unable to maintain himself or herself can be enforced only if it is preceded by the fulfillment of the parental obligation to maintain and bring up the children during the childhood of the children"77. Thus, the duty to maintain as between father and son though reciprocal the son cannot refuse payment of maintenance to his father on the ground that his father had not fulfilled his parental obligation towards him at his younger age.

4.3.3.1 Daughter's Obligation to Maintain Her Parents

A daughter's liability towards her parent is another issue that remained unsettled for sometime until the intervention of the Supreme Court to clarify the position. The use of the word 'his' in relation to Section 125(d) tends to give an impression that only sons have an obligation to maintain their father or mother and such an obligation is not there with the daughter. A normal interpretation will certainly exclude daughters from paying maintenance towards their father or mother. But such a rigid and

77. *Id.* , at p.258.

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narrow interpretation cannot be adopted while enforcing a social welfare legislation like Section 125 of the Cr.P.C. For precision the legislation has omitted the word 'her' which if used might not have given rise to this conflict. Moreover, Section 2(1) of the Cr.P.C. read with Section 8 of the I.P.C. will certainly include daughter within the phrase 'his' under Section 125.

It is unfortunate that some of the courts in India have given the word 'his' its natural interpretation and denied the claim of maintenance by parents. For the first time, the Kerala High Court recognized such a right and imposed the duty on daughters to maintain her parents. The Court observed that it was as much the duty of a daughter to maintain her parents as it is the duty of a son. Then came the decision of the Supreme Court in Dr. Mrs. Vijaya Manohar Arbat v. Kasirao Rajaram Sawai and another which held that the word 'his' includes both male and female children. This appears to be a reasonable interpretation of the provision. The Court observed that maintenance of parents being a moral duty there was no reason why a daughter should be excluded. Inspite of means, if a daughter is to make her parents starve denying the remedy under Section 125 it would amount to injustice. The Supreme Court did point the need of reading the word 'his' in Section 125 Cr.P.C. in conjunction with Section 2(y) of the same code with Section 13(1) of the General Clauses Act and Section 8 of the Indian Penal Code. The position of daughters who are married,

80. 1987 Cr.L.J. p.977.
warrants a differential and cautious treatment. Even after marriage and having gone to live in another family, if she has her own means there is no bar in imposing the liability on daughters. Courts in India have recognized such a duty on the part of married daughters.

In *Dr. Mrs. Vijaya Manohar Arbat v. Kashirao Rajaram Sawai and another*\(^{82}\), the appellant Dr. Mrs. Vijaya Arbat, a Medical Practitioner was the married daughter of the respondent Kashirao Rajaram Sawai through his first wife. Her mother died whereafter the respondent remarried and was living with his second wife. The respondent filed an application for claim of maintenance before the Magistrate from his daughter. The appellant raised a preliminary objection to the maintainability of the application on the ground that Section 125 (1) (d) of the Code does not entitle a father to claim maintenance from his daughter. The objection was overruled and the Magistrate held that the application was maintainable. Aggrieved by the order of the Magistrate, the appellant moved the High Court of Bombay in revision. The High Court having dismissed the revision the matter came before the Supreme Court. The Supreme Court emphasised by its ruling that the word 'his' does not exclude the parents from claiming maintenance from their daughter.\(^{83}\)

The social economic conditions of the society have changed a vast. Girls now have the right to own property on their own and the right to inherit property. A large number of them now take up jobs and are financially

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83. *Id.*, at p.1102. 86
sound. They come to occupy responsible position at varying levels. Politically too they have now a say in the governance of the country. In short the condition and status of women is not the same as it prevailed decades ago. Equality exists now in reality. Moral obligations rest not on the basis of sex. Legal recognition of this moral right under the provision of Section 125 will not go away from its avowed objective. Moreover in the society which progressively controls birth at family level and where people too show inclination towards limiting the number of issues it seems more essential. For parents with mere daughters this will remain as an indispensable right too.