A. Scope of Section 125

We have already discussed the provisions of alimony and maintenance as ancillary to the divorce proceedings under Hindu law. The provisions under section 125 of the Code of Criminal Procedure, 1973, (hereinafter simply cited as the Code of 1973), on the other hand, provides a speedy and summary remedy obtaining to all the communities in India, in addition to any other remedy which they may have under their respective personal laws. These two types of remedies, i.e., under the Hindu Marriage Act and the Code of 1973 are different in their scope and object. The object of the remedy under the Code of 1973 is to avoid vagrancy and destitution, therefore, it provides a summary procedure before a criminal court. Thus, a criminal court armed with a more coercive enforcement machinery, can provide assistance and support more speedily. On the other hand, a civil court under the Hindu Marriage Act has to adjust the equities between the parties after taking into account all the matters involved in the case. These two remedies differ on other count also. Under the Hindu Marriage Act both the

2. For instance, Ss. 24, 25 of the Hindu Marriage Act, 1955 (for Hindus); Ss. 36, 37, of the Indian Divorce Act, 1869 (for Christians); Ss. 39, 40 of the Parsi Marriage and Divorce Act, 1936 (for Parsis); Ss. 36, 37 of the Special Marriage Act, 1954 (for those married under the Act); as (contd...)
spouses are entitled to claim maintenance against each other, whereas under the Code of 1973, the wife alone has the right to claim maintenance against the husband. What may be probable reason for the duality of approach? Firstly, it is generally the husband who is the wage earner; the wife's role confining to the household. Secondly, the criminal court has to provide maintenance as a stop-gap arrangement in a summary manner and it would be least conducive in furthering that objective if the courts were to order maintenance to fulfil the immediate needs on the basis of determining the respective interests of the spouses.

The Code of 1973 repealed and re-enacted the Code of Criminal Procedure, 1898. The analogous provision in the Code of 1898 was section 488, which provided maintenance only to an existing wife. Accordingly, a divorced wife could claim maintenance only under the personal law applicable to her. In certain cases, for instance, a Muslim divorced wife, who under her personal law could claim maintenance up to a period of 3 months (called *idda*), or Hindu divorced

to Mohammadan law see A.A.A. Fyzee, Outlines of Mohammadan Law, 4th ed., at p. 156; Tyabji, Muslim Law, 4th ed., Section 302, et seq.

3. Act No. 5 of 1898.

4. In Mohammedan Law, when a marriage is dissolved by death or divorce, the woman is prohibited from marrying within a specified time, called *idda* or *iddat*. Where the marriage is consummated and divorce takes place, the duration of *idda* is three months or if the woman is pregnant, till delivery. But if the marriage is not consummated no *idda* has to be observed in case of divorce, see Fyzee, op. cit., at p. 107-108.
wife where customary law applicable to her permitted such a
divorce, it was very hard for them. It was generally acce-
pted by all the High Courts that where a woman governed by
the Mohammadan law was awarded maintenance, the same would
cease from the date of divorce by the husband and the comp­
letion of the period of idda.

There was a long standing demand on behalf of the
Muslims in India to change the law in this regard. For ins­
tance, Denial Latifi, a senior advocate of the Supreme Court
by way of an urgent and imperative reform had suggested th­
in all cases irrespective of the marriage contract the wife
should be granted an adequate dower (in a sense lump sum)
and/or alimony after divorce. Similarly, former Chief Justice
Hidayatullah of the Supreme Court in his Presidential Address
to the International Seminar on Religion, Morality and Law
(Dec.11, 1973) observed:

"A condition of maintenance for life
to the divorced wife is absolutely

5. A Hindu wife who is divorced according to the customary
divorce, is not entitled to any maintenance, see Raj Kumari
Aggrawala, "Hindu Divorce Law - Its History", (1959) S.C.J
(Jour.) 242, at pp 250-51.

6. This was so held by Allahabad High Court in a very early
case in the matter of the petition of Din Mohammad, I.L.R.
(1883) All.226. For other cases see In re Shekhmano,
A.I.R.1930 Bom.178; In re Mohammed Rahimullah & Anr.,
A.I.R. 1947 Mad.461; Rahimmunisa v. Mohd.Ismaiil, A.I.R.
Sheikh Jalil v. Bibi Sarfunnissa, 1976 H.L.R. 811(Pat.);

Bom.L.R.(Jour) 193, at p.199.

8. Quoted by Denial Latifi, "An Inauspicious Amendment",
(1975) 15 Indian Advocate 16, at p.20. Id."
necessary, provided she leads a chaste life and does not remarry."

The Muslim women also joined hands with the men in this crusade. A petition on behalf of Temur Jahan Begum - the 80-year old decedent of the last Moghul Emperor Bahadur Shah Jaffar and 300 Muslim women of Delhi was presented by Shri Jyotirmoy Basu in the Parliament for the unfettered right of a divorced wife to claim maintenance under the Code of 1973. Therefore, when the Code of 1973 was on the anvil of the Parliament, it had in mind the deplorable lot of destitute and ill-used Muslim divorced wives. The Joint Committee of the Parliament observed:

"The benefit of the provision should be extended to a woman who has been divorced from her husband, so long as she has not remarried after the divorce. The Committee's attention was drawn to some instances in which 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 thereby compelling the Magistrate to dismiss the petition. Such divorce can be made easily under the personal laws applicable to some of the communities in India. This causes special hardship to the poorer section of the community who become helpless. The amendments made by the Committee are aimed at securing social justice to women in our society belonging to the poorer classes."


Hence, the Code of 1973 made a distinct departure from the previous Code and imported a legal fiction to create an artificial relationship of husband and wife only for the purpose of maintenance after divorce. Section 125 of the Code of 1973, introduced, *inter alia* the principal change by widening the definition of wife and to some extent, overruled the personal law of the parties so far as the proceedings for maintenance under section 125 are concerned. Under clause (b) of the Explanation to section 125(1), the divorced wife continues to be a wife within the meaning the provisions of the Code of 1973 even though she had been divorced by her husband or has otherwise obtained a divorce and has not remarried. The expression "wife" includes a woman who has been divorced by, or has obtained a divorce from her husband, has come for interpretation before the courts on wide ranging arguments. In almost all the cases the husbands made a vain attempt to nullify the ameliorating and benign effect of the provision.

Since before the Code of 1973, it was consistently held by all the High Courts that an order under section 488

11. For the major changes introduced by S. 125, see Ejaz Ahmed and M.S. Ansari, *Cases & Materials on Law of Maintenance*, 1982, at pp.4-5.

12. The relevant Part of S. 125(1) reads:

"If any person having sufficient means neglects or refuses to maintain-
(a) his wife, unable to maintain herself, or....
(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried.

"
of the old Code ceases to operate after divorce; immediately after the passing of the Code of 1973, there was a spate of cases in the courts on the question if section 125 is retrospective in effect. In other words, the question before the Courts was: Did the new provision conferring right of maintenance on a divorced wife also create a right on the wives divorced prior to the passing of the Code of 1973?

Probably, the first case decided on the point was by the Allahabad High Court in Mohd. Haneef v. Anisa Khatoon. The wife was divorced in 1968. In reply to the former wife's application under section 125, the husband contended that since the wife was divorced prior to the coming into force of the Code of 1973, she was not entitled under the provisions of section 125. The Magistrate accepted the objection, but the application was restored by the 1st Additional District and Sessions Judge on revision. Feeling aggrieved, the husband came to the High Court which upheld the decision of the Sessions Judge. Dismissing the application of the husband, H. Swarup, J., observed:

"There is nothing in the Code to prohibit a divorcee, who had been divorced prior to the enforcement of the Code of Criminal Procedure, 1973, from being non included within the definition of 'wife' and may not be entitled to get maintenance. The Code of Criminal Procedure allows maintenance to a divorce irrespective of the fact that she was divorced before the new Code came into force."

13. See note 6, and the accompanying text, supra.
14. 1976 Cr.L.J.520(All.).
15. Id., at p.521.
Again the point arose before the Andhra Pradesh High Court in *Raza Khan v. Mumtaq Khatoon*. The wife in this case was divorced only two months prior to the commencement of the new Code and it was argued that section 125 is only prospective in effect. Citing G.P. Singh, it was held that where a statute is remedial in nature and beneficial in character, "it is the duty of the judge to construe the statute in such a manner as to suppress the mischief and advance the remedy." On more argument was advanced that this interpretation would open the flood-gates of litigation. To this the court's bold reply was:

"But we are not scared away by that prospect, for we will only be doing here justice to them which is legally due to them." 

Explained grammatically also, the expression "who has been divorced by or who has obtained a divorce" means a wife who is divorced in the past before section 125 came into force or who has obtained a divorce subsequent to the coming into force of the section. Thus, under the plain language

17. *Principles of Statutory Interpretation* at p.246.
18. 1976 Cr.L.J. 90, at p.907.
19. Id., at p.908.
of the definition, divorce at a stage prior to the coming into force of the section was included.

Undaunted by the failure to convince the courts that it is prospective in effect, the ingenuity chose another field of attack contending that the Code is merely procedural in character, hence, it does not create a right which did not exist hitherto before. Thus, in *Umar Hayat Khan v. Mahaboobunnisa*, 22 where the wife who was divorced in July, 1973, filed an application soon after the Code of 1973 came into force. The Magistrate awarded Rs 250/- per month. It was contended before the High Court that section 125 of the Code cannot in law extend to cover rights which are not available to parties under their personal law. 23

M. S. Kesarnagi, J., quoting certain other decisions, 24 in which it was held that section 488 (of the old Code) was not in conflict with any personal law, held 25

"That shows that maintenance to some additional period beyond the period of iddat becomes available to a divorced muhommad(sic) woman to an action under Section 125 of the new Code. This additional benefit does not at all conflict with the right she had under the Mohammedan law. By proceeding under section 125 of the new Code, she gets something more than

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22. 1976 Cr.L.J. 395(Kant.).
23. Id., at p.396.
that she is entitled to get under her personal law. A statute can confer rights and benefits on persons even though those rights and benefits happen to be more than what those persons are entitled to under their personal law."

The question again came for consideration in Mohamad Khan v. Mehrunnissa, 26 Lal., J., of the Karnataka High Court, relying on Nanak Chand v. Chandra Kishore 27 and following Umar Hayat Khan case, supra held:

"Presumably the said section confers a right to a divorced wife to claim maintenance. Therefore, Section 125 of the Code, in my opinion, stands independent of any provision, may be contrary or otherwise under the personal law applicable to the claimant." 28

In Isak Chanda v. Nyamatbi, 29 the plea was that the divorced wife is not entitled to maintenance since the parties are governed by the Shariat Act, 1937 30 which is a 'special law' saved under section 5 of the Code of 1973.

It was observed by Dharma Dhikari, J., (Housale, J., concurring), that the Shariat Act "does not lay down any special rules of Criminal Procedure but merely makes a provision as

26. 1977 Cr.L.J.923(Kant). The wife in this case was divorced some twenty years before the filing of the application in 1974. The C.J.M. overruling the objection of the husband and awarded Rs 60/- per month as maintenance. The argument of the husband in revision before the High Court was that S.125 of the new Code did not create a right in favour of the wife as she was not entitled under the personal law.


28. 1977 Cr.L.J.923, at p.924. See also Sayyad Mohamad Vallad v. Shalanbi, 1977 Cr.L.J.(NOC) 127 (Kant.).

29. 1980 Cr.L.J. 1180(D.B.)(Bom.).

regards the applicability of Muslim personal law to Muslims. 31

His Lordship further observed:

"By S.125 of the Code an additional right or
benefit is conferred upon a Muslim divorcee
and the said provision is independent of
personal law or any other customary law
governing the parties. In these circumstan-
ces the Shariat Act or any other personal
law cannot control the said right nor the
 provision of the said Act can be imported
into S.125 of the Cr.P.C. for determining
the right conferred by S.125 of the Code." 32

It was further emphasised that the object of section
125 in providing for maintenance, creed or religion is also
in tune with the mandate of Article 44 of the Constitution. 33

Ravindran v. Sakunthala 34 presents another line of
argument. The parties divorced under a customary divorce
and the wife agreed not to claim maintenance. Her application
under section 488 of the Code of 1898 was rejected. Her ap-
lication under new section 125 was resisted on the grounds

31. 1980 Cr.L.J.1180, at p.1185.
32. Ibid.
33. Article 44 of the Constitution provides: "The state shall
endavour to secure for the citizens a uniform civil Code
throughout the territory of India", See also Nalini Kumar
Pal v. Shakunthala, 1977 Cr.L.J. (NOC)148 (Cal.); Iqbal
Ahmad Khan v. Hafizan Bano, The Times of India, Oct.6,
1979, where the constitutional validity of clause(b) of
S.125(1) was upheld by the Allahabad High Court.
34. 1978 Cr.L.J.1049(Ker.).
that (a) section 484(2)(b) of the Code of 1973 bars the remedy; (b) they are living by mutual consent, hence subsection (5) of Section 125 applies; and, (c) under the agreement the wife has waived her right to maintenance. Dismissing all the grounds the court held that a divorced wife is entitled to maintenance under the provision of the new Code of 1973 even if her earlier application under the old Code was dismissed. 37

The conferment of the right to a divorced wife to seek maintenance under the Code of Criminal Procedure has a social purpose which seeks to inhibit neglect of such women. 36 We have noted that almost all the High Court rejected the plea to construe the expression "has been divorced by or has obtained a divorce from her husband" in somewhat a narrow sense. However, the Allahabad High Court tried to confine the provision as applicable only to the Muslims and that too only in the case if the divorce proceeded from the husband. If, on the other hand, the divorce was sought by

35. The relevant portion of S.484(2) reads: 
"(2) Notwithstanding such repeal,-
(a)...
(b) all...orders...made under the Old Code and which are in force immediately before the commencement of this Code, shall be deemed, respectively, to have been...made under the corresponding provisions of this code;...

36. S.125(5) reads:
"On proof that any wife in whose favour an order has been made under this section...that they are living separately by mutual consent, the Magistrate shall cancel the order."

37. See also Mushaque Mondal v. Joyshun Bibi, 1977 Cr.L.J. 484(Cal.).

38. "...statutes are not petrified print but vibrant words with social functions to fulfill" per Krishna Iyer, J., in Ramesh Chander v. Veena Kaushal, A.I.R. 1978 S.C.1807, at p.1809.
the decree of a court, the argument was that this provision would not apply unless the divorce was given unilaterally by the husband or was obtained by the wife from the husband.

In Zohra Khatoon v. Moh. Ibrahim, the wife was granted a decree of dissolution under the Dissolution of Muslim Marriages Act. The magistrate granted Rs 100/- per month to the wife under section 125 of the Code of 1973. The Allahabad High Court quashed the order on the grounds that:

(a) the wife has obtained only a decree of dissolution of marriage and **not** a divorce, and

(b) the expression "from the husband" envisages divorce by voluntary action of the husband which is missing in this case. The dissolution of marriage having been obtained from the court, therefore, **not from the husband**.

On appeal to the Supreme Court, Fazal Ali, J., (for himself and on behalf of A Varadarajan, J.) held that clause (b) of the Explanation to section 125(1) has widened the definition of the wife and, to some extent, overruled the personal law of the parties so far as the maintenance of a Muslim divorced wife is concerned and:

"...the High Court was not at all justified in taking the two separate clauses "who has been divorced" and "has obtained a divorce from her husband" conjunctively so as to indicate a divorce proceeding from the husband and the husband alone and in not treat-

40. Act No. 8 of 1939.
41. 1981 H.L.R. 289 at p. 299 (S.C.), per Koshal, J.,
42. Id., at p. 294.
Koschel, J., in a separate opinion (while he was in general agreement with majority) made the meaning of the word 'dissolution' clear. The decision of English Court of Appeal in Peacock v. Peacock, 44 was cited. In this case the court was called upon to interpret sections 16(1) and 19(3) of the Matrimonial Causes Act, 1950. 45 An argument was raised that a decree for dissolution of marriage as envisaged in section 16(1) does not amount to a decree for divorce mentioned in section 19(3) and that, therefore, there was no jurisdiction in the court to direct the husband to pay the wife any maintenance in pursuance of the latter section. Hodson, L.J. (Morris, L.J. and Vaisey, J., concurring), repelled the argument thus:

"In my view the word "dissolution" relates to the marriage itself, whereas the word 'divorce' relates to the parties to the marriage bond; and it is apt to refer to 'divorce' when speaking of parties and 'dissolution' when speaking of the bond." 46

Therefore, the expression 'divorce' and 'dissolution' are two facets of the same situation. 47

43. [Ref.], at p. 297.
44. (1958) 2 All E.R. 633.
45. Section 16(1) empowered the court to make a decree of dissolution on the presumption of death. Under S. 19(3) provisions for alimony were made on a decree for 'divorce or nullity' of marriage.
47. Per Koschel, J., ibid., in Khurshid Khan v. Husnabadi, 1977 H.L.R. 23 (D.B.) (Bom.), a futile argument that since in the instant case the divorce was by mutual consent or khula divorce, the wife was estopped from (contd...
The matter can be viewed from another angle also. The provisions of the Code of 1973 are obtaining to all the communities in India, viz., Hindu, Muslim, Christian, Parsi etc., construing the expression "has been divorced by or has obtained a divorce from her husband" in a manner that it applies only to Muslim divorced wives, will lead to obvious absurdity. The plain meaning of the first limb of the expression "has been divorced by" is where the divorce proceeding (whether by talaq under Muslim law or by proceedings in a Court under any other personal law) is initiated on behalf of the husband; and the second limb of the expression "or has obtained divorce" simply means where proceeding is initiated on behalf of the wife.

It may here be worthwhile to note that Explanation(b) to section 125(1) confers a right only to a divorced wife to claim maintenance under the Code of 1973. But it seems that a wife whose marriage has been declared void, e.g., on the ground that it has been contracted in violation of any of the conditions in section 5(i)(iv) and (iv) of the Hindu Marriage Act, is not entitled to claim maintenance under the

claiming maintenance, Vaidya, J., (Rege, J., concurring), rejecting the argument said that S.125 makes no distinction between Khula divorce and talaq divorce, id., at p. 25.

43. The whole tenor of the judgement of Fazal Ali, J., in Zohra Khatun, supra, appears to reflect that clause(b) was primarily intended for Muslim wives. Probably this might have prompted Koshal, J., to express his separate opinion in the case. As also, per Koshal, J., 1981 H.L.R. 289, at pp. 298–299.
Code of 1973. Although she is entitled to claim maintenance under section 25 of the Hindu Marriage Act, yet, the beneficial protection under the Code of 1973 should not be denied to the unfortunate woman.

It is submitted that clause (b) of section 125(1) is not happily worded and should be replaced by simple words:

"Wife' includes a 'divorced wife' or a wife of void marriage and who has not remarried."

B. Liability of the 'Former-Husband' in the Criminal Court Under Section 125 of the Code of Criminal Procedure

Unlike Sections 24 and 25 of the Hindu Marriage Act, section 125 of the Code of 1973 makes provision for maintenance of divorced wives (children and parents), independent of any divorce proceedings, through the institution of summary proceedings in the Criminal Court.

Though section 125 is in the Code of Criminal Procedure, nevertheless "(t)he proceedings under this section (section 488 of the Old Code)

49. Chapter IX of the Code of Criminal Procedure is entitled as "Order for Maintenance of Wives, Children and Parents".
50. Section 125 confers power to order maintenance on a Magistrate of the First Class (Section 488) of the old Code conferred power on District Magistrates, Presidency Magistrates, Sub-Divisional Magistrates and Magistrates of the First Class) who is undisputably a Criminal Court, and not Civil Court. The reason for this change that now (contd. . .)
are in the nature of civil proceedings". For instance, an application under this section does not amount to a complaint, nor the husband against whom the application is filed, an accused, nor the act complained of an offence. Moreover, the procedure to be followed by the Magistrate in dealing with maintenance cases under section 125 is not the procedure which is generally laid down in the Code of Criminal Procedure, but the special procedure power vests only with the Magistrate of the First Class is that the function is of a judicial character, see D.D. Basu, Criminal Procedure Code, 1973, (1979), at p.333. See also Law Commission, 41st Report, Vol.I, paras 36,1-36, 10.

Further, the proceedings under this section are registered in the High Courts as Criminal Revision and presented under the Criminal Procedure Code and not the Civil Procedure Code. See, for instance, Rules and Orders of the Punjab High Court, Vol.III, Ch.7-A, rule 1, stating that the proceedings under section 488(now S.125) of the Code are of criminal character. See also Chan Singh v. Jangir Kaush, 1983 H.L.R. 223, at p.225(D.B.(P&H).


53. The words used in section 126(1) of the Code of 1973 is "person" and not "accused". See also Parbat v. Chotev, 1 Cr.L.J,864; Mehr Khan v. Bakat Bhard, A.I.R.1929 Lah.32; Sew Kumhar v. Mongru, A.I.R.1959 Cal.454.


55. For instance, the wife under section 125 is not a (contd...
under Chapter IX, i.e., sections 125-128.\(^{56}\)

While it is true that the respondent husband in these proceedings is not an accused person facing trial, culminating into a consequent conviction and sentence, but these by itself does not take away the essential character of the criminal nature of these proceedings.\(^{57}\) Accordingly,

"complainant". It is, therefore, not legally necessary for her to be examined before the issuing of process under section 200 of the Code of 1973, see Nur Mohammad v. Mt. Asgara, I.R. 1934 Lah. 946. Similarly, the husband against whom an application is made under section 125 is not an "accused", he may therefore, give evidence on his own behalf, see section 315(2) of the Code of 1973. See also Nur M. v. Bismulla, I.L.R. (1889) 16 Cal. 781 (case decided under the corresponding section 340(2) of the old Code).


The proposition that the proceedings under section 125 of the Code of 1973, are criminal in nature as well is reinforced by reference to the provisions of the Code. For instance, the evidence under section 126(2) has to be taken in the presence of the person against whom an order is claimed and is to be recorded in the manner prescribed for summons-cases. Further, the execution of order under section 125(3) is by issuing a warrant for levying the amount due in the manner provided for levying fines and it further empowers the Magistrate to sentence such a person for the whole or any part of each month's allowance remaining unpaid. Also, the revision against the order of Magistrate lies to the Court of Session under Section 399. Equally, the High Court's power of revision thereof would be derived from section 401 of the Code of Criminal Procedure.
the technicalities of civil proceedings are not attracted, and absence of an express pleading\(^{58}\) that the claimant is unable to maintain herself is in no way fatal to her claim.\(^{59}\)

Here we can not do better than quote Virendra Kumar, who has pithily stated the nature of the proceedings, (Under the corresponding provision of the old Code) thus:\(^{60}\)

"Stated positively, the proceedings under section 488 are essentially 'civil' in nature. However, since the maintenance provisions are contained in the Code of Criminal Procedure and not in the Code of Civil Procedure, and since the maintenance proceedings are instituted in the Criminal Court and not in the Civil Court, the association of the label 'criminal' does come to mind with these maintenance proceedings. It is perhaps because of this association that the maintenance proceedings under section 488 have been described as "quasi-criminal"..."  

Moreover, since the object of section 125 is to prevent

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58. However, making of an application is a \textit{sin qua non} for the grant of maintenance under the section, see \textbf{Kishan Lal v. Nand Lal, A.I.R.1968 Raj.} 96, at p.88.

vagrancy and destitution\textsuperscript{62} by means of summary remedy before a magistrate, the jurisdiction is essentially preventive, rather than remedial or punitive.\textsuperscript{63}

The proceedings may be taken by the wife against the husband in any district:
(a) Where he is, or
(b) Where he or his wife resides, or
(c) Where he last resided with his wife.\textsuperscript{64}

Thus there are four alternative forums available to the wife.\textsuperscript{65} The expression "where he is" has a wider connotation and not limited by the animus manendi of the person or the duration or the nature of his stay.\textsuperscript{66} What

\begin{itemize}
  \item 1980 All L.J.296.
  \item 60. Alimony and Maintenance, (1978) at p.160.
  \item 64. Sub-section(1) of section 126.
  \item 65. As originally enacted, under the Code of 1882, only the Magistrate of the district where the husband resided had jurisdiction. The Code of 1898 provided three alternative forums, whereas the fourth, i.e., where the wife resides, was introduced by the Code of 1973.
\end{itemize}
matters is his bare physical presence at the moment. For example, if a person goes to a distant place or even to a foreign country to live but returns to the district of destination or a neighbouring district on a casual visit the wife can take advantage of that visit and file a petition for maintenance in the district where he is. However, this principle would not apply where the presence of the person at the place where the wife was residing had been compelled by some act of the wife herself, e.g., by bringing a criminal case against the husband or even a previous proceeding of maintenance in a wrong jurisdiction, where to defend it he was obliged to stay at the place for some time.

67. In the Jagir Kaur case, supra, the husband came to India on a flying visit from Africa where he had been employed since 1930. The wife filed her application for maintenance against him in the district where he was staying during the visit. The respondent was held by the Punjab High Court to be within the jurisdiction of the Magistrate under section 488(8) of the old Code. The Supreme Court reviewing the decision held:

"The said Magistrate had jurisdiction to entertain the petition, as the said proceedings can be taken against any person in any district who he 'is'", A.I.R.1963 S.C.1521, at p.1526.

The same view was taken in Sm. Baleshweri Devi v. Bikram Singh, A.I.R.1968 Pat.383; Shantabal v. Vishnupant Atmaram, A.I.R.1965 Bom.107. However, a restricted view of Madras High Court in Sakuntala v. Thirumalayya, (1966) 2 Mad.L.J. 326, does not appear to be in line with the view of the Supreme Court in the Jagir Kaur case, supra.

68. Ramkrishna v. Gouri, 1971 Cr.L.J. 1784(Cal.).
Now the Code of 1973 introduced a momentous change on the recommendation of the Law Commission,\(^{69}\) and a wife can bring proceedings in any district where she resides. Of course, the words "resides" include both permanent and temporary residence.\(^{70}\) It may however be noted that the verb used in clause(b) of section 126(1) is 'resides' and there is no 'is', as it occurs in clause(a) of this section. Hence, the wife would not be entitled to bring an application at a place where she is on a casual visit at the time of application.\(^{71}\)

Since the remedy under section 125 of the Code of 1973 is of a summary nature and is designed to prevent

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"Under sub-section (6) (of old 8.488), the place where the wife resides after desertion by the husband is not material as regards the venue of the proceedings, though the place where the husband resides- even temporarily - is relevant. Often deserted wives are compelled to live with their relatives far away from the place where the husband and the wife last resided together. They would be put to great harrassment and expenditure unless the venue of the proceeding is enlarged so as to include the place where they may be residing on the date of the application".


vagrancy and destitution, the Magistrate is empowered to order maintenance to a maximum of "five hundred rupees in the whole" at a monthly rate. The expression "in the whole" has been construed as separate and not compendious. For instance, where a divorced wife claims maintenance for herself and two children in custody with her, a maximum of rupees five hundred can be awarded to each claimant. The

72. See note 63, supra.

73. Originally the maximum limit was fifty rupees which was raised to rupees one hundred by Amending Act 18 of 1923 and which was further raised to five hundred by Amending Act 26 of 1955.

74. Sub-section(1) of section 125(Emphasis added).


76. In Ramesh Chander case, supra, the Magistrate awarded Rs 1000/- to the wife and two children together. It was argued before the Supreme Court that the awardable maximum sum for mother and children as a whole under section 125(1) was rupees five hundred. Krishna Iyer, J. (Dr.A.Desai, J.concurring) said:

"In the whole' in the context means taking all the items of maintenance together, not all the members of the family put together, To our mind, this interpretation accords with social justice and semantics...". A.I.R. 1978 S.C.1807, at p.1811.

His Lordships further pointed out the absurdity of such a conclusion by giving an example:

"If a woman has a dozen children and if the man neglects the whole lot and, in his addition to fresh mistress, neglects even his parents and all these members of the family seek maintenance in one petition against the delinquent respondent, can it be that the court can not award more than Rs 500/- for all of them together? On the other hand if each filed a separate petition where would be maximum of Rs 500/- each awarded by the Court. We can't therefore, agree to this obvious jurisdictional inequity by reading a limitation of Rs 500/-..." id., at p.1810.
two expressions "in all" and "in the whole" are not synonymous; "in all" means "all together" or "each and every" but "in the whole" means as "to the full amount or entirely". Therefore, "it appears that the words "in the whole" as used in § 488(1) of the Code of Criminal Procedure (old) do not mean "in all" and therefore the ceiling of five hundred rupees as mentioned there is not for all the claimants in a proceeding...".

We have noticed a previous Chapter, a controversy about the time from which the maintenance has to be awarded under the Hindu Marriage Act. Sub-section (2) of section 125 of the Code makes it clear that the Magistrate can order the maintenance "from the date of order, or, if so ordered, from the date of the application for maintenance. Accordingly, the Magistrate can not make an order from any date anterior to the date of application. Subject thereto the Magistrate..."


79. For the controversy among the various High Courts, See Chapter III, Part A, sec C entitled "Commencement and Duration of the Order", supra.

80. Rose Cracker v. Emperor, A.I.R. 1928 Mad. 899; Enamul v. Taimunissa, A.I.R. 1967 Pat. 344. However, where an order for such retrospective payment was made with consent of the parties, the High Court did not interfere, see Ejaz Ahmad and S. Ansari, Law of Maintenance (1982), at p. 46. Maintenance may also be made payable from the date of previous application which was dismissed on the ground that subsequent application was a continuation of that application, ibid.
has discretion \(^{81}\) to direct, in the light of the circumstances, that the maintenance fixed by him shall be payable from the date of his order or from the date of application. \(^{82}\) The reason for this discretion is apparent. If the maintenance is allowed only from the date of order, for instance, the husband "would try to delay the proceedings". \(^{83}\) However, in a fit case, if there is delay in disposing of the application, the High Court may reduce the amount of maintenance for the period between filing the application and passing of the order of the Magistrate, since it would be difficult for the husband to pay the large amount of accumulated arrears. \(^{85}\)

\(^{81}\) Kanwar v. Vasudeo, 1977 Cr.L.J. 1008 (H.P.).

\(^{82}\) Janamma, A.I.R. 1959 Ker. 366. But where the order is silent as to the date from which it is to take effect, maintenance will be payable from the date of order. The reason being that the section directs that in normal cases it should be from the date of order unless expressly made payable from the date of application.

\(^{83}\) Per M.R. Sharma, J., in Jangir Kaur v. Bhura Singh, 1975 H.L.R. 247, at p. 248 (P&H). In the instant case it took 28 months to pass an order after the application for maintenance was filed by the wife. The High Court confirmed the recommendation of the Additional Sessions Judge to reverse the order and to allow maintenance from the date of application.

\(^{84}\) Janamma, A.I.R. 1959 Ker. 366, where the husband was found to have behaved badly so as not to deserve any sympathy or consideration, the maintenance should be awarded from the date of application. See also Pratam Kaur v. Sunder Singh, (1965) 67 P.L.R. 263.

\(^{85}\) In Shiv Singh v. Susheela Kumari, 1982 H.L.R. 681 (Raj.), where it took 74 months to pass the order, the High Court reduced the amount to be paid for the period between filing the application and passing the order.
C. Cancellation of Maintenance Allowance of Divorced Wife on Payment of the Whole Sum Payable Under Customary or Personal Law

The divorced wife is entitled to maintenance under section 125 of the Code of 1973, as discussed above, however, the former-husband can get it cancelled on any of the grounds existing under sub-section(3) of section 127 of the Code. Sub-section(3) of section 127 mentions three fact-situations which apply to the divorced wives who have been granted maintenance under section 125. Clauses (a) and (c) of the sub-section does not pose much difficulty, but, clause(b) had sparked off controversy giving rise to a much contested litigation. In the pre-Code-divorcee-cases only faint voices, taking the plea under clause(b) of the said sub-section were heard in the courts. However, for post-Code

86. The relevant part of Sub-section(3) of Section 127 of Code of Criminal Procedure provides:

"(3) 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 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 the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order,-
(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 of thereof."

87. See our discussion on the meaning of "wife", under Sec.A.

88. For instance, in Mushaque Mondal v. Joysum Bibi, 1977 Cr. (contd....)
divorcees it posed too great a hurdle to be crossed. The decision of various High Courts rendered the ameliorating effect of section 125 of the Code to the proverbial "carrot and stick", till the thundering voice of Justice Krishna Iyer was heard in the case of Bai Tahira v. Ali Hussain. 89

Clause (b) of sub-section (3) of section 127 provides that where the wife has received, whole of the sum payable on divorce under any "customary or personal law" of the parties, the Magistrate shall cancel the order. Then what is the sum payable on divorce in view of any customary or personal law of the parties? Construing the provision in relation to Muslim personal law, almost all the High Courts (except a Division Bench decision of Kerala High Court discussed below) 90 came to the conclusion that the sum

L.J. 484 (Cal.), where the plea on the ground of section 127(3)(b) was raised for the first time before the High Court during the arguments. Banerjee, J., dismissed the plea on the ground that it was not properly raised. Nevertheless, a passing remark was made that still it is open to the petitioner to get it cancelled from the Magistrate under section 127(3)(b). See also, Mohd. Haneef v. Afisa Khatoon, 1976 Cr.L.J. 520 (All); Khurshid Khan v. Husnabah, 1976 Cr.L.J. 1584; Mahbubai v. Nasir Farid, 1977 Cr.L.J. 391 (D.B.) (Bom.).


90. The view expressed by Saleem Akhtar, in "Alimony to Muslim Divorcees Under Ss.125 & 127(3)(b) Cr.P.C. - A Need For Reform", (1980) 20 Ind. Adv. 42, at p. 44, that earlier view of certain High Courts viz., Kerala, Karnataka, Calcutta, Bombay and Allahabad was "that the Muslim divorced wives are entitled the alimony under S.125 of the new Code after the period of iddat", it is submitted, is wrong. In those cases (except Kerala) the main argument veered around the question whether a wife (contd...)
payable under clause (b) of said section was the amount of mehr plus the amount of maintenance for the period of idda. Therefore, where the husband pays these two types of amounts under clause (b) of the said section, the divorced wife does not have any subsisting right of maintenance and the Magistrate will have no jurisdiction to make an order under section 125 of the Code. Thus, the laudable objective sought to be achieved by the Parliament by expanding the meaning of the term "wife" under section 125 of the Code, was rendered nugatory.

In Kunhi Moyin v. Pathumma,91 the Division Bench of the Kerala High Court held that the payment of maintenance of the period of idda and the payment of mehr will not exonerate the Muslim husbands from the liability towards the divorced wives under section 125 of the Code of 1973. Khalid, J., (speaking on behalf of the Court) spelled out the social purpose of the legislation and observed:

"In considering the social welfare legislation the court will be justified in straining the language a little to achieve the object of the enactment. If the object of the enactment can be achieved only by the martyrdom of few husbands, we will boldly do so and would not shirk our duty in effectuating the object of enactment. If statistics are taken, it will be clear that women divorced before the Code of 1973 came into existence is entitled for maintenance under the provisions of the new code, see note 88 and the accompanying text, supra.

who have advantage of such protection are young divorcees, who have been mercilessly divorced by their husbands."  

Holding that clause (b) of section 127(3) does not refer to maintenance during the period of idda or payment of dower, instead:

"...what is impliedly covered by this clause is such sums of money as alimony or compensation made payable on dissolution of marriage under customary or personal law codified or uncodified, or such amount agreed upon at the time of marriage to be paid at the time of divorce the wife agreeing not to claim maintenance or any other amount."  

The Gujrat High Court, on the other hand, construing the words "has received", held in Hajuben Suleman v. Ibrahim Gandabhal, that "a mere tender of the amount payable on


95. 1979 H.L.R. 1(D.B.) (Guj.).
divorce under customary or personal law applicable to the parties without receipt of that amount by the wife would not be sufficient to clothe the Magistrate with the power of cancelling the order of monthly allowance*. Hence, as the wife did not accept Rs 100/- deposited by the husband as idda, money, the court held, it could not be said that she "has received" all the amount payable under clause(b) of sub-section(3) of section 127 which must be a "voluntary act" on the part of the wife. The order cancelling maintenance was quashed.

But this view did not find favour with the Andhra Pradesh High Court in Qayyum Khan v. Noorunnissa Begum. The husband in this case deposited rupees 1100.00 towards the mehr amount in answer to the wife's execution application for the realization of rupees 871.40 of the arrears of maintenance. Following Hajuben case, supra, the Magistrate held that the wife was entitled to "maintenance until her life time or until she remarried", and she can not be forced to 'receive' the amount of mehr. Accordingly, the Magistrate allowed the payment of arrears out of the mehr amount. On revision to the High Court, Gangadhar Rao, J., while disagreeing with Hajuben case, supra observed:

"In the context of the section, the words 'has received' should be understood as 'has been paid'. That is evident when we

96. Id. at p.6, per D.P. Desai, J., (Bhatt, J.concurring).
97. The amount of mehr(Rs27.50p) which was agreed was already paid by the husband at the time of marriage.
98. 1978 Cr.L.J.476(A.P.).
99. Id., at p.1478.
read two sub-cla. (i) and (ii) to S. 127 (3)(b). Sub-clause(ii) says, "in any other case from the date of the expiry of the period if any for which maintain­ance has been actually paid". Evidently, the Legislature used the word 'received' with reference to the women and 'paid' with reference to the husband."

The contrary view that payment of a sum under the customary or personal law cancels the right of a divorced wife under section 125, was taken in Rukhsana Parvin v. Mohd. Hussain. Chandukar, J., (Shah, J., concurring) held that all the sections from 125-128 of Chapter IX of the 1973 Code should be "harmoniously construed", and that section 127(3)(b) must be read and understood as a proviso to section 125. So understood, section 127(3)(b) would restrict the power of the Magistrate to entertain an application for maintenance "once he is satisfied that what was due under the customary law or the personal law was paid to the wife". Taking the lead from Rukhsana Parvin case supra, the other High Courts followed suit.

The Kerala High Court also fell in line with the views of Rukhsana Parvin case supra, and in a Full Bench decision in Kamalakshi v. Sankaran, overruling the earlier case of Kunhi Moyn v. Pathumma, held:

100. 1977 Cr.L.J. 1041(D.B.)(Bom.).
101. Id., at p.1044.
102. Id., at p.1045.
"S.127(3) is telescopied into S.125 and is to be read and understood as a proviso to the latter Section...Sum referred to by S.127(3)(b) need not be restricted to maintenance in the well understood sense of the term, but may cover any sum or amount payable on divorce under customary or personal law of the parties, such was the amount in the instant case and S.127(3)(b) is attracted."

106 conclusion, Parliaments dithering where Muslims were concerned the result would be that when Muslims who contemplate divorcing their wives by talak will be advised by their lawyers that they need not fear the Criminal Procedure Code, S.125-128, at all. It has no teeth for them. Sooner or later Parliament must take this bull by the horns. Perhaps the thin end of the wedge technique will work in the end...but the storm must (it seems) get worse before it can be better", quoted by Saleem Akhtar, "Alimony to Muslim Divorcees Under Ss.125 & 127(3)(b) Cr.P.C. - A need For Reform," (1980) 20 Ind. Adv. 42, at p.46.

104. A.I.R.1979 Ker.116(F.B.) In this case, the parties were Ezhavas governed by Travancore Ezhava Act,1100. The parties got divorce under the said Act in 1970 and the husband paid compensation of ₹ 2000/- (which is the maximum which the husband has to pay on divorce, under section 9 of the said Act). In view of divorce, the husband filed an application for the cancellation of maintenance which he was paying under section 488 of the old Code, which was allowed. On the commencement of the Code of 1973, the ex-wife filed application under section 125. The Magistrate dismissed the same on the ground that she had received the whole of the sum payable under the personal law on divorce.


These were the views prevailing in the various High Courts were Rukhsana Pervin\(^{107}\) dominated the scene. Unfortunately Hajuben\(^{108}\) and Kunhi Movin\(^{109}\) were not followed and the laudable objective sought to be achieved by the Legislature by widening the definition of 'wife' remained in limbo when Bai Tahira v. Ali Hussain\(^{110}\) settled the "heat and dust" of the various High courts' decisions. The brief facts of the case were as follows: In 1962, the wife, after divorce, received mehr money and maintenance for the period of \(\text{iddat} (\text{Rs.} \ 5000/- \text{ and Rs.} \ 180/- \text{ respectively})\) and compromised. There was flickering improvement after this, but the relations again became estranged. Finding herself unable to maintain the wife approached the Magistrate for maintenance on the ground that she was an existing wife. The Magistrate granted Rs. 300/- per month for the child and Rs. 400/- per month to the mother. On revision, the Sessions Judge reversed the order on the ground that the Magistrate had no jurisdiction to consider whether the applicant was a wife, and so did the High Court bestowing little attention, as the question of 'divorce or non-divorce' was immaterial in the light of amended provision of section 125 of the Code of 1973. The matter, thus, came to the Supreme Court. Interpreting section 127(3)(b), Krishna Iyer, J., (Tulza Puykar and Pathak, JJ., concurring) said

108. 1979 H.L.R.I (D.B.) (Guj.).
that even if the payment "of mehr money, as a customary
discharge, is within the cognizance of that provision" but it must be an adequate amount and that there "must be
a real rationale relation between the sum so paid and its
potential as provision for maintenance; to interpret other-
wise is to stultify the project". Referring to the social
purpose of the amendment the Court held that the customary
payment must be adequate and a "reasonable substitute" of
the maintenance allowance. "The only just construction of
the section is", said Krishna Iyer, J., "that Parliament
intended divorcees should not derive a double benefit".

But, this authority of the Summit Court was flagrantly
flouted by a Division Bench of the Andhra Pradesh High
Court in Fuzlunbi v. K. Khader Vali. In this case, the
petitioner, was divorced by her husband by a triple talaq.
The husband paid rupees 500.00 by way of mehr and rupees
750.00 towards maintenance for the period of adda. On applica-
cation the Magistrate granted maintenance to her. The order
was vacated by the Add. First Class Magistrate. The wife's
revision was dismissed by the Sessions Court.

111. Id., at p.770.
112. Ibid.
113. Ibid.
114. At least two High courts followed the decision of the
Supreme Court before this case of Andhra Pradesh High
Court came to be considered by the Supreme Court, see
Kamarunnisa v. Farid Gafur, 1980 Cr.L.J.1390 (Bom.);
and Sirajul Mondal v. Samejnecha Bibi, 1979 Cr.L.J.
(N.O.C) 91(Cal.). Though Kamakashi v. Sankaran,
A.I.R.1979 Ker.116(F.B.) was decided after Bai Tahira
case, but it was not referred to before the Court.
The High Court holding that a divorced Muslim wife, who has been given the amount of mehr and maintenance for the period of idda under the personal law, is not entitled to maintenance under section 125 of the Code in view of the provision of section 127(3)(b) of the Code, confined the authority of Bai Tahira case, supra, to the facts of the case on the grounds that:

"...(i) the compromise of 1962 referred to therein was construed as not affecting the rights of a Muslim divorced wife in seeking to recover maintenance under Section 125 Cr.P.C., (ii) what was considered to have been paid to the Muslim divorced wife was only the mehr amount and not the maintenance amount payable for the iddat period, (iii) the mehr amount revealed a rate of interest which for a person residing in Bombay was held to be wholly inadequate to do duty for maintenance allowance, (iv) there was nothing in that case to show that amount of Rs 130/- paid towards iddat represented the payment of a sufficient maintenance amount for the three months period of iddat, and (v) the husband in that case did not raise any plea based on Section 127(3)(b) Cr.P.C."  

Feeling aggrieved, the appellant went in Supreme Court and the Bench was headed by the same illuminary, Justice Krishna Iyer (with O. Chinnappa Readdy and A. P. Sen, JJ) who was pained at the 'heartless and lawless' decision of the High Court, which chopping little logic concocted "a distinction without a difference", and laid down "unlaw" in the face of the law in Bai Tahira.

117. Id., at p. 127.
The court after considering various authorities on the Mohamedan law came to the conclusion that mehr "as understood in Muhammadan law cannot, under any circumstances be considered as consideration for divorce on a payment made in lieu of loss of connubial relationship". The payment which is to be made under section 127(3)(b) of the Code of 1973 should at any rate, "be so linked with the divorce as to become payable only in the event of divorce". Thus, the stand taken in Bai Tahira case was reiterated.

118. Id., at p.135.
119. Ibid.
120. These two decisions of the Supreme Court in Bai Tahira and Fuzlunbi have caused a flurry among the Muslim Community in India. M. Fazlul Haq has criticized Justice Krishna Iyer, as the construction put by the Court "has amended the provision and thereby usurped and jurisdiction of the Legislature", in "A Comment on Supreme Court Decision in Fazlunbi's case (A.I.R.1980 S.C.1730)". 1981 K.L.T. (Jour)15, at p.16. As a sequel to Bai Tahira case two Bills had been introduced in the previous Parliament to nullify the effect of the case. One was introduced by Mr. Syed Shahabuddin, M.P., in Rajya Sabha on 28th Nov., 1980, quoted to by Fazlul Haq, supra, at p.17; Another was introduced by Mr. G.M. Banatwalla, M.P., vide G.Q.I. Extra., Part II, at p.138 (March, 1980), referred to by Kusum, "Maintenance of a Divorced Muslim Wife: A Critique of the Proposed Law", 22 J.I.L.I. 408(1980) at p.412. See also comment of Syed Ameeral Hasan Rizvi, Editor, Radiance Views Weekly, Delhi, quoted by Saleem Akhtar, "Maintenance to Muslim Wife and Ex-wife and the Supreme Court", (1982) 10 Law Journal G.N.D. Uni., Nos.3,4, at p.108. But there are kudos also to these decisions, see for instance, Saleem Akhtar, "Alimony to Muslim Divorcees Under Ss 125 & 127 (3)(b) Cr.P.C. - A Need For Reform", (1980) 20 Ind. Adv. 42, where the author commends Bai Tahira, saying that it "rightly propounded a criteria for fixing the amount of alimony to the divorced wife", id., at p.48; O.U. Abdulkhader, "Supreme Court Decisions on Maintenance to Muslim Divorcees - Bai Tahira and Fuzlunbi", A.I.R.1982 (Jour)115; Kusum, "Maintenance of a Divorced Muslim Wife: A Critique of the Proposed Law", loc. cit.; Tahir Mahmood, in Muslim Law of India, (1980) at p.133 has expressed the (contd....)
in a "fool-proof fashion", and it was hoped by Krishna Iyer, J., that,...no judge in India, except a larger Bench of the Supreme Court without a departure from judicial discipline can whittle down, wish away or be unbound by the ratio thereof\textsuperscript{121} and defile by judicial interpretation sabotaging the true meaning and reducing the benign protection into a 'damp-squib'.

Now in a very recent case, the Supreme Court has, by a larger Bench, reiterated the views taken by Justice Krishna Iyer in the cases of Bai Tahir a and Fuzlunbi.\textsuperscript{122}

The controversy, which prevailed for well over years now seems to be set at rest. The roots of the controversy lie in the false premise, which marred the true import and underlying object of section 127(3)(b). The premise was that what is payable to a Muslim wife on divorce is the mehr amount and the amount of maintenance during the period of idda. So far as the amount of idda is concerned it is certainly payable after the divorce is pronounced.\textsuperscript{123} Then

\begin{quote}

\textsuperscript{121} (1980) 4 S.C.C.125, at p.129.


\textsuperscript{123} T.M. Abdullah, in two articles entitled, "Ss.125 to 127 of the New Criminal Procedure Code, How Far Applicable to Muslims?", 1974 K.L.T. (Jour) 54 and "Muslim Husband's Liability Under Ss.125 & 127 Cr.P.C.", 1977 K.L.T. (Jour) 18, has, however, maintained that the question of (contd...)
what is the nature and object of mehr? Tyabji, defines mehr as:

"a sum that becomes payable by the husband to the wife on marriage, either by agreement between the parties or by operation of law." (Emphasis added).

Citing certain authorities, Mulla defines it as "a sum of money or other property which the wife is entitled to receive from the husband in consideration of marriage." Abdur Rahim, another distinguished jurist, defines mehr as "either a sum of money or other form of property.

Maintenance has no inseparable connection either with divorce or with idda. These are not coincidental or concomitant. Maintenance for idda does not arise by reason of divorce. It is an extention of the obligation subsisting during coverture to maintain the wife upto a period of 3 monthly courses just to see if there is any sign of pregnancy in the woman by the divorcing husband. Cf. M. Fazlul Haq, "Section 125 of the New Cr.P.C. and the Muslim Law", 1974 K.L.T. (Jour.) 58, a reply to Mr. Abdullah's article at 1974 K.L.T. (J) 54, O.V. Abdulkhader, "Supreme Court Decisions on Maintenance to Muslim Divorcees - Bai Tahira and Fazlunbi", A.I.R. 1982 (Jour) 115, on the other hand, has considered the confining of maintenance of a divorced wife to the period of idda as obsession of the 'purist'.


to which the wife becomes entitled by marriage.\textsuperscript{126}

(Emphasis added).

The observations of Lord Parker in Hamira Bibi v. Zubaida Bibi,\textsuperscript{127} are also notable:

"Dower is an essential incident under the Mussulman law to the status of marriage; ... Regarding as a consideration for the marriage, it is, in theory, payable before consummation; but the law allows its division into two parts, one of which is called 'prompt', payable before the wife can be called upon to enter the conjugal domicil; the other 'deferred', payable on the dissolution of the contract by the death of either of the parties or by divorce..."\textsuperscript{128}

(Emphasis added).

On the perusal of the above definitions it is clear that it is an incident of status of marriage and not of divorce. It is only with regard to its payment that the law allows its division into two parts. According to Shia law, when dower is not settled at the time of marriage whether the dower is to be prompt or deferred, the rule is to regard the whole as prompt. According to Madras High Court,\textsuperscript{129} at least in Madras Presidency whether the parties are Shias or Sunnis, dower must be presumed to be prompt unless payment of the whole or any part of the dower is expressly postponed. The same are the views expressed by Privy Council in Mirza Pedar Bukht v. Mirza Khurram,\textsuperscript{130} where it was held

\textsuperscript{126} Abdur Rahim, Muhammadan Jurisprudence, at p.334.
\textsuperscript{127} A.I.R.1916 P.C.46, at p.48.
\textsuperscript{128} Id., at p.300.
\textsuperscript{130} (1873) 19 W.R.315.
that the dower, if not expressly stipulated that the payment of it should be deferred, as a matter of course, it must be paid immediately.

Hence, it is clear, that in the absence of a stipulation, the presumption would be that whole of the dower is prompt. But where the payment is deferred, divorce or death of the husband is only an event which law recognises as the maximum period for which the payment may be deferred.


132. See Tahir Mahmood, Muslim Law of India, (1980), at pp.74-75. T.M. Abdullah, has very succinctly distinguished mehr and maintenance, when he observed:

"Mehr is consideration for acquisition of the wife while maintenance is consideration for continuance of wifely duties to the husband. 'Mahar' in pre-Islamic days was a sale price for the chattel of a girl which her male parent was entitled to receive. Islam transformed it as an ex-gratia present for the companion which the girl herself was entitled to receive. Its incidence is at the inception of the contract of marriage though it is payable at any time during the coverture or at the time of or after divorce. 'Mahar' is contractual, maintenance during coverture is sociological; maintenance after divorce is humanitarian in concept 'Mahar' is not one necessarily payable on divorce; it does not arise on divorce either", (Emphasis added)

while holding that it is sheer due to masculine obsession of jurisprudence that linked up dower as a consideration equivalent of maintenance after divorce observed:134

"The quintessence of mehr is clearly not a contemplated quantification of a sum of money in lieu of maintenance upon divorce. Indeed, dower focuses on marital happiness and an incident of connubial joy. Divorce is farthest from the thought of the bride and the bridegroom when mehr is promised. Moreover, dower may be prompt and is payable during marriage and cannot, therefore, be a recompense for divorce too distant and unpleasant for the bride and the bridegroom to envision on the nuptial bed."

This stand has been reiterated by the Supreme Court in a very recent case of Mohd. Ahmed Khan v. Shah Bano Begum.135 It was held by the Court that divorce maybe said to be only "a convenient or identifiable point of time at which the deferred amount has to be paid by the husband to the wife.136 Thus, it can not be said that mehr is payable 'on divorce', an expression used under section 127(3)(b) of the Code. Mehr is an obligation imposed upon the husband "as a mark of respect for the wife", therefore, "a sum payable to the wife out of respect cannot be a sum payable 'on divorce'." 137

134. Id., at p. 1736.
136. Id., at p. 952.
137. Id., at p. 953.
We can view the nature of mehr from another angle also. The right to future maintenance cannot be assigned\(^{138}\) in nor be attached/the execution of a decree\(^{139}\) nor it survive after the death of the payee but mehr is both assignable and survivable.\(^{140}\)

Hence, we can conclude that mehr is not quantification of maintenance, nor it is, as such, payable on divorce. So there is no question of extricating the husband from liability if he pays the mehr amount at the time of divorce.

D. Interrelation of the Criminal Court and the Patrimonial Court vis-a-vis Maintenance of the Ex-wife.

A wife may petition for maintenance in the Criminal Court under section 125 of the Code of 1973 as discussed above. On the other hand, the wife may claim alimony and maintenance under the "general law" in the Civil Courts. The expression 'general law' refers to the relevant provisions of the Hindu Adoptions and Maintenance Act, 1956, and it also refers to the maintenance relief that might be indirectly obtained as ancillary to the proceedings under the Hindu Marriage Act. The interrelation between the Criminal

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138. See section 6(\text{dd}) of the Transfer of Property Act, 1882
139. See section 60(n) of the Code of Civil Procedure, 1908.
Court and Matrimonial Court (or Civil Court) in the matter of alimony and maintenance is clearly envisaged in sub-section(2) of section 127 of the Code, which reads as follows:

"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." 142

141. "Matrimonial Court" here means the Court as defined in clause(b) of section 3 of the Hindu Marriage Act, 1955. For convenience, in this section both the expressions "Matrimonial Court" as well as the 'Civil Court' will be used interchangeably.

142. Under the English law there is no such provision parallel to section 127(2). Where a spouse has obtained a maintenance order in the Magistrate's court, subsequent decree of divorce does not put an end to the order, see Wood v. Wood (1957) P.254; Newmarch v. Newmarch, (1978) Fam. 79; cf. Kirk v. Kirk (1947) 2 All E.R. 118. In case the High Court or a county court is seized of substantially the same matter, Magistrate's court may refuse the relief due to jurisdictional conflict, Bromley, Family Law, 5th ed., at pp. 230 and 502; see also Kaye v. Kaye (1965) P. 100; Sanders v. Sanders, (1952) 2 All E.R. 767, at pp. 770-771. But, if the wife had made it clear that she does not purpose to apply for maintenance in the divorce court, there is no reason not to grant her relief, Cooper v. Cooper, (1952) 2 All E.R. 857. But in exceptional circumstances, the speedy remedy is not refused, Lantis v. Lantis, (1970) 1 All E.R. 466. The general practice in the divorce court is that so long as a Magistrate's order is in force, it will not make an order, or in certain cases might supplant Magistrate's order by its own. Russell v. Russell, (1956) P.283. However, the High Court or county court has power under section 7(3) of the Matrimonial Proceedings (Magistrate's Courts) Act, 1960 (now Section 28(1) of the Domestic Proceedings and Magistrate's Courts Act, 1978 to direct that a maintenance or interim order made by Magistrate's shall cease to have effect.
The purpose of the provision is to avoid any inconsistency that might arise in view of the subsequent findings of the Civil Court otherwise, "the parties will be engaged in an unholy competition to exploit the concurrent jurisdiction of the civil and criminal court" and the question might "see-saw between the two courts, producing an absolute scandal". Thus, where there is a decree of the Civil Court on the liability and the quantum of maintenance, it would be binding on the Magistrate so as to entail a necessary variance or cancellation of the earlier order of maintenance. The Legislature, it appears has given more importance to the decisions of the Civil Court and, consequently, "if there is inconsistency between the decision of the Criminal Court and that of the Civil Court, the decision of the Civil Court would prevail".


144. Per Avory, J., in Rex v. Middlesex Justices, (1933) K.B. 72, at p. 50.


"Broadly stated and as an abstract proposition, it is valid to assert ... that a final determination of a civil right by a Civil Court must prevail against a like decision by a Criminal Court", id., at p. 1809.
words, in an application under section 127(2), the Magistrate has only a very limited discretion to exercise. He should take the decision of the Civil Court as it stands and considering the effect of the order passed by the Civil Court, he must give effect to it by varying or cancelling the order made by the Criminal Court.\footnote{147}

But where both the orders of the Civil as well as Criminal Courts fix the liability, the Magistrate may order enforcement of order of the Criminal Court.\footnote{148} However, in certain cases the Criminal Court may pass an order even if an order of the Civil Court exists. For instance, where the decree of the Civil Court becomes inexecutable or unrelisable due to the insolvency or the reason that the respondent has no means, Criminal Court may make an order under section 125.\footnote{149} Similarly, when considerable time has passed since the passing of decree by the Civil Court, an order for


\footnote{148} See Govindasami Mudaliar v. Muthulakshmi, 1966 Cri.L.J. 732(Mad.); Vadapelli Sathyavathi v. V.V.S.N. Raju, 1979 Cr.L.J.(N.O.C.)114(Mad.).
enhanced maintenance may be passed by the Criminal Court. The question of Criminal Court's discretion under Section 127(2) has often arisen in cases where the husband armed with a decree of restitution of conjugal rights approaches the Magistrate to cancel the order in view of the finding that the wife has withdrawn from his society without reasonable excuse and therefore, is not entitled to maintenance. But the Courts have been reluctant to cancel the order since the husband's intention in getting the order for restitution of conjugal rights, more often than not, is "solely for the purpose of avoiding his maintenance liability and not with a desire for cohabitation."

It has been observed by Ramchandra Raju, J., of the Andhra Pradesh High Court:

"A mere decree for restitution of conjugal rights in favour of husband itself does not automatically bar the wife from claiming maintenance under Section 125, though


151. Section 9, Hindu Marriage Act, 1955.

152. Virendra Kumar, Alimony and Maintenance, (1978), at p. 164. See also the cases cited therein, id., at pp. 164-65 nn 32-34.

the decree cannot be ignored. The magistrate has discretion to decide on evidence adduced before him by the parties, whether the wife is entitled to maintenance despite the fact that husband has got a decree for restitution of conjugal rights." 154

Recently, the question came to be considered before the Karnataka High Court in K.N.Rao v. Bhagyamma. 155 The wife, in this case was granted rupees 500/- as maintenance for herself and three minor children by the Magistrate. The husband, on the other hand got an ex-parte decree of restitution of conjugal rights against the wife. In the circumstances the precise question before the High Court was: "What would be the implication of a decree by one spouse against the other under the personal law governing them in a matrimonial court over a proceeding initiative by the wife against the husband under Section 125 of the Code"? 156 Referring to the observation of Fazal Ali, J., in Mst. Zohara Khatoon v. Mohd. Ibrahim, 157 N.D. Venkatesh, J., held that the findings of the matrimonial court were not binding on the Criminal Court, hence the wife was entitled to maintenance.

The discretion of the Criminal Court, in this respect, however, is limited to those cases where the husband had obtained the decree of restitution of conjugal rights only

155. 1984 H.L.R.602 (Kant.).
156. Id., at p.605.
for the purpose of defeating the wife’s right to claim maintenance under the Code. But in other cases, a decree of restitution of conjugal rights will be a proof the wife's withdrawal from the society of the husband and the defaulting wife cannot invoke the Criminal Court’s jurisdiction under section 125 of the Code of 1973.158

The relationship between the Criminal Court and the Civil Court should not be regarded in terms of inferior or superior jurisdiction, so far as maintenance of a wife is concerned. For instance, a Civil Court has no jurisdiction to set aside an order duly and properly passed by a Magistrate under the Code of 1973.159 Such an order can only be modified or set aside by the higher court under the provisions of the Code of 1973.160


159. In Durghatia v. Ayodhya Prasad, 1953 V.P. 28, Krishna, J.C. held that the Civil Court "is not sitting in judgement over the Magistrate, so as to decide if he should have made the order under S.485, Cr.P.C.(old code).Therefore, that court can not entertain a suit for the relief that the Magistrate should not have passed the order, or that the order should be set aside, or that there should be an injunction upon the realisation under the order", id., at p.29. Per Maharanjan, J., in Krishnammal v. Mahadeva Iyer, (1973) I Mad.L.J. 344, at p.345.

160. But where the order of the Magistrate is challenged on the ground that it was obtained by fraud upon the court and the cause of the action is based on the fraudulent conduct of a party who obtained the order, its validity can always be challenged by a suit in the Civil Court as ultimately the order affects the civil rights of the parties concerned relating to status, (contd...)
The jurisdiction of both the Civil Court and the Criminal Court is concurrent so far as maintenance of wife is concerned when during the proceeding under the Hindu Marriage Act, the court awards interim maintenance under section 24 of the Act, does this order operate as a bar for an application before the Criminal Court? Or, can both the courts pass two independent orders? And if so, order of which court - Civil or Criminal - is executable?


161. Under Section 488 of the Old Code of 1898 an argument was raised that in view of section 4(b) of the Hindu Marriage Act, that the Criminal Court has no jurisdiction. Section 4(b) of the said Act makes any law, which was in force before the Hindu Marriage Act, as inoperative in so far it was inconsistent with the provisions of the said Act. But the jurisdiction of the Criminal Court under the old Code was held not to be inconsistent with the provision of the Hindu Marriage Act since the scope of two laws was different, see Mallappa v. Tholawwa (1963) 1 Cr.L.J.693(Mys.).See also Nanak Chand v. Chandra Kishore, A.I.R.1970 S.C.446, approving Ram Singh v. State, A.I.R.1963 All.355; Mahabir Aggarwala v. Gita Roy(1962) 2 Cri.L.J. 523(Cal.).See also Nalini Rani v. Kiran Rani, A.I.R.1965 Pat.442 (the same argument under section 4(b) of the Hindu Adoptions and Maintenance Act, 1956 was rejected) In the context of Muslim personal law also it is held that remedy before the Criminal Court is independent of any personal law of the parties, see for instance, Sarvari v. Safi Mohammad, I.L.R.(1957) 1 All.255; at p.257; Ghulam Mohd. v. Noora Bibi, 1971 Cr.L.J. 1628(D.B.) (J&K).See also per Fazal Ali, in Zohara Khatoon v. Mohd.Ibrahim, 1981 H.L.R.289, at p.291,para 7(S.C.).
It has been held by the Calcutta High Court that where an application under section 24 is pending before the Court, Magistrate has power to order maintenance under section 125 of the Code of 1973. And since, the object of summary proceeding under section 125 of the Code of 1973 is to prevent vagrancy and to provide neglected wives and children a cheap and speedy remedy, the proceeding before a Civil Court can not be a bar nor "can the proceedings under section 488 Cr.P.C. (now section 125 of the new Code) be made to await the result of such other proceedings". In Ramesh Chander v. Veena Kaushal, where the wife was granted Rs 400/- per month as interim maintenance under section 24 of the Hindu Marriage Act, the Magistrate ordered Rs 1000/- per month for the mother and two children. It was argued before the Supreme Court that order of a Civil Court must prevail against the Criminal Court, hence, the Magistrate had no jurisdiction to order Rs 1000/- per month as maintenance in the face of the Civil Court's order. Krishna Iyer, J., (D.A. Desai, J. concurring) while holding that as a rule Civil Court's final adjudication must prevail, upheld the order on two grounds. First, the determination under section 24 of the Hindu Marriage Act is merely an order pendente lite.

and not a final order as under the Hindu Adoptions and Maintenance Act, 1956. Secondly, the amount ordered under section 24 of the Act does not include claim for the maintenance of children though the order advert to the fact that wife was having custody of two children. Therefore, "this incidental direction is no comprehensive adjudication". The only thing which the Civil Court or the Criminal Court has to bear in mind is that if there is an order passed earlier by any of the two courts, that order has to brought to the notice of the other court which will make "due adjustment" while making its own order. The Criminal Court, does not have power under the Code of 1973 to stay its proceedings under section 125 since the Code of 1973 does not contain similar provision like section 10 of the Civil Procedure Code, 1908 wherein subsequently instituted proceedings involving similar issues between the same parties are required to be stayed. Thus, both the Civil Court and the Criminal Court has power to make independent orders, but the wife can execute one.

165. See also Majumdar, J., In Rameshchandra v. Dhirajgavri, 1982 H.L.R.465, at p.467(Guj.).
167. Per Majumdar, J., in Ramesh Chandra Shambhubhai Yadav v. Dhirajgavri, 1982 H.L.R.465, at p.468(Guj.).
order of maintenance at one time. M.M. Punchhi, J., of the Punjab and Haryana High Court has observed: 169

"It is now well settled that the wife can claim only one maintenance. Though there are different forums open to her to claim maintenance, yet there cannot be parallelly running different maintenance orders for one and the same time. Only one of them is enforceable and others remain just delarate; in dormancy or consumed." 170

But where, the wife received a lump sum by way of a compromise in the proceedings under section 125 of the Code, in complete and final satisfaction of all claims, her right to maintenance is extinguished and she cannot claim any maintenance under section 24 of the Hindu Marriage Act. 171

This view that both the Civil Court and the Criminal Court retain their respective jurisdictions, it is submitted is a healthy practice. Under English law, the practice is that normally a divorce court would not make an order for maintenance so long as a Magistrate’s order was in force. 172

Consequently, if the wife wishes to apply before the divorce court she will have to first get the order of the Magistrate discharged. This clearly has two disadvantages. First, that the wife might run the risk of obtaining less than she was...

170. Id., at p. 566. The wife may execute the order fixing higher maintenance, see Balbir Kaur v. Mohinder Singh, 1983, H.L.R. 90 (P&H).
172. See note 142, supra.
already getting. Secondly, she does not have the opportunity to have two orders in her favour and then enforce the more favourable.\textsuperscript{173} Moreover, an unscrupulous husband might try to frustrate the wife's attempt to obtain a speedy remedy before Criminal Court by instituting proceeding under the Hindu Marriage Act.\textsuperscript{174}

With regard to order of maintenance under section 25 of the Hindu Marriage Act, the position will be different, since order passed under this section is a final determination of the rights of the parties. If there is an existing order of the Criminal Court, the Matrimonial Court may convert that order of the Criminal Court into permanent maintenance under section 25 of the Hindu Marriage Act.\textsuperscript{175} However, dismissal of an application for maintenance by the wife by the Criminal Court, is not a bar for the Civil Court to grant maintenance under section 25 of the Hindu Marriage Act.\textsuperscript{176} But it appears that when the Civil Court has fixed maintenance under section 25 of the Hindu Marriage Act, the Criminal Court will have to jurisdiction to make an order in the face of that order.\textsuperscript{177}


\textsuperscript{174} For instance, by filing a petition for restitution of conjugal rights, under Section 9 of the Act. See our discussion in text accompanying notes 151-157, supra. See also Vishy Kumar v. Rita Kumari, 1982 H.L.R. 593(P&H), husband's petition for divorce was filed to frustrate the wife's application under section 125 of the Code.


\textsuperscript{177} "...a final determination of civil right by a Civil Court (contd...)."
in circumstances, a Criminal Court may entertain an application and make a fresh order.

The point has recently been dealt in detail by the Delhi High Court in *Kuldeep Kumar v. Smt. Chander Kant*. 178

The brief facts of the case were as follows: After divorce, wife obtained an order for permanent alimony and maintenance under section 25 of the Hindu Marriage Act. The maintenance was fixed at rupees 200/- per month. The order remained unsatisfied and in execution husband's salary was charged and rupees 116/- per month (1/3rd of his salary) were deducted. Thus, the order could not be fully satisfied. The wife filed an application under section 125 of the Code. Despite the objection, that the Magistrate can not make an order of maintenance because a competent Civil Court has already adjudicated the matter and has granted maintenance to the wife, he granted maintenance at the rate of 300/- rupees per month. On revision Add.Sessions Judge reduced the amount to rupees 200/- per month to reduce the conflict of quantum between two courts. The High Court, after citing various authorities came to the conclusion that the "two jurisdictions are independent of each other and where a person refuses or neglects to maintain...the wife even though...

... the Magistrate, subject to the conditions and limitations


178. 1984 H.L.R. 262 (Del.)
stated in the Code has an obligation to make provision for
(the wife) in order to prevent penury, vagrancy and misery."179
It was further held that in view of the fact that the wife
had to file execution proceedings to realize the amount,
itsf is a proof of the intention of the husband not to
maintain his wife.180

Thus, the instant case goes to show that even if an
order for maintenance passed by a Civil Court exists, the
Criminal Court does not surrender its jurisdiction. The
object of the provision under the Code is to prevent vagrancy
and destitution. A decree on paper is poor comfort to the
neglected and starving wife.181 Therefore, even if a decree
is passed by a Civil Court, if in fact the wife is not pro­
vided for, the mere existence of a decree will not oust the
jurisdiction of the Criminal Court.

The relationship between the two courts may also be
viewed from another angle, namely the amount of maintenance
which the Criminal Court and the Civil Court are empowered
to grant under the relevant provisions of their respective

179. Id., at p. 266.
180. Id., at p. 267.
K.L.T. 521. "A mere order of permanent alimony and main­
tenance is not equivalent to maintenance the wife and
cannot oust or take away the jurisdiction of the Magis­
E.E.L. Kent, A. I. R. 1926 Mad. 59. See also, per Khalil, J.,
statutes. There is no statutory limit on the discretion of the Civil Court under the Hindu Marriage Act, but, the Criminal Court can order a sum not exceeding the limit of ₹ 500.00 per month for each person entitled. In practice, however, with a few exceptions hardly any difference will be found in the amount of maintenance whether it is granted by a Civil Court under the Hindu Marriage Act or by the Criminal Court under the Code of 1973. One apparent distinction seems to be that payment ordered by the Magistrate under section 125 of the Code must be in the form of monthly payments and in cash not in kind. Perhaps, this distinc-

182. See notes 74-77 and the accompanying text, supra.
183. See Dr. Virendra Kumar, Alimony and Maintenance, 1st Ed. (1978), at pp.155 et seq. However, where there is no child of the family, the award to the wife may be higher than that which the Criminal Court could fix in view of the maximum limit of ₹ 500.00, and the income of the husband is comparatively larger, see for instance Ashok Kumar v. Satwant Kaur, 1983 H.L.R. 274 (Del.), where the income of the husband was ₹ 8000 per month, the wife was earning ₹ 900/- per month, she was awarded ₹ 500/- per month (i.e. making a total of ₹ 1400/- per month). Similarly, in T.K. Gautam v. District Judge, 1983 H.L.R. 687 (All), the income of the husband was alleged to be ₹ 40,000 per year, the wife was granted ₹ 750/- per month. For recent cases, see Dev Dutt Singh v. Raini Gandhi, 1984 H.L.R. 346 (Del.), the wife was granted ₹ 500/- p.m. in addition to her own income of ₹ 1344.78 p.m.; Gunvant C. Patel v. Meena G. Patel, 1984 H.L.R. 384 (Bom.) (wife was granted ₹ 500/- p.m.).

Cf. Sudershan Kumar v. Deepak alias Reena, 1983 H.L.R. 565 (P&H) where both the Civil Court as well as the Criminal court granted ₹ 700/- per month to the wife since there was a minor daughter in the custody of the mother. Ramesh Chander v. Veena Kaushal, A.I.R. 1978 S.C. 1907, where there were two children of the family who were in the custody of the mother, against the order ₹ 400/- per month of the Civil Court, the Criminal Court granted (contd. . . .)
tion in section 125 of the Code reflects the "urgent nature" of its provisions. 186

The maximum limit of Rs 500.00 was raised from rupees 100 in the year 1955. Since then there has been great inflation and considerable devaluation of the rupee value. Therefore, it is submitted, that now the limit should be raised to rupees 2000.00 per month.

maintenance at the rate of Rs 1,000/- per month.

184. Chavadi v. Basuvan, 2 Weir 627, an order for the payment of certain sum annually for the value of clothes was held not legal. See also Thankappan v. Pankajakshi, A.I.R. 1960 Ker. 66.

185. The Magistrate is not empowered under the Code to order the husband to provide a house for the wife, Roshan v. Azim, A.I.R. 1943 Lah. 59, at p.60; an order for payment of maintenance in grain is not in accordance with the provisions of the Code, Selambal, 2 Weir 626. Similarly an order directing a mixed payment in kind and cash is also bad under the provisions of the Code, Mukta v. Datta Mahadev, 25 Cr.L.J. 965. See also Kaluram v. Chinto 34 Cr.L.J. 127; Abirani, 1953 Cri.L.J. 83(3au.).

On the other hand, the Civil Court is empowered to make an order for food, clothing, residence, education and medical treatment, see A v. B. (1978) 80 Bom. I.L.R. 384(D.B.); Nanak Chand v. Chander Kishore, A.I.R. 1969 Del. 235(D.B.), affirmed by the Supreme Court in A.I.R. 1970 S.C. 446.

186. In Mahabir Agarwalla v. Gita Roy, (1962) 2 Cr.L.J. 528, at p.529(Cal.), it was observed that the reason for the distinction is that the Civil Court has, while the Criminal Court has not, the machinery for inquiring into the value of maintenance in kind.
Another distinction between the jurisdiction of the two courts is with regard to the scope of obligation under the relevant provisions of the respective statutes.

The liability of the person under section 125 of the Code arises if he was having "sufficient means". The word "means" under the section has been defined signifying not only visible means, such as real property and definite employment, but it includes also the capacity to earn money. 187 Accordingly, if a person is proved to have capacity to earn, he will be liable even if he is insolvent, 188 young and unemployed, 189 a professional beggar, 190 indebted, or a sadhu or a monk. 191 On the other hand, the expression used


189. Kandasami Chetty, In re, A.I.R.1926 Mad.346. But where a person was studying at school and was dependent on father, it was held that he cannot be said to have sufficient means, Chheldial Singh v. Srimati Bhanumati 1973 Cr.L.J.1097(All).


in section 24 of the Hindu Marriage Act is "income of the respondent" and in section 25 is "respondent's own income and other property". The expression occurring in section 24 is construed to mean the factual earning of the husband and not his capacity to earn on the basis of which maintenance can be granted. Under section 25, however, apart from the income of the respondent, his property is also taken into account. If the respondent does not have any recurring income, the court, nevertheless, may take into account the property of the respondent and saddle him to maintain the claimant spouse.

When we compare, these two parallel jurisdictions to grant maintenance to the divorced wife, the most distinguishing feature appears to be, the power of both the courts with respect to the variation, discharge etc., of the order of maintenance. Section 25(3) of the Hindu Marriage Act, lays down two circumstances on the occurrence of which the order of maintenance may be varied, modified or rescinded:

1. remarriage of the party in whose favour the order has

192. Per I.S. Tiwana, J., in Dev Raj v. Harjit Kaur, 1981 H.L.R. 416, at p.417(P&H), following Lila Devi v. Tarlok Chand, (1978) 80 P.L.R. 744. In Balbir Kaur v. Rabhibir Singh, 1977 H.L.R. 20(P&H), however the husband was a foreign qualified engineer, it was not believed by the court that he was not getting a job, hence, the husband was ordered to pay Rs 100/- per month as maintenance to his wife and two children. In this case the reference was also made of section 488(of the old Code) saying that under that section the liability of the father was absolute to maintain his minor children.
been made, and secondly, the unchastity of such party. On the other hand, under the Code of 1973, section 127(3)(a), provides that on proof of her remarriage the Magistrate shall cancel the order. This clause, however, is only a corollary of the words "and has not remarried" occurring in Explanation(b) to Section 125(1). But it is to be noted that the main difference between section 25(3) of the Hindu Marriage Act and these provisions under the Code is that while under the former Act the court has discretion either to vary, modify or rescind the order, under the latter provisions, however, the Magistrate is bound to cancel the order on proof of remarriage. This shows the basic objective of section 125, namely, the relief under the Code is primarily meant to meet the urgency of the situation. Therefore, when the wife has remarried, it is the duty of the second husband to maintain her and naturally, the liability of the former husband ceases. On the other hand, a Divorce Court grants the maintenance after adjusting the equities between the parties. Therefore, even after remarriage, the Court may still feel that it is in the interest of justice that the allowance should continue till the wife is compensated for the amount which "she has earned during marriage", to use the expression of Lord Denning. 193

Section 125(5) of the Code of 1973 mentions certain other grounds on which the order of maintenance to a wife may be cancelled. These are:

(a) living in adultery; or
(b) refusal to live with her husband, without sufficient cause; or
(c) living separately by mutual consent.

With regard to the latter grounds, i.e., refusal to live with her husband or living separately by mutual consent, it has been held does not apply to a divorced wife.

Now the question arises, whether the unchastity of a divorced wife is a ground to cancel the order under section 125 of the Code. Secondly, whether it is also a bar for the grant of maintenance to her.

With respect to the second question, section 125(4) of the Code of 1973 bars a "wife" who is "living in adultery" to claim maintenance from her husband. Does the word "wife"  


196. Section 125(4) of the Code says that no wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery.
include a "divorced wife" or it is confined in its application to a "wife" whose marriage is subsisting? The High Court of Kerala has held that the word "wife" occurring in section 125(4) does not include a "divorced wife".


The Court based its decision on the following grounds:

1. Section 125(4) refers to "husband"; it does not include a "former husband".
2. For the divorced women, there is separate provision under Section 127(3).
3. Since under the Indian Penal Code, adultery can only be committed by a married woman, it will not apply to a divorced woman.
4. Application of Section 125(4) to divorced wives will not promote the objective sought to be achieved by enlarging the definition of "wife" by Cl.(b) of Exp.to Section 125(1).

Sudesh Kumar Sharma, "Maintenance Under Criminal Procedure Code, 1973: Some Observations", in Law Towards Stable Marriage, Paras Diwan and Virendra Kumar, (Eds.) 337 at p.342, criticises the decision, as the approach which, though "technically sound" can have "undesirable consequences". But the author, it is submitted, seems to be confused since he himself recognises that such destitute women "constitute a class weaker in itself desperately in need of protection and help" and "still more remains to be done" towards them. Id., at p.337.
With respect to the term "living in adultery", it has been said that it does not apply to a divorced wife since conceptually she cannot commit adultery. However, it is submitted that in matrimonial law the term "adultery" is not construed in the sense it is defined in section 497 of the Indian Penal Code, 1860. For instance, before the amendment of the section 13(1)(2) of the Hindu Marriage Act in 1976, the ground mentioned in the said clause was "living in adultery" as a ground of divorce. Now, under the Indian Penal Code, it is only the man who commits the offence of adultery and the wife is not punishable even as an abettor. But under the matrimonial law, as a ground of divorce, adultery may be committed by the wife also.

Thus, when a divorced wife has developed illicit relationship with another person, and thereby, her financial position is changed, the Magistrate may cancel the order.

198. See J. D. M. Derrett, "Muslim-Ex-Wives: a Note of Caution", 1976 K.L.T. (Jour) 33, at p. 35. See also Meharunnishabai v. Abdul Razak, 1983 H.L.R. 616, at p. 617 (Bom.), where it was held that before marriage a wife cannot be said to have committed adultery under section 497 of the Indian Penal Code, 1860. In Nalini Kumar Pal v. Smt. Kulkarni Pal, 1977 Cr.L.J. (N.C.C.) 148 (Cal.), where divorce was obtained by the husband on the ground of adultery of the wife, the court said that she must be "living in adultery", i.e., in the present and not in the past.

199. Section 497 of the Indian Penal Code, 1860.